

As regards the case at hand, the court found that the claimants had not satisfied these requirements. The claimants had not shown that the OEMs and car glass repair shops had calculated their sales prices in such manner that the cartelised prices from car glass manufacturers would have been directly passed on. The court admitted that almost all OEMs and car glass repair shops had been affected by the car glass cartel in a similar manner and that the oligopolistic supply market for car glass and the lack of end-consumers' price-elasticity would generally justify the assumption that a passing-on was theoretically conceivable. This mere finding was, however, not as such sufficient to assume that passing-on had indeed occurred in the case at stake. The court rather considered that the direct purchasers (mainly OEMs) held monopoly positions vis-à-vis the end customers in respect of the car glass used for their respective cars/models. This monopoly position conveyed to the direct purchasers significant market power which was evidenced by the fact that they were able to sell-on the car glass with very significant profit margins. Against this backdrop, the court concluded that the direct purchasers were capable and likely to absorb any cartel-related price increases. The fact that the input costs for car glass necessarily and undisputedly was one factor considered by the direct purchasers when setting their sales prices was not enough to establish a sufficient causal link between input prices and output prices. Rather, the court concluded that the direct purchasers determined their sales prices on the basis of demand side considerations rather than using a cost plus margin based calculation method.

Finally, and quite importantly, the court refused to appoint an expert witness in respect of the question of passing-on. The court emphasised that the appointment of any such expert witness was only possible and necessary where the court itself would not be able to understand or fully evaluate economic evidence. In the case at hand, the court did not consider that an economic expert would be more qualified to assess the relevant facts than the court itself.

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## Hungary

### THE SUPREME COURT DECLARES A TRADERS' PRICING METHOD TO BE AN ABUSE OF SIGNIFICANT BUYER POWER

☞ Abuse of dominant position; Discounts; Hungary; Supermarkets; Suppliers

#### Background

The Hungarian Trade Act defends suppliers by prohibiting traders from abusing their significant buyer power (s.7 of Act CLXIV of 2005 on Trade). Two of the many forms of abuse defined by the Trade Act are imposing unjustified conditions on the supplier and one-sidedly imposing a fee on the supplier, in particular in exchange for allowing their goods to become part of the trader's product range.

One of the biggest retail chains of consumer goods in Hungary is SPAR. SPAR applied a so-called Performance Based Bonus System (PBB). The PBB worked in a way that when the goods were sold to SPAR, it paid the full purchase price to the trader. Then, at the end of every month or year, a bonus was calculated based on the PBB, which the supplier then had to pay to SPAR. This PBB bonus consisted of two parts: the first part was a fixed percentage of the price of the goods sold to SPAR (fixed PBB), the second so-called dynamic part was an amount calculated based on the number of goods sold by SPAR (dynamic PBB). The more goods SPAR sold, the higher the amount of the dynamic PBB became.

SPAR applied the PBB system for all of its suppliers; the application of the PBB system was not up for discussion and only the percentages could be varied.

## Competition Authority investigation

In 2012, the Hungarian Competition Authority (HCA) found that the PBB system of SPAR constituted an abuse of significant buyer power towards suppliers and imposed a fine on SPAR (Decision No.Vj/047-274/2010).

The HCA established that the PBB is a price setting mechanism, which works as a discount system based on volume. The HCA declared that agreeing on a discount (i.e. agreeing on a lower purchase price) is not an abuse of buyer power, but the mechanism by how that price is set can be. The HCA established that the fixed PBB is not paid as a consideration for any extra service (provided by SPAR to the suppliers), rather only for the basic trading activity of SPAR. Thus it violates the Trade Act by being an unjustified condition, since no extra service is provided for it. Moreover, the fixed PBB does not incentivise an increase in sales by SPAR, since the percentage of the fixed PBB does not depend on the sales volumes. The HCA also found the dynamic PBB to be unlawful. While acknowledging that the dynamic PBB may have an increasing effect on sales, the HCA found that in reality this was not the case, because the dynamic PBB had to be paid even if SPAR sold very low amounts and not just as a bonus if target numbers were met.

The HCA also found both the fixed and the dynamic PBB to be “fees” one-sidedly imposed on suppliers, thus violating the Trade Act which prohibits such fees.

## Court proceedings

SPAR contested the HCA’s decision in court and the Supreme Court delivered the final decision in September 2015 (Decision No.Kfv.III.37.392/2015/5). The Supreme Court agreed that the PBB system is an abuse of significant buyer power, although the reasoning in some respects was different to the reasoning of the HCA.

The Supreme Court examined in detail whether the PBB is part of the purchase price, or a contractual term. This was done because SPAR argued that the PBB is actually part of the purchase price, not a contractual term, and as a result cannot violate the Trade Act (since agreement on the purchase price cannot be an abuse of buyer power).

The Supreme Court stated that the PBB was not part of the purchase price, but rather a bonus system. It is not part of the purchase price, but rather a contractual term which can violate the Trade Act. Furthermore, the Supreme Court also stated that just because a contractual term affects the purchase price—like the PBB—it does not mean that it would be part of the purchase price, because in the Supreme Court’s opinion every contractual term affects the purchase price to some extent.

## Assessment of the decisions

The decision in the case is very important for market players, since many traders were using complex price setting mechanisms. This decision will serve as an important guide for traders setting up similar systems in the future. One may argue that both the HCO’s and the Supreme Court’s decisions are too formalistic. The PBB is clearly part of the purchase price and is actually more beneficial for the suppliers than a simple price discount. The reason for this is that, in the case of the PBB, the supplier first receives a higher purchase price and only has to pay back the discount later. In the meantime, this amount has a positive effect on the supplier’s cash-flow.

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