

Newsletter, 23 February 2018

German Federal Court of Justice decides that EDEKA abused its buyer power by requesting "wedding rebates"

On 23 January 2018, the German Federal Court of Justice ("FCJ") held that a dominant purchaser on a purchasing market violates the so called "Anzapfverbot" by requesting unjustified benefits from the supplier.

In its decision of 23 January 2018 the FCJ gives guidance concerning the interpretation of Sec. 19 (2) No. 5 ARC and the so called "Anzapfverbot". Following the 9th Amendment of the ARC in 2017 the importance of this prohibition had already increased and is now further strengthened by the FCJ's judgement. Until then, the Federal Cartel Office ("FCO") and the Düsseldorf Higher Regional Court ("the Court") took opposing positions regarding the scope and interpretation of Sec. 19 (2) No. 5 ARC.

Facts and Procedure

Following its takeover of Plus stores and their integration into its own discount markets, EDEKA approached several producers of sparkling wine, demanding so called "wedding rebates". At the beginning of special negotiations it demanded a retroactive price adjustment and the compensation of the amount paid by EDEKA in excess of such adjusted purchase prices. Moreover, EDEKA asked for bonus payments that should be used for the Plus store's renovation and modernisation.

The FCO found that such conduct is an abuse of market power and EDEKA therefore infringed the prohibition provision of Sec. 19 (2) No. 5 ARC. The Court reversed this decision by judgement of 18 November 2015 against which the FCO successfully appealed.

Judgement of the FCJ

The FCJ held that EDEKA abused its position as a dominant purchaser within the meaning of Sec. 19 (2) No. 5 ARC (2013) and Sec. 20 (3) ARC (2007) by inducing the producers of sparkling wine to grant price adjustments and compensations without any objective justification as well as by granting bonus

payments for the Plus store's renovations in absence of any consideration.

This new decision provides guidance concerning the scope of application of the so called "Anzapfverbot" that is also relevant for the application of the revised version of Sec. 19 (2) No. 5 ARC as part of the 9th Amendment of the ARC.

If a dominant purchaser requests benefits without any objective justification, it is presumed by law that it expects to accomplish this unjustified advantage due to its dominant market position (see para. 17 of the judgement).

Sec. 19 (2) No. 5 ARC addresses dominant purchasers as well as relatively market strong purchasers, i.e. buyers from which suppliers are dependent. In the case at hand, the FCJ found that the producers of sparkling wine were dependent on EDEKA irrespective to their own strong market position. Their dependence arises from a lack of alternative purchasers. The more turnover a supplier generates with sales to a specific purchaser, the higher is its dependence on that specific purchaser (see para. 47, 48 of the judgement). If the negotiation had failed, the producers would have lost their entire turnover with EDEKA, while EDEKA itself would only have lost the turnover of one core product. These losses could not have been compensated by sales to third parties.

Another important finding of the FCJ is that the requirements of Sec. 19 (2) No. 5 ARC can already be met by the buyer's first demand for an unjustified advantage: The legal purpose of this provision requires that a dominant or relatively market strong purchaser must not ask for unjustified benefits during or even in advance of subsequent negotiations. This applies irrespective of whether or not this demand has only been used as an initial

opening of negotiations or is finally agreed between the parties (see para. 29, 30 of the judgement).

As a general rule, a demand for benefits can be justified under Sec. 19 (2) No. 5 ARC if the requested advantage is proportional to the consideration granted. The FCJ states that benefits are proportional if they are based on economic considerations such as the quantity of the purchased product or additional services. If, however, the benefits requested by the purchaser are not related to supplier- or product-specific aspects of the supply contract it can be assumed that they are not proportionate and merely the result of the purchaser's dominance or relative market strength. These economic considerations should not be limited to an individual examination of every single negotiation topic but must be the result of an overall assessment of the conditions requested by the dominant purchaser. Yet, a once requested disproportionate benefit cannot retroactively be justified by fair negotiation results. In the case at hand, the infringement of Sec. 19 (2) No. 5 ARC could neither be justified by EDEKA's expectation of tough negotiations following its first demand nor by the suppliers' positive assessment of the deal from today's point of view.

The FCJ stresses that the factual justification of the granted benefits must be determined regardless of the supplier's market position, its possible countervailing market power or the causal link between its market position and the demanded benefit.

Comment

With this judgement, the FCJ strengthens the rights of suppliers in relation to dominant purchasers. It applies the old version of Sec. 19 (2) No. 5 ARC in a way compatible and corresponding with the wording of the new version of this provision as revised in the course of the 9th Amendment of the ARC in 2017. Even though it remains difficult to draw a clear line between tough negotiations and the abusive demand for benefits, this decision establishes a general framework for the assessment of request for benefits by dominant purchasers. Of particular importance for practitioners is the FCJ's finding that the dominant or relatively market strong purchaser's first demand for benefits is already decisive in determining whether this conduct was abusive or not. A later adjusted benefit package following the parties' negotiations will likely only be justifiable in exceptional individual cases.

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