German court quashes FCO abuse decision against Edeka

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On November 18, 2015, the Düsseldorf Court of Appeal quashed the decision of the Federal Cartel Office ("FCO") that supermarket chain Edeka had abused its market power vis-à-vis suppliers by requesting special terms and conditions ("t&cs") following its acquisition of discounter Plus in 2008 (so-called "wedding rebates"). The ruling is not yet published, only a press release.

Legal background

The case marks a rare occasion on which the FCO has applied (former) Section 20(3) of the Act against Restraints of Competition (ARC), now Sections 19(2) no.5, 20(2) ARC. Section 19(2) no. 5 ARC prohibits a dominant company to abuse its market position by requesting benefits from other companies without objective justification – in other words, the prohibition of an abuse on the demand-side in procurement markets. Section 20(2) ARC applies the same prohibition to companies with "market power", from which other companies are dependent, which is the case in a supplier-customer relation if there are no sufficient and reasonable alternative customers available. The provision is a special subsection of the general prohibition under German law to abuse "relative market power" or "quasi-dominance" in Section 20 ARC. Generally, public enforcement of Section 20 ARC is not very common; the provision typically plays a bigger role in private litigation in supplier/customer relations.

The FCO case

Following the integration of Plus's outlets into its own discount business at the end of 2008, Edeka had started "special negotiations" with around 500 suppliers across various product segments in the first months of 2009, requesting (i) to compare t&cs and obtain the best prices as granted to Plus, (ii) an "adjustment of the payment targets", (iii) a continuous "synergy bonus" for potential cost savings on the supply-side, (iv) a "partnership remuneration" for the refurbishing of outlets, and (v) a "product portfolio expansion" bonus for possible additional product listings in the new outlets – all of which with retroactive effect per January 2009.

The branded goods manufacturers association in Germany complained about these requests, which triggered the proceedings. The FCO carried out dawn raids in 2009. Afterwards, it limited the proceedings to the exemplary sparkling wine product group and interviewed witnesses. The FCO issued the abuse decision on July 3, 2014. (The FCO had not only reviewed the original Edeka/Plus merger, but also carried out a sector-inquiry into the grocery retail market in Germany in parallel to the abuse case.) It did not fine Edeka, because the FCO examined various issues in the framework of Section 20(2) ARC for the first time.

In substance, the FCO found that each of the four selected sparkling wine suppliers was dependent on Edeka within the meaning of Section 20(2) ARC, in light of Edeka's general position on the retail grocery sales and procurement markets in Germany, the actual market conditions in the sparkling wine procurement market, as well as the bilateral supply-relations with Edeka. The FCO found that the various requests was illegal, due to lack of objective justification. *Inter alia*, the FCO took issue with the retroactive payment and adjustment of conditions; Edeka's unilateral setting of adjusted payment targets; the cherry picking when requesting selected favorable elements of Plus's t&cs without taking into account Plus's overall package; and requesting payments without consideration (synergy bonus and partnership remuneration).

In the case summary, the FCO explained that the decision had general significance beyond the individual case and should help drawing the line between legitimate "tough negotiations" on the one hand and an illegal abuse of buyer power on the other. It also mentioned that in light of an ever increasing concentration in the grocery retail markets in Germany it would be necessary to apply Section 20(2) ARC consistently. The abuse of procurement power would not only harm the suppliers concerned, but also smaller and medium-sized grocery retailers. Not only would their t&cs directly deteriorate in comparison to larger competitors, but they would also not be able to secure more favorable individual t&cs in the future (because of the suppliers fearing a possible similar adjustment exercise in future mergers).

The Court's ruling

Edeka appealed the decision with the Düsseldorf Court of Appeals, who quashed the FCO's decision, apparently *inter alia* based on a different assessments of the facts. The Court heard several witnesses and concluded that the relevant "wedding rebates" were the result of negotiations, not of an abuse on Edeka's side. It seems that the Court already rejected the finding that the selected suppliers were dependent on Edeka and thus, that Section 20(2) was applicable. The Court held that Edeka's actual market power was counterbalanced by the suppliers: as a full product range supermarket, Edeka was dependent on the suppliers' sparkling wine, because consumers expected to find and buy these well-known brands in Edeka outlets.

Against this background, the Court qualified the t&c discussions as commercial negotiations with requests and counter-requests, which typically only takes place among almost equally strong parties. The Court stressed that all four suppliers managed to reduce Edeka's initial requests, sometimes to a significant extent, as well as to obtain important trade-offs in the negotiations. In addition, contrary to the FCO's fact finding, the Court held that Edeka did not unilaterally set the new payment targets, but made the latter conditional upon the suppliers' consent, and subsequently entered into negotiations on this point when the suppliers did not agree.

Conclusions?

It is unclear whether the Court merely came to a fundamentally opposite conclusion when assessing the facts or whether it also rejected (parts of) the FCO's approach in applying Section 20(2) ARC in general. The FCO is examining whether to further appeal the ruling to the Federal Court of Justice, which would be limited to points of law. In the meantime, the FCO is expected to be more reluctant to bring any further Section 20(2) ARC cases, including in the highly concentrated retail grocery markets, contrary to its prior announcement in the case summary. The case may indeed be remembered as a landmark decision in the future, but it is not clear yet whether it will mark a push or rather the end of public enforcement of Section 20(2) ARC.