

Update: EDEKA “Wedding rebates” - German Federal Supreme Court answers key questions on abuse of relative market power

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Germany’s Federal Supreme Court (Bundesgerichtshof – BGH) has now published its full judgment in *EDEKA – wedding rebates* (case KVR 3/17) on allegedly anti-competitive requests for preferential rebates and conditions by food retailers.

For background on the preceding decisions of the Federal Cartel Office (Bundeskartellamt – BKartA) and Higher Regional Court of Düsseldorf (OLG Düsseldorf) please see our [previous post](#).

The BGH’s judgment clarifies a number of issues regarding the application of Germany’s rules on abuse of relative market power.

The concept of relative market power does not exist at EU level which covers only abuse of market power by dominant undertakings. In Germany, relative market power exists in vertical relationships (i.e. supplier/customer relationship) if one undertaking is “dependent” upon the other. An undertaking is dependent if it has

no possible and practicable alternatives available to switch business partners.

The rules on exclusionary and discriminatory practices by undertakings holding relative market power under secs. 20 (1), 19 (1), (2) No. 1 Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB) protect only small- and medium-sized undertakings.

However, the so-called tapping prohibition of secs. 20 (1), 19 (1), (1) No. 5 GWB applies to protect all dependent undertakings, irrespective of their size. An undertaking holding relative market power infringes the tapping prohibition if it requests advantages from a dependent undertaking without objective justification – in other words, it “taps” the dependent undertaking’s economic resources in an abusive manner.

The BGH now clarifies a number of material aspects of the tapping prohibition including the dependency criterion, when an advantage is requested and under which conditions there can be an objective justification.

Dependency. The BGH confirmed that the sparkling wine suppliers concerned were dependent on their customer EDEKA. In particular, the court took into account that the food retailer was an important customer for the suppliers who generated 10-40% of their turnover with sales to EDEKA. Furthermore, suppliers were not sufficiently able to switch customers whilst contracts were already running as contracts were negotiated on annual basis. Accordingly, intra-year delistings by EDEKA would leave the suppliers without a feasible alternative to shift their goods to other buyers. The BGH also noted the asymmetry in dependencies: while suppliers would lose 10-40% of their turnover, EDEKA’s loss in sales would be minimal. The brand-loyalty of consumers is not that high so the vast majority would not switch supermarkets if their favourite sparkling wine were not available.

While the question of dependency was rather industry-specific, the BGH further clarified how the conditions for abuse of relative market power by “tapping” must be understood in general.

Request. The BGH interprets “requesting” an advantage very broadly. A one-time demand of an abusive advantage is sufficient, even if it is presented as negotiable or the request is ultimately not successful.

Advantage. Also the notion of “advantage” has been clarified. The BGH took the

view that any improvement of the status quo constitutes an advantage. (Exception: there is no advantage if there is an obvious, classic contractual exchange of mutual benefits, and this is objectively apparent to the other party.)

Objective justification. Finally, there is the question whether the advantage has been requested without objective justification. This includes the determination of whether a practice simply constitutes legitimate “hard bargaining”.

A lack of justification is presumed if there is no objectively discernable reward for the requested advantage, or if the reward is obviously disproportionate. The presumption shifts the burden of proof onto the undertaking which is in a position of power. In *EDEKA*, the court applied this presumption as EDEKA had demanded additional advantages to existing supply contracts in the wake of taking over the Plus supermarket chain without offering a proportionate compensation.

In this context, it should be noted that the relevant provision on objective justification has recently been amended by the legislator’s 9th Novella of the GWB (see sec. 19 (2) No. 5 GWB). It now states that the assessment should particularly take into account whether the request is comprehensibly justified towards the dependent undertaking and whether the advantage is proportionate.

Deviating from the BKartA’s decision, the BGH took the view that individual conditions cannot be assessed in isolation from the entire arrangement between the parties. A business partner would naturally consider the full package of conditions and rewards to determine whether the offer is economically attractive. Similarly, any assessment of the objective justification has to be based on the full package of conditions attached.

Speculative future rewards are insufficient and too vague to justify an advantage. In this context, the BGH examined EDEKA’s request for a partnership fee (*Partnerschaftsvergütung*). EDEKA had asked its suppliers to contribute a fixed percentage of their turnover generated with EDEKA for the renovation of supermarkets, and argued that suppliers would thereby benefit from more attractive shops. The court held that such an advantage was too remote as it did not relate to the specific supplier, to certain groups of goods or distinct products.

Finally, the ultimate result of the parties’ negotiations cannot compensate for the request for an unjustified advantage. The BGH pointed out that the law is clear as

it relates to the mere request (not the contract or the final result of negotiations). The goal is to avoid any distortion of negotiations from the outset.

While the 9th Novella intended to eliminate the (highly debated) element of causality between relative market power and a request for an unjustified advantage from the provision, the BGH reconfirmed this position also for the previous version of the tapping prohibition. The BKartA does not have to prove that the powerful undertaking relied on its market position in order to achieve or request the advantage. Establishing relative market power and the fact that there was a request for an unjustified advantage by the powerful undertaking is sufficient.