



Case Summary

28 August 2014

Food retailer EDEKA violates prohibition to demand unjustified benefits from dependent suppliers

Sector: Food retail

Ref: B2-58/09

Date of Decision: 03 July 2014

By decision of 3 July 2014, the Bundeskartellamt has found that in 2009 EDEKA Zentrale AG & Co. KG ("EDEKA") made illegal demands on four manufacturers of sparkling wine to grant it special conditions (violation of § 19 (1), (2) in conjunction with § 20 (2) Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB)). The demands were made following the takeover by EDEKA of the discount chain "Plus".

At the end of 2008 EDEKA had acquired from its competitor Tengelmann 2,300 outlets of the discount chain "Plus" with the aim of integrating them into its own discount chain "Netto" (around 2000 outlets). In the first months of 2009 EDEKA conducted so-called "special negotiations" with around 500 suppliers from almost all product areas. With retroactive effect as of 1 January 2009, EDEKA demanded an "alignment with previous "Plus" prices", an "adjustment of payment terms", the payment of a permanent "synergy bonus" for potential cost savings on the part of the suppliers, a "partnership reimbursement" for the refurbishment of outlets, and the payment of a "bonus for product range enlargement" for possible additional listings in the new outlets.

Following a complaint by the trademark association and based on evidence found in the preceding merger control proceedings which indicated that EDEKA intended to finance the takeover with payments from its suppliers, the Bundeskartellamt saw reasonable grounds for a suspicion that EDEKA had violated the prohibition to demand benefits from dependent suppliers without an objective justification (§ 19 (1), (2) No. 5 in conjunction with § 20 (2) GWB). In April 2009 it searched EDEKA's headquarters in Hamburg. The evidence seized during the search and the questioning of witnesses from the product market for sparkling wine (which was taken as an example) confirmed this suspicion with regard to several practices applied by EDEKA in the

calculation of or reasoning for its demands. In July 2013 EDEKA received a preliminary legal assessment of the Bundeskartellamt to this effect (statement of objections). Between October 2013 and February 2014 EDEKA, the food retailer REWE and the German trademark association [*Markenverband*] commented extensively on the statement of objections.

In order to determine whether a supplier was dependent on EDEKA at the time EDEKA made its demands, the Bundeskartellamt examined the general market position of EDEKA on the German food retail sales and procurement markets, the market conditions on the procurement market for sparkling wine and the individual bilateral relations between the four suppliers surveyed and EDEKA. Based on this extensive analysis, the Bundeskartellamt assessed to what extent the suppliers had sufficient and reasonable options of resorting to other companies. It concluded that all four suppliers were dependent on EDEKA.

In order to determine whether, or to what extent, EDEKA's demands constituted a benefit which was not objectively justified, the Bundeskartellamt examined each of the five demands listed above and reviewed the individual demands made on the dependent suppliers which were chosen as an example. Subsequently it assessed for each of the demands the reasoning EDEKA had given and the calculation on which it was based. The timing of the demands and their retroactive effect were also considered. Ultimately, the Bundeskartellamt came to the conclusion that the following practices of EDEKA were - both individually and taken together - illegal:

- The use of several reference dates over a period of 18 months to compare the conditions offered to EDEKA and to Plus and the resulting multiple adjustments of conditions;
- The choice of reference dates from well before the merger and the beginning of the negotiations on conditions;
- The non-transparent and for the suppliers incomprehensible presentation and justification of demands;
- The demand of retroactive payments and the retroactive alignment of conditions;
- The unilateral adoption and enforcement of new conditions (e.g. the "adjustment of payment terms");
- The "cherry-picking", i.e. the demand to have conditions for EDEKA aligned to individual, more beneficial conditions for Plus, without consideration of the overall package of conditions;
- The demand of payments without offering any compensation in return (e.g. the "partnership reimbursement");

- The demand of payments without a plausible product-related reason (e.g. the "bonus for product range enlargement");
- The demand of more favourable conditions from suppliers although the annual agreements on conditions at the time were already agreed;

In the Bundeskartellamt's view the current proceedings help to define the line between (admissible) hard bargaining on the one hand and the abusive exploitation of buyer power on the other.

In view of the increasing concentration in the German food retail sector and the resulting pooling of demand for branded products in the hands of a few large food retailers it is mandatory that the prohibition of inducing dependent suppliers to grant benefits without an objective justification (so-called "Anzapfverbot") be rigorously enforced. For the assessment of whether the relevant criteria "dependent" and "benefit without objective justification" are fulfilled, the individual market conditions of the markets affected need to be taken into account. Abusively induced benefits not only harm the suppliers directly affected but are also harmful to small and medium-sized food retail companies. Their conditions are further weakened in comparison to their large competitors and they are unlikely to be granted better conditions in the future by their suppliers (who are afraid that in the case of a subsequent takeover they will have to also grant these conditions to the acquiring company). Consumers also suffer in the medium and long term from lower product quality, a decline in innovation activity, less product diversity and the risk of price increases caused by lower competition intensity in the German food retail sector. Distinguishing between admissible hard bargaining and illegal demands by powerful companies is also an issue of major current importance for other EU Member States. There are various European initiatives on this subject.

In the proceedings, the criteria "dependent" and "benefit without objective justification" were for the first time subject to an extensive evaluation. In addition, the proceedings raised a number of issues with a relevance beyond the case in question, which is why the Bundeskartellamt decided to conduct them as administrative proceedings that could be closed with a declaratory decision under Section 32 (3) GWB (subsequent finding of an infringement).

EDEKA has lodged an appeal against the decision.