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**Case No:** VJ/85/2016.

**File No:** VJ/85-189/2016.

**Public version!**

**Business secrets of the undertaking subject to the proceeding are contained in the sections marked as [BUSINESS SECRET]!**

In the competition supervision proceeding initiated against **Facebook Ireland Ltd. (4 Grand Canal Square, Grand Canal Harbour, Dublin 2 Ireland)**, as the undertaking subject to the proceeding and represented by Lakatos, Köves és Társai Ügyvédi Iroda (1075 Budapest, Madách Imre út 14.), for the alleged infringement of the prohibition of unfair business-to-consumer commercial practices, the competition council of the Hungarian Competition Authority proceeding in the case has adopted the following

## **d e c i s i o n .**

The competition council of the Hungarian Competition Authority proceeding in the case establishes that through its misleading claim directed to Hungarian users from January 2010 until 12 August 2019 on the homepage and until 23 October 2019 in the Help Centre on the [www.facebook.com](http://www.facebook.com) website relating to its service being free, Facebook Ireland Ltd. breached the prohibition set out in Article 3(1) of Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices (hereinafter: UCPA) by committing the infringement specified in Article 6(1)(c) of the UCPA.

For the aforesaid infringement, the competition council proceeding in the case obliges Facebook Ireland Ltd. to pay a competition supervision fine of HUF 1,200,00,000 (one billion and two hundred million Forints), which amount is payable within 30 days of receipt of the decision to the Hungarian Competition Authority's incoming fines account No (HU88) 10032000-01037557-00000000.

The name of the undertaking subject to the proceeding, the number of the competition supervision proceeding and the legal basis of payment (competition supervision fine) must be entered in the "comments" box of the remittance order. If the obligee fails to meet its payment obligation within the time limit, it shall pay default surcharges at a rate calculated in the manner specified for default surcharges pursuant to the act on the taxation procedure. If the fine (and any late charge) is not paid, the Hungarian Competition Authority shall initiate the enforcement of the decision.

An administrative court action may be initiated to challenge the decision within 30 days of its receipt. The statement of claim is to be submitted to the Hungarian Competition Authority by electronic means using the designated form<sup>1</sup>, which is available on the website of the Hungarian Competition Authority. The Hungarian Competition Authority shall forward the statement of claim - together with the case file - to the Budapest-Capital Regional Court, which has jurisdiction and competence with regard to administrative court actions. In the proceedings of the regional court, legal representation of mandatory.

## **R E A S O N I N G**

### **I.**

#### **Commencement and directions of the investigation**

<sup>[1]</sup> [http://www.gvh.hu/data/cms1041089/GVH\\_gvh\\_k01\\_19\\_01.jar](http://www.gvh.hu/data/cms1041089/GVH_gvh_k01_19_01.jar)

1. Pursuant to Article 26(1) of the UCPA, the Hungarian Competition Authority (hereinafter: GVH) initiated a competition supervision proceeding by its order dated 10 October 2016 after becoming aware that, on the [www.facebook.com](http://www.facebook.com) website operated by Facebook Ireland Ltd. (hereinafter: the undertaking subject to the proceeding or Facebook Ireland) the undertaking subject to the proceeding, allegedly,
  - fails to clearly indicate which appearances qualifying as commercial practices are governed by its policies,
  - fails to ensure that its policies cover all commercial practices, and
  - fails to apply the provision in its Advertising Policies regarding sensitive data (“*We do not use sensitive personal data for advert targeting*”),

and has, by this conduct, committed the infringement set out in Article 3(2) of the UCPA and has allegedly violated the prohibition set out in Article 3(1) of the UCPA.

2. Following the commencement of the competition supervision proceeding the GVH became aware of the fact that the undertaking subject to the proceeding had been making, most likely since January 2010 - the date on which Facebook Ireland commenced its service - claims that its service was provided free of charge, conduct which is likely to have constituted an infringement according to paragraph 20 of the Annex to the UCPA and which is likely to have violated the prohibition set out in Article 3(1) of the UCPA.
3. In view of the aforesaid, on 10 March 2017 the GVH extended the investigation, by Order No VJ/85-15/2016., to the question whether Facebook Ireland had committed the infringement set out in paragraph 20 of the Annex to the UCPA by claiming that its service was provided free of charge (through the use of statements such as “*It’s free and always will be*”) on the [www.facebook.com](http://www.facebook.com) website from 1 January 2010 (the start of its service).
4. The case handler submitted the report on the completion of the investigation to the Competition Council on 12 March 2018, whereby the proceeding entered the Competition Council phase pursuant to Article 47(2) of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter: Competition Act).
5. Pursuant to Article 72(1) of the Competition Act, and having regard to Article 70(4) of the Competition Act, the competition council of the GVH proceeding in the case returned the documents to the case handlers by Document No VJ/85-77/2016. in order to extend the legal basis of the competition supervision proceeding to Article 6(1)(c) of the UCPA with regard to the claim of the free nature of the Facebook service examined in the proceeding.
6. The competition supervision proceeding was extended, by Document No VJ/85-78/2016., to the investigation of the question whether Facebook Ireland had infringed Article 6(1)(c) of the UCPA by claiming that its service was provided free of charge (through the use of statements such as “*It’s free and always will be*”) on the [www.facebook.com](http://www.facebook.com) website from 1 January 2010 (the start of its service).
7. With a view to the submission of the supplementary report of the case handler No VJ/85-81/2016. to the Competition Council, the competition supervision proceeding re-entered the Competition Council phase on 5 June 2018. In accordance with Article 72(1) and Article 70(4) of the Competition Act, the competition council of the GVH proceeding in the case returned the documents to the case handler again to extend the competition supervision proceeding on 17 December 2018 with its order No VJ/85-119/2016.
8. On 20 December 2018, the investigation was extended, via Order No VJ/85-121/2016., to the commercial practice exhibited by the formulation and implementation of provisions containing terms regarding the data and data types collected and used in the business model of the undertaking

subject to the proceeding, as related to the conduct initially investigated, with a view to the provisions of Article 3(2) of the UCPA.

9. Upon the submission of the supplementary report of the case handler No VJ/85-134/2016., the competition supervision proceeding re-entered the Competition Council phase on 15 February 2019.
10. In its order No VJ/85-187/2016., the competition council proceeding in the case terminated the competition supervision proceeding with regard to the conducts falling under Article 3(2) of the UCPA pursuant to Article 31(1)(i) of Act CXL of 2004 on the General Rules of Public Administrative Procedures and Services (Public Administrative Procedures Act, hereinafter: PAPA Act).

## II.

### The undertaking subject to the proceeding

11. The undertaking subject to the proceeding is an enterprise registered in Ireland in the company form of “private limited company”, which is wholly owned and directly controlled by Facebook International Operations Limited. Facebook International Operations Limited is also an enterprise registered in Ireland; its ultimate parent company is Facebook Inc., which is registered in the United States. Even though Facebook Ireland is a member of the Facebook group, it constitutes a separate legal entity under Irish company law, with its own legal personality.<sup>1</sup>
12. Since 2010 Facebook Ireland has been providing the Facebook Service to European residents through the [www.facebook.com](http://www.facebook.com) website in line with the Statement of Rights and Responsibilities of the Facebook Service and has been selling Facebook advertising services in Europe. When a Hungarian undertaking publishes an advert on Facebook, it enters into a contract with Facebook Ireland.<sup>2</sup>
13. As indicated in its report, Facebook Inc. earns its revenues from advertisements and service fees.<sup>3</sup> According to the report, essentially all of the revenues are generated from advertisements. Advertising revenues arise from the publication of product adverts on Facebook, Instagram, Messenger and third-party websites or mobile applications.
14. In addition to the services offered by Facebook Inc. and Facebook Ireland, Facebook also owns and operates other companies, as detailed in Facebook’s Help Centre. The mentioned companies apply their own terms of service and privacy policies with the proviso that user-related data can be shared within the family of companies to facilitate, support and integrate their activities and improve their services. According to the Help Centre of Facebook, these companies were Facebook Payments Inc., Atlas, Instagram LLC, Onavo, Moves, Oculus, WhatsApp Inc., Masquerade and CrowdTangle on 20 September 2017<sup>4</sup>, and Facebook Payments Inc. and Facebook Payments International Limited, Onavo, Facebook Technologies, LLC and Facebook Technologies Ireland Limited, Whatsapp Inc. and Whatsapp Ireland Limited, Masquerade and CrowdTangle on 26 June 2019<sup>5</sup>.
15. The net turnover of the undertaking in 2018 was [BUSINESS SECRET] EUR<sup>6</sup>, which corresponds to [BUSINESS SECRET] Ft<sup>7</sup>, [BUSINESS SECRET].<sup>8</sup>

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<sup>1</sup> VJ/85-10/2016.

<sup>2</sup> VJ/85-10/2016.

<sup>3</sup> <http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/99de879a-f34a-480f-9a13-ea0e6219cabb.pdf>, (last download: 5 July 2019), p. 30, VJ/85-157/2016.

<sup>4</sup> <https://www.facebook.com/help/www/111814505650678?helpref=related>, VJ/85-56/2016.

<sup>5</sup> VJ/85-157/2016.

<sup>6</sup> Document No VJ/85-136/2016., paragraph 1.

<sup>7</sup> Calculated with the official EUR/HUF exchange rate for 2018, available on the official website of MNB.

<sup>8</sup> Document No VJ/85-136/2016., paragraph 1.

16. In April 2017 Facebook announced that it had 5,000,000 active advertisers (globally), as compared to 4,000,000 seven months earlier, and that it had earned 26.9 billion USD in advertising revenue in 2016, exceeded only by the Google group.<sup>9</sup>
17. The total revenue of the undertaking subject to the proceeding and its advertising revenue allocated to the Hungarian market between 2011 and 2018 are shown in the table below.<sup>10</sup>

Year	Total turnover (USD)	Total - converted - turnover (HUF) <sup>11</sup>	Turnover from advertising (USD)	Revenue from advertising (converted) (HUF)
2011	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]
2012	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]
2013	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]
2014	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]
2015	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]
2016	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]
2017	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]
2018 <sup>12</sup>	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]
<b>Total</b>	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]	[BUSINESS SECRET]

18. There have been no previous competition supervision proceedings in Hungary against the undertaking subject to the proceeding or the brand (group of companies) in general; however, similar conducts have been investigated in other countries.
19. The undertaking subject to the proceeding stated that there is no other proceeding, whether international, domestic, administrative or judicial, ongoing with regard to the subject matter of the present competition supervision proceeding.<sup>13</sup> It noted, however, that there is a court proceeding in progress in Germany at the second instance, which has been brought by the Federation of German Consumer Organisations, with the purpose of obtaining an injunction concerning the “free” and “no charge” claims made in relation to the provision of the service.<sup>14</sup>
20. As a result of the pressure exerted by the European Commission and consumer protection authorities, the European Commission welcomed, in its press release<sup>15</sup> of 9 April 2019, Facebook’s update of its terms and clarification of its use of user data. The new terms clearly set out how the company uses its users’ data to develop profiling activities and targeted advertising to finance the company. Furthermore, the new terms detail what services Facebook sells to third parties that are based on the use of its users’ data, how consumers can close their accounts and under what circumstances accounts can be disabled. These developments came after coordinated action by the respective authorities aimed at getting Facebook to clarify to users, in a clear and transparent

<sup>9</sup> Online Advertising - Trends, Benefits and Risks for Consumers, OECD Digital Economy Papers, January 2019, No. 272, [https://www.oecd-ilibrary.org/science-and-technology/oecd-digital-economy-papers\\_20716826](https://www.oecd-ilibrary.org/science-and-technology/oecd-digital-economy-papers_20716826), (last download: 3 July 2019), p. 18, VJ/85-157/2016. Original source: Chaykowski, K. (2017), Sheryl Sandberg: Facebook Hit 5 Million Advertisers By Turning Users Into Marketers, Forbes, <https://www.forbes.com/sites/kathleenchaykowski/2017/04/10/sherylsandberg-facebook-hit-5-million-advertisers-by-turning-users-into-marketers/#18bf6ad0e99d> (downloaded on 9 January 2018).

<sup>10</sup> VJ/85-93/2016. paragraph 1 (with the exception of the 2018 figures, which are included in document No VJ/85-136/2016.), document No VJ/85-154/2016.

<sup>11</sup> The figures were converted using the average central rate of the 2011-2018 period available on the official MNB website. (<https://www.mnb.hu/letoltes/hu0301-arfolyam.xls>).

<sup>12</sup> Document No VJ/85-136/2016., paragraph 2.

<sup>13</sup> Document No VJ/85-113/2016.

<sup>14</sup> Document No VJ/85-99/2016., paragraph 20.

<sup>15</sup> [http://europa.eu/rapid/press-release\\_IP-19-2048\\_hu.htm](http://europa.eu/rapid/press-release_IP-19-2048_hu.htm)

manner, that its business model and main source of revenue is based on the commercial use of data and generated content that users give in exchange for using its services.

21. As a follow-up to the investigation on social media platforms in 2018, the European Commission and national consumer protection authorities asked Facebook to clearly inform consumers about how the social network is financed and what revenues are derived from the use of consumer data. They also asked the platform to bring the rest of its Terms of Service into line with EU Consumer Law. As a result, Facebook agreed to introduce new text in its Terms of Service explaining that it does not charge users for its services in return for users' agreement to share their data and to be exposed to commercial advertisements. According to Facebook's commitments, its terms will now clearly explain that its business model relies on selling targeted advertising services to traders by using data acquired from the profiles of its users.
22. According to the press release, Facebook undertook to fully implement its commitments at the latest by the end of June 2019, the performance and fulfilment of which would be monitored by the European Commission and the Consumer Protection Cooperation network.
23. The GVH noted, on its own initiative, that on 29 November 2018 the Italian competition authority closed its proceeding against Facebook Ireland and its parent company, Facebook Inc., and found that the undertaking had misled consumers in the course of the registration process by failing to provide sufficient and immediate information about the fact that their data would be used for commercial purposes. The authority highlighted in general that Facebook emphasises the free nature of the service without pointing out the commercial objectives that serve as the basis for the operation of the social network, thereby encouraging consumers to make a decision of a commercial nature that they would not have taken if they had been in full possession of the facts. Consequently, it was held that the information provided by the undertaking was general and incomplete and failed to clearly separate the use of data relating to the personalisation of the service and the use of data for targeted commercial campaigns.
24. Furthermore, the Italian authority held that Facebook had forced an aggressive practice on registered users by transmitting their data from Facebook to third parties and vice versa, without their express and prior consent, for commercial purposes. The authority came to this conclusion after criticising the company for the default setting of the Facebook Platform services, according to which consumers' consent to the sharing of their data is automatically set to the broadest scope. While users are able to restrict their consent, they face significant restrictions if they choose to do so. These restrictions take the form of limited use of the Facebook platform and of the websites and applications of third parties, the aim of which is to encourage users to stick to the preselected consent option.
25. According to news in the media published on 24 July 2019<sup>16</sup>, the US Federal Trade Commission (hereinafter: FTC) imposed a fine of 5 billion USD on Facebook Inc. for the infringement of an FTC order of 2012. The 2012 order prohibited Facebook from providing misleading information regarding privacy, the security of the personal data of consumers and the scope of personal information shared.
26. The press release disclosed on the FTC website<sup>17</sup> states that Facebook Inc. had misled users about their ability to control the privacy of their personal information and undermined consumers' choices. The FTC found that Facebook Inc. had repeatedly used misleading disclosures and settings to undermine users' privacy preferences; these tactics allowed the company to share users' (and their friends') personal information with third-party apps. Many users were unaware that Facebook was sharing such information, and therefore did not take the steps needed to opt-out of sharing. The FTC

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<sup>16</sup> [https://index.hu/techtud/2019/07/24/5\\_milliard\\_dollarra\\_buntettek\\_a\\_facebookot/](https://index.hu/techtud/2019/07/24/5_milliard_dollarra_buntettek_a_facebookot/)

<sup>17</sup> <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions>

also required the social media site to modify its corporate structure so that it can be held accountable for the decisions it makes about its users' privacy.

### III.

#### The investigated commercial practice

27. The undertaking subject to the proceeding has been making claims that its service is provided for “free” on the [www.facebook.com](http://www.facebook.com) opening page since January 2010, the date on which its service began (up to 12 August and 23 October 2019). The undertaking subject to the proceeding stated that the appearance of the website had not changed significantly since January 2010.
28. The undertaking subject to the proceeding attached a screenshot<sup>18</sup> and asserted that the “*It’s free and always will be*” claim was displayed from 15 July 2017 (until 12 August 2019); previously, the opening page displayed the claim “*It’s free and anyone can join*”.<sup>19</sup>
29. On 26 June 2019 the following information was available:<sup>20</sup>



30. At present (since 13 August 2019) the opening page shows the “*It’s quick and easy*” slogan.
31. The text on the acceptance of the terms of the contracts is as follows: “*By clicking Sign Up, you agree to our Terms. Learn more about how we collect, use and share your data in our Data Policy and how we use cookies and similar technology in our Cookies Policy. You may receive SMS notifications from us and can opt out at any time.*”
32. The undertaking subject to the proceeding stated that there was no historical data available on where else, in addition to the website, was the claim regarding “free” displayed. In other regards the undertaking subject to the proceeding stated that Facebook did not publish any marketing material

<sup>18</sup> VJ/85-25/2016.

<sup>19</sup> Document No VJ/85-10/2016.

<sup>20</sup> Document No VJ/85-157/2016.

outside www.facebook.com that would have promised the use of Facebook services offered on the www.facebook.com website to be free.<sup>21</sup>

33. The Facebook Help Centre contained the following information (before 24 October 2019) regarding the free nature of the service:

*“Does it cost money to use Facebook? Is it true that Facebook is going to charge to use the site?”*

*No. Facebook is a free site and will never require that you pay to continue using the site.*

*You do, however, have the option to make purchases related to games, apps and other items. In addition, if you choose to use Facebook from your mobile phone, keep in mind that you'll be responsible for any fees associated with internet usage and/or text messaging as determined by your mobile carrier.<sup>22</sup>“*

34. Currently the Help Centre contains the aforementioned communication in the following format:

*“Does it cost money to use Facebook?”*

*No, we don't charge you to use Facebook. Instead, we charge advertisers to show ads on the Facebook family of apps and technologies. This helps us make Facebook available to everyone without charging people for access to it.*

*When using Facebook, keep in mind:*

- You need Internet access to use Facebook from your computer, mobile phone or tablet, and your Internet provider may charge you for this access. Learn more about data charges and connecting to Facebook on your mobile phone or tablet.*
- Using some Facebook features, such as text message notifications, may also lead to charges from your mobile provider.*
- If you add your payment information to Facebook, you can do things like make purchases from businesses, send money to friends, support creators on Facebook and purchase ads on Facebook.*
  - If you make a purchase on Facebook, we may earn a commission or transaction fee from that activity.*
  - You can also make purchases through Facebook for games, apps and other items.*

*Note: Facebook doesn't sell your information, and we don't share information that personally identifies you (information such as your name or email address that by itself can be used to contact you or identifies who you are) unless you give us permission.*

*Learn more about your information on Facebook and how we decide what ads to show you.”*

#### **IV.**

#### **Characteristics of the relevant product and market**

35. The product directly relevant to the competition supervision proceeding is the service<sup>23</sup> of the undertaking subject to the proceeding provided through the Facebook platform, social network site (to Hungarian consumers) (hereinafter: Facebook or platform). The service is available on mobile phones, PCs and other tools, and can be used via the website or application. Facebook operates a two-sided platform: on the one side it provided services, without any pecuniary charge, to

<sup>21</sup> It is only with regard to its Facebook Analytics product that the undertaking subject to the proceeding mentions that it is free. This product, however, does not target consumers.

<sup>22</sup> See: [https://hu-hu.facebook.com/help/186556401394793?helpref=uf\\_permalink](https://hu-hu.facebook.com/help/186556401394793?helpref=uf_permalink) (26 February 2018), Note No VJ/85-56/2016.

<sup>23</sup> In paragraph 2 of disclosure No VJ/85-10/2016. the undertaking subject to the proceeding itself defines the service concerned as a platform.

consumers, and on the other side it offers advertising and other, also data-driven, marketing options to undertakings.<sup>24</sup> The source of the operation of the platform (and of the revenues of the undertaking subject to the proceeding and the company group) is revenue from advertising in the broad sense and other marketing facilities. It should also be noted in advance that there is extensive economic and other – social sciences – literature on the operation and business models of Facebook and of large digital service providers and platforms (including complex issues raised in the context of big data and zero-pricing). Below the competition council proceeding in the case highlights some general conclusions and considerations by way of example.

36. In general, both the literature and the general public agree that in the digital era the value of information as a resource has increased, therefore data, and in particular personal data, have become one of the most valuable and most complexly processed “commodity” that can be effectively commercialized.

37. In the same context the competition council proceeding in the case also wishes to note that it is irrelevant from the aspect of consumer interest whether a market participant commercializes (sells) the data itself as a resource or - also in exchange for consideration - provides technological access to the data or their source.

#### **4.1. The supply side of the market, characteristics of online platforms and zero pricing**

38. With a view to the aforesaid, the supply side of the relevant market of the investigation consists of the so-called online platforms, which, as stated in the Commission staff working document providing guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices (hereinafter: UCP Guidance),<sup>25</sup> “*generally provide infrastructure and enable interactions between suppliers and users for the provision of goods, services, digital content and information online. On-line platforms work according to many different business models: their behaviours range from merely allowing users to look for information supplied by third parties to facilitating, often against remuneration, contractual transactions between third party traders and consumers or advertising and selling, in their own name, different kinds of products and services including digital content.*”

39. According to the UCP Guidance<sup>26</sup>, “*social media such as Facebook, Twitter, YouTube, WhatsApp, Instagram and blogs enable users to create profiles and communicate with each other, including sharing information and content, such as text, images and sound files. A social medium may be a chat room, a blog or a social network. (...) Furthermore, consumers could experience social media just as services for the exchange of information between consumers and may not be aware that traders use social media for marketing purposes. On the one hand, social media platforms can qualify as “traders” in their own right, under Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market*

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<sup>24</sup> ACCC, Australian Competition & Consumer Commission, Digital Platforms Inquiry, Preliminary report, December 2018, <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/preliminary-report> (5 July 2019), p. 35, VJ/85-157/2016.

<sup>25</sup> Point 5.2.1. of the UCP Guidance.

<sup>26</sup> The UCP Guidance classifies online platforms into the following categories:

- Search engines (e.g. Google, Yahoo!)
- Social media (e.g. Facebook, Twitter)
- User review tools (e.g. TripAdvisor)
- Comparison tools (e.g. Trivago.com, Rentalcars.com, Kayak.com, Booking.com)
- Collaborative economy platforms (e.g. Airbnb, Uber, BlaBlaCar)
- E-commerce platforms (marketplaces) (e.g. Zalando, Amazon, Alibaba, eBay)
- App stores (e.g. Apple App Store, Google Play, Amazon App Store)
- Collective buying websites (e.g. Groupon).

(hereinafter: UCPD). (...) Indeed, a wide variety of commercial practices take place in social media.<sup>27</sup>

40. On digital markets undertakings offer a number of services as “free” or “zero-price”. These services raise a number of issues affecting different areas; for instance, a roundtable discussion of the joint meeting of the consumer protection and competition committees of OECD also had quality considerations in the zero-price economy as one of its subjects on 28 November 2018. According to the background paper drawn up for the meeting,<sup>28</sup> business models centred around the zero-price provision of products are not new. However, in the digital economy, new zero-price markets have arisen with their own unique characteristics and vast scope: seven of the ten largest global companies provide zero-price products and services in digital markets.<sup>29</sup> According to some estimates, the value of European citizens' personal data has the potential to grow to nearly €1 trillion annually by 2020.<sup>30</sup>
41. In the model for the provision of zero-price goods, firms use content to attract consumers and then expose those consumers to advertisements while they are accessing this content.
42. Furthermore, as the so-called Furman Report<sup>31</sup> also states, there is nothing novel about businesses seeking to understand consumers' preferences (and flexibility) to enable them to offer more targeted products and services at the right price. However, the report finds that the scale and breadth of data that large digital companies have been able to amass is unprecedented, and that the centrality of this data to their business model is unique. Such detailed knowledge about consumers' behaviour or purchasing intentions, in some cases held in near-real time, can be valuable. This data makes targeted advertising possible, for example to be deployed when a consumer is considering making a purchase and also allows services to be tailored towards groups or individuals. Many consumers are not aware of the extent or value of their data which they are providing, nor do they usually read terms and conditions for online platforms. The Report also notes that although accessing services for free may appear to be an attractive proposition, this zero-price may in fact be too high, as consumers could be extracting greater value in return for their data. For example, they could even be paid for the use of their data, and so effectively receive a negative price. In addition, the Report explains that digital advertising provides the revenue-generating side of platform services frequently offered at zero price to consumers, and generating revenue in these markets, and hence the competitive strength of companies, depends upon being able to obtain and use the most comprehensive and timely data about the consumer that is possible.
43. According to the OECD background note, such advertising-based business models generate value as long as advertisers are willing to pay more to serve an advertisement to consumers than the latter are willing to pay to avoid receiving this advertisement. However, information asymmetries and behavioural biases may lead to different outcomes in this market as well.<sup>32</sup> The competition council proceeding in the case considers that the so-called FOMO effect (Fear of Missing Out<sup>33</sup>) may also be such a bias.

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<sup>27</sup> Point 5.2.9. of the UCP Guidance.

<sup>28</sup> Quality considerations in digital zero-price markets, Background note by the Secretariat, 28 November 2018, <http://www.oecd.org/daf/competition/quality-considerations-in-the-zero-price-economy.htm> (5 July 2019), Document no. VJ/85-157/2016

<sup>29</sup> PriceWaterhouseCoopers (2018), “Global Top 100 companies by market capitalisation: 31 March 2018 update”, <https://www.pwc.com/gx/en/audit-services/assets/pdf/global-top-100-companies2018-report.pdf>.

<sup>30</sup> European Commission (2017), “Fact Sheet: Questions and Answers – Data protection reform package”, [http://europa.eu/rapid/press-release\\_MEMO-17-1441\\_en.htm](http://europa.eu/rapid/press-release_MEMO-17-1441_en.htm).

<sup>31</sup> Unlocking digital competition, Report of the Digital Competition Expert Panel, March 2019, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf) (last download: 5 July 2019), paragraphs 1.37-39, 1.123 and 1.173, VJ/85-157/2016.

<sup>32</sup> Evans, D. (2011) The Internet of Things: How the Next Evolution of the Internet Is Changing Everything.

<sup>33</sup> [https://en.wikipedia.org/wiki/Fear\\_of\\_missing\\_out](https://en.wikipedia.org/wiki/Fear_of_missing_out)

44. There may be different motives behind the decision of a business to apply the zero-price model (data collection, promotion, establishment of a consumer base, other long-term economic objectives or even altruism). With regard to economic motives it should be noted that, as the European Commission established in its decision on Google Shopping,<sup>34</sup> even though “users do not pay a monetary consideration for the use of general search services, they contribute to the monetisation of the service by providing data with each query” furthermore, in the context of the review of OECD’s e-commerce guidelines in 2016 the scope of the recommendation was extended to cover “non-pecuniary transactions” to highlight the importance of protecting consumers in this context as well.
45. The competition council proceeding in the case draws attention to the European Parliament legislative resolution of 17 April 2019 on the proposal for a directive of the European Parliament and of the Council amending certain directives as regards better enforcement and modernisation of EU consumer protection rules<sup>35</sup>, which expressly emphasizes the identical treatment, on the level of directives, of services where consumers do not pay a price (e.g. monthly):

*(31) Digital content and digital services are often supplied online under contracts where the consumer does not pay a price but provides personal data to the trader. ... Given their similarities and the interchangeability of paid digital services and digital services provided in exchange for personal data, they should be subject to the same rules under Directive 2011/83/EU.*

*(32) Consistency should be ensured between the scope of application of Directive 2011/83/EU and the Directive (EU) 2019/..., which applies to contracts for the supply of digital content or digital services under which the consumer provides or undertakes to provide personal data to the trader.*

*(33) Therefore, the scope of Directive 2011/83/EU should be extended to cover also contracts under which the trader supplies or undertakes to supply a digital service to the consumer, and the consumer provides or undertakes to provide personal data. ... the Directive should apply whenever the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for supplying the digital content or digital service, and the trader does not process this data for any other purpose.*

46. Furthermore, in its paper on online advertising<sup>36</sup> the OECD explains that online advertising may bring some tangible benefits for consumers, two of which are of key importance. The first is the potential for more targeted, relevant and timely ads; done well, such ads could bring consumer benefits in the form of reduced search costs, greater awareness of relevant products, and identification of and access to deals. The second is that online advertising funds a host of online services that consumers can access at zero price. Such services include search services (e.g. Google); social networking services (e.g. Facebook) and news services (e.g. The Guardian); many consumers use these services on a daily basis for a wide variety of educational, social, informational and entertainment purposes.

47. However,<sup>37</sup> online advertising also raises a number of new issues concerning consumers. According to the paper, potential risks include the potential for misleading advertising online; consumers may

<sup>34</sup> European Commission Decision C(2017) 4444, Case AT.39740 – Google Search (Shopping), 27 July 2017, [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf).

<sup>35</sup> [http://www.europarl.europa.eu/doceo/document/TA-8-2019-0399\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0399_EN.html)

<sup>36</sup> Online Advertising - Trends, Benefits and Risks for Consumers, OECD Digital Economy Papers, January 2019, No. 272, [https://www.oecd-ilibrary.org/science-and-technology/oecd-digital-economy-papers\\_20716826](https://www.oecd-ilibrary.org/science-and-technology/oecd-digital-economy-papers_20716826) (3 July 2019), p. 6, VJ/85-157/2016.

<sup>37</sup> Online Advertising - Trends, Benefits and Risks for Consumers, OECD Digital Economy Papers, January 2019, No. 272, [https://www.oecd-ilibrary.org/science-and-technology/oecd-digital-economy-papers\\_20716826](https://www.oecd-ilibrary.org/science-and-technology/oecd-digital-economy-papers_20716826) (3 July 2019), p. 24, VJ/85-157/2016.

not be able to identify some forms of online advertising, and online advertising could reduce consumer sentiment and trust online, prey on consumer biases and vulnerabilities, there may be a threat of “malvertising” (the installation of malware), and threats associated with increased data collection.

48. The collection of large volumes of data concerning the online activity of individuals has impacts regarding the protection and security of the personal data of consumers, particularly as consumers are interested in the protection of such data and they want to be informed about the collection, use and sharing of their personal data. In addition, the OECD report also states<sup>38</sup> that the marking of online services relying on personal data and advertising as ‘free’ may be misleading in view of the provisions of the UCPD.<sup>39</sup>

#### **4.2. The (user) demand side of the market, characteristics of the relevant consumers**

49. In the context of the commercial practice under investigation in this case, the demand side of the market consists of consumers who are present as private individuals and use the functions and services offered by Facebook as a platform.

50. Even though there are undertakings, entities, celebrities, politicians, movements, not-for-profit companies, etc., that is, potential advertisers among the users, who create and operate various so-called Facebook Pages to promote their products or services making use of the potentials of the social media, the conduct under investigation is relevant only with regard to the information available to private individual users acting for purposes outside their trade, business or profession.

51. According to the above-mentioned OECD background note, demand-side problems in digital zero-price markets include both typical characteristics, such as information asymmetries. Considering that many zero-priced digital products can be considered experience or credence goods (their quality can only be evaluated after they are consumed or quality may not be observable by consumers at all), demand (the channelling of consumer needs) may not play its usual role in disciplining firm behaviour. This is particularly true when the information available to consumers is complex or misleading, few alternatives are available to consumers, or consumer mobility is limited by network effects and low data portability.

52. The terms and conditions are often either not read by consumers, or their implications are not fully understood. In one experimental study involving a fictional social networking service, 74% of participants opted not to review the terms of service, and 98% did not identify a provision that allowed the supplier to share data with employers and law enforcement agencies.<sup>40</sup> Thus, even when consumers are aware of the extent of personal data they are providing to firms, they may not fully assess the potential uses of that data and the range of third parties it can be provided to. This makes it difficult for consumers to choose between zero-price and paid premium services.

53. Furthermore, those markets also feature some novel behavioural biases that diverge from what would be expected in a competitive environment. Some of these biases are simple to understand consumers may decide that since they are receiving a product for free, there is no need to become

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<sup>38</sup> Helberger, N., F. Zuiderveen Borgesius and A. Reyna (2017), „The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law”, *Common Market Law Review*, Vol. 54, pp. 1427–1466, <https://www.kluwerlawonline.com/document.php?id=COLA2017118&PHPSESSID=fue2e2pu9rq4uv6cos6s3gir76> (1 February 2018)

<sup>39</sup> European Parliament (2005), “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 of the European Union*, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0029&from=EN> (9 February 2018).

<sup>40</sup> Obar és Oeldorf-Hirsch, 2018

particularly concerned with variations in quality. This sentiment may be echoed by providers of zero-price products; however, such a perception may be reflective of an optimism bias and limited information – there is evidence that consumers underestimate how effective advertising is and how many points of data they are providing to firms in exchange for zero-price products<sup>41</sup> even if they are inclined to be concerned about the data collected for the purposes of online advertising. For instance, in the European Union more than 60% of the consumers were concerned in 2016 that their online activities may be monitored for the purpose of personalized advertising (Eurostat<sup>42</sup> and OECD<sup>43</sup> data).<sup>44</sup>

54. Particularly typical behavioural biases include the so-called “free effect”, as a result of which a significantly greater proportion of consumers use the product that becomes free even if its quality is inferior. The “privacy paradox” refers to the fact that consumers express significant concerns about privacy, and rate it as an important dimension of product quality, but do not seem to make product decisions with privacy in mind.
55. In its preliminary report on digital platforms<sup>45</sup>, the Australian competition authority (hereinafter: ACCC) also points out the role of information asymmetry, also highlighting the bargaining position of platforms vis-a-vis consumers and noting that many digital platforms (including Facebook) use click-wrap agreements during registration, where the agreement is concluded by a click, with take-it-or-leave-it terms; that is, consumers either accept the terms or they are unable to use the service. In addition, consumers must give “bundled” consent, accepting multiple separate agreements at the same time. These arrangements limit the ability of consumers to provide well-informed and freely given consent to digital platforms’ collection, use and disclosure of their valuable data. It is generally well-established that most consumers do not read the terms of online standard form contracts, particularly if they are acting under pressure from time or financial constraints.<sup>46</sup>
56. In the context of behavioural biases relating to the promise of “free” online services, ACCC noted that even though customers are often receiving valuable digital platform services for no monetary cost, the framing of these services as “free” fails to take into account that consumers are required to provide the digital platforms with access to their user data, which is often a key input in the business models of digital platforms. In addition, presenting offers to consumers as “free” is likely to result in behavioural biases from the impact of the emotional appeal of free offers<sup>47</sup>, considering that the promotion of certain services as “free” allows marketers to “present a narrow way of thinking that focuses on only one or a few aspects of a more complex decision problem”.<sup>48</sup> As a result, consumers

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<sup>41</sup> Newman, 2017

<sup>42</sup> Eurostat ((n.d.)), Digital Economy and Society, <http://ec.europa.eu/eurostat/web/digital-economy-and-society/data/comprehensive-database> (14 March 2018).

<sup>43</sup> OECD (2017), OECD Digital Economy Outlook 2017, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264276284-en>

<sup>44</sup> Online Advertising - Trends, Benefits and Risks for Consumers, OECD Digital Economy Papers, January 2019, No. 272, [https://www.oecd-ilibrary.org/science-and-technology/oecd-digital-economy-papers\\_20716826](https://www.oecd-ilibrary.org/science-and-technology/oecd-digital-economy-papers_20716826) (3 July 2019), p. 28, VJ/85-157/2016.

<sup>45</sup> ACCC, Australian Competition & Consumer Commission, Digital Platforms Inquiry, Preliminary report, December 2018, <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/preliminary-report> (5 July 2019), VJ/85-157/2016.

<sup>46</sup> See JM Paterson and RL Smith, ‘Why unilateral variation clauses in consumer contracts are unfair’, *Competition & Consumer Law Journal* 23 (2016), p. 205. See also, MA Eisenberg, ‘The Limits of Cognition and the Limits of Contract’ *Stanford Law Review*, 47 (1995), p. 241; R Korobkin, ‘Bounded rationality, standard form contracts, and unconscionability’, *University of Chicago Law Review* Vol. 70 Iss. 4, Article 2 (2003); CR Sunstein, ‘Behavioural Analysis of Law’ (Coase-Sandor Institute for Law & Economics Working Paper No. 46, 1997), p. 64.

<sup>47</sup> DA Friedman, *Free Offers: A New Look*, 38 *New Mexico Law Review* (2008), pp. 49, 68–69; C. J. Hoofnagle and J Whittington, *Free: Accounting for the Costs of the Internet’s Most Popular Price*, *UCLA Law Review* (via SSRN), 606 (2014), p. 609.

<sup>48</sup> D Boush et al., *Deception in the marketplace: the psychology of deceptive persuasion and consumer self-protection*, (2009); cited in CJ Hoofnagle and J Whittington, *Free: Accounting for the Costs of the Internet’s Most Popular Price*, *UCLA Law Review* (via SSRN), 606 (2014).

are likely to focus more on the zero monetary cost of signing-up and less on the other potential costs of providing digital platforms with their user data. Consumers receiving free services are also less likely to perceive digital platforms as commercial entities supplying advertising services, which may have the effect of lowering their guard in transactions with digital platforms<sup>49</sup>. The ACCC also notes that costs incurred by consumers may include additional elements such as increased risk of data breach and cybercrime, price discrimination, etc.

57. The position of Omer Tene<sup>50</sup> is also relevant in this regard as he highlights that research has shown that simply by providing users a feeling of control, businesses can encourage the sharing of data, and when consumers see the term 'privacy policy', they believe that their personal information will be protected in specific ways while, in reality, they serve more as liability disclaimers for businesses. Hoofnagle and Whittington<sup>51</sup> explain that personal information transactions have hidden costs because consumers cannot determine the value of personal information. In addition, Lieshout notes<sup>52</sup> that there are different notions about the sensitivity of data; furthermore, in a Eurobarometer Survey, stemming from 2011, 74% of respondents indicated that they accept personal data need to be disclosed when participating to today's society. However, once many people already entered a specific site or social medium, consumers are inclined to follow them, and thus the absence of real choices may impact upon how people will behave.

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<sup>49</sup> CJ Hoofnagle and J Whittington, Free: Accounting for the Costs of the Internet's Most Popular Price, UCLA Law Review (via SSRN), 606 (2014), p. 611

<sup>50</sup> Omar Tene and Jules Polonetsky, Big Data for All: Privacy and User Control in the Age of Analytics (2012), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1191&context=njtip&sei-redir=1&referer=https%253A%252F%252Fwww.bing.com%252Fsearch%253Fq%253Domar%252Btene%252Band%252Bjules%252Bpolonetsky%25252C%252Bbig%252Bdata%252Bfor%252Ball%25253A%252Bprivacy%252Band%252Buser%252Bcontrol%252Bin%252Bthe%252Bage%252Bof%252Banalytics%2526form%253DEDGTCT%2526qs%253DPF%2526cvid%253De857ccbfc5b42309b8dc0d5a67e26b2%2526ref%253D46eee118b82b4a69e1cfaaba94e88d70%2526cc%253DHU%2526setlang%253Dhu-HU%2526elv%253DAQj93OAhDTi%252AHZTv1paQdngNyJMROx149PDt%252521jXxE%252AZ49EzZnt2Am8zizmFb0xCavhO6b8GrWYF3zsDNocULq1uexUmJiwHWdvW%252AvEAcuB%252A4#search=%22omar%20tene%20jules%20polonetsky%2C%20big%20data%20all%3A%20privacy%20user%20control%20age%20analytics%22> (las download: 5 July 2019), p. 24, VJ/85-157/2016.

<sup>51</sup> Chris Jay Hoofnagle and Jan Whittington, 'Free: Accounting for the Costs of Internet's Most Popular Price' UCLA Law Review (2014), p. 610, VJ/85-157/2016.

<sup>52</sup> Lieshout, M van (2015). 'The value of personal data.' In: Camenisch, J.; Fischer-Hübner, S. et. al (Eds.) Privacy and Identity 2014, IFIP AICT, vol. 457. Heidelberg, Berlin: Springer, pp. 26-38., pp 9-11 VJ/85-157/2016.

## V.

### Facebook

#### 5.1. The service

58. The undertaking subject to the proceeding stated that Facebook is a social networking site that promotes more efficient information sharing among friends, family and co-workers. Anyone can sign up for the platform and can communicate in a reliable environment with their friends; in addition, Facebook offers a wide range of goods, services and functions to several groups of beneficiaries (users, advertisers, developers and publishers) - it is not just a homogeneous "social networking site". Facebook products include, inter alia, various communications tools, sharing tools, photo storage space, editing and management services, voice and video calls services, tools for live streaming, news channels, advertising tools, games, and payment solutions.<sup>53</sup>

59. As of 31 January 2017, Facebook's Statement of Rights and Responsibilities (last amended on 30 January 2015) defined Facebook services as follows:

*"By "Facebook" or "Facebook Services" we mean the features and services that we make available, including through (a) our website at www.facebook.com and any other Facebook-branded or co-branded websites (including sub-domains, international versions, widgets and mobile versions); (b) our Platform; (c) social plugins such as the Like button, the Share button and other similar offerings; and (d) other media, brands, products, services, software (such as a toolbar), devices or networks now existing or later developed".*<sup>54</sup>

60. The name of the Statement of Rights and Responsibilities was subsequently changed to Terms of Service. Pursuant to its version effective on 26 June 2019<sup>55</sup> (last amended on 19 April 2018) *"these Terms govern your use of Facebook and the other products, features, apps, services, technologies and software that we offer (the Facebook Products or Products), except where we expressly state that separate terms (and not these) apply"*.

61. Additional information regarding the service (based on the Terms of Service) is provided in paragraphs 61-62 of the new preliminary position No VJ/85-166/2016.

#### 5.2. The use and popularity of Facebook, characteristics of Hungarian users

62. According to the statement of the undertaking subject to the proceeding, there were [BUSINESS SECRET] active users in Hungary [BUSINESS SECRET].<sup>56</sup> As regards to the age of users, the competition council proceeding in the case notes that, pursuant to Article 2:10(1) of Act V of 2013 on the Civil Code (hereinafter: Civil Code), minors may also create Facebook accounts in line with the provisions of the User Agreement (which remained unchanged in this regard in the period under review).

63. Furthermore, according to the statement of the undertaking subject to the proceeding, [BUSINESS SECRET],<sup>57</sup> [BUSINESS SECRET].<sup>58</sup>

64. The company subject to the proceeding stated<sup>59</sup> that [BUSINESS SECRET] Hungarian users opened the Advertising Policies on [BUSINESS SECRET], the terms of service applicable to the use of Facebook Pages on [BUSINESS SECRET], the Statement of Rights and Responsibilities on

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<sup>53</sup> VJ/85-10/2016.

<sup>54</sup> VJ/85-14/2016., Annex 1, paragraph 18.

<sup>55</sup> VJ/85-157/2016.

<sup>56</sup> For detailed figures in a daily breakdown see VJ/85-25/2016., Annex 4.

<sup>57</sup> VJ/85-25/2016., Annex 3.

<sup>58</sup> VJ/85-25/2016., Annex 2.

<sup>59</sup> Document No VJ/85-54/2016.

[BUSINESS SECRET], the Self-Serve Ad Terms on [BUSINESS SECRET], and the Branded Content Policies on [BUSINESS SECRET]<sup>60</sup> occasions.

65. Upon the request of the competition council proceeding in the case, the undertaking subject to the proceeding added to the above<sup>61</sup> [BUSINESS SECRET].

66. The undertaking subject to the proceeding also made a statement regarding various communications targeting Hungarian consumers (among others). As regards to the three messages set out below, which were received by Hungarian users after 1 May 2018, the undertaking subject to the proceeding stated that Hungarian users requested additional information in relation to the messages (achieved by clicking on the various pages mentioned in the messages)<sup>62</sup>, the below detailed number of times:<sup>63</sup>

- Number of persons clicking on the “*Protection of your information*” message, sent to a smaller scope of users, and the “*Additional information*” active button<sup>64</sup>  
[BUSINESS SECRET]
- Number of persons clicking on the “*Protection of your information*” message, sent to a smaller scope of users, and the “*Open Settings*” active button<sup>65</sup>  
[BUSINESS SECRET]
- Number of persons clicking on the “*How can I tell if an application may have abused my Facebook data?*” message and on the “*Your settings*” button<sup>66</sup>  
[BUSINESS SECRET]

67. The undertaking subject to the proceeding also stated that<sup>67</sup> [BUSINESS SECRET].

68. In addition, in response to a question regarding the awareness of user activity and data, the undertaking subject to the proceeding stated<sup>68</sup> that in case of posts appearing in the Newsfeed the “*Why am I seeing this ad?*” message is shown next to the displayed advertisements. It is also accessible by clicking on the three dots shown in the right-hand corner and selecting it from the drop-down list.

69. [BUSINESS SECRET].

70. [BUSINESS SECRET].

71. Based on Hungarian figures on the use of social media<sup>69</sup>, in the summer of 2017 there were approximately 5,900,000 active Facebook users in Hungary. The magnitude of this number in itself indicates that the user group is heterogeneous, which is underscored by the figure shown in paragraph 74 of the new preliminary position No VJ/85-166/2016., showing the number of Hungarian Facebook users by age groups between 2013-2018.<sup>70</sup>

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<sup>60</sup> The undertaking subject to the proceeding emphasised that [BUSINESS SECRET].

<sup>61</sup> Document No VJ/85-151/2016.

<sup>62</sup> Facebook Ireland stated in this context as well [BUSINESS SECRET].<sup>63</sup> Document No VJ/85-151/2016.

<sup>63</sup> Document No VJ/85-151/2016.

<sup>64</sup> Document No VJ/85-151/2016.

<sup>65</sup> Document No VJ/85-151/2016.

<sup>66</sup> Document No VJ/85-153/2016.

<sup>67</sup> Document No VJ/85-151/2016.

<sup>68</sup> Document No VJ/85-151/2016.

<sup>69</sup> See: <http://kozossegikalandozasok.hu/2017/08/28/facebook-instagram-messenger-snapchat-hol-vagytok-fiatalok/> (21 November 2017), document No VJ/85-56/2016.

<sup>70</sup> Source: <https://kozossegikalandozasok.hu/2018/08/07/a-facebook-es-a-magyarok-elemzes-2018-augusztus/> (5 June 2019), Document No VJ/85-157/2016.

72. According to a Eurostat survey conducted in 2017 among internet users aged between 16-74 years, 66% of Hungarian internet users are active on social media sites, ranking sixth on the continent.<sup>71</sup> According to the Eurostat survey of 2015, among elderly European internet users, Hungarians represent the highest proportion of users of Facebook and other social media services.<sup>72</sup>

73. NRC Marketingkutató és Tanácsadó Kft. conducted an online questionnaire-based survey at the end of 2015 with the participation of 500 persons (aged between 18-49 years) into the Facebook usage habits of users.<sup>73</sup> A selection of the results of the survey, which are also relevant for the present competition supervision proceeding, are as follows:

- 82% of users visit the platform every day,
- on average, Hungarian users spend 86 minutes on the page, actively browsing,
- the more time someone spends on Facebook, the more likely it is that he/she is doing so using a smartphone,
- even though there is no clear trend regarding content consumption on the platform (news portals, magazines, blogs, etc.), the most typical mixture is reading on Facebook and news portals, but exclusivity is also common,<sup>74</sup>
- among Facebook users, keeping in touch with friends plays the most prominent role (70%),
- the average role of Facebook in communication is 49%, in entertainment 43%, and in information gathering 40%.

74. Another survey<sup>75</sup> was conducted in 2018 into the use of the platform. This survey involved a large but non-representative sample and identified that a significant proportion of users (70%) use the platform several times a day, particularly those aged between 18 and 55 years (in their case, multiple daily use exceeded 86%). As regards to the reasons given for their use of the platform, most respondents once again selected staying in touch with friends (63.45%), with almost the same percentage indicating that they use the platform in order to “see funny things” (59.72%), and over half of the respondents claimed that the platform served as a basis for news consumption (55.07%).

75. As regards to the amount of revenue that Facebook generates from a user, a number of reports have been prepared containing this information. According to the figures published by [www.hvg.hu](http://www.hvg.hu) on 30 January 2016, “on average, a user earns Facebook 3.73 USD; however, not all are equal around the world in this regard either. For instance, in the last quarter of 2015 an American or Canadian user was worth 13.54 dollars to Facebook, while Europeans were worth only 4.5 dollars. There are others worth even less: Facebook rates the Asian and Pacific region at 1.59 dollars, and the “rest of the world” at 1.22 dollars. The difference is due to the amount of money spent on advertising in the regions concerned. In the last three months of last year, Americans spent 2.8 billion dollars on advertising, while Europeans spent only 1.4 billion.”<sup>76</sup>

76. The Q1 2019 results of Facebook Inc. reveal that in Q4 2018, for instance, the revenue per European user was almost 11 USD (see also paragraph 79 of the new preliminary position No VJ/85-166/2016.).<sup>77</sup>

<sup>71</sup> See: [http://mitnyomjakmegdanikam.blog.hu/2017/08/22/imadnak\\_posztolni\\_a\\_magyar\\_nagyszulok#comments](http://mitnyomjakmegdanikam.blog.hu/2017/08/22/imadnak_posztolni_a_magyar_nagyszulok#comments) (23 February 2018), VJ/85-56/2016.

<sup>72</sup> See: <http://24.hu/tech/2015/09/29/a-magyar-idosek-kedvence-a-facebook/> (23 February 2018), Note No VJ/85-56/2016

<sup>73</sup> Facebook használati szokások - Kutatási jelentés az MTE számára – See: [http://mediatorveny.hu/dokumentum/843/MTE\\_FB\\_201511\\_v2\\_pdf.pdf](http://mediatorveny.hu/dokumentum/843/MTE_FB_201511_v2_pdf.pdf) (23 February 2018), Document No VJ/85-56/2016

<sup>74</sup> See: [http://mte.hu/\\_magyar\\_facebook\\_trendek/](http://mte.hu/_magyar_facebook_trendek/) (23 February 2018), Document No VJ/85-56/2016

<sup>75</sup> Be Social – Nagy Facebook körkép, 2018. augusztus – Lásd: [https://besocial.hu/wp-content/uploads/2018/09/be\\_social\\_szmo\\_nagy\\_facebook\\_korkep\\_180918\\_adatok.pdf](https://besocial.hu/wp-content/uploads/2018/09/be_social_szmo_nagy_facebook_korkep_180918_adatok.pdf) (2018. február 23.)

<sup>76</sup> See: [http://hvg.hu/tudomany/20160130\\_Kivancsi\\_mennyit\\_er\\_on\\_a\\_Facebooknak\\_Eppe](http://hvg.hu/tudomany/20160130_Kivancsi_mennyit_er_on_a_Facebooknak_Eppe) (23 February 2018), Document No VJ/85-56/2016.

<sup>77</sup> [https://s21.q4cdn.com/399680738/files/doc\\_financials/2019/Q1/Q1-2019-Earnings-Presentation.pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2019/Q1/Q1-2019-Earnings-Presentation.pdf) (5 July 2019), Document No VJ/85-157/2016.

### 5.3. The operation of Facebook from the perspective of users (consumers)

#### 5.3.1. Registration

77. It is possible to gain limited access to the content of Facebook without registering for the service. In order to register for Facebook and open a Facebook account, a potential user must visit the main page of Facebook, which can be found at <https://www.facebook.com>, and enter his/her first name, surname, mobile phone number or email address, date of birth, password and gender.<sup>78</sup>
78. By clicking on the “Create Account” button, the user accepts the Terms of Service of Facebook and confirms that he/she has read the Data Policy, including the document on Cookies Policy.
79. Since approximately 8 February 2008, information relating to the use of data has been provided on the opening page of Facebook during the registration process. This information has taken various forms, as set out below.<sup>79</sup>

Start date (approx.)	Text
8 February 2008	<i>“I have read and accepted the Terms of Service and Data Policy.”</i>
14 November 2009	<i>“By clicking Sign Up, you agree that you have read and accepted our Terms of Service and our Data Policy.”</i>
21 December 2011	<i>“By clicking Sign Up, you agree to our Terms and that you have read and understood our Data Policy.”</i>
1 May 2012	<i>“By clicking Sign Up, you agree to our Terms and that you have read and understood our Data Policy, including the document explaining our Cookies Policy.”</i>
2 February 2015	<i>“By clicking Sign Up, you agree to our Terms and that you have read our Data Policy, including our Cookies Policy.”</i>
22 December 2016	<i>“By clicking Sign Up, you agree to our Terms and that you have read the text of our Data Policy, including the document explaining our Cookies Policy. You may receive SMS notifications from Facebook and can opt out at any time.”</i>
26 June 2019	<i>“By clicking “Sign Up”, you agree to our <a href="#">Terms of Service</a>. Learn now we collect, use and share your data in our <a href="#">Data Policy</a> and how we use cookies and similar technology in our <a href="#">Cookies Policy</a>. You may receive SMS notifications from us and can opt out at any time.”</i>

#### 5.3.2. Options available to users - the use of Facebook

80. After completing the registration process, a user is able to edit his/her profile and can choose to provide additional information, above that provided during registration, about himself/herself. This additional information relates to, for example, place of work, education, location, and life events. The user is able to use Facebook to connect with friends, browse/like Facebook Pages, create groups or join groups, use various applications or games, create events or confirm his/her attendance at events, share photos/videos/live videos, “check in” from locations, shop, advertise, create his/her own pages, connect with friends through the Messenger application, which is part of the Facebook group, etc. Additionally, when using Facebook, a user is able to share any articles/pages he/she finds interesting, comment on them and publish his/her posts, thereby generating content.
81. In the News Feed which appears in the middle of a user’s home page, a user is able to see the content that has been generated by his/her friends (posts, likes, shares), as well as content and ads shared by Facebook Pages. According to the undertaking subject to the proceeding, *“the News Feed is a central part of the Facebook experience, and we should like users to see content that are*

<sup>78</sup> See: [www.facebook.com](http://www.facebook.com) (22 November 2017), document No VJ/85-56/2016.

<sup>79</sup> Documents No VJ/85-25/2016. and VJ/85-157/2016.<sup>80</sup> Document No VJ/85-25/2016.

*important to them. Consequently, the News Feed of each person is unique and a highly personalized experience”.*<sup>80</sup>

82. Users can specify the type of content that they do not wish to see by making use of the “unfollow”, “hide post” options and they can also indicate the type of content that they would like to see more of by using the “prioritise” option. When a user utilises these options, the undertaking subject to the proceeding regards the action as feedback and uses the information to determine which content is the most important for users. Users may also see posts in chronological order if they wish to do so.<sup>81</sup>
83. Facebook also allows users to be active outside of the platform as, by so-called API<sup>82</sup> use, users may also like or share the contents of other websites.
84. As previously mentioned, users are presented with advertisements in their News Feeds, which are chosen by Facebook based on the users’ interests. For this purpose, Facebook uses all of the information it has available about its users.
85. The undertaking subject to the proceeding stated that what a particular user sees in his/her News Feed primarily depends on<sup>83</sup>
- his/her contacts (friends, brands, news portals etc.),
  - the type of content he/she generally views and the content he/she is influenced by,
  - real-time signals, e.g. when a friend is writing a comment to a post, and
  - general feedback, i.e. the overall response given to posts (likes, comments, shares).
86. The undertaking subject to the proceeding stated that the algorithm used to generate a user’s News Feed is under continuous development and that it is therefore impossible to provide a comprehensive and exact description of it in the present proceedings.<sup>84</sup>
87. Since 9 April 2015 users have been able to check why they are seeing certain advertisements. This is assured by the “*Why am I seeing this?*” function, which also gives users the opportunity to decide what kind of advertisements they wish to see.<sup>85</sup> The undertaking subject to the proceeding stated<sup>86</sup> that this function provides users with transparency as regards to why particular advertisements are being displayed and who the advertisers of the displayed ads are. The function leads users to the settings regarding types of ads, where they can delete themselves from certain interest categories, and where they can set the use of their data for targeted advertisements.
88. Furthermore, since 10 April 2015 Facebook users have been able to use the Ad Types Settings option, which allows them to see the preferences regarding the ads shown to them (on the “Your ad preferences” page), which the undertaking subject to the proceeding determines based on the users’ activity on the platform. Using these settings users are able to modify the specified interests (for instance, they can delete certain interests). In addition, this is where users are able to check which companies are responsible for the ads that they have been seeing and into what categories they have been classified based on their data by the undertaking subject to the proceeding. Since 9 July 2015 users have also been able to customise their News Feeds.<sup>87</sup>

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<sup>80</sup> Document No VJ/85-25/2016.

<sup>81</sup> Document No VJ/85-25/2016.

<sup>82</sup> <https://hu.wikipedia.org/wiki/Alkalmaz%C3%A1sprogramoz%C3%A1sifel%C3%BClet>

Application programming interface (API) is the documentation of the procedures (services) of an application or system programme (and the use thereof) that may be used by other programmes. Using a public API, the services of a programme system can be used without any need to know its internal operation.

<sup>83</sup> Document No VJ/85-25/2016.

<sup>84</sup> <https://wallaroomedia.com/facebook-newsfeed-algorithm-change-history/#one> (26 February 2018) Note No VJ/85-56/2016.

<sup>85</sup> Document No VJ/85-41/2016.

<sup>86</sup> Document No VJ/85-54/2016.

<sup>87</sup> Document No VJ/85-41/2016.

#### 5.4. Operation of Facebook from the perspective of advertisers

89. Facebook offers several types of advertisements (boosted page posts, link click ads, page likes, application installation and activation ads, local awareness ads, event ads, offer claims, video ads, lead ads, collection ads, reach and frequency ads, canvas ads).<sup>88</sup>
90. The process of submitting ads is described in detail in the report of the case handler No VJ/85-61/2016.,<sup>89</sup> and paragraphs 94-116 of the new preliminary position No VJ/85-166/2016. illustrate the intricate system of presenting commercial practices and targeting advertisements, while paragraphs 117-138 explain the rules governing the commercial practices of third parties.
91. When advertising on Facebook, advertisers may specify the key (practically manually selected) target audiences, individual target audiences (defined based on the data of the advertiser concerning its customers) and lookalike audiences (similar in some characteristic to existing customers). These three categories may be based on the information made available by users on Facebook, as well as on information regarding what they do outside Facebook as explained in the Data Policy, and on the information available to advertisers about their customers.
92. The undertaking subject to the proceeding stated that advertisers may choose from hundreds of thousands of targeting options at any given time. It is impossible to summarise in a single table all of the detailed targeting options that advertisers may choose from because the options depend on the advertiser concerned as well as on who is to be targeted, when and how on Facebook.<sup>90</sup>
93. On the CD attached to Document VJ/85-47/2016. by the undertaking subject to the proceeding [BUSINESS SECRET].
94. The following information was available on the Facebook page regarding the targeting of advertisements:

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<sup>88</sup> Based on Richárd Lévai's book "Hogyan készíts eredményes Facebook hirdetések? Gyakorlati tippek, trükkök, stratégiák kezdőknek és haladóknak" (2016., RG Stúdió Kft.) and screenshots of the ads management interface filed under No VJ/85-55/2016.

<sup>89</sup> Document No VJ/85-10/2016.

<sup>90</sup> Document No VJ/85-36/2016.

## Hogyan dönti el a rendszerünk, hogy milyen hirdetéseket jelenítsen meg?

Többféle forrásból – többek között az alább ismertetett forrásokból – származó információk használatával próbáljuk meghatározni, hogy milyen hirdetések lehetnek értékesek a számodra.

### Tevékenységek a Facebook alkalmazásaiban és szolgáltatásaiban

Az egyik leggyakoribb eszközt, hogy tudjuk, milyen hirdetéseket látnál valószínűleg szívesen, a Facebook alkalmazás- és szolgáltatáscsaládjában végzett tevékenységed jelenti. Például a következők tartoznak ide:

- oldalak, amelyeket kedvelsz, illetve az ismerőseid kedvelnek
- a Facebook- és az Instagram-profilodban megadott információk
- helyek, ahol a Facebook használatával bejelentkezél

A hirdetéstípusok beállításainak megjelenítése [↗](#)

### Vállalkozásokkal megosztott információk

Amikor egy vállalkozással olyan adatokat osztasz meg, mint például a telefonszámod vagy az e-mail-címed, azt [ügyfelli](#)stá vehetik fel, amely megfeleltethető a Facebook-profilodnak. Ilyen adatforrások többek között a következők:

- [hűségprogramok](#) (például szupermarket „klubkártyája”)
- [adatszolgáltatók](#) által feldolgozott információk
- vásárlások kiskereskedelmi üzletekben

További tudnivalók az ügyfellistákról [↗](#)

### Egyéb online tevékenységek

A hirdető a Facebook technológiái – például a [Facebook-képpont](#) segítségével hirdetéseket tudnak megjeleníteni olyan embereknek, akik felferesték a webhelyüket vagy használták a mobilalkalmazásukat. A vállalkozások és szervezetek például a következő tevékenységek alapján próbálhatják elérni az embereket:

- Facebook-képpontot használó weboldal megtekintése
- a mobilalkalmazásuk letöltése
- vásárlás (vagy csak egyszerűen termék kosárba helyezése)

A hirdetési beállításaid megjelenítése [↗](#)

### Helyszín

Helyadatok használatával jelenítjük meg neked olyan hirdető hirdetéseit, akik egy adott helyen vagy annak közelében szeretnének embereket elérni. Az ilyen információkat például a következő forrásokból érjük el:

- az internethez való kapcsolódásod helye (számítógépek, táblagépek és telefonok [IP-címjén](#) keresztül)
- a telefonod használatának helye ([GPS-adatok és helymeghatározási szolgáltatások](#) használatával)
- a helyadataid a Facebook- és Instagram-profilod alapján

További tudnivalók a helyadatokról [↗](#)

95. After specifying the target audience, Facebook shows the advertiser the size and composition of the audience that may see the ad; however, the undertaking subject to the proceeding stated that it does not disclose any personal data of its users to advertisers.

## 5.5. Rules governing data management

96. The Facebook Help Centre<sup>91</sup> states the following regarding the data management and data collection of Facebook services:

*(...) All such services are covered by our Data Policy, which explains how we collect, use or disclose your data. In certain cases, additional terms may apply to a particular product or service; we provide information about those in the service concerned. Please note that in certain cases some of the products and services offered by us may be subject to separate data policies and terms of service.*

97. In the policies of the undertaking subject to the proceeding, the provisions and information relating to data collection and management are disclosed in several places. A detailed list of the policies concerned is contained in paragraph 140 of the new preliminary position No VJ/85-166/2016.

## VI.

### Other information

#### 6.1. Description of the provisions of the UCPD guidance document issued by the European Commission regarding the concept of “free”

98. With regard to the interplay with EU data protection rules, the UCPD guidance document states that there is an increasing awareness among undertakings of the economic value of information related to consumers’ preferences, personal data and other user-generated content. The marketing of such

<sup>91</sup> <https://www.facebook.com/help/1561485474074139?helpref=search&sr=8&query=insights> (20 September 2017). Note No VJ/85-56/2016.

products as “free” without telling consumers how their preferences, personal data and user-generated content are going to be used could in some circumstances be considered a misleading practice.

99. The UCPD guidance document cite an example in which an internet service provider in Italy was prevented from claiming in an advertisement that its services were for “free”, as in exchange for the use of the services consumers had to agree to a number of disproportionate conditions, involving tracking and receiving commercial communications. The Italian authorities concluded that the information on all the terms and conditions of the service was significant, and that the contractual terms of membership, which imposed disproportionate conditions on consumers seeking to benefit from the offer, were decisive for consumers when they were deciding whether the advertised service was actually convenient or not. The fact that these conditions were not mentioned in the advertisement may have misled consumers and unduly influenced their economic behaviour.
100. The UCPD guidance document emphasises that data-driven business structures are increasingly dominating the online world. In particular, online platforms analyse, process and sell data related to consumer preferences and other user-generated content. This, together with advertising, often constitutes their main source of revenue. Personal data, consumer preferences and other user generated content, have a "de facto" economic value and are being sold to third parties. In this context, consumers must be able to exercise their rights with regard to such data processing.<sup>92</sup>

## 6.2. EU guidelines regarding data protection and the consumer protection aspect of big data

101. Considering that for the conduct under investigation it is relevant how complex, understandable and noticeable the management of user data is, it is justified for the present competition supervision proceeding to take into account certain guidelines related to privacy notices and certain issues of the big data phenomenon.
102. The term ‘Big Data’ refers to large amounts of different types of data produced from various types of sources. Big Data may involve personal data: that is, any information relating to an individual, and can be anything from a name, a photo, an email address, bank details, posts on social networking websites, medical information, or a computer IP address.<sup>93</sup>
103. In 2014 the European Data Protection Supervisor published a preliminary opinion (hereinafter: preliminary opinion of the EDPS) on privacy and competitiveness in the age of big data<sup>94</sup>.<sup>95</sup>
104. In the preliminary opinion of the European Data Protection Supervisor, *“the digital economy holds many advantages for consumers and citizens. Online services offer unprecedented scope for social connections, innovation and efficient problem-solving. At the same time, users of these services disclose masses of information about themselves. The volume and variety of data generated cannot be handled by traditional data mining and analysis technologies, but control of this information is now increasingly possible thanks to the development known as ‘big data’. Extracting value from big data has become a significant source of power for the biggest players in internet markets. Not all big data is personal, but for many online offerings which are presented or perceived as being ‘free’, personal information operates as a sort of indispensable currency used to pay for those services. As well as benefits, therefore, these growing markets pose specific risks to consumer welfare and to the rights to privacy and data protection.”*<sup>96</sup>

<sup>92</sup> ec.europa.eu/justice/consumer-marketing/files/ucp\_guidance\_hu.pdf , p. 28.

<sup>93</sup> “The EU data protection reform and big data” (Factsheet, January 2016). Available at: ec.europa.eu/newsroom/document.cfm?doc\_id=41630

<sup>94</sup> Preliminary Opinion of the European Data Protection Supervisor, [https://edps.europa.eu/sites/edp/files/publication/14-03-26\\_competition\\_law\\_big\\_data\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/14-03-26_competition_law_big_data_en.pdf)

<sup>95</sup> *“Preliminary Opinion of the European Data Protection Supervisor Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy”*

<sup>96</sup> Preliminary Opinion of the European Data Protection Supervisor, Executive Summary in Hungarian, [https://edps.europa.eu/sites/edp/files/publication/14-03-26\\_competition\\_law\\_big\\_data\\_ex\\_sum\\_hu\\_0.pdf](https://edps.europa.eu/sites/edp/files/publication/14-03-26_competition_law_big_data_ex_sum_hu_0.pdf)

105. As shown in the Hungarian summary of the EU publication of 2011 “*Special Eurobarometer 359: Attitudes on Data Protection and Electronic Identity in the European Union*” (“Az adatvédelemről és az elektronikus személyazonosságról alkotott nézetek az Európai Unióban”)<sup>97</sup>, 55% of Hungarian internet users and 54% of their EU counterparts dislike the fact that search engines and email programmes used by consumers use information about their online activity to tailor advertisements or content to their hobbies and interests.

106. According to the Hungarian summary of the EU publication of 2012 “*Special Eurobarometer 390: Cyber security*” (“Számítógépes biztonság”),<sup>98</sup> 71% and 72% of Hungarian and European internet users, respectively, agree that they are concerned that their online personal information is not being kept secure by websites.

107. The “*Special Eurobarometer 431: Data Protection*”, an EU paper published in 2015 (hereinafter: Data Protection Eurobarometer 2015),<sup>99</sup> found that 69% of EU residents thought that their explicit approval should be required in all cases before any kind of personal information is collected and processed. In the EU, around seven out of ten people are concerned about their information being used for a different purpose from the one it was collected for. The survey found that only two out of ten respondents are always informed about data collection and the way data are used. 18% of the respondents stated that they fully read privacy statements.<sup>100</sup>

108. According to the Hungarian summary of the Data Protection Eurobarometer 2015<sup>101</sup>:

- only 25% of Hungarians feel they have complete control over their data supplied online, while 45% say they have partial control (compared to the EU average of 15% and 50%, respectively).
- 26% of Hungarian respondents think they have no control at all (EU average: 31%),
- 65% of Hungarians are concerned that authorities and private companies holding information about them may use it for a different purpose than the one it was originally collected for without informing the person concerned (EU average: 69%),
- 56% of Hungarians do not trust internet companies collecting and holding personal information about users (EU average: 63%),
- in 2015, 52% of Hungarians (the same as the EU average) felt that they were expressly against providing personal information, even if they received free online services in return.

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<sup>97</sup> [ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_359\\_fact\\_hu\\_hu.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_fact_hu_hu.pdf)

<sup>98</sup> [ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_390\\_fact\\_hu\\_hu.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_390_fact_hu_hu.pdf)

<sup>99</sup> Data Protection Eurobarometer 2015, [ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_431\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_431_en.pdf)

<sup>100</sup> Data Protection Eurobarometer 2015, p. 7.

<sup>101</sup> [ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_431\\_fact\\_hu\\_hu.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_431_fact_hu_hu.pdf)

### 6.3. The so-called Cambridge Analytica scandal and other concerns regarding the management of user data

109. In light of the subject matter of this competition supervision proceeding, a brief, non-comprehensive description of certain abuses of Facebook data, which have recently received extensive media coverage, cannot be dispensed with when summarising the facts of the case. This issue is also relevant in the sense that the undertaking subject to the proceeding disagreed with the proposition that the gravity of its conduct had changed later, between the first preliminary position and the new preliminary position. However, the competition council proceeding in the case finds that these cases highlighted the fact that it was only subsequently, in the wake of such incidents receiving broad media coverage, that the average consumer and the entire public became aware of the complex situations and risks that users face when using the Facebook platform with regard to their data.
110. Media reports revealed that Cambridge Analytica, a political analyst and consultancy firm, gained access to the data of Facebook users that they should not have had access to. Even though worldwide “only” 270,000 users installed the application called “*thisisyourdigitallife*” that collected the data, the number of aggrieved persons is much higher because, due to the former data management practices of Facebook, the developers of the application had access to the data of persons in direct contact with their software as well as those of the friends of such persons.<sup>102</sup>
111. According to the European Commission<sup>103</sup>, up to 2.7 million European Facebook users may have been affected by the aforementioned data collection scandal; their personal data may have been disclosed unlawfully to Cambridge Analytica. The European Commission was informed by Facebook about the number of EU citizens potentially affected.
112. The chief executive of Facebook Inc. reported that the data of up to 87 million users may have been disclosed to Cambridge Analytica, which, according to press reports, was using this data to carry out targeted political advertising with the aim of intentionally swaying US voters, who had no idea that they were being targeted in this manner.
113. According to an article<sup>104</sup>, only 13 Hungarian users installed the application concerned. However, given that the data was collected in such a manner that allowed the developers of the app to not only access the data of the users that had consented to the app, but also to the data of their friends, a total of 32,067 Hungarian users were affected in the case according to the figures disclosed by Facebook Inc.
114. The undertaking subject to the proceeding stated that in the absence of the findings of an expert investigation it was impossible to establish with certainty what data (and from which users) Dr. Kogan had forwarded to the SCL Group (the parent company of Cambridge Analytica). At the same time, according to the undertaking subject to the proceeding, information in the public domain and the evidence at its disposal strongly indicated that Dr. Kogan had only forwarded data relating to Facebook users living in the United States. Even though there were minor differences between the statements of Dr. Kogan and the SCL Group, they both consistently claimed to the authorities and others that Dr. Kogan had never transferred any data relating to Facebook users outside the United States (including users in Hungary) to the SCL Group.
115. The scandal had several consequences, including the fact that the senior management of Facebook Inc. was interviewed by a number of institutions (see also the FTC decisions detailed in Part II). At one of the hearings the chief executive stated that, in his opinion, being free was a fundamental

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<sup>102</sup> [http://hvg.hu/tudomany/20180317\\_cambridge\\_analytica\\_adatgyujtes\\_facebook](http://hvg.hu/tudomany/20180317_cambridge_analytica_adatgyujtes_facebook)

<sup>103</sup> [http://hvg.hu/tudomany/20180406\\_facebook\\_adatgyujtes\\_europai\\_felhasznalo\\_cambridge\\_analytica\\_botrany](http://hvg.hu/tudomany/20180406_facebook_adatgyujtes_europai_felhasznalo_cambridge_analytica_botrany)

<sup>104</sup> [http://hvg.hu/tudomany/20180405\\_facebook\\_cambridge\\_analytica\\_adatgyujtes\\_erintett\\_magyar\\_felhasznalok\\_szama](http://hvg.hu/tudomany/20180405_facebook_cambridge_analytica_adatgyujtes_erintett_magyar_felhasznalok_szama)

aspect of Facebook, and that the social media site would always have a free version. However, he also said that Facebook would consider offering a paid version if there was enough demand for this.<sup>105</sup> Another major consequence was that many users decided to leave Facebook, delete their profiles or change their privacy settings due to privacy concerns.<sup>106</sup>

116. Privacy concerns on Facebook were also the subject matter of another case in early June 2018. In this particular case the posts of approximately 14 million Facebook users intended for a closed circle became public due to a programming error between 18 and 27 May 2018. The bug modified the privacy settings of affected users so that their posts were set to public by default without their knowledge. The undertaking stated that the error had been fixed and it apologised to the persons concerned. In any event, the share price of Facebook dropped by 1.6% on the trading day of 7 June 2018.<sup>107</sup>
117. In addition, the competition council proceeding in the case also quotes a news article from December 2018<sup>108</sup>, according to which Facebook Inc. had in fact shared significantly more personal data about its users with its partners than its CEO had admitted to at the hearings mentioned above: for instance, it allowed Microsoft to see the friends of users, while Netflix and Spotify gained access to the private messages of Facebook users. Amazon could obtain the names and contact details of Facebook users, Yahoo could view the News Feeds of users even in the summer of 2018, despite the fact that Facebook Inc. had claimed to have stopped disclosing such data years earlier. According to the article, a total of 150 companies had such agreements with Facebook Inc., mostly online retail companies, entertainment pages, car manufacturers and the media.
118. The agreements, which date back to 2010, were still active in 2017, and some even in 2018. According to the privacy director of Facebook Inc., none of the company's partners had infringed the user privacy rules, which were also binding on its partners. The spokesman added that there was no evidence that the partners had breached any of the rules; the largest companies, such as Amazon, Microsoft and Yahoo claimed to have used the data appropriately. Nevertheless, Facebook admitted that it had mismanaged some agreements and that data had still been accessible after the sharing had ceased.
119. As noted in the article, Facebook Inc. had not in fact sold any user data, but had merely granted other companies access to some systems of the social media site. In exchange, it obtained contact lists from its partners, for example Amazon, Yahoo and Huawei (which, incidentally, has been identified as a security risk by US intelligence).
120. In a relatively recent development,<sup>109</sup> Facebook Inc. announced that it had suspended tens of thousands of applications (associated with approximately 400 developers) as part of an investigation it had launched in the wake of the Cambridge Analytica scandal. The investigation was launched after the undertaking promised to review the applications that had access to large volumes of Facebook data. While the investigation is still ongoing, the suspension of these applications represents the most radical step that has been taken so far in response to the scandal. The applications in question violated the privacy policies of the company in a number of different ways:

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<sup>105</sup> [https://index.hu/tech/2018/04/11/mark\\_zuckerberg\\_belengette\\_a\\_fizetos\\_facebookot/](https://index.hu/tech/2018/04/11/mark_zuckerberg_belengette_a_fizetos_facebookot/)

<sup>106</sup>

[https://index.hu/tech/helpdeszka/2018/05/23/facebookalternativak\\_cambridge\\_analytica\\_vero\\_prevaat\\_minds\\_steemit\\_rafr\\_diaspora\\_ello/](https://index.hu/tech/helpdeszka/2018/05/23/facebookalternativak_cambridge_analytica_vero_prevaat_minds_steemit_rafr_diaspora_ello/)

<sup>107</sup> <https://www.portfolio.hu/vallalatok/it/hupsz-nyilvanossa-valtak-14-millio-facebook-felhasznalo-posztjai.5.288172.html>

<sup>108</sup> <https://www.portfolio.hu/vallalatok/itt-az-ujabb-facebook-botrany-beleolvashatott-a-netflix-es-a-spotify-is-az-uzenetekbe.308353.html>

<sup>109</sup>

[https://index.hu/techtud/2019/09/20/facebook\\_felfuggesztett\\_tobb\\_tizezer\\_appot\\_adatkezeles\\_adatvedelem\\_cambridge\\_analytica/](https://index.hu/techtud/2019/09/20/facebook_felfuggesztett_tobb_tizezer_appot_adatkezeles_adatvedelem_cambridge_analytica/)

for instance, they inappropriately shared user data or made it available without protecting the identity of users. Furthermore, the applications of some developers were blocked because they could not be contacted to obtain further information.

121. In another recent development,<sup>110</sup> Facebook Inc. admitted in an announcement that in the past it had recorded and transcribed certain users' audio, allegedly with their consent, through the Messenger application operating on the page. However, it claimed that it had stopped engaging in this practice one week prior to the announcement. At the Congressional hearing that took place in the spring of 2018, the head of the undertaking denied allegations that the firm had intercepted conversations. This statement was subsequently clarified, so as to specify that the undertaking only has access to conversations conducted through the microphones of mobile phones if users give their explicit consent to this.

#### **6.4. The information practices of the undertaking subject to the proceeding as related to the GDPR**

122. In response to the questioning of the competition council proceeding in the case, the undertaking subject to the proceeding stated, in Document No VJ/85-83/2016, that since 1 March 2018 Hungarian users had been receiving, in Hungarian, messages from Facebook on their profile pages, news feeds or via other means through the platform, concerning the following three subjects: "*protection of your information*", GDPR and security tips.

123. As regards to the "*Protection of your information*" messages, Facebook Ireland sent different versions of the messages to users worldwide, based on whether they had installed the "Thisisyourdigitallife" application (created by Dr. Kogan), one of their friends had done so or they did not fall into either category.

124. In addition, Facebook shared the opening page starting "*How can I tell if an application may have abused my Facebook data?*" with each user.

125. On the subject of GDPR messages, the undertaking subject to the proceeding stated that Facebook Ireland had informed all of its European users about the process and had explained user participation.

126. With regard to security tips (so-called news feed tips) Facebook Ireland stated that [BUSINESS SECRET].

127. Furthermore, the undertaking subject to the proceeding stated that the update of the Facebook Terms of Service and Data Policy was announced to users in April 2018. The Terms of Service and Data Policy were updated for transparency reasons. Facebook updated its Terms to clarify its commitment to all Facebook users. In addition, the updates aimed to use easy-to-read language to describe the services offered by Facebook. The Data policy was updated so that it explains more clearly the data collected by Facebook and the manner they may be used by Facebook, Instagram, Messenger and other products of the Facebook family.

128. The undertaking subject to the proceeding stated that, during a 7-day period beginning on 4 April 2018, users were invited to provide feedback on the updated Data Policy and Terms of Service. The updated Data Policy and Terms of Service were delivered directly to users through the aforementioned user participation process at the end of April 2018, and users were asked to agree to the updated Terms of Service.<sup>111</sup>

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<sup>110</sup> <https://www.portfolio.hu/gazdasag/20190814/a-facebook-elismerte-hogy-lehallgatott-minket-334239>

<sup>111</sup> Detailed information about the updates is provided in the Facebook News Room public post, available at: <https://newsroom.tb.com/news/2U18/04/terms-and-data-policy/>.

## **6.5. Results of the surveys relating to privacy issues (awareness, expectation)**

129. The undertaking subject to the proceeding presented the results of surveys relating to privacy awareness and other “confidence”-type opinion polls.<sup>112</sup> [BUSINESS SECRET]. The questions and findings (as described in Annex 4 to Document No VJ/85-83/2016.) were as follows:

[BUSINESS SECRET]

## **VII.**

### **Position of the undertaking subject to the proceeding**

#### **7.1. Position with regard to the concept of “free”**

130. In the opinion of the undertaking subject to the proceeding, partly due to the legal character of the underlying directive - irrespective of whether data have a value or not - the conduct of the undertaking that is the subject matter of the present proceeding does not constitute an offence according to paragraph 20. of the Annex to the UCPA, and it cannot do so under a dogmatically correct interpretation of the law that is in line with existing case law. It is submitted that the text in question refers to the case where consumers are required to pay a price, which is not the case in the present proceeding.<sup>113</sup>

131. With regard to the extension order No VJ/85-78/2016. the undertaking subject to the proceeding stated<sup>114</sup> that by making claims about the free nature of the service it did not commit the offence set out in Article 6(1)(c) of the UCPA, and, in its opinion, the new legal basis is not applicable (the undertaking subject to the proceeding refers back to its previous submissions, such as paragraph 18 of its submission No VJ/85-19/2016. dated 13 April 2017 and paragraph 23 of its submission No VJ/85-25/2016. dated 3 July 2017).

#### **7.2. Comments of the undertaking subject to the proceeding regarding the findings in the preliminary position No VJ/85-88/2016.**

132. In its submission No VJ/85-99/2016. dated 18 September 2018, the undertaking subject to the proceeding disclosed its comments to the contents of the preliminary position No VJ/85-88/2016. of the Competition Council issued on 28 June 2018.

133. Its comments regarding the free nature of its services are summarised below. In its opinion, the services of Facebook are effectively free; it is beyond dispute that users do not need to make any pecuniary contribution for the use of the platform, and in the course of the registration required for the use of the service, users need to provide only four types of data. It states that the fact that in its preliminary position the competition council proceeding in the case contests the free nature of the service goes to show that the GVH is fundamentally mistaken about the business model of Facebook Ireland.

134. It also pointed out that the average Hungarian consumer - as defined in Article 4(1) of the UCPA - understands “free” to mean that no obligation of monetary payment arises, which, in its opinion, is beyond dispute. It emphasised that the Dictionary of the Hungarian Academy of Sciences also assigns this meaning to the word “free”, and so does the commentary to the UCPA, where, in its

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<sup>112</sup> The competition council proceeding in the case notes that even though Hungarian users encountered the questions in Hungarian (this was also the motivation behind the data request of the competition council proceeding in the case), the undertaking subject to the proceeding attached both the questions and the findings in English, therefore the description is the translation of the competition council proceeding in the case. Furthermore, the undertaking subject to the proceeding did not state whether the findings relate to the Hungarian or EU market, while in the former case the undertaking subject to the proceeding should have attached the questions and answers in Hungarian.

<sup>113</sup> VJ/85-19/2016.

<sup>114</sup> VJ/85-80/2016.

interpretation, “free” means that the undertaking does not charge a price for its service. In its opinion, the fact that an undertaking has a commercial interest in offering a product/service without any obligation of monetary payment does not change the simple fact that the consumer interprets this as meaning that the product/service is being provided to him/her free of charge. In this context it also quoted Judgment No Kfv.III.37.020/2014/5. of the Curia, stating that “*the terms ‘free’ and ‘free of charge’ have clear and explicit meanings. The everyday and grammatical interpretations are identical.*” To underpin its position, it also referred to a proceeding ongoing in the German court, where the Federation of German Consumer Organisations has been seeking an injunction against an internet company, which derives its revenues from analysing users’ private data and selling the information to third party traders in the form of advertising space.

135. In its opinion, the positions of the GVH as explained in previous cases support the interpretation of the term “free” that has been adopted by the undertaking subject to the proceeding. In this context it pointed out to the GVH that in cases No VJ/66/2011. and VJ/23/2015., both the GVH and the Media Council, the latter of which was invoked as a specialist authority, classified channels based on whether their broadcasts were free or provided in exchange for a subscription fee/programme fee; both bodies classified the former as ‘free’ due to the absence of any payment of a fee. Finally, in this regard it also referred to the final report published by the GVH on the conclusion of a sectoral enquiry into the market of online accommodation reservations, which characterised the platforms scrutinised as being typically free for consumers because consumers paid no separate charge for their use, with the platform operators obtaining their revenues from accommodation providers under the model in use.
136. Furthermore, with regard to “free” it explained that the GVH’s assumption that consumers pay for Facebook services with their data is erroneous; it is based on a misinterpretation of the firm’s operational model. Facebook claims that it focuses on providing a relevant and personalised user experience, for which it is indispensable to use the data that users share with Facebook Ireland while using Facebook services, or which the undertaking subject to the proceeding itself collects regarding its users, as well as those that come from third parties, e.g. advertisers, friends of users. This selection process (which focuses on relevance from the perspective of users) is used not only for the presentation of posts in the news feed but also for the presentation of ads. In its opinion, in the absence of personalisation (and of data), the service offered by the platform would be an impenetrable mass of content without any social context.
137. It stated that when completing the registration process required to use the platform, users only need to provide four pieces of data, which, in terms of type and content, are in conformity with the information that consumers tend to provide in the course of signing up to other free online services. In addition to the data required for registering on the service, consumers may choose, at their own discretion, to provide other data to Facebook Ireland in order to make the use of the service more relevant and personalised. Furthermore, the undertaking subject to the proceeding claims to safeguard the privacy of users and utilises a number of tools in order to ensure that users are provided with an overview of the management of their personal data, that they can make choices and users are expressly encouraged to acquaint themselves with the data policy.
138. The undertaking subject to the proceeding denied the allegation that it can provide the service free of charge to users because they “pay” with their data. It reiterated that Facebook Ireland obtains its revenues from allowing advertisers to transmit their messages to people, that is, advertisers pay for access to the aggregate attention - on a reach basis. In its opinion, this practice is fully in line with the industry practice characteristic of two-sided markets. In its view, the average Hungarian consumer is used to seeing advertisements as part of free services, and on this basis consumers do not believe, despite the term “free”, that the undertaking offering the service does not make a profit from this arrangement.

139. On the whole, it considers that the use of the term “free” is the most simple, appropriate and generally understandable way to express the fact that the use of the Facebook service entails no monetary payment obligation, which is in line with the interpretation of consumers and the case law of the GVH and results in no misunderstanding on the side of consumers.

### **7.3. [BUSINESS SECRET]**

#### **Statement as per submission No VJ/85-108/2016.**

140. [BUSINESS SECRET].

141. [BUSINESS SECRET].

142. [BUSINESS SECRET].

143. [BUSINESS SECRET].

144. [BUSINESS SECRET].

145. [BUSINESS SECRET]

- [BUSINESS SECRET] communicated the important elements of its business model to users in several different ways (Data Policy, Terms, Help Centre). [BUSINESS SECRET]
- In its opinion, the proposed decision set out in the preliminary position No VJ/85-88/2016. containing a finding of infringement would create confusion as Hungarian consumers understand “free” to mean that no monetary payment is required for the use of the service and no actual monetary payment is made. [BUSINESS SECRET].
- [BUSINESS SECRET].
- [BUSINESS SECRET].

146. [BUSINESS SECRET].

147. [BUSINESS SECRET].

148. [BUSINESS SECRET]. Furthermore, it highlighted that the Help Centre is easy to access for users through the “?” icon located in the top right corner of all Facebook (i.e. [www.facebook.com](http://www.facebook.com)) pages.

149. [BUSINESS SECRET].

#### **Statement as per submission No VJ/85-150/2016.**

150. [BUSINESS SECRET].

151. [BUSINESS SECRET].<sup>115</sup>

152. [BUSINESS SECRET].

153. [BUSINESS SECRET].

154. [BUSINESS SECRET].

155. [BUSINESS SECRET]

156. [BUSINESS SECRET].

157. [BUSINESS SECRET].

#### **Statement as per submission No VJ/85-164/2016.**

158. [BUSINESS SECRET].

### **7.4. The position and statements of the undertaking subject to the proceeding following the new preliminary position<sup>116</sup>**

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<sup>115</sup> M/1 Annex to submission No VJ/85-149/2016.

159. In Document No VJ/85-171/2016, the undertaking subject to the proceeding stated that [BUSINESS SECRET].

160. The undertaking subject to the proceeding emphasised that [BUSINESS SECRET].

161. The undertaking subject to the proceeding made its comments regarding the new preliminary position of the competition council proceeding in the case in Document No VJ/85-174/2016. The undertaking stated that it is aware of its obligations under EU law regarding fair and transparent data management, in particular with regard to the requirements set out in the GDPR<sup>117</sup>, and that it consistently strives to abide by such obligations. The undertaking is under the supervision of the Data Protection Commissioner of Ireland, and in cases affecting data security, Facebook Ireland closely cooperates with the Irish Data Protection Commissioner. In full compliance with the requirement of good faith, Facebook Ireland also strives to cooperate with the GVH in the present case.

162. The undertaking subject to the proceeding stated that in its submission it wishes to respond to the issues raised in the new preliminary position only “to the most necessary extent”, and reserves the right to provide a more detailed response in subsequent submissions or proceedings.

163. According to the undertaking subject to the proceeding, the competition council proceeding in the case is mistaken in claiming that the term “free” is misleading; furthermore, it refutes the claims regarding the alleged “distraction” of the attention of users.

164. The undertaking subject to the proceeding explained in detail in its submission that, in its opinion, [BUSINESS SECRET].

165. In the view of the undertaking subject to the proceeding,

- [BUSINESS SECRET],
- the competition council proceeding in the case failed to take into account the obvious benefits that the public derives from the availability of services that do not require monetary payment, such as the Facebook service. According to the undertaking subject to the proceeding, numerous online platforms have been operating for years on the internet based on the “zero-price” model (offering their services to users “free” and advertising them as such).
- the only court in a Member State that has examined claims of the “free” nature of the service concluded that such claims are not misleading and do not constitute an infringement. The undertaking subject to the proceeding attached the Hungarian translation of the relevant parts of the decision of the Berlin Court.
- [BUSINESS SECRET].
- [BUSINESS SECRET].

166. Furthermore, in the opinion of the undertaking subject to the proceeding the new preliminary position is based on incorrectly assumed facts, such as [BUSINESS SECRET].

167. The undertaking subject to the proceeding also objected to the proposed fine calculation: in its opinion, the proposed fine has been calculated in an arbitrary and irrational manner, and a number of mitigating factors have not been taken into account.

168. The undertaking subject to the proceeding argued that the competition council proceeding in the case had proposed, in its first preliminary position, the imposition of a fine for an infringement of

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<sup>116</sup> Document No VJ/85-116/2016.

<sup>117</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR)

the UCPA based on two different conducts, and had stated that the appropriate starting point for the calculation of the fine was less than 10% of half of the turnover generated from advertisements in the last audited business year (2017). In contrast, according to the new preliminary position the competition council proceeding in the case is no longer planning to establish one of the alleged infringements, focusing instead solely on the claim regarding the “free” character of the service; however, instead of reducing the proposed amount of the fine, it has raised the base amount by 100%. It clearly follows from the fact that the competition council proceeding in the case has decided to double the amount of the proposed fine, despite the fact that it now intends to only establish one infringement instead of the former proposed two, that the proposed amount of the fine has been determined arbitrarily.

169. The undertaking subject to the proceeding disagrees with the statement that “the gravity of the presumed infringement is greater than previously stated”, because the claim of the “free” nature of the service had been in use since 2010, when in fact numerous online platforms have been operating on this “zero-price” model for years, a fact which was indeed also present one year ago, when the first preliminary position was issued. Consequently, in the opinion of the undertaking subject to the proceeding there are no new circumstances that could have increased the gravity of the alleged infringement.

170. In the view of the undertaking subject to the proceeding, the competition council proceeding in the case should actually substantially reduce the base amount used for the calculation of the fine in view of the following:

- The conduct subject to the proceeding has been voluntarily corrected [which, pursuant to Paragraphs 45 and 71<sup>118</sup> of Notice No 12/2017 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the method of setting fines for infringements in consumer protection type cases (hereinafter: Fine Notice) constitutes a mitigating factor]. [BUSINESS SECRET]
- The business model of Facebook Ireland is well-known and understandable to the public (mitigating factor pursuant to Paragraph 48 of the Fine Notice<sup>119</sup>). The “zero-price” model is widely and customarily used in both the offline (e.g. broadcasting) and online arenas. This is supported by the evidence submitted by Facebook Ireland in response to the first preliminary position, as well as the OECD study referred to in Paragraph 36 of the new preliminary position and in footnote 27.
- The infringing nature of the conduct is unclear (mitigating factor pursuant to Paragraph 50 of the Fine Notice). According to the German courts, the claim of the “free” nature of the service does not infringe the provisions of the German equivalent of the UCPA, and the undertaking subject to the proceeding is not aware of any EU court or Member State court that has concluded that reference to a “free” service amounts to an infringement. These circumstances substantiate that the alleged infringing nature of the conduct is not clear and serve as a basis for reducing the fine. In the view of the undertaking subject to the proceeding, as a result of the lack of clarity of the infringing nature of the conduct in question it would clearly be unlawful to impose the proposed record-high fine for the violation of the UCPA.
- Under the present circumstances (pursuant to Paragraph 61 of the Fine Notice), no deterrent effect as a desirable objective can be taken into consideration. [BUSINESS SECRET].

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<sup>118</sup> The competition council proceeding in the case notes in advance that the modification of a commercial practice does not constitute proactive reparation (as defined in Subsection VI.1 and Paragraph 71 of the Fine Notice).

<sup>119</sup> The competition council proceeding in the case notes that Paragraph 48 of the Fine Notice provides an example of when a consumer could necessarily and realistically receive correct information before concluding a contract, thereby enabling him/her to make an informed decision. In contrast, in the present case we are dealing with a conduct or claim that is immediately followed by the conclusion of a contract (acceptance of terms).

171. In the context of its comments regarding the proceeding, the undertaking subject to the proceeding noted that it found it disconcerting that the GVH had adopted an increasingly broad legal interpretation of the lawfulness of the claim concerning the “free” nature of the service. Before the issuance of the new preliminary position, the GVH had examined the conduct of Facebook Ireland for more than two and a half years. During that time, the GVH made no preliminary statements regarding the alleged “distracting” effect of the claim concerning the “free” nature of the service. Facebook Ireland had been using that phrase since 2010, and there had been no substantive change in the period between the issuance of the first preliminary position and the new preliminary position. Thus, the GVH effectively changed its position without any legal or factual basis.
172. The undertaking subject to the proceeding also noted that [BUSINESS SECRET].
173. [BUSINESS SECRET].
174. Furthermore, if the competition council proceeding in the case departs again from the contents of the new preliminary position to the detriment of Facebook Ireland [BUSINESS SECRET], that will substantiate the procedural concerns stated above.
175. At the – closed – hearing held as part of the competition supervision proceeding<sup>120</sup> [BUSINESS SECRET].
176. [BUSINESS SECRET].
177. [BUSINESS SECRET].
178. The undertaking subject to the proceeding the noted that [BUSINESS SECRET].
179. The undertaking subject to the proceeding stated that [BUSINESS SECRET].
180. In Document No VJ/85-181/2016. the undertaking subject to the proceeding informed the competition council proceeding in the case that [BUSINESS SECRET]<sup>121</sup> [BUSINESS SECRET].
181. The undertaking subject to the proceeding emphasised that [BUSINESS SECRET].
182. In Document No VJ/85-182/2016. the undertaking subject to the proceeding, to facilitate a comprehensive view, also presented past and present contents as well as their differences regarding the modifications implemented on 24 October 2019. Facebook Ireland emphasised that [BUSINESS SECRET].

## VIII.

### Legislative framework

183. Pursuant to Article 1(1) of the UCPA, the UCPA applies to unfair business-to-consumer commercial practices, before, during and after a commercial transaction in relation to goods, and it lays down the requirements relating to codes of conduct applicable to such commercial practices, as well as the provisions for proceedings in cases of infringements of these codes of conduct.
184. Pursuant to Article 2 of the UCPA, for the purposes of the UCPA, the following definitions apply:
- ‘consumer’ shall mean any natural person who is acting for purposes which are outside his/her trade, business or profession;
  - ‘goods’ shall mean any goods of a fungible nature that are capable of being delivered, including money, securities and financial instruments, and natural resources that can be utilised as capital goods (hereinafter collectively referred to as “product”), including, furthermore, immovable property, services, rights and obligations;

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<sup>120</sup> Record No VJ/85-175/2016.

<sup>121</sup> [BUSINESS SECRET]

- 'business-to-consumer commercial practices' shall mean any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a person for a business entity or in the name and on behalf of a business entity, directly connected with the promotion, sale or supply of a product to consumers;
- 'commercial communication' shall mean any form of communication made for the purposes of and directly connected to the trade or business of a business entity;
- 'transactional decision' shall mean any decision taken by a consumer concerning whether, how and on what terms to enter into a contract or to exercise a contractual right in relation to the product.

185. Pursuant to Article 4(1) of the UCPA, when determining whether or not a commercial practice is considered unfair, the assessment shall use the benchmark of the average consumer, namely an individual that is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors relating to the goods in question. Where a commercial practice is specifically aimed at a particular group of consumers, it shall be assessed from the perspective of the average member of that group.

186. Pursuant to Article 3(1) of the UCPA, unfair commercial practices shall be prohibited.

187. Pursuant to Article 3(3) of the UCPA, within the meaning of Subsection (2), in particular, commercial practices shall be unfair which are misleading as set out in Articles 6 and 7 or are aggressive as set out in Article 8.

188. Pursuant to Article 6(1)(c) of the UCPA, a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or if it in any way, including through its overall presentation, deceives or is likely to deceive the average consumer – even if the information is factually correct – in relation to the price of the goods or the manner in which the price is determined, or in relation to the existence of a specific price advantage or discount, and in either case causes or is likely to cause him/her to take a transactional decision that he/she would not have taken otherwise.

189. Pursuant to Article 9(1) of the UCPA, liability for any violation of the prohibition of unfair commercial practices shall lie with the business entity directly connected with the promotion, sale or supply of goods to which the commercial practice in question pertains.

190. Pursuant to Article 19(c) of the UCPA the GVH, in its competition supervision proceeding to establish the unfair nature of a commercial practice, applies the provisions of the Competition Act with the derogations set out in the UCPA.

191. Pursuant to Article 76(1) of the Competition Act, in its decision the competition council proceeding in the case

e) shall establish the fact of infringement;

k) shall impose a fine.

192. Pursuant to Article 78(1)(a) of the Competition Act, the competition council proceeding in the case may impose a fine for any infringement that falls within the competence of the Hungarian Competition Authority. Pursuant to (1b), the fine shall not exceed ten per cent of the net turnover, achieved in the business year preceding that in which the decision is adopted, of the undertaking or the group of undertakings which is specified in the decision and of whom the undertaking on which the fine is imposed is a member. The fine imposed on associations of undertakings shall not exceed ten per cent of the net turnover in the preceding business year of the undertakings which are members of such associations.

193. Pursuant to Article 78(2) of the Competition Act, in determining the maximum amount of the fine, the net turnover shall be determined relying on annual accounts or simplified annual accounts for the business year preceding that in which the decision is adopted.
194. Pursuant to Article 78(3) of the Competition Act, the amount of the fine shall be established with all the circumstances of the case taken into account, in particular the gravity of the infringement, the duration of the infringing situation, the benefit gained by the infringement, the market position of the party infringing the law, the culpability of the conduct, the cooperation of the undertaking during the proceeding and the repetition and frequency of the infringement. The gravity of the infringement shall be established, in particular, on the basis of the extent of the threat to economic competition and the range and extent of the harm to the interests of ultimate trading parties.
195. Pursuant to Article 95/F(1) of the Competition Act, in the present proceeding the procedural provisions of the Competition Act effective at the time of the opening of the proceeding (on 10 October 2016) are applicable.
196. Pursuant to Article 44(1) of the Competition Act, unless the Competition Act provides otherwise, competition supervision proceedings are governed by the provisions of Act CXL of 2004 on the General Rules of Public Administrative Procedures and Services (hereinafter: PAPA Act), with specified exceptions. Pursuant to Article 13(2)(e) of the PAPA Act, the provisions of the PAPA Act are applicable to competition supervision proceedings unless the Competition Act or the UCPA set out different rules.

## IX.

### Assessment framework

#### **Short summary of the conduct forming the subject matter of the proceeding**

197. The competition council proceeding in the case identified two fundamental issues, namely two interrelated conducts that formed the subject matter of the case; however, in its order No VJ/85-187/2016., the competition council proceeding in the case terminated the proceeding, for the reasons stated in the order, in relation to the alleged contradictions between the information and terms of contract concerning the management and use of various (particularly personal, sensitive) data affecting Facebook users, and other deficiencies.
198. Consequently, the present decision only assesses the conduct of Facebook in relation to its claim that its service is provided for free, which was made on its opening page, during registration and log-in and in its Help Centre - despite the complexity of the business model and of the consideration provided by consumers (by way of their data) for the use of the service. It should be noted that in the present context, irrespective of the terminology used in the relevant sectoral regulations, the competition council proceeding in the case focuses on all data that are relevant from an economic perspective: consequently, in addition to the personal data of consumers, all aspects of their consumer activity and expression of their opinions may be relevant (as such information may have market value either in itself or in aggregate).
199. Any conduct can be examined from multiple aspects and legal bases, but in general it can be stated that in the context of the UCPA
- first, correspondence to the “narrow” facts of the case should be examined (that is, first it must be assessed whether the conduct concerned constitutes one of the unfair commercial practices listed in the Annex to the UCPA; then, in the absence of this, whether the conduct may infringe Articles 6, 7 or 8 of the UCPA, and finally, if the aforesaid do not apply, correspondence with the so-called general clause of the UCPA, namely the general ban explained in Article 3(2) of the UCPA),

- if correspondence to at least one of the facts of the case can be established, it is generally not justified to continue the examination of the conduct on some other legal basis.

200. It should be emphasised in the context of the evaluation of conducts that the undertaking subject to the proceeding (even though its business model is not unique) is a member of one of the largest and well known groups of undertakings and has hundreds of millions of active users; it is an essential channel in any effective marketing mix, its actions are monitored by its business partners and competitors alike - nevertheless, recently there has been repeated media coverage highlighting that consumer or user data have been managed, used and commercialised through Facebook at a significantly greater extent than previously envisaged and in diverse ways. All of this highlighted the fact that users are in a complex decision making situation when using Facebook (both in terms of their activity and the management of their data), but are only likely to receive and understand a limited amount of information about the true nature and extent of the consideration that they provide for the use of the service and the associated risks, all of which are practically imperceptible and incomprehensible for the average consumer. Consequently, if the full awareness of consumers is restricted during the course of a complex decision making situation – either due to the distracting communications of market participants or external factors, to one or a few elements or factors (e.g. the absence of a user/subscription agreement or standards of data management), then this may distort consumer behaviour.

### **Subject matter of the competition supervision proceeding, scope of the UCPA**

201. The subject matter of this competition supervision proceeding – in light of the termination order No VJ/85-187/2016. - is the conduct of Facebook Ireland Ltd, according to which it has claimed that the services provided by the Facebook platform, which it has operated since 2010<sup>122</sup>, are provided for free. This commercial practice shall be assessed under Article 6 of the UCPA.

202. Thus in the context of the aforesaid conduct it should be examined, in addition to its ability to influence the transactional decisions of users, whether the claim regarding free service is misleading while the business model of the platform relies on the use of the data of users (and their friends), that is, consumers give compensation for the use of the platform with these (often sensitive, personal) data, which represent significant market value, and their (direct or indirect) consent to the use of such data.

203. The conduct investigated in this case is assessed under the provisions of the UCPA considering

- Article 1(2) of the UCPA, as the conduct occurred in the territory of Hungary and affected consumers living in Hungary, and
- the fact that the communication of the undertaking subject to the proceeding constitutes a commercial practice (commercial communication) pursuant to Article 2(d) of the UCPA, directed to natural person consumers (among others).

204. The claim regarding “free” was displayed on the opening page of Facebook, which is accessible by anyone, as well as in the Help Centre, and was therefore addressed directly to consumers as defined in Article 2(a) of the UCPA. In the opinion of the competition council proceeding in the case the average, reasonable consumer has some sort of idea - essentially based on trust - about the operation of the platform before registering and logging into the platform or using Facebook, which may be reinforced or modified by the communications received on the platform.

205. With regard to the activities of users, the messages and information relating to the operation of Facebook as a platform (or their sequence or entirety) as well as any deficiencies manifest themselves to users as a commercial practice, as a number of elements and services of the platform encourages continuous consumer activity and the intensive use of the platform.

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<sup>122</sup> The undertaking subject to the proceeding has been providing the Facebook service to European residents through the [www.facebook.com](http://www.facebook.com) website since 2010.

206. Under Article 3(1) of the UCP Guidance, pursuant to Article 3(1) of the UCPD, commercial practices occur not only during the marketing and supply stages, but also after the transaction has been made; furthermore, Recital 13 of the UCPD also refers to “*unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution*”.

207. Thus, pursuant to the UCP Guidance, the UCPD has a very broad scope of application as it covers the totality of business-to-consumer transactions, whether offline or online; furthermore, it is technology neutral and applies regardless of the channel, medium or device used to implement a business-to-consumer commercial practice.

208. The competition council proceeding in the case is of the opinion that, through the basic principles and provisions of the UCPA (with particular attention to the broad interpretation of the concepts of transactional decision and commercial practice, the wide range of the material characteristics of products as well as the approach to liability for infringements based primarily on the interest principle without neglecting the liability of contributors), the protection of consumers and the public interest can be effectively assured by the application of the UCPA even in the most innovative, fast-changing technological markets and in other markets that are difficult to grasp with traditional product characteristics, as well as in case of novel commercial practices and forms of communication.

209. In this context, with regard to the application of the UCPA, the competition council proceeding in the case refers to the following statements in the decision adopted in the competition supervision proceeding No VJ/88/2016. (which, incidentally, imposed a commitment):

- it is in the interest of consumers (and not only from a data protection perspective but also in terms of market relevance) that they have control over their personal and, as may be the case, other data (of economic or commercial relevance), and that they can control and understand which data are managed by a service provider and in what manner,
- consumers expect self-determination regarding their data, and are concerned about the use and management of their data,
- transactional decisions may include the installation/download, activation and use of a function or application, which may be influenced by the information that is provided to consumers about how such steps will affect the treatment of their data,
- the nature of the service (the consideration for its use) is fundamental and material information regarding the service; in its absence, the consumer is in no position to understand the type of product he/she is using, therefore the nature of the consideration, that is, the collection and management of data is not only a privacy issue but also material information in an economic sense, from the aspect of the transactional decision. The material nature of data management related mechanisms of economic relevance that affect the transactional decision is underscored by the concerns and questions voiced by consumers.

### **Competence and jurisdiction**

210. Pursuant to Article 10(3) of the UCPA, the Hungarian Competition Authority has exclusive jurisdiction in connection with any infringement of the provisions relating to the prohibition of unfair commercial practices if the commercial practices in question exert material influence upon competition.

Pursuant to Article 11(1) of the UCPA, in the application of Article 10, in determining the material effect of competition the following criteria shall apply, taking into account the attributes specific to the relevant market:

a) the extent of the commercial practices applied, with due regard, in particular, to the nature of the means of communication, the size of the geographical area affected by the infringement, the number

of shops affected by the infringement, the duration of the infringement or the value of the goods affected by the infringement; or  
b) the size of the business entity liable for the infringement based on the amount of net sales revenues.

211. The undertaking subject to the proceeding (and the group of undertakings) is a major actor on the market of social media; Facebook is one of the most recognised products/brands in the world and the undertaking subject to the proceeding is a large firm, as demonstrated by its net turnover figures. The platform's innovations, newly introduced services, as well as any adverse developments or events relating to the platform, are the subject of continuous interest and media coverage.
212. In the present case there is a material effect on competition, in view of the extensive nature of the commercial practice applied, in particular the fact that the investigated practice relating to data and advertisements and the investigated claim regarding "free" affects a wide range of consumers living in the territory of Hungary - close to 6,000,000 Facebook accounts relate to Hungarian users, all of whom may be affected.
213. Consequently, pursuant to Article 11(1)(a) of the UCPA, the proceeding falls within the competence of the Hungarian Competition Authority.<sup>123</sup>
214. Furthermore, considering that this is an undertaking whose marketing, commercial and communication practices are expected, due to its size, turnover and number of customers, to attract an extensive amount of attention in Hungary as well, and that its turnover estimated for the Hungarian market and connected with the conducts investigated is also huge, the jurisdiction of the GVH can be established pursuant to Article 11(1)(b) of the UCPA as well.
215. The power of the GVH to proceed is established in Article 46 of the Competition Act.

### **Consumers affected**

216. The consumers affected in this competition supervision proceeding are natural persons who, for purposes unrelated to their trade, business or profession are present on Facebook as users, and who view the posts, news, advertisements and other content displayed thereon and engage in other consumer activities or generate content.
217. In the opinion of the competition council proceeding in the case, in the present case, also in view of the extent of the target group, no particularly vulnerable group of consumers within the meaning of Article 4(2) of the UCPA can be identified. The affected group of consumers is wide, with members of varying characteristics; the average consumer as defined in Article (4)(1) of the UCPA shall form the basis of the assessment of the commercial practice subject to the proceeding.
218. However, there is a limit to the expected level of reasonability, thus it should be noted that a consumer also acts reasonably if he/she does not question the commercial communication and the credibility of the undertaking but trusts the commercial communication in question as part of the reasonable and cost efficient information gathering process, relying on the notion of business integrity.<sup>124</sup> Furthermore, consumer awareness (prudence) is to be clearly separated from whether a consumer is aware of the real meaning of a term or provision (in view, for instance, of the complex issues of privacy regulations and access to data).

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<sup>123</sup> As stated in subsection I.6.1 of the UCPA-related decisions of the Competition Council of the GVH, which contain findings on a matter of principle, the applicability of the UCPA is not prevented by the fact that the undertaking subject to the proceeding is not an enterprise with its registered office in Hungary. Article 1(2) of the UCPA clearly states that the Act applies to commercial practices carried out in the territory of Hungary, and to those that involve any citizen in the territory of Hungary in his/her role as a consumer.

<sup>124</sup> Decisions of the Competition Council of the GVH on matters of principle in relation to subsection I.4.2 of the UCPA.

219. In view of the fact that Facebook is used by a significant number of minors and also by numerous elderly consumers above the age of 65, it should also be taken into account that different age groups tend to have different digital consumption habits and characteristics; for instance, while younger persons, “digital natives”,<sup>125</sup> tend to have high-level, organic knowledge of the digital language, they tend to be less patient when it comes to reading policies and, due to lack of experience, may not be fully aware of their consumer rights, the “digital immigrants” are only just learning the digital language and are less flexible in its use, but they are more patient and experienced in other areas. The broad target group of the undertaking means that it must take these differences into account when publishing its communications, as communications must be equally informative to all users and age groups.

### **Transactional decision**

220. The adoption of a consumer decision, which is relevant for the purposes of legal assessment, is a process that is protected by law in its entirety as well as in its separate stages. As regards to a commercial practice directed at consumers, it is a clear requirement that, on the basis of the concerned practice, consumers should be able to acquire a realistic view of the product or undertaking concerned and the content of the communication. According to case-law, consumers may not only be misled when their attention is captured in relation to products requiring simple decisions, but also in markets where, in accordance with sectoral rules, the conclusion of a contract is preceded by a complex communication process; furthermore, the conclusion of a contract is not the same as a transactional decision.

221. The competition council proceeding in the case refers to the statement in the reasoning of the UCPA that *“the concept of transactional decision is significantly broader than the everyday meaning of the term and, pursuant to the provisions of the Directive, it is intentionally removed from the assessment of the economic decisions of consumers taken strictly as the expression of contractual intent under private law. In the application of the Directive, and thus of the Act, it not only consumer decisions made up to and about the conclusion of the contract that are “transactional decisions” but all the economic decisions of the consumer regarding the goods, including the ones that are typically made after the conclusion of the contract (for instance, decision on exercising the right of withdrawal or enforcement of claims regarding the goods). Consequently, commercial practices affecting the use of goods are also covered by the regulation. Such a broad interpretation of the “transactional decision” provides extensive discretionary powers to law enforcers and necessitates case-by-case assessment.”* This approach was reflected, for instance, in Decision No VJ/93-34/2011., which reinforced that the transactional decision is distanced from the assessment of the economic decisions of the consumer as strictly the expression of contractual intent under private law, i.e., the act of contracting; thus transactional decisions include the decision of the consumer whereby he/she identifies a need, and decides in that context whether to make use of the service and if so, under what terms.

222. In the case investigated in the present competition supervision proceeding, transactional decision includes, inter alia, the decision of the consumer about whether he/she wants to participate in the free financial survey offered by the undertaking but conducted by another undertaking, whether he/she requests and takes advantage of this possibility, and whether, as a precondition, he/she provides his/her personal data and agrees to their management for direct marketing purposes. It is not a conceptual element of the transactional decision that the consumer should provide any pecuniary consideration.<sup>126</sup> In the case concerned, however, the consumer did provide consideration

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<sup>125</sup> [http://goliat.eik.bme.hu/~emese/gtk-mo/didaktika/digital\\_kids.pdf](http://goliat.eik.bme.hu/~emese/gtk-mo/didaktika/digital_kids.pdf)

<sup>126</sup> “This can be concluded from the illustration provided in the context of transactional decisions in paragraph 2.1.3. of the Commission’s guidance on the implementation of Directive 2005/29/EC on unfair commercial practices, which provides that “additional examples include the decision of a consumer to have ‘free security assessment’ of his home done, which is

with regard to the transactional decision, in the form of the provision of information, which is of value for the undertaking subject to the proceeding in the course of its commercial activities. This is because the undertaking subject to the proceeding obtained the data of potential customers to whom it can subsequently provide targeted offers. Furthermore, the decision of a consumer to allow personal contact is also valuable for other reasons, because it allows the undertaking to create and maintain a favourable image, which is in its longer-term interest.<sup>127</sup>

223. The infringing character of a communication is not eliminated if the consumer is able to subsequently obtain information (e.g. an extensive education campaign is launched after publication, or the commercial practice is subsequently modified), as the infringement will have already occurred when the communication was published. The publication of an infringing communication may in itself result in the distortion of the consumer decision making process; it unfairly creates consumer interest in the undertaking or product concerned, which undoubtedly plays a part in the decision making process, and may alter the position of the product in the consumers' preference system.<sup>128</sup>

224. The UCPD does not limit the material distortion test to assessing whether the consumer's economic behaviour (i.e. its transactional decision) has actually been distorted; instead, it also requires an assessment as to whether a commercial practice is 'likely' (i.e. capable) to have such an impact on the average consumer. That is, according to the UCP Guidance, national enforcement authorities should therefore investigate the facts and circumstances of the individual case (i.e. in concreto), but also assess the 'likelihood' of the impact of that practice on the transactional decision of the average consumer (i.e. in abstracto).

225. In the view of the competition council proceeding in the case, in addition to the particular characteristics of the product concerned, the nature of the commercial practice or conduct also has an effect on the potential transactional decisions in a particular case. In the present case, in view of the fact that in the context of assessing the conduct subject to the proceeding, the clarity of the consideration for the service, the nature of certain consumer data, as well as their treatment, management and use are fundamental questions, the competition council proceeding in the case finds that the following constitute transactional decisions:

- entry/registration to the Facebook platform,
- creation of a Facebook profile (or even a non-commercial Facebook Page) and the upload of data (information, photos, contacts),
- user activity on the platform (likes, shares, following friends and other pages, updating information, viewing and filtering commercial practices, reporting or banning unwanted content, setting restrictions or granting permission/consent, etc.), which, directly and indirectly, generates new data and information,
- use of services or ordering of goods available from the platform,
- liking and sharing pages outside the platform using the Facebook logo,
- updates and other settings,
- use of settings regarding privacy or advert targeting or the absence thereof,
- giving or refusing consent to data management,
- deleting a Facebook profile, abandoning the use of the platform.

### **General issues of material information and ability to influence**

226. The competition council proceeding in the case emphasises that in the context of the ability to influence and material information it is also necessary to consider, with regard to the subject of the competition supervision proceeding, that in this case the issue is not (only) the failure of the

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indeed free but its only purpose is to allow the trader to convince the user to purchase the alarm system." SEC(2009) 1666, p. 23"

<sup>127</sup> Paragraphs 78 to 80 of Decision No VJ/93-34/2011.

<sup>128</sup> Decision of the Competition Council in case No VJ/9/2014.

undertaking subject to the proceeding to clearly explain to consumers the details of its business model, its context and potential risks to the consumer, but the undertaking actually communicated that its service is available free of charge, that is, it made an explicit statement about the consideration for the product.

227. In the opinion of the competition council proceeding in the case, Facebook is such a service which forms an immanent part of the business model whereby the undertaking subject to the proceeding offers the service to consumers. If a consumer is unaware that the product concerned is a service provided by a market participant on a commercial basis and that he/she is using the product in exchange for the imposition of an obligation or commitment (contractual relationship), then he/she is mistaken about the nature of the product and the consideration provided for its use, and thus also about the nature of his/her transactional decision (which has market relevance) and his/her options in relation to it.
228. The undertaking subject to the proceeding does not charge a direct pecuniary fee for the use of the platform, neither in the form of a one-off fee nor as a fee payable at specified intervals; however, its operational model is based on the management and exploitation or “commercialisation” of its users’ data, as well as the data and information generated in the course of user activity, for marketing and other purposes. In view of this, the consideration provided for use of the platform - in addition to viewing advertisements and commercial messages, user data and additional data and information obtained through user activity - is fundamental and material information regarding the service. In the absence of such information, users are not in the position to understand the type of product they are using or the nature of the consideration they are providing for its use, namely their consent to and participation in the collection and management of data in the everyday sense of the term, which is not only a privacy issue but also material information in the economic sense, from the perspective of the transactional decision.
229. The application of a default, broad consent setting in relation to the management and use of data enables the collection, management and use of data allows the undertaking subject to the proceeding to accurately target income-generating commercial practices, thus the commercial practice concerned will be shown to users who are potentially more likely to purchase the product, thereby generating revenue for Facebook Ireland, for instance by a direct click-through. In this regard it is far from certain that the user is sufficiently aware that viewing the posts of a friend or clicking on the commercial content liked by a friend may be a subject of data collection, which the undertaking subject to the proceeding subsequently takes into account in the course of its own economic activities. If users were fully aware of these circumstances, they would probably consider in greater depth whether or not they want to make use of the services of Facebook under the given circumstances and terms.
230. It is also a material factor determining the nature of the service and affecting its use what data are used in the business model, how and for what type of commercial practices.
231. The importance of data management related mechanisms and of targeted advertising that have economic relevance affect transactional decisions. This is underscored also by the concerns and questions voiced by consumers - see the survey results submitted by the undertaking subject to the proceeding and the issues arising as a result of the so-called Cambridge Analytica scandal, which resulted in changes to the service and large numbers of users quitting Facebook.
232. In the preliminary opinion of the European Data Protection Supervisor, users of online services disclose masses of information about themselves. For many online offerings which are presented or perceived as being ‘free’, personal information operates as a sort of indispensable currency used to pay for such services.<sup>129</sup> Furthermore, the findings of the Data Protection Eurobarometer 2015<sup>130</sup>

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<sup>129</sup> Annex 7 to Note No VJ/88-43-2016.

survey indicate that in the EU, around seven out of ten people are concerned about their information being used for a different purpose from the one it was collected for. The survey found that only two out of ten respondents are always informed about data collection and the way data are used. Only 18% of the respondents stated that they fully read privacy statements.<sup>131</sup>

233. Information is considered material if it is necessary in the given situation in order to enable the consumer to make an informed transactional decision. In light of the aforesaid, the consideration provided for a service (in the present case, the management and use of data and the complex nature of the business model) and, in that context, the characteristics of data management constitute material information for the purposes of the transactional decision of consumers. A consumer can only assess the impact that his/her use of a particular service (in this case, the - active - use of Facebook services) might have on his/her consumer identity and privacy, in light of the risks associated with the provision of the data and the importance of the data in general, if he/she is aware of both the scope of the data managed and the essential features of the data management process – as this is how he/she can decide, for instance, whether to log into a certain platform, what activities to perform, what data to share and whether to consent to data management.<sup>132</sup>

### **Assessment of the promise of “free”**

234. Pursuant to paragraph 20 of the Annex to the UCPA, unfair commercial practices include describing a product as “gratis”, “free”, “without charge” or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item. However, the competition council proceeding in the case concluded that the nature and other characteristics of the product at issue in the present case call into question the meaning of unavoidable cost; consequently, it is of the opinion that the claim regarding “free” investigated in this case is not to be regarded as a blacklisted commercial practice that is prohibited *per se*, but as a misleading claim regarding the consideration for, or price of, the service pursuant to Article 6 of the UCPA. In the framework of the assessment under Article 6 of the UPCA, it should be examined whether the information received was misleading and was likely to distort consumer decisions.

### Ability to influence

235. In the context of the ability to influence it should be noted, in addition to the general comments, that according to the case law<sup>133</sup>, “*commercial practices whereby an undertaking communicates a product or service to the consumer as a gift or as being “free” are particularly suitable for influencing the transactional decisions of consumers. When consumers encounter the words “gift” or “free”, they can expect to receive some goods or services “free”, that is, that they do not need to give or do anything in return.*

*If an undertaking claims a good or service to be free, then a reasonably well-informed and reasonably observant and circumspect consumer cannot be expected to reckon with any other costs to be incurred in connection with taking possession of such, because the wording conveys that the undertaking charges no price for the good or service.*

*The words “gift” and “free” and the communication of such raises the interest of consumers in themselves, encouraging them to accept the goods or use the services, therefore the use of those terms as part of commercial communication has outstanding importance for the consumer decision.*

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<sup>130</sup> Preliminary Opinion of the European Data Protection Supervisor, Hungarian summary; Annex 9 to Note No VJ/88-43-2016.

<sup>131</sup> Data Protection Eurobarometer 2015, p. 7.

<sup>132</sup> Hungarian National Authority for Data Protection and Freedom of Information (HAIH) Recommendation, p. 9, see: Annex 1 to Note No VJ/88-43-2016.

<sup>133</sup> Decision of the Competition Council in case No VJ/71/2013.

*Both being free (or its synonyms) and the promise of a prize are dominant messages, strong buzzwords that are in themselves capable of determining the interpretation of consumers, raising consumer interest and laying the ground for a decision - irrespective of whether the communication practice contains any additional information (later, elsewhere)."*

236. Furthermore, in its judgment No 7.K.31.081/2006/6. the Metropolitan Court of Budapest, referring to the decisions in Case No VJ/133/2005., stated that *"grammatically, the word "free" means the absence of counter-value, a unilateral benefit, and no other, different interpretation can be attributed to it. Conditions may be attached to a free service, but this must be indicated in the advertisement to ensure accurate and true communication, thereby avoiding the unfair manipulation of consumer decision and protecting economic competition.*<sup>134</sup> "

237. Commercial practices whereby an undertaking communicates to consumers that a particular product or service is a gift or "free" are particularly suitable for influencing the transactional decisions of consumers, as consumers are likely in such circumstances to interpret the word "free" as meaning that they are not required to give anything in exchange for the service or good in question (thereby assuming that there is practically no financial or other risk involved in the use or trial of the good or service). While the brand image and networking possibilities of Facebook play a major role in influencing potential users to join the platform, the fact that it advertises itself as free increases interest even further as the word "free" and the communication of this to consumers has the effect, in itself, of raising the interest of consumers; furthermore, it eliminates the fears that consumers may have about their need to pay some form of compensation, thereby encouraging them to use the services in question. Consequently, it can be seen that the use of the word "free" as part of a commercial communication has a profound impact on the consumer decision making process.

#### Data as consideration

238. It is established that no financial payment is required for the service under investigation (user registration, use). It is also established that, on the one hand, the platform may not be used without providing data and, on the other hand, Facebook becomes interesting and valuable for consumers/users exactly because the user and other users actively use the interface (and facilities outside the platform as the case may be), that is, it generates more and more data and information for Facebook.

239. The undertaking subject to the proceeding repeatedly refers to business models that consumers have been familiar with for some time, for example, those related to commercial television where consumers use the services in question in exchange for accepting advertisements and other marketing activities (watching commercials). The competition council proceeding in the case emphasises, however, that Facebook users not only see advertisements and other commercial practices, but they also see the activity stemming from the displayed ads; furthermore, they see some of the ads on a targeted basis, which is made possible through the use of previously collected information and data. This complexity (and in particular, e.g., the possibility to provide immediate feedback) substantively and significantly distinguishes Facebook from all other channels and (even bilateral) services.

240. The products and services of the digital world can also be described in terms of supply and demand characteristics, that is, elasticity of demand features, utility functions can be identified and specified for them as well, and market participants can base their business models on these: this is how certain goods and services become available for consumers, for a charge or otherwise, for installation, download or use.

241. Market participants are fundamentally profit oriented, or at least try to operate in a way that is rational and minimises losses, which means that they do not provide their goods or services for no

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<sup>134</sup> Decision No VJ/93-34/2011.

consideration. Consideration is typically the payment of some direct or indirect price or fee, but any other commitment or risk-taking is also considered as consideration. If a consumer is under the impression that he/she is using a product or service without the payment of some form of remuneration or consideration, then he/she may be mistaken about the nature and character, and thus the “price” (ratio of costs and benefits) of the product or service; in such situations the consumer may overlook information pertaining to the transactional decisions (i.e. market decisions with economic content) that he/she may make in relation to the product or service concerned.

242. In this context it should be noted that barter also constitutes, without question, as an economic transaction; the present case involves a barter-type transaction as far as Facebook is concerned, as consumers provide consideration in the form of their use-related data (thus, with the assumption of some risk) in exchange for the use of the service provided by Facebook. It is also beyond doubt that personal and other, less sensitive data, have market value for each individual consumer and in aggregate, on also micro- and macroeconomic levels as well; furthermore, data can be commercialised and have a value that can be expressed in monetary terms. As regards to the commercialisation of data, this of course does not only concern the sale, transfer and trading of data, but also encompasses their use, processing and the granting of access to them for commercial purposes. In this context the competition council proceeding in the case notes that the options of the use and processing of various information and user data are not only non-transparent for the average consumer but are also likely to be inexhaustible.

243. On 8 June 2017, the European Council adopted its position on the directive setting out new rules for business-to-consumer contracts for the supply of digital content and digital services. The position provided, inter alia, that consumers should be entitled to contractual remedies not only under contracts where they pay a price for the digital content or digital service, but also in cases where they only provide personal data that will be processed by suppliers, given the increased value that personal data have in new business models.<sup>135</sup>

244. Deloitte Review, in the Article “Data as the new currency - Government’s role in facilitating the exchange” published in its Vol. 13 of 2013, also discusses the economic value of data. Thus, in the context of the market of data it refers to the scenario where consumers receive a service in exchange for their data. *“Nothing in life is free. When we use services such as Facebook, Twitter, or Google, we pay for the privilege by divulging personal information. The Facebook “nation” - now larger than many countries - grows in value with every “like,” “share,” and post.”*<sup>136</sup>

245. When consumers encounter the word “free”, they can expect to receive some goods or services “free”, that is, they do not need to give or do anything in return; any other information regarding consideration may be overlooked, maybe because the relevant contractual terms, including the applicable privacy statements, are not read (after all, there is nothing to lose, no payment is involved). In this case, however, when using the Facebook service in the broader sense, consumers do provide consideration, there is a “cost” to the service and therefore a price to consider. In the present case, consumers provide consideration for the use of the Facebook service in the form of their user data, which is of economic value for the undertaking subject to the proceeding (and which is essentially generated by user activity, as what a consumer likes and follows and otherwise “consumes” through the platform are important from a commercial point of view). The data submitted or generated allow the undertaking subject to the proceeding to let its advertisers target Facebook users with a high degree of accuracy. However, for the consumer the word “free” means, grammatically, that there is no consideration involved, it is a unilateral benefit or gift, and no other meaning can be attributed to it - however, given digital developments, in the big data era data that

<sup>135</sup> See: <http://data.consilium.europa.eu/doc/document/ST-9901-2017-INIT/hu/pdf> (Last download: 26 February 2018), Note No. VJ/85-56/2016.

<sup>136</sup> See: [http://deloitte.wsj.com/riskandcompliance/files/2013/11/DataCurrency\\_report.pdf](http://deloitte.wsj.com/riskandcompliance/files/2013/11/DataCurrency_report.pdf) (Last download: 11 December 2017), Note No. VJ/85-56/2016.

are voluntarily given by consumers or collected about them by market participants have significant market value (see for instance the value of the Facebook brand or share prices, in addition to advertising revenues).

246. Furthermore, it is relevant in this context that data not only represent consideration in themselves but also that consumers take on a risk with their data, and they must also give their consent, within a certain framework, to the entity managing the data.

247. The competition council proceeding in the case is of the opinion that the provision of consideration or remuneration are synonyms of payment; however, while when purchasing an FMCG product we tend to pay in cash, in the case of Facebook we pay for use with our data, consumer activity and all the related (privacy and other) risks (in addition to the aforementioned consumption of advertisements in the narrow sense). The undertaking subject to the proceeding converts the supplied data into cash by receiving payment (based on successful user reach) from specified advertisers for allowing them to publish commercial practices on the platform (or outside the platform through Facebook Ireland), which are targeted - using highly precise criteria developed on the basis of the user data provided or collected - to those users that are likely to find the commercial practices particularly interesting.

248. In connection with the above, an article published on the [www.economist.com](http://www.economist.com) website on 6 May 2017 defines data as the “new oil” of the digital era, in light of its claim that the “Big Four” companies, namely Alphabet (Google’s parent company), Amazon, Apple, Facebook and Microsoft, which all deal with huge amounts of data, are the five most valuable listed firms in the world.<sup>137</sup>

249. Furthermore, some awareness-raising campaigns of market participants also indicate the value of data, for instance

- Google gave 5 USD gift vouchers in exchange for a portrait to be used for the development of face-based identification,<sup>138</sup>
- Kaspersky Lab opened a temporary store in London called Data Dollar<sup>139</sup>, where people could sell their personal data (in exchange for graphics).

250. The latter undertaking stated: “*as the amount of personal data continues to grow exponentially, consumers could be sitting on a gold mine of valuable currency that holds value regardless of geographical location or affected by currency exchange rates. The lack of awareness is a massive obstacle in making people understand why they should protect the data. The experts of the company hope Data Dollars will raise this awareness and thus make everybody’s online experience more secure.*”, and “*If a website is offering services for free, but in return using customer data to monetize their service, they should use the Data Dollar symbol, to demonstrate that a form of exchange is actually happening.*”

#### Use of the word “free” in relation to the Facebook service

251. The undertaking subject to the proceeding has been using claims of “free” on the [www.facebook.com](http://www.facebook.com) opening page since January 2010 - the start of its service in Hungary -, on the log-in interface, and there was also information in the Facebook Help Centre regarding the free character of the service.

252. The communications of the undertaking subject to the proceeding gave consumers the impression that they could register on Facebook for free and use the service for free, without providing any form of consideration. However, as explained above, over recent years it has become increasingly

<sup>137</sup> <https://www.economist.com/news/leaders/21721656-data-economy-demands-new-approach-antitrust-rules-worlds-most-valuable-resource> (Last download: 26 February 2018), Note No. VJ/85-56/2016.

<sup>138</sup> [https://hvg.hu/tudomany/20190723\\_google\\_arcazonositas\\_arckep\\_adat\\_informacio](https://hvg.hu/tudomany/20190723_google_arcazonositas_arckep_adat_informacio)

<sup>139</sup> [https://itcafe.hu/hir/kaspersky\\_london\\_data\\_dollar.html](https://itcafe.hu/hir/kaspersky_london_data_dollar.html)

accepted that consumer data have economic value, thus remuneration in the form of data goes beyond the case where something is available without consideration, commitment or obligation. If an undertaking provides its services to consumers without demanding the payment of any monetary fee, instead asking for some other form of commitment, while at the same time promising that its service is provided for free, then this communication or promise hinders the interpretation of the consumer, and lulls the attention of the consumer regarding the nature of the product and thus the well-informed decision. It should also be emphasised that in the view of the competition council proceeding in the case, the promise of “free” should not be replaced by the claim “not free”; instead, the fact and true nature of the consideration provided by consumers for the use of the service should be appropriately communicated to them (the commitment, the risks undertaken, the business model, the complexity of the data used, the complexity of the acceptance of commercial content). Thus, in the opinion of the competition council proceeding in the case, in order for a commercial practice to be considered legitimate in relation to which consideration or remuneration is required in exchange for the use of a service, the commercial practice in question must clearly convey to the consumer that he/she is using a complex service and is party to a transaction, which has long- and short-term consequences, and that he/she therefore has, just like the other party to the transaction, both rights and obligations.

253. In the present case, the volume and complexity of the data, the monitoring, recording and use of the activity of Facebook users (and their friends) and its release to third parties (granting access) indicates that all of these data are of value to the undertaking subject to the proceeding, which is expressed in monetary terms when it sells advertising space to advertisers. It should be noted, in particular, that if there is more than one relevant advert falling within the sphere of interest of a user that can potentially be displayed, advertisers “compete” with each other in a special “auction” procedure on the price to be paid for the display. Given the amount of time that users spend on Facebook and all of the activities that are carried out on the platform, Facebook as an advertising space is becoming increasingly valuable to advertisers. Based on the data collected, the undertaking subject to the proceeding has an increasingly accurate view of its users’ interests, which allows it to target them more effectively with published commercial communications, as a result of which advertisers are willing to pay ever increasing prices for the publication of well-targeted commercial communications that are more likely to generate direct revenues (sales) - as potentially less but better targeted content is more effective in reaching users than content that is shown to a higher number of uninterested consumers. Therefore, the data of consumers generate a direct benefit for the undertaking subject to the proceeding.
254. By providing data about himself/herself (or his/her friends) when registering on Facebook or using the platform (as well as outside the platform, e.g. liking and sharing articles and other contents on other websites by clicking on the Facebook logo), the consumer effectively provides consideration for the use of Facebook, that is, “pays” with his/her data (and consent, risk-taking) (however commonplace that statement may sound), because it is not a conceptual element of a transactional decision that the consumer needs to provide pecuniary consideration (see e.g. the comments on barter).
255. The fact that by accepting the Data Policy and the Statement of Rights and Responsibilities consumers consent to the collection and use of their data does not release the undertaking subject to the proceeding from its liability, as this does not alter the fact that they untruthfully advertise their services as free. Indeed, this consent actually increases the value of the consideration. In particular, the fact that the consumer mandatorily ticks that he/she has read and accepted the terms of service/data policy does not mean, in itself, that these documents have actually been read and

understood. A study conducted in the United States also found that scrolling increases the risk that certain conditions may not reach the consumer.<sup>140</sup>

256. In the opinion of the competition council proceeding in the case, the sharing of data from users represents a considerable market value – which can be considered as a form of compensation in exchange of the consumer activity that cannot be disregarded in the context of the price or charge of the service or their communication in order to make an informed consumer decision in relation to the purchase of the product.
257. In the absence of supplementary, corrective information describing the business model, the term “free” clearly implies that no consideration needs to be provided, that is, that the service concerned, together with all its features and elements, is free and can be used without the provision of any form of consideration; however, in the present case users provided consideration in the form of their data (activity) and therefore the undertaking subject to the proceeding, through its misleading claims of “*It’s free and anyone can join*” from January 2010 to 15 July 2017, and “*It’s free and always will be*” from 15 July 2017 to 12 August 2019 and the communication in the Help Centre (up to 23 October 2019), distorted the decision making process of consumers and misled them about the consideration provided for the service, as if consumers had been/were aware of the magnitude, nature and complexity of the consideration provided for the service and the business model of the undertaking subject to the proceeding, they could have made a different decision regarding joining the platform, its use and their consumer activity. By this conduct the undertaking subject to the proceeding committed the infringement specified in Article 6(1)(c) of the UCPA and violated the prohibition set out in Article 3(1) of the UCPA.
258. The competition council proceeding in the case emphasises that, pursuant to Article 6(1) of the UCPA, it is not only commercial practices that distort consumer decisions through the use of false claims that constitute an infringement under in Article 3(1) of the UCPA, but also claims that present true facts, but which in light of all the circumstances of their presentation, may mislead consumers when they are making transactional decisions regarding the product concerned. In the opinion of the competition council proceeding in the case, in the business model of the undertaking subject to the proceeding, in light of its characteristics, the message of “free” diverts consumer attention from the magnitude and actual value of the consideration provided for the use of the service and the potential risks associated with its use.
259. Furthermore, the competition council proceeding in the case emphasises that it does not challenge the fact that users need not pay a monthly or other fee for the use of the service, or that a number of innovations of Facebook, potentially inducing additional data management, represent favourable, added-value developments for users; however, these circumstances do not justify the undertaking subject to the proceeding promising a free service, inducing consumers to lower their guard, while the value of the product and of the brand stems from the activity and contribution of consumers. The competition council proceeding in the case reiterates that the legitimate version of the claim concerning “free” use is not the claim “not free” but arrangements that clearly and understandably convey a message describing the business model of Facebook. In this context the competition council proceeding in the case also notes that the undertaking subject to the proceeding itself made adjustments to its commercial practice during the competition supervision proceeding that conformed to that expectation without being harmful in other regards to its business model or otherwise having a detrimental effect on its operation.

### **Liability of the undertaking subject to the proceeding**

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<sup>140</sup> See also paragraph 157 of Decision No VJ/32-164/2016.

260. Pursuant to Article 9(1) of the UCPA, liability for any violation of the prohibition of unfair commercial practices shall lie with the business entity directly connected with the promotion, sale or supply of goods to which the commercial practice in question pertains.
261. Facebook Ireland sells Facebook advertising services in Europe and as a result its revenue is generated by the usage of Facebook; consequently, it is in the direct interest of the undertaking subject to the proceeding to increase usage and consumer activity. The direct interest stemming from the promotion of the sale of the goods affected by the commercial practice is substantiated by the access to consumer data.
262. The undertaking subject to the proceeding is liable for the conduct under investigation given the fact that, as regards to the commercial practice concerned, it acted for purposes relating to its profession or economic activity; namely, it had a direct interest in making the “free” claim as through this commercial practice it sought to increase the usage of Facebook and thereby increase its revenue.
263. Furthermore, the design of the commercial and marketing practice under investigation is clearly and exclusively connected to the undertaking subject to the proceeding. The direct interest of the undertaking subject to the proceeding can also be established, taking into account the nature of the transactional decisions involved, as the undertaking subject to the proceeding has an interest in consumers actively using the platform. The more consumers that use the product, the more data that can be managed and exploited for commercial purposes, thereby enabling the undertaking subject to the proceeding to obtain more revenue and other benefits (such as the potential to establish more favourable contractual relations with partners, long-term image improvement, cost reduction).
264. The competition council proceeding in the case also noted that *“the direct interest regarding promoting the sale of the goods affected by the commercial practice is substantiated not only by the immediate sale of the goods but also by access to data relating to consumers, which facilitates subsequent sales, as well as the creation, maintenance and reinforcement of a favourable image for the same purpose (VJ/93/2011.).”*
265. In view of the aforesaid, pursuant to Article 9(1) of the UCPA, the undertaking subject to the proceeding is liable for the aforementioned conducts.

### **Comments of the competition council proceeding in the case regarding the objections of the undertaking subject to the proceeding**

266. In addition to the aforesaid, in view of the objections of the undertaking subject to the proceeding, the competition council proceeding in the case wishes to note the following in order to reiterate and supplement the previous argumentation:
- the competition council proceeding in the case does not object to the business model of the undertaking subject to the proceeding and has instead assessed its communication,
  - the competition council proceeding in the case does not contest the benefits of the service, nor are they subject to the competition supervision proceeding, although it should be emphasised that consumer protection type competition supervision proceedings (aimed at bringing about changes to commercial practices) primarily concern goods or services with undisputable social benefits (e.g. pharmaceuticals, financial and infocommunication services, everyday items),
  - the occurrence of an unfair commercial practice does not lead to the presumption of bad faith or intentional distorting practices on behalf of undertakings; however, it should be emphasised that the undertaking subject to the proceeding can be presumed to have been in possession of knowledge (based on international literature or its own surveys or feedback from consumers) about what consumers expect and what they know about the management of their data, and how

much confidence they have in the operation of the undertaking subject to the proceeding, in Facebook and the extent of their commitment,

- in case of zero-price models it is not necessary or customary for undertakings to emphatically promote them as free (indeed, the undertaking subject to the proceeding did not offer such examples), while any incomplete, untruthful or otherwise misleading communication about any kind of consideration (price, loyalty period, necessity of active cancellation after a trial period, etc.) may constitute an infringement, as indicated by case-law,
- consumer awareness is made more difficult as, despite the existence and accessibility of relevant policies, in practice it would only be possible to identify which elements of consumer activity are used and how they are used by algorithms and market participants, if the contents of Facebook's transactions and contracts with its business partners were accessible,
- it can be conclusively concluded that the average consumer is unable to comprehend what exactly to expect on Facebook regarding the treatment of his/her data generated in part through his/her consumer activities. However, this in itself is not the reason for the infringing nature of the conducts investigated in this case; the infringing nature derives from the fact that through its promise of "free", the undertaking subject to the proceeding distorts the picture concerning the consideration for, or price of, the service (which is complex and linked to data management). If consumers had known the risks concealed behind the promise of being free, it could have influenced their consumer activity, attitude to data management, and the level of attention and control that is lulled by the promise of "free".

267. The competition council proceeding in the case also wishes to emphasise that the examination of commercial practices concerning the non-monetary provision of consideration and the stipulation of expectations is not unprecedented in the case-law. In its decision adopted in case no VJ/127/2007., the Competition Council established that in the case of fixed-term contracts, consumers bear two closely connected duties (consideration): the obligation to pay the price of the package and the obligation to restrict their possible consumer decisions (such as changing to another supplier, for instance) for a specified period. Consequently, loyalty contracts represent the same commitment and consideration as the payment of prices.

268. In its decision adopted in case No VJ/80/2005., the Competition Council also underlined that, as stated in its decision adopted in case No VJ/191/2004., consumers interpret "free" to mean that they do not have to provide any form of consideration; furthermore, the infringing character of a communication directed to consumers is not nullified by supplementary information if such information is not provided in a manner that is suitable for attracting the consumers' attention (unlike communication regarding "free"), or if the supplementary information is separated from the claim of "free", and if the entirety of the information does not resolve the contradiction between inconsistent pieces of information.

269. Furthermore, the competition council proceeding in the case wishes to highlight two court judgments that also concerned the assessment of in-platform commercial practices relating to the digital economy. Judgment No 104.K.700.626/2018/47. of the Budapest-Capital Regional Court (in the proceeding relating to Case No VJ/32/2016.) stated (and reiterated), inter alia, that

- a transactional decision *"is a complex process consisting of several elements, potentially complicated by feedback cycles, and cannot be restricted to a single decision-making situation. Accordingly, the elements of the transactional decision making process of a consumer are as follows: use or non-use of the iOS system with the given functions, conscious use or non-use of the Wi-Fi Assist default setting, longer-term use or non-use of the Wi-Fi Assist based on experience, brand loyalty or brand switching."*

- *“Therefore, the correct identification of the transactional decision is indispensable in this case because it shows what the deception of consumers consisted of: consumers were under the impression that they had control over their traffic, while this was not the case due to the concealment committed by the claimant. The .... function offered an extra consumer experience in such a manner that the consumer was not necessarily aware of its price; the commercial communication practice of the claimant deprived consumers of the possibility to make conscious decisions regarding the use of the claimant’s operating system, the function that constitutes part thereof, and in general the goods of the claimant.”*
- *“consumers need not necessarily assume that an undertaking has concealed some communication element relating to a material feature and that they can obtain information regarding such only from other sources, by actively searching for it.”*
- *“The claimant could have been expected to emphasis the characteristics of the function, which fundamentally changed the logic of the use of the consumers’ resources (mobile data), highlighting the elements (from the consumers’ perspective: risks) that are material for consumer protection purposes. In this context, it is deemed unacceptable conduct if consumers are required to engage in considerable efforts in order to find essential characteristics [of one element of the service] and decision-making options (the information could be found, in case of the communication relating to phones, only after scrolling through numerous pages, and in the user manual and on the internet after reading through several pages).”*
- *“and if the consumer experiences the - unexpected - slowdown of the mobile internet, it should be regarded as harm suffered on his/her side (even if he/she does not purchase additional data packages and thus incurs no extra costs).”*

270. Judgment No Kf.III.38.283/2018/12. of the Curia (in the proceedings relating to Case No VJ/140/2015.) reinforced, regarding services available online, that *“the transactional decision making process may consist of several elements; the legality of the commercial decision must be present in respect of partial decisions and elements as well”* and *“pursuant to Article 2(d) of the UCPA the concept of commercial practice effectively includes all activities relating to the sale and promotion of the goods, including the use of pop-up windows.”*

271. With regard to the German court judgment invoked by the undertaking subject to the proceeding, the competition council proceeding in the case emphasises, first of all, that German case-law is not binding on the assessment of cases in Hungary; there is nothing to prevent the competition council proceeding in the case from basing its decision on Hungarian circumstances, the Hungarian wording and the decisions of Hungarian authorities and courts. In this context the competition council proceeding in the case refers to the fact that even the Joint Position of the CPC Network states (in line with the applicable law) that its contents do not affect the outcome of proceedings conducted by the authorities of Member States.

272. However, it should also be noted with regard to the judgment of the German court that

- the approach of the German authority was stricter than the one adopted in this competition supervision proceeding; it found that the claim of Facebook regarding being “free” was misleading according to the definition contained in the annex to the UCPD, that is, an unfair commercial practice *per se* (as defined in paragraph 20 of the Annex to the UCPD),
- with regard to German users, Facebook used the term *kostenlos*, which may convey a slightly different meaning to other words expressing the notion of “free” (as the word is derived from *Kosten*, i.e., costs, plus the privative suffix *los*); moreover, there is a difference between the meaning of the Hungarian words *költségmentes* (‘without cost’) and *ingyenes* (‘free’),

- the judgment of the Court stated that the investigated conduct did not constitute a misleading commercial practice because it did not consider the “consideration” (Gegenleistung) involving the provision of data to be incompatible with “free”, they are not “costs” (Kosten) and Facebook did not claim that Facebook could be used without any consideration whatsoever.

273. In summary, the competition council proceeding in the case states that if an undertaking claims that a particular market service is available for free and consumers are not required to pay a monetary fee for the use of the service in question, when in fact they are subject to some other form of consideration or obligation in exchange for the use of the service (payment with their attention and time, and also their consumer activity, data and information – potentially originating from their friends), then the “free” claim will make consumers forget about the obligations they have undertaken in exchange for the service. As market participants are fully aware, consumers are not inclined to read or thoroughly study the various terms of a contract, and a message claiming that a product or service is provided for free further reduces the likelihood that contractual terms and policies will be understood. Thus in the case of business models similar to those found in the present case, the message of “free” may also be confusing with regard to the liability of consumers that is entailed in use (or even to contractual obligations), because it suggests that there is no risk or obligation to be borne by consumers, whereas there is an underlying, multi-layer commitment involved (which is not entirely transparent due to the complexity of the data managed and used). It is detrimental for transactional decisions and also for certain real economy processes, in both the short term and the long term, if consumers believe that they can use a service without offering any consideration.

274. If the average prudent consumer knew that his/her free registration and use of Facebook in reality relies on the assumption of his/her complex cooperation involving primarily the sharing of (his/her own and his friends’) data (user activity, consent to management and use), which thus represents significant market value, he/she could make different transactional decisions with regard to the use of Facebook. The competition council proceeding in the case also emphasises that certain findings (relating to inconsistencies and questions) of Decision No VJ/85-187/2016. terminating the competition supervision proceeding with respect to certain practices (in paragraphs 115-124.) also underline that for the average user, the system of policies used by the undertaking subject to the proceeding is difficult to comprehend, including their content as well as the complexity and manner of the management and use of data.

## X.

### Legal consequences

#### 10.1. [BUSINESS SECRET]

- 275. [BUSINESS SECRET].
- 276. [BUSINESS SECRET].
- 277. [BUSINESS SECRET].
- 278. [BUSINESS SECRET].
- 279. [BUSINESS SECRET].
- 280. [BUSINESS SECRET].
- 281. [BUSINESS SECRET].
- 282. [BUSINESS SECRET].
- 283. [BUSINESS SECRET].
- 284. [BUSINESS SECRET].

#### 10.2. The established infringement, fine

285. Pursuant to Article 76(1)(e) of the Competition Act, the competition council proceeding in the case has established that, through its misleading claim directed at Hungarian users displayed on the [www.facebook.com](http://www.facebook.com) website relating to its service being free from January 2010 (until 12 August 2019 on the opening page and until 23 October 2019 in the Help Centre), the undertaking subject to the proceeding committed an unfair commercial practice vis-a-vis its users in Hungary, whereby the undertaking subject to the proceeding carried out the infringement specified in Article 6(1)(c) of the UCPA and violated the prohibition set out in Article 3(1) of the UCPA.

In this context the competition council proceeding in the case emphasises that the gravity of the claim of “free” displayed in the Help Centre is substantially smaller than that of the communication displayed on the opening page, on the login screen; that communication is likely to have been transmitted to a narrower group of consumers and therefore its effect may have been smaller relative to that of the claims on the opening page. The gravity of the infringement is based on the slogans displayed on the opening page.

286. Considering that the undertaking subject to the proceeding has changed the commercial practice under investigation, the competition council proceeding in the case did not find it necessary to prohibit the continuation of the infringing practice pursuant to Article 76(1)(g) of the Competition Act.

287. However, in view of the nature and gravity of the infringement as well as the relevant market, the competition council proceeding in the case, in addition to establishing the fact of the infringement, regarded it justified to impose a fine on the undertaking subject to the proceeding pursuant to Article 76(1)(k) of the Competition Act and Article 78(1)(a) of the Competition Act.

288. The Fine Notice<sup>141</sup> details the considerations based on which the GVH sets the amount of competition supervision fines in all proceedings opened pursuant to the UCPA or Chapter III of the Competition Act, as well as any legal provision invoking the procedural rules of the UCPA and applicable by virtue of such rules, falling within the jurisdiction of the GVH and regulating fair communication with consumers and trading parties.

289. Pursuant to Article 78(3) of the Competition Act, the amount of the fine shall be established with all the circumstances of the case taken into account, in particular the gravity of the infringement, the duration of the infringing situation, the benefit gained by the infringement, the market position of the party infringing the law, the culpability of the conduct, the cooperation of the undertaking during the proceeding and the repetition and frequency of the infringement. The gravity of the infringement shall be established, in particular, on the basis of the extent of the threat to economic competition and the range and extent of the harm to the interests of ultimate trading parties.

290. The aim of imposing a fine is to deter undertakings from unfair market practices, while at the same time ensuring fair economic competition. When setting a fine, the GVH bears in mind that the purpose of the imposition of fines is both to serve as a punishment and to provide specific and general deterrence; consequently, the amount of the fine imposed must be appropriate to provide adequate punishment for the infringing conduct of the undertaking, which means that the fine must also reflect the economic importance of the infringement.

291. In addition, the amount of the fine must serve to prevent the undertaking in question, as well as other undertakings in similar situations, from committing (further) infringements, while at the same time strengthening compliant undertakings in the belief that fair business behaviour is appropriate. This goal can only be achieved if the amount of the fine imposed is proportionate, while placing a considerable financial burden on the undertaking committing the competition law infringement.

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<sup>141</sup> The GVH uses the Notice in proceedings where the preliminary position as defined in Section 73 of the Competition Act had not been sent to the undertaking subject to the proceeding by 21 December 2017, the date of publication of the Notice.

292. Pursuant to paragraph 13 of the Fine Notice, the fines to be imposed are determined, with a view to the goals contained therein, in five subsequent steps. First the competition council proceeding in the case sets the starting amount of the fine, then, taking into account the factors mitigating or aggravating the gravity of the infringement, sets the basic amount of the fine; after this, if justified, it adjusts this basic amount in view of any correction factors, taking into account the cooperation of the undertakings, and finally it assesses any facilities to be offered in view of payment difficulties.
293. Pursuant to the Fine Notice, in case of commercial practices the Competition Council typically starts from the costs of the commercial practice; however, (see paragraph 19 of the Fine Notice) if the amount of the communication costs is not an appropriate point of reference or there are no reliable figures available to facilitate their estimation, the Competition Council resorts to the method of fining based on turnover. Pursuant to paragraph 20 of the Fine Notice, the starting amount of the fine is the net turnover generated through the infringing commercial practice if it can be identified with certainty (for instance because the commercial practice was essentially based on the infringing communication); failing this, it is 10% of the net turnover generated from the goods affected by the infringement throughout the period of the infringement.
294. In this case the cost of presence allocated to the Hungarian market is unknown and the turnover originated from advertisers and other parties rather than from consumers. However, in the view of the competition council proceeding in the case, it is still appropriate to start from the (advertising) turnover as described above in the present case because, in view of the practice and business model investigated, it is a good reflection of the magnitude of the consideration or countervalue obtained from consumers (see also paragraph 76), and thus it can be considered as the relevant turnover. That is, the relevant turnover is the advertising turnover of the entire period under review, amounting to approx. [BUSINESS SECRET] HUF (see paragraph 17).
295. In the view of the competition council proceeding in the case, the use of 10% of the advertising revenues of the entire period investigated (approx. [BUSINESS SECRET] Ft) as the starting amount would result in an excessive fine even relative to the size of the undertaking subject to the proceeding; consequently, in this case the competition council proceeding in the case, exceptionally, departing from the Fine Notice to the benefit of the undertaking subject to the proceeding, took as the starting amount of the fine 10% of the part of the turnover of the last full year investigated (2018) that is attributable to the Hungarian market (approx. [BUSINESS SECRET] Ft), which amount was slightly reduced taking into account, inter alia, that some of the revenues were not affected by the conduct investigated in the present case or they originated from users other than natural persons.
296. The competition council proceeding in the case notes that it disagrees with the position of the undertaking subject to the proceeding that the fine is defined arbitrarily, particularly in view of the fact that the competition council proceeding in the case stated the reasons for departing from the Fine Notice and that departure was for the benefit of the undertaking subject to the proceeding. Instead of starting from the turnover generated during the entire period of the infringement under investigation, the competition council proceeding in the case found it justified to use a special method of apportioning, taking into account the fact that this turnover relates to Hungarian consumers and their activities, and may be also related to the current economic situation. Furthermore, in this context and to the benefit of the undertaking subject to the proceeding the competition council proceeding in the case also took into consideration that certain findings, even in light of clear case law, may appear to be novel.
297. The competition council proceeding in the case notes that, relative to the competition supervision fine proposed in its preliminary position No VJ/85-88/2016., the starting amount of the fine specified in the new preliminary position No VJ/85-166/2016. and in this Decision is indeed higher, in view of the fact that based on the facts discovered in the meantime, the gravity of the presumed infringement is greater than previously thought (also taking into consideration that the competition

council proceeding in the case terminated the competition supervision proceeding with respect to the conducts relating to the violation of the requirement of professional diligence). It should also be emphasised in this context that the revenues of the undertaking subject to the proceeding have been continuously increasing, however, the increase in the gravity of the infringement was primarily justified by the growing number of instances in which it was identified that data related to consumer activity was being used in a complex manner, which raised further questions; also, even though the undertaking subject to the proceeding removed and modified the contested slogan, consumers had already encountered the “free” promise, the validity of which message has been brought into question by new concerns.

298. The competition council proceeding in the case emphasises that in this case a new, rather than supplementary, preliminary position has been issued, containing novelties relative to the first preliminary position not only with regard to the starting amount of the fine but also in other respects, in relation to which the competition council proceeding in the case provided the undertaking subject to the proceeding with an opportunity to present its defence.

299. Having determined the starting amount of the fine – as described above – the basic amount of the fine is calculated, taking into account the aggravating and mitigating factors reflecting the gravity and effect of the infringement as well as the undertaking’s attitude to the infringement. An aggravating factor of minor importance increases the starting amount of the fine by 0-5%, a factor of medium importance by 5-15%, while a factor of high importance by 15-25%. Likewise, a mitigating factor of minor importance reduces the starting amount of the fine by 0-5%, a factor of medium importance by 5-15%, while a factor of high importance by 15-25%.

300. In the present case the competition council proceeding in the case did not identify any aggravating factors to be taken into account, although it took into account, as special mitigating factors, also in view of paragraphs 43 and 45 of the Notice, that

- as of 13 August 2019 the undertaking subject to the proceeding globally modified the investigated slogan referring to “free” on its opening page, that is, as a result of the proceedings, it terminated the investigated conduct (see the active action of global effect in paragraph 43 of the Fine Notice),
- as a sign of its cooperation, on 24 October 2019 the undertaking subject to the proceeding modified the contents of the Help Centre globally, in several regards (the amendment of the Terms of Service was also partly related, in terms of its motivations, to the former modification), and thus took measures to ensure that its commercial practice complies with legislative provisions (see the correction mentioned in paragraph 45 of the Fine Notice, as the modification also entailed additions to the content of the communications concerned, in addition to abandoning the use of the word “free”).

301. In response to the objections of the undertaking subject to the proceeding, the competition council proceeding in the case notes that the modification of a commercial practice does not constitute proactive reparation (as defined in Subsection VI.1 and paragraph 71 of the Fine Notice); furthermore, it was not in a position to take into account the reduction mentioned in paragraph 48 of the Fine Notice because the example provided in that paragraph refers to the situation where the consumer can necessarily and realistically receive the correct information before the conclusion of the contract, thereby providing the consumer with the potential to change his/her decision. In contrast, in the present case we are dealing with a conduct or claim that is immediately followed by the conclusion of the contract (acceptance of terms). It should also be noted that while prior knowledge of the business model of the undertaking subject to the proceeding might have been different in 2010 than in 2019- the competition council proceeding in the case finds it likely that, taking into account the current knowledge of the average consumer, he/she is still unable to fully grasp the complexity of the operation of the undertaking subject to the proceeding, the management

and use of data and the scope of risks (despite continuous media coverage and published conclusions).

302. In view of the aforesaid, the basic amount of the fine was reduced to almost half of the starting amount.

303. Pursuant to the Fine Notice, after calculating the basic amount of the fine, the following factors are taken into account: a) repeated infringement, b) gains derived from the infringement, c) deterrent effect, and d) maximum amount of the fine as set out in Article 78 of the Competition Act.

304. In this case the competition council proceeding in the case did not identify any benefit achieved through the infringement that could be definitively taken into account for the purposes of the fine and did not consider it justified to take into account the deterrent effect separately with a view to the proposed fine amount; furthermore, the proposed fine amount is nowhere near the maximum fine, which would correspond approximately to [BUSINESS SECRET] HUF for the year 2018, based on the figures specified in paragraph 15. The competition council proceeding in the case notes that the amount of the fine, taking into account the average quarterly turnover per European user (approx. HUF 1500 - 3000) as per paragraph 76, is significantly smaller than the presumed quarterly turnover projected to Hungarian users (in the order of magnitude of 6 000 000 based on the data in paragraph 71).

305. Based on the above, as cooperation within the meaning of Chapter VI of the Fine Notice did not occur, the competition council proceeding in the case sets the amount of the fine at HUF 1,200,000,000.

306. The competition council proceeding in the case notes<sup>142</sup> that in the event of a cross-border remittance, the following competition supervision fine account is to be used:

IBAN: HU88 10032000-01037557-00000000

SWIFT: HUSTHUHB

307. For fine payment, the case number of the competition supervision proceeding and, if the person making the transfer is different from the undertaking subject to the proceeding, the name of the undertaking subject to the proceeding must be entered in the “comments” box. Furthermore, the competition council proceeding in the case notes it is expedient to make the transfer in HUF to prevent any exchange rate differences.

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[https://www.gvh.hu/tartalmak/fogyasztoknak/a\\_gvh\\_eljarasai/birsagbefizetessel\\_kapcsolatos\\_adatok/birsagbefizetessel\\_kapcsolatos\\_adatok](https://www.gvh.hu/tartalmak/fogyasztoknak/a_gvh_eljarasai/birsagbefizetessel_kapcsolatos_adatok/birsagbefizetessel_kapcsolatos_adatok)

## XI. Miscellaneous

308. Pursuant to Article 63(2)(a) of the Competition Act, which is applicable pursuant to Article 27(1) of the UCPA, the decision concluding the proceeding must be adopted within three months of the opening of the investigation with the proviso that in justified cases as set out in subsection (6) of the same section, the administrative time limit may be extended on two occasions by a maximum of two months each time. Pursuant to Article 33(3)(b) and (c) of the PAPA Act, the period of legal assistance proceedings, and the time between the notice requesting information that was omitted or is required for ascertaining the relevant facts of the case, until they are provided, furthermore, pursuant to Article 63(4)(e), (f) and (g) of the Competition Act, the time from inviting a party to make a statement as defined in Article 65/C(6) until such statement is made, the time from the invitation to provide information or supply data or documents pursuant to Article 64/B(4) of the Competition Act until they are provided, and the time from the delivery of the preliminary position or the competition council proceeding in the case or the final report on the investigation until the party makes its statement but not exceeding the end of the time limit open for the making of such statement is not included in the administrative time limit. In view of the above, taking into account the exempted period of approx. 900 days, the administrative time limit ended on 29 October 2019.
309. The competition council proceeding in the case emphasises that the expiry of the time limit had no effect on the substance of the case, and in particular it caused no injury to the undertaking subject to the proceeding; it occurred partly so that the competition council proceeding in the case could take into account the global changes implemented by the undertaking subject to the proceeding on 24 October 2019<sup>143</sup> as a mitigating factor; furthermore, the competition council proceeding in the case also took into account other submissions by the undertaking subject to the proceeding that were not relevant for the calculation of the time limit but were submitted after the new preliminary position. Moreover, exceeding the time limit by one month in a proceeding that had been ongoing for over 3 years cannot be regarded as a substantial protraction of the competition supervision proceeding.
310. Furthermore, the competition council proceeding in the case refers to the statement in paragraph 31 of the ruling no 3270/2018. (VII.20.) AB of the Constitutional Court to the effect that *“the objection of the complainant regarding the administrative time limit does not raise the unconstitutionality of the judgment of the Curia or any fundamental concern under constitutional court as the administrative time limit set out in Article 63 of the Competition Act cannot be regarded as a time limit under substantive law, and therefore the constitutional requirement laid down in ruling No 5/2017. (III. 10.) AB of the Constitutional Court invoked by the complainant is not applicable.”*
311. The right to seek a legal remedy against the decision is granted under Article 83(1) of the Competition Act.
312. Pursuant to Article 157(7) of Act I of 2017 on the Code of Administrative Court Procedure (hereinafter: CACP), where a law allows for judicial review, it shall mean administrative court action from 1 January 2018 onwards. The rules of Administrative court action are set out in the CACP.
313. Pursuant to Article 29(1) of the CACP, the provisions of the Code of Civil Procedure shall apply, as appropriate, to electronic communication. Pursuant to Article 608(1) of Act CXXX of 2016 on the Code of Civil Procedure, if a person is obliged under Act CCXXII of 2015 on the General Rules on Electronic Administration and Trust Services (hereinafter: E-administration Act) to communicate by electronic means, he/she shall file all submissions to the court by electronic means only and in a manner specified in the E-administration Act and its implementing decrees.

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<sup>143</sup> See the plans of the undertaking subject to the proceeding described in submission No VJ/85-164/2016. (paragraph 158.)

314. Pursuant to Article 9(1) of the E-administration Act, economic associations acting as parties to a case within the jurisdiction of public administrative authorities and the legal representatives thereof are obliged to use electronic administration.
315. Pursuant to Article 39(6) of the CACP, unless otherwise provided by an Act, the submission of the statement of claim shall not have suspensory effect on the administrative act becoming effective. However, Article 50 of the CACP regulates an application for interim relief as follows. A person whose right or legitimate interest is infringed by an administrative activity or by a situation arising from the maintenance of an administrative activity may submit an application for interim relief to the court having material and territorial jurisdiction at any phase of the procedure with a view to averting an imminent threat of detriment or maintaining the status giving rise to the legal dispute. In the context of interim relief, it may be requested that suspensory effect be ordered. Such application may be submitted together with the statement of claim. If not submitted together with the statement of claim, it shall be submitted to the court. In the application, the reasons justifying interim relief shall be identified in detail and the documents certifying those reasons shall be attached. The facts underlying the application shall be substantiated.
316. Pursuant to the currently in force Article 95/F(1) of the Competition Act, the procedural rules of this Act as established by Act CXXIX of 2017 on the Amendment of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices and of Certain Related Legislative Provisions (hereinafter: Amending Act 4) shall apply, with the derogations set out in paragraph (2), to proceedings initiated after the entry into force of these provisions and to repeated proceedings.
317. However, pursuant to subsection (2), the provisions of the Competition Act set out in Amending Act 4 relating to enforcement shall also be applicable to enforcement proceedings not yet ordered at the time of the entry into force of these provisions and to proceedings in progress at the time of the entry into force of these provisions.
318. Chapter XII/A of the Competition Act provides for the execution of the resolutions of the Hungarian Competition Authority.
319. Pursuant to Article 84/A of the Competition Act, with regard to matters not regulated in the Chapter, the provisions of the Act CL of 2016 on the General Rules of Administrative Proceedings (hereinafter: GRAP Act) shall apply to enforcement as appropriate.
320. Pursuant to Article 84/C of the Competition Act, if the obligee fails to meet its payment obligation within the time limit, or with respect to the costs advanced by the State for the time period that the payment is advanced, it shall pay default surcharges at a rate calculated in the manner specified for default surcharges pursuant to the act on the taxation procedure.
321. Pursuant to Article 133 of the GRAP Act, unless provided otherwise by an Act or government decree, the enforcement shall be ordered by the authority which made the decision; with regard to a decision of second instance, enforcement shall be ordered by the authority of first instance. Pursuant to Article 134 of the GRAP Act, the enforcement shall be carried out by the national tax authority unless provided otherwise by an Act, government decree or, in an administrative case of a local government, a local government decree.

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