

Abuse of Significant Market Power by SPAR Magyarország Kereskedelmi Kft.

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The initiation of the case

The Hungarian Competition Authority (Gazdasági Versenyhivatal – hereinafter referred to as the GVH) initiated a competition supervision proceeding on 6 May 2010 against SPAR Magyarország Kereskedelmi Kft. (hereinafter referred to as SPAR or undertaking under proceeding) based on the following:

- its dealers have presumably regularly underestimated the expected yearly turnover of the suppliers in order to increase the dynamic part of the performance-based bonus (teljesítményarányos bónusz – hereinafter referred to as TAB) suppliers have to pay to SPAR;
- the suppliers have to pay this bonus in all circumstances while SPAR does not have to refund it even if the actual turnover did not reach the expected rate;
- as from 1 January, 2010 SPAR built in the fees of certain services into the fixed part of the performance-based bonus without ascertaining whether the suppliers actually need these services;
- in 2009 SPAR probably did not make all its suppliers pay the since terminated organisational and infrastructure-development fees.

At the commencement of the competition supervision proceeding the GVH presumed that SPAR had violated, with the above mentioned conducts, Article 7(1) and specific points of Article 7(2) of Act CLXIV of 2005 on Trade on abuse of significant market power.

The legal assessment

Firstly, the GVH determined that SPAR has significant market power in its sector. The data provided by SPAR shows that in the investigated time period its net revenue was always more than 100 billion Hungarian Forints. This is sufficient evidence of the significant market power of SPAR.

Secondly, the GVH determined that the time period concerned and the subject of the current proceeding are different from those of previous proceedings related to SPAR. Consequently, the resolutions of previous cases cannot be applied in the current case.

Finally, the GVH evaluated the reasonableness of the usage of the performance-based bonus system. The proceeding competition council found that the TAB is a condition of

distribution both in practice and due to its function as well, and that this is against Article 7(2) e) of Act CLXIV of 2005 on Trade. Moreover, based on the supplier contracts acquired by the GVH, it can be established that SPAR only distributes the product of a supplier if the latter agrees that SPAR will later vindicate its rights to the TAB.

In the opinion of the proceeding competition council, SPAR in its agreements with the suppliers has prescribed the usage of the static and dynamic parts of the TAB. During the negotiation of these agreements only the extent of the TAB was up for discussion and not whether it should even be used at all.

According to SPAR, the initial discussion on the TAB is only conducted orally and is not documented, and this is the reason why no written evidence can be provided about the fact that the suppliers actually have a say about whether it is used or not. Based on the findings of the GVH, the suppliers are in a very weak bargaining position regarding this matter and effectively have to accept the terms of SPAR in all cases, generally without any modifications to them. Based on the acquired documents and the fact that the undertaking under proceeding could not provide evidence to the contrary, the GVH has accepted as fully proved that SPAR uses the TAB unilaterally. According to the questioned suppliers, it was never suggested that there was any alternative to accepting the TAB. As a result, SPAR has abused its significant market power.

Even SPAR admitted that its bonus system is practically a volume-dependent discount that is vindicated at a later time. While retailers should be allowed to ask suppliers for discounts based on their sales volume, SPAR left its suppliers no choice but to offer this discount.

The proceeding competition council does not dispute that retailers and distributors may be entitled to this kind of discount, but it is of the opinion that in this specific case the discount was groundless. A discount system can be justified if it rewards an increase of sales compared to a specified amount (e.g. the volume of the previous year). The undertaking under proceeding received the discount based not on the excess volume, but on the sold volume itself, even if it did not reach the previously expected amount.

According to the undertaking the discount is reasonable. However, the proceeding competition council did not share this opinion, based on the following grounds:

- economies of scale are not relevant in the case because the TAB is to be given even if SPAR sells only a single product;
- production efficiency and economies of scale are inconsistent with SPAR's distribution methods;
- the undertaking under proceeding technically admits its dominant position through its own reasoning.

Regarding the static part of the performance-based bonus, the proceeding competition council argued that the amount a supplier has to pay depends only on the volume sold by SPAR, and therefore it only reflects its trade activity and has no real incentive effect. In extreme cases it is to be paid even if only a single product is sold. Enforcement of the TAB therefore amounts to an abuse of significant market power.

In the dynamic part of the TAB there are elements that the competition council found reasonable; however they are only theoretical, and have no incentive effect in practice. This was also confirmed by the undertaking under proceeding.

SPAR also explicitly admitted that although they set the turnover that is to be achieved, they did not take responsibility for actually reaching it, and the discount was to be paid regardless. Therefore while the static and dynamic parts of the TAB essentially have the same contents, the dynamic part is more flexible.

When determining the fine the GVH decided in favour of the undertaking under proceeding, because the Competition Council did not consider the refunds from first-year suppliers, although it could have done so.

On the whole, neither the static, nor the dynamic part of the TAB was eligible to function as a proper incentive and therefore the TAB was in conflict with Act CLXIV of 2005 on Trade.

Article 7(2) f) of Act CLXIV of 2005 on Trade prohibits in general the unilateral charge of any fees by an undertaking having significant market power. The proceeding competition council emphasised that while it does not object to the fact that the percentage of the TAB is determined in negotiations between SPAR and its suppliers, it does object to the fact that the suppliers have no choice as to whether the TAB is used at all. In other words, suppliers may only negotiate about the extent of the TAB and not about its applicability.

The proceeding competition council then investigated whether the TAB can be considered as a fee. Although Act CLXIV of 2005 on Trade does not specify it, every payment obligation that the dealer claims from its suppliers for a service it offers may be regarded as such. SPAR claims the TAB from all of its suppliers, while it offers no specific service in return. This was even confirmed by SPAR on multiple occasions.

The proceeding competition council therefore determined that the undertaking under proceeding had infringed Article 7(1) points e) and f) of Article 7(2) of the Act CLXIV of 2005 on Trade. The TAB may be judged on a dual legal basis because it functions both as a unilateral payment obligation and a groundless discount system.

In conclusion, the proceeding competition council imposed a fine on SPAR for its abuse of significant market power.