

## Case summary

29 November 2017

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### Examination under competition law following the withdrawal of appeals against the ministerial authorisation granted to EDEKA/Tengelmann

Sector: Food retail trade

Ref: B2 - 31/17

Date of decision: 16 November 2017

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The Bundeskartellamt has closed its proceedings concerning potential competition law violations initiated after the withdrawal of appeals against the ministerial authorisation granted to EDEKA/Tengelmann.

#### I. Background/facts

In October 2014, EDEKA and Kaiser's Tengelmann (hereinafter 'KT') notified the Bundeskartellamt of the divestment of the KT store network in Berlin, the greater Munich area and North Rhine-Westphalia (hereinafter 'NRW') to EDEKA. The Bundeskartellamt prohibited the plans in spring 2015 (ref. B2-96/14) because they threatened to significantly impede effective competition on numerous regional markets, especially in the inner cities. The parties to the merger then applied to the Federal Minister for Economic Affairs and Energy for a ministerial authorisation at the end of April 2015, which was granted in March 2016 subject to conditions relating to labour law and collective agreements (I B 2 - 2208 50/01). Markant, NORMA and REWE, which had been summoned to the ministerial authorisation proceedings as third parties, filed an appeal against the ministerial authorisation with the Düsseldorf Higher Regional Court. In July 2016, the Düsseldorf Higher Regional Court suspended the ministerial authorisation in interim relief proceedings (VI - Kart 3/16) and ordered that the appeals have a suspensive effect. The decision was primarily based on concerns about the impartiality of the Federal Minister for Economic Affairs and Energy. The Federal Minister for Economic Affairs and Energy, EDEKA and KT filed an appeal against the denial of leave to appeal with the Federal Court of Justice (KVR 38/16).

Before a decision on the merits of the case, Markant and NORMA were persuaded during negotiations in October 2016 to withdraw their appeal against the decision of the Federal Minister for Economic Affairs and Energy. In October and November 2016, EDEKA and the appellant REWE held mediation talks with the result that REWE was prepared to also withdraw its appeal at the Düsseldorf Higher Regional Court in return for the transfer of KT stores to it.

## II. Legal assessment

Following the settlement, the Bundeskartellamt examined whether the agreements between the appellants REWE, Markant and NORMA and the companies involved in the merger that were concluded in connection with the withdrawals of the appeals violated Section 1 of the German Competition Act (GWB) or Article 101 of the Treaty on the Functioning of the European Union (TFEU). The relevant bilateral settlement agreements were reviewed accordingly with the result that no competition law violations were found.

### 1. Markant

Markant contractually agreed to withdraw all its appeals against the ministerial authorisation and, in return, received financial compensation for any disadvantages arising from the termination of the business relationship (especially for competitive disadvantages and unfavourable conditions). In the Bundeskartellamt's opinion, this out-of-court settlement does not constitute a cartel agreement under Section 1 of the GWB or Article 101 of the TFEU. A settlement removes legal uncertainty and by its very nature limits the freedom of action of the parties involved. However, the relevant settlement agreements do not contain any restrictions that go beyond what is necessary to end the legal dispute nor do they contain any terms that could be seen as an understanding with regard to one or several competitive factors. In this respect, this constellation does not constitute a "buying off of competition", which typically violates general competition law and whose distinguishing feature is a market exit against payment of compensation. Such paid for relinquishment of a market position that would otherwise exist forms, for example, the basis of pay-for-delay cases, where patent holders in the pharmaceutical industry make payments to generic drug manufacturers if, in return, the latter refrain from entering the market or at least delay their market entry.

However, in the case of Markant, there is no such market exit. The market exit of a member of Markant – Kaiser's Tengelmann – was not the subject of the agreement concluded with Markant but of the merger control proceedings, which ended with a prohibition, and of the subsequent ministerial authorisation proceedings. Markant also was also not able to legally prevent the exit of Kaiser's Tengelmann. In view of this, Markant agreed to a particular conduct in the proceedings as part of the settlement but not to a particular market conduct. The settlement only governed its conduct as a party to the proceedings, not its conduct as a retailer. There also was no indication

of the settlement being used as a vehicle for an already planned coordination of reciprocal market conduct as in the pay-for-delay cases mentioned above.

It follows from the above that the settlement with Markant could not even get close to being a violation of the ban on cartels. The fact that Markant may have had the opportunity to derail the ministerial authorisation by not withdrawing its appeal and so make an impact on competition does not change that. The effects of the ministerial authorisation on the market arose solely from the application submitted by the parties to the merger and the Minister's conduct; Markant's purely legal (potential) power of veto did not make these effects become market conduct on the part of Markant within the meaning of the ban on cartels. Just as Markant could not be expected to appeal the ministerial authorisation, it was also not obliged to uphold its appeal and forego a settlement in its favour.

## 2. NORMA

The agreements between EDEKA and the appellant NORMA differed from the previous case only insofar as NORMA was EDEKA's competitor and received not only financial compensation but also eleven former Netto stores for withdrawing its appeal. The settlement with NORMA again related only to its conduct in the proceedings and not its market conduct – for the same reasons as with Markant. The transfer of the stores and the resulting structural change were examined under merger control law and cleared because of their pro-competitive effects on the market (transfer of stores from the market leader EDEKA to the much smaller NORMA) (B2-38/17).

However, NORMA also obtained assurances that EDEKA would subsidise the lease for the transferred stores. Since these subsidised leases were linked to the stores' sales development, the parties agreed that NORMA would submit annual sales reports for each store to EDEKA. The Bundeskartellamt informed the parties of its competition concerns regarding this aspect of the agreement because these reports would provide EDEKA with information about the development of these stores and enable it to respond accordingly in the competitive environment, which would constitute a violation of secret competition the protection of which is envisaged by competition law. In the end, the parties found a mutually acceptable solution for the lease arrangement that addressed the Bundeskartellamt's concerns and prevented any exchange of information.

## 3. REWE

A similar agreement between EDEKA and REWE attracted particular public attention. In return for REWE withdrawing its appeals, EDEKA transferred 63 stores in Berlin, two stores in NRW, two stores in the greater Munich area, a meat processing plant and the post-processing services operated by K-LOG to REWE. The settlement with REWE also related purely to its conduct in the proceedings.

Consideration was given to an indicative assessment by the Bundeskartellamt, which had been requested by the parties involved. The Bundeskartellamt had informed the parties that, on the basis of current figures, the acquisition of Kaiser's Tengelmann stores would be much more problematic in Munich where REWE already held a strong position than in Berlin where this was not the case. Provided relevant data is available, it is standard practice of the Bundeskartellamt in complex merger projects to provide the parties with a pre-evaluation of the project prior to notification.

The agreed transfer of the stores was examined under merger control (B2-139/16, press release of 8 December 2016 – REWE may acquire 67 EDEKA stores<sup>1</sup>). In contrast to the acquisition of EDEKA's stores by NORMA, which is not one of the major food retailers in Germany, the acquisition by REWE was initially not expected to lead to pro-competitive post-merger effects. However, on the basis of the data already collected, the Bundeskartellamt was able to make a prompt assessment of the effects on individual market areas so that the merger could be cleared quickly. After the merger, REWE's market share was below 25% in 13 out of the total of 15 market areas affected by the merger, which were mostly located in Berlin, and below 30% in the remaining two Berlin districts of Lichtenberg and Marzahn-Hellersdorf. There were no competition concerns about the transfers of the Perwenitz meat processing plant and the post-processing services to REWE (B2-140/16). The Bundeskartellamt found no evidence that REWE and EDEKA had made anti-competitive arrangements or agreements relating to their respective market conduct beyond the divestment of branches.

### III. Outcome

With respect to the two separate store transfers to NORMA and REWE, the Bundeskartellamt does not regard the underlying agreement between the parties as a violation of Section 1 of the GWB. The agreement causes a one-off structural change which was consequently examined under merger control. As far as the Bundeskartellamt is aware, the agreement is not associated with any noticeable permanent changes in conduct or relevant incentives for specific conduct. The parties are still free to open or close stores in the relevant markets or take other competitive measures (branch refurbishments, special offer policies, product range policies, etc.).

In view of this, it was appropriate to subject the settlement agreements to structural control only. Any potentially anticompetitive effects would have had to have been established in the course of this and prohibited, if necessary. The mere understanding between the parties regarding the allocation of the stores, however, does not meet the legal definition of a restriction of competition.

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[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/08\\_12\\_2016\\_Edeka\\_Re we.html?nn=3591568](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/08_12_2016_Edeka_Re we.html?nn=3591568)