



Case Summary

6 July 2015

Prohibition of acquisition of Kaiser's Tengelmann outlets by Edeka

Sector: Food retail trade

Ref: B2 – 96/14

Date of Decision: 31 March 2015

The Bundeskartellamt has prohibited Edeka Zentral AG & Co. KG, Hamburg ("Edeka") from acquiring 451 Kaiser's Tengelmann outlets. The elimination of Kaiser's Tengelmann GmbH, Mülheim an der Ruhr ("Kaiser's Tengelmann") as an independent retail company and the acquisition of its outlet network by Edeka would have considerably worsened competition conditions on a large number of already highly concentrated regional markets and municipal districts in greater Berlin, Munich, Upper Bavaria and North Rhine-Westphalia. Moreover, the leading group of retailers, consisting of Edeka, Rewe and the Schwarz group with Kaufland and Lidl, would have further increased their market lead over their competitors in the procurement of branded products in particular, because the manufacturers would have lost one of the remaining alternative sales outlets outside this group.

Also in these proceedings, the Bundeskartellamt has again assumed the existence of single product markets on the demand side, which include all distribution channels from full-range retailers to hard discount. This notwithstanding, the competitive relationship between the distribution channels varies in degree, which was reconfirmed on the basis of data analyses. In addition to an analysis of customers' till receipts and product overlaps a so-called event analysis was carried out which measures the turnover reaction of various distribution forms (full range and discount) to the opening and closure of other outlets.

In defining the geographic market the Bundeskartellamt has taken into consideration the concrete alternatives of consumers in the relevant local market to switch to another retailer of their choice. In cities with a population of more than 500,000, a city district analysis and, for the sake of plausibility, a neighbourhood analysis were carried out in addition to a market area assessment. Such an in-depth analysis of the geographic market was carried out in Berlin, Munich, Düsseldorf and Essen.

The investigations have shown that with market shares of between 10 and just under 30 per cent, Kaiser's Tengelmann is an important competitive force in the regional markets affected, with a network of outlets of substantial value to any potential acquirer. The planned takeover would have significantly lessened the competitive pressure on Edeka in these markets and even in those markets in which not Edeka but its close competitor, Rewe, is the market leader. The effects of the planned acquisition both on the parties as well as Rewe, which is not a party to the merger, had to be considered within the context of the current prohibition criterion which has been in force since 2013. Other than the classical case of single firm dominance, this criterion focuses on the significant impediment to effective competition ("SIEC"). In many districts of the metropolises of Berlin, Munich and Düsseldorf as well as some market areas in Upper Bavaria and North Rhine-Westphalia, Kaiser's Tengelmann is the strongest competitor and a close competitor of Edeka and Rewe, meaning that its disappearance from the market would have significantly reduced consumer choice.

In this context the Bundeskartellamt has only examined those sales markets more closely on which there is both a high level of concentration and significant post merger growth. In a large number of regional markets the parties to the merger and their next competitor, Rewe, account for more than half of the total market (i.e. including discounters, self-service department stores and organic supermarkets). Furthermore, alternative providers, mainly self-service department stores, are often unable to achieve a degree of market significance from which effective competition against the full-range retailers Edeka and Rewe in local markets can be expected. In any case, in cities like Munich, self-service department stores only exist in a few districts. In addition, the increase in market share resulting from the acquisition of the target is usually significant. These structural characteristics were present in the large cities irrespective of the exact geographic market definition and thus revealed a great degree of robustness. The characteristics were already found on the basis of the (in the Bundeskartellamt's view) coarse-scale market area assessment but were also confirmed in the analysis of the city districts.

The investigations also showed that there are significant barriers to entry in particular in city centres in the form of building approval regulations which make the entry of potential competitors considerably difficult. The actual obstacles facing small and medium-sized retailers in being considered by investors or land or property owners in the allocation of building plots or real estate while competing against the well-known names of Edeka and Rewe, are also high. The considerable advantage in local markets which the parties and Rewe already enjoy, is thus of even greater significance. This advantage would have increased further post merger. In Berlin, for example, 139 more outlets would have been added to the 359 sites already operated

by Edeka. Together with the 249 outlets in the hands of Rewe, in total 747 of the 1208 food retail outlets in Berlin (including discounters) would have been brought together under the ownership of the two leading companies (approx 60 per cent). The investigations showed a similar situation for Munich and Düsseldorf.

On the procurement side the Bundeskartellamt has based its prohibition on 11 procurement markets. These range from conventional fresh milk and chocolate products to sparkling wine and frozen pizza. In this context it became clear that the Bundeskartellamt's sector inquiry into the food retail sector, which was concluded in 2014, provided a robust factual basis for the assessment of such cases. Depending on the procurement market examined, the market shares achieved by Edeka in Germany amounted to up to 35 per cent, the target company accounted for an additional 2 to 5 per cent. In some cases higher shares were achieved by regional suppliers in the areas of Berlin and Munich. In the Bundeskartellamt's view the merger would have strengthened the leading group of retailers consisting of Edeka, Rewe and the Schwarz group in their procurement of branded products. The merger would have led to the takeover of one of the few competitors which is not dependent on the leading group in its procurement activities and which owns a network that is essential for access to customers in particular in urban areas.

Edeka and Kaiser's Tengelmann have significant overlaps in terms of the products they buy and their manufacturers. The suppliers affected would have lost an important sales alternative to the leading customers Edeka, Rewe and Schwarz group. The acquisition of Kaiser's Tengelmann would not only have increased Edeka's overall procurement volume further, but would also have increased its advantage in local markets with the takeover of a network of attractive inner city locations. The latter also leads to advantages over competitors in negotiations on conditions with suppliers. Furthermore, on the procurement side, Kaiser's Tengelmann is currently a member of a purchasing cooperation with the supplier Bünting. Also because of its other members this cooperation represents a direct alternative for the manufacturers in their supply to the food retail sector. The merger would have involved the takeover of an independent retailer, Kaiser's Tengelmann, by Edeka, the largest company of the leading group on the demand side, a project which would have further increased the already high concentration of the demand structure in a number of procurement markets and would have strengthened the leading position of the three leading buyers of branded products (Edeka, Rewe and the Schwarz group) vis-a-vis their remaining competitors.

It has also been proven in the past that Edeka is able to make use of its economies of scale by asking to be granted special conditions, which the Bundeskartellamt considers as abusive conduct to the detriment of suppliers and smaller competitors (cf. case summary of 28 August 2014 on the proceeding B2-58/09 - so-called "Anzapfverbot"). An appeal filed against the Bundeskartellamt's decision in this regard is pending at the Düsseldorf Higher Regional Court.

In early December 2014, in the context of its merger control proceedings, the Bundeskartellamt had already imposed an interim injunction on EDEKA and Tengelmann to prevent them from implementing parts of the planned merger before the authority had concluded its examination proceedings. The parties had previously agreed that the closure of warehouses and meat processing plants and the (partial) reduction of administrative units would increase the acquisition price. They had also agreed that Kaiser's Tengelmann would close some of its outlets in Berlin and Brandenburg even before the acquisition. These measures were not to be realized before the conclusion of the merger control proceedings as this would have constituted a partial implementation of the merger. The interim injunction was limited to the duration of the merger control proceedings. It was also included in the decision on the merits of the case in order to ensure that, until a final decision was issued, the independence and competitive potential of Kaiser's Tengelmann was maintained also for the duration of possible appeal or ministerial authorisation proceedings.

In its draft decision, which was sent to the parties to provide them with an opportunity to comment, the Bundeskartellamt had made it clear to Edeka and Tengelmann that approx. 100 outlets of Kaiser's Tengelmann would not be covered by a potential prohibition and could be taken over. On the basis of the comments subsequently made by the parties the Bundeskartellamt also included organic supermarkets in its market assessment. This would have enabled the parties to take over a further approx. 70 locations, and thus a total of more than one third of all locations. Irrespective of this, EDEKA and Tengelmann only offered to give up a total of approx. 100 outlets in two steps in Berlin and Bavaria, meaning that altogether EDEKA would have been able to acquire around 350 outlets. However, in their choice of outlets the parties did not consider the criteria and conditions established by the Bundeskartellamt for offering sustainable commitments. Above all, the parties offered to sell those outlets to third parties which would have hardly reduced Edekas's critical market share increase or which Edeka could have easily acquired anyway because the merger posed no danger whatsoever to competition in the local markets affected. Even some outlets which were closed or on the verge of closure were offered for sale to third parties as part of the commitments. The commitments offered addressed neither the prohibition criterion of significant impediment to effective

competition (SIEC) nor the narrower definition of the geographic market in the case of large city areas which the Bundeskartellamt considered to be appropriate.

In the Bundeskartellamt's view, the commitments would have needed to address the permanent structural changes that would have resulted from the elimination of the independent retailer Kaiser's Tengelmann from the market. With its merger control proceedings the Bundeskartellamt therefore intended to ensure that a significant competitor was strengthened or built up in the market areas and city districts affected. This was even more important as Edeka's competitors are themselves largely unable to expand their competitive position on account of legal and factual restrictions on their internal growth. Therefore, the merger project could have been cleared if (at least with regard to the critical sales markets) the *preponderant* part of the three regional distribution networks of Kaiser's Tengelmann would have been transferred to one or at the most two independent competitors per distribution area. This would also have solved the competition problems on the procurement markets affected.

The fact that in the course of the proceedings several competitors approached the Bundeskartellamt to express their interest in acquiring parts of the networks of Kaiser's Tengelmann proves, in the view of the authority, that a settlement under these terms could have been achieved.

The commitments offered by the parties were therefore not sufficient to eliminate the competition problems of the merger project. The planned acquisition was thus to be prohibited.

The prohibition decision is not yet final. The parties have applied to the Federal Minister for Economic Affairs and Energy for a ministerial authorisation under § 42 of the German Competition Act. They have also filed an appeal against parts of the prohibition decision with the Düsseldorf Higher Regional Court.