

## German Supreme Court Issues Landmark Ruling on Unfair Trading Practices



### IN SHORT

**The Situation:** Market-dominant and powerful companies in Germany are subject to a number of rules that are significantly broader and stricter than the European Union's, Article 102 AEUV, which prohibits the abuse of a dominant position.

**The Development:** A recent decision by the German Supreme Court provides guidance on a previously rarely applied prohibition on demanding unjustified benefits from suppliers.

**The Result:** The decision significantly broadens the scope of Germany's prohibition on demanding unjustified benefits from suppliers. It loosens the criteria for the application of the prohibition, eliminates the previous requirement of an abuse of the dominant or powerful position, and toughens the criteria for a justification of the demand.

On February 2, 2018, the German Supreme Court ("*Bundesgerichtshof*") published a landmark ruling on the prohibition that prevents market-dominant and powerful buyers from demanding unjustified benefits from suppliers. The decision concerned the demands by EDEKA (one of Germany's large retailers) for an "alignment of conditions," an "adjustment of payment terms," and a so-called "partnership reimbursement" in the context of EDEKA's acquisition of 2,300 stores from a competitor. The decision is relevant to other industries where the mutual dependence between buyers and suppliers is not commensurate with the disadvantage to the suppliers.

#### The Facts of the Case

Following the acquisition of a competitor's 2,300 stores at the end of 2008, EDEKA compared its own purchase conditions with those of the acquired stores and demanded an adjustment from suppliers that had offered more favorable conditions to its competitor. The comparison included even those conditions that had existed only temporarily before the acquisition. Further, EDEKA compared its own payment terms with those granted to its competitor and demanded an adjustment when the competitor had more favorable terms, even where these terms had been part of a larger deal. Finally, EDEKA asked the suppliers to share the costs of refurbishing the acquired stores by means of a partnership reimbursement.



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The *Bundesgerichtshof* overturned a Düsseldorf Higher Regional Court decision of 2015, which set aside a 2014 order of the German Federal Cartel Office ("*Bundeskartellamt*") that had considered EDEKA's demands to be illegal. The initial Cartel Office proceedings were triggered by a complaint from the German Brands Association ("*Markenverband*"), after EDEKA had requested suppliers to agree to the "wedding" conditions at the beginning of 2009.

#### The Decision's Key Findings

The *Bundesgerichtshof* held that:

- In order to fall under the prohibition against demanding unjustified benefits from suppliers, it is sufficient that the buyer accounts for a substantial share of the supplier's total sales and that the suppliers have limited alternatives for selling their products.
- The prohibition already applies to mere demands for unjustified benefits. The outcome of the negotiations that are started by such demands is irrelevant.
- The prohibition does not require that the powerful buyer abuses its market dominant or powerful position vis-à-vis the supplier.
- Any demand for a benefit that is not combined with an objectively recognizable, appropriate quid pro quo, such as the offer of greater sales, is likely to violate the prohibition.
- The "cherry-picking" applied by EDEKA regarding the more favorable conditions applied to its competitor could not be justified since the combination of the respective more-favorable terms led to conditions that had not been enjoyed by either EDEKA or its competitor before.

- EDEKA's claim that its demand for the partnership reimbursement in the amount of 4 percent of the suppliers' sales was justified because the suppliers would profit from additional sales because of nicer stores is without merit.

### Comments and Guidance

While the *Bundesgerichtshof* stressed that hard negotiations are still legal even between market-dominant and powerful companies and their suppliers, procurement departments of major companies are well advised to review their practices (to the extent that they are subject to German law) in light of this decision.

First, many procurement departments may have to reconsider their view as to whether their company is subject to the prohibition on demanding unjustified benefits, in light of what they consider countervailing factors such as size and countervailing bargaining power. Further, by abolishing the requirement of an abuse of market power, the *Bundesgerichtshof* broadened the scope of the prohibition significantly.

Second, according to the *Bundesgerichtshof*, the outcome of the negotiations, including whether the suppliers themselves consider the ultimate package of conditions to be fair and reasonable, is irrelevant. By limiting its view on whether the demand is combined with an appropriate quid pro quo, the *Bundesgerichtshof* further broadens the scope of the prohibition.

Third, the *Bundesgerichtshof's* assessment of which demands may be considered objectively justified makes it likely that the *Bundeskartellamt* and the German courts will require determinable benefits for suppliers such as lower transaction costs or greater sales. The *Bundesgerichtshof* clearly considered the demand for lump sum benefits solely based on the supplier's sales to the buyer as obviously unjustified.

Fourth, the *Bundesgerichtshof's* decision is likely to be applied in other industries where suppliers achieve a significant portion of their sales with one particular customer and where they have difficulty identifying additional suitable customers.

### TWO KEY TAKEAWAYS

1. While the decision concerns a fact pattern that appears to be mainly relevant for negotiations between Germany's large retailers and their suppliers, it is to be expected that it will also be applied to other industries in which the mutual dependence between buyers and suppliers is not commensurate with the disadvantage of the suppliers.
2. All procurement departments of major companies operating in Germany are advised to review their practices to ensure compliance with this decision.

### CONTACTS



Jürgen Beninca  
Frankfurt



Carsten T. Gromotke  
Frankfurt



Philipp Werner  
Brussels



Johannes Zöttl  
Düsseldorf

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