No more empty shelves?

Competition Law as the new wonder weapon

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Empty supermarket shelves are an image German consumers have become quite used to over the recent years. Haribo gummy bears were no longer for sale at Lidl for a while, Dr. Oetker's pizza could not be shopped in Kaufland freezers and Mars stopped delivering EDEKA for a long time. It seems that increasing costs, e.g. for energy, transportation, production, have translated into price fights between manufacturers facing increased production costs on the one side, and retailers on the other, who try to keep price raises at bay knowing the hardship of passing them on to end consumers. What is interesting from a competition law perspective is that a number of these conflicts not only gained fairly high press attention but were even escalated to civil courts, where competition law arguments played a core role.

A cereal matter and black sugar water

In a recent case that caused a rather heated public debate, US food giant Kellanova, producer of Kellogg's cornflakes, stopped supplying EDEKA and Rewe, causing empty cornflakes shelves in two of Germany's largest retailers. Both had refused to accept the price increase presented to them by Kellanova – according to press reports 45%. Apparently, Kellanova continued to supply other German retailers that had temporarily increased the consumer prices for Kellanova products. Some months earlier, Coca-Cola had also stopped delivering EDEKA with a range of their soft drinks. Like in the Kellogg's case, EDEKA had – after unsuccessful negotiations – refused to meet Coco Cola's increased price expectations.

In the Coca-Cola case, EDEKA filed suit, trying to enforce *a right to delivery* (or: a duty to deal on the manufacturer's side) based on alleged antitrust infringements, namely abusive pricing.

The claim was successful against Coca-Cola in the first instance with the regional court of Hamburg issuing an interim injunction on 8 September 2022, by which the company was ordered to resume deliveries to EDEKA. According to the court's initial opinion, Coca Cola had been abusing its market power in order to enforce unreasonable price increases with the delivery stop. However, the final ruling of the regional court a few weeks later revoked this order. The court, eventually, did not see sufficient grounds to confirm the allegation of excessive pricing. According to the court, this had not been sufficiently proven by EDEKA in the summary proceedings. Besides, it found that the legal requirements for issuing interim measures were not sufficiently substantiated.

In the Kellanova case, the retailer went for a slightly different procedural strategy: First, it filed a formal complaint against Kellogg Deutschland GmbH ("Kellogg's") at the Federal Cartel Office (FCO - *Bundeskartellamt*). In addition, EDEKA informed Kellogg's about its intention to claim damages of approx. EUR 34 million in front of civil courts. According to media reports in June 2024, the FCO decided not to initiate an investigation against Kellogg Deutschland GmbH following a preliminary examination. Attempts to increase consumer prices for Kellogg's products failed and prices decreased again. Additionally, media reports state that EDEKA has not yet asserted its claims in court, but is still assessing and quantifying potential claims.

What is interesting about these cases is the attempt of using antitrust as a leverage to enforce genuinely contractual obligations. In a sector where many players operate in highly concentrated markets with in many segments, rather strong market positions on both the retailer and the manufacturer side, it is certainly not unreasonable to build a claim based on an allegation of dominance abuse. Of course, dominance – and its abuse – need to be established in each individual case.

The Claim to Delivery

Under German competition law, the enforcement of the "right to be supplied" is generally more common in relation to selective distribution systems. It is, in fact, a well-established tool for resellers who are members of a selective distribution system to secure their supply of products where suppliers – typically manufacturers of exclusive or luxury goods – have stopped supplying because resellers do not meet their expectations as to the manner and method of sale. The peculiarity under German law is that abuse of market power by refusing to supply can not only arise where the supplier has a dominant market position. Instead, a so-called "relative market power" can already be sufficient. Relative market power arises where other companies down (or up) the supply chain are dependent on an upstream (or downstream) company in a way that makes it particularly hard to evade harmful conduct (§ 20 GWB). In the FMCG sector, where brands play a significant role and many products are considered "must stock" items because of their popularity with consumers, and where retail landscapes are concentrated, this concept is particularly important.

Of course, apart from relative market power, there is the classical concept of "dominance", where a firm is essentially not restrained by other healthy competitors (market shares >40% can be an indicator). In a civil court case, it is up to the claimant alleging dominance to submit the required evidence and prove the allegation. In an FCO investigation, the burden of proof lies with the FCO. Note that the claim to delivery can be used in both directions, either for retailers facing abusive conduct from a dominant supplier or for suppliers facing similar behavior from dominant retailers.

Procedural Implications

The claim to delivery can be particularly useful when combined with an application for an interim injunction because this is an effective tool to combat the short-term effects of delivery stops. Nevertheless, applicants must be diligent due to rather strict legal requirements for interim injunctions, as the EDEKA/Coca-Cola case demonstrated. In order to obtain fast legal protection through injunctive relief (§ 33 GWB), claimant must be able to show that the unlawful behavior is still ongoing or at risk of being repeated instantly at the time of the application. These applications are usually only affirmed by courts if applicants are either in an extraordinary emergency situation regarding their economic position or if the imminent damage of a delivery stop/rejection disproportionately exceeds the opponent's potential damage by maintaining supply.

Is (competition) law the answer?

The relationship between manufacturers and retailers – which has never been easy – remains charged with tension, especially in times of overall price inflation. A claim to delivery based on competition law can very well serve as a great strategy against imminent and unjustified delivery stops in the FMCG sector where an abuse of dominance allegation is at stake. However, competition law is not the only tool dealing with an unlevel playing field in the FMCG sector. In 2019, the EU Directive on unfair trading practices in the agricultural and food supply chain (*UTP Directive*) came into force, followed by its German equivalent, the Act to strengthen organizations and supply chains in the agricultural sector (*AgrarOLkG*) in 2021. The regulations provide for a complementary framework to competition law, aiming to redistribute profits to farmers by banning certain practices *per se* without any possibility of (efficiency or consumer welfare-based) justification or exemption. Both the UTP Directive and the AgrarOLK are supposed to protect smaller suppliers from so-called unfair practices by larger buyers, under the assumption that trading partners with significant bargaining power (over €350 million turnover; note that for certain goods the turnover thresholds are even higher) can often negotiate on a level playing field. The regulations have been heavily criticized as not being proportionate and effective to level the playing field but rather to limit competition and the European single market. On July 5, 2024, the parliamentary groups of the coalition agreed on the draft bill to amend the AgrarOLkG. It remains to be seen what the consequences of this amendment are.

BLOMSTEIN regularly publishes updates on hot topics in competition law and has extensive industry know-how, particularly in the FMCG and retail sector. If you have any questions on this or others topics, Anna Huttenlauch and Marie-Luise Heuer will be happy to assist you.

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