# EDEKA “Wedding Rebates” – German Federal Supreme Court Removes Roadblock to Antitrust Enforcement in Food Retail Sector

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On 23 January 2018, Germany’s Federal Supreme Court (Bundesgerichtshof – BGH) handed down its judgment on allegedly anti-competitive requests for preferential rebates and conditions by food retailers (case KVR 3/17 – not yet published). This is an important judgment as it removes a major roadblock to antitrust enforcement in the food retail sector in Germany, and maps a route for antitrust enforcement in a sector in which regulators have historically struggled to make much headway.
In comparison to EU competition law, Germany’s antitrust laws confer broader enforcement powers against anti-competitive behaviour of powerful market players. In addition to dominant undertakings, market players with “relative” market power may not abuse their position in relation to business partners that are dependent on them (commonly referred to as *Anzapfverbot* / the “tapping prohibition”).

In its 2014 200 page landmark decision against EDEKA’s so-called “wedding rebates” the Federal Cartel Office (Bundeskartellamt – BKartA) exercised these otherwise rarely used powers to address abuse of relative market power. Allegedly, EDEKA had requested suppliers to agree to a number of preferential conditions to finance its take-over of “Plus” discount markets from Tengelmann (the “wedding” of EDEKA and Plus). Since approximately 500 suppliers were affected by the demands, the BKartA chose four sparkling wine suppliers as a ‘sample’ to investigate the preferential conditions further. It found that EDEKA’s request for rebates constituted an abuse of its relative market power towards them. The BKartA’s decision did not impose fines but was intended to generally clarify the line between admissible “hard bargaining” and illegal imposition of preferential conditions by powerful buyers /retailers like EDEKA.

Following EDEKA’s appeal, the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf – OLG) quashed the BKartA’s decision in full. Surprisingly, the OLG did not permit a further appeal to the BGH, as the case did not involve “a legal question of fundamental importance” (OLG Düsseldorf, judgment of 18 Nov. 2015 – VI-Kart 6/14 (V), para. 236).

Upon the BKartA’s application, the BGH admitted a further appeal and, contradicting the OLG, decided that the following legal questions had to be clarified (ruling of 15 Nov. 2016, case KVZ 1/16):

- Whether and to what extent countervailing supplier power must be taken into account to outweigh relative market power, and whether each preferential condition must be assessed individually (instead of the full rebate package).
- The extent to which a causal link between relative market power and a demand for preferential conditions is required.
- The types of return that could justify preferential conditions, e.g. could a food retailer legitimately demand rebates if the advantage gained is invested in the renovation of old supermarkets, since the supplier may thereby indirectly benefit from a more attractive shop?
- Does the absence of a return or compensation render any demand for preferential conditions automatically anti-competitive?

The BGH’s replies to these questions have not been published but press reports suggest that the BKartA’s decision on those points was upheld by the BGH.

The OLG’s initial judgment in 2015 created such big waves that the legislator considered it necessary to amend the relevant provision in order to “ensure the effective applicability of the so-called tapping prohibition” and clarify the legal uncertainties reflected therein (see draft of 9th Novella, BT-Drs. 18/10207 of 7 Nov. 2016, p. 52). The legislator noted that no causality beyond the request for an advantage by an undertaking with relative market power is required. The language requiring the undertaking with relative market power “uses its market position” has been deleted. Furthermore, the legislator added criteria (which had previously been used by the BKartA) to facilitate determining whether preferential conditions are justified or not. In particular, it must be taken into account if the reasons for the requested advantage are reasonable and transparent to the dependent business partner and if the advantage is proportionate.

However, in its opinion on the draft of the 9th Novella date 25 July 2016 (p. 22), the BKartA took the view that the need for a (further) change of law could be only determined once the BGH had rendered its judgment.

Throughout the EU, competition regulators are faced with the complex task of how to tackle antitrust issues in the retail supply chain. The EDEKA-ruling and the amendment to the law provide clarity in Germany – one of Europe’s biggest markets. The BGH’s judgment and the BKartA’s next move will be crucial to the sector as a whole!