

Halting delivery during price negotiations: Abusive or permissible under competition law?

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Regardless of the sector, companies around the globe are battling crises on multiple fronts, which has led to supply chain issues as well as rising costs for input products, energy, production and transport, not to mention the effects of inflation. To respond to these challenges—and the skyrocketing costs of production—manufacturers have had no other recourse than to hike up prices. Such increases may lead to heated negotiations and disputes e.g. between branded goods manufacturers and retailers, and/or can result in the manufacturer suspending deliveries or a large retailer delisting an entire brand from its shelves.

While price increases should come as no surprise in the current environment, allegations have been raised that some manufacturers may try to increase prices beyond what can be explained with cost changes. In such circumstances, companies may consider complaining to antitrust regulators or bringing actions before a civil court if they believe that competition law rules are being violated—in particular, if the other party is perceived as more powerful or even an “unavoidable” business partner.

A recent German court decision on a case involving price increases of consumer goods sheds some light on these issues. The court has set the bar high for retailers to prove that a price increase is abusive in the competition law sense and that a decision in interim proceedings is necessary. The principles set out in this decision provide guidance for consumer goods in Germany and could also become relevant in other jurisdictions and industries.

1. Background

In July 2022, Coca-Cola requested a major retailer in Germany, Edeka, to pay higher prices for certain products from 1 September 2022. When the two parties could not come to an agreement on the increase, Coca-Cola stopped deliveries. Edeka filed for a preliminary injunction with the Regional Court of Hamburg, claiming that Coca-Cola was abusing its dominant position by demanding excessive prices for its products. It asked the court to prohibit Coca-Cola from stopping deliveries, i.e. to continue delivering its products at the purchase prices agreed on in January.

On 8 September 2022, the court found that Edeka had credibly demonstrated that the price increases wanted by Coca-Cola were most likely “inappropriate” and that Coca-Cola abused its dominant position when it demanded that Edeka pay higher prices and then stopped deliveries. The court’s interim order forced Coca-Cola to continue supplying Edeka at the previously agreed prices until the end of September. In addition, the court ordered Edeka to provide additional facts to “credibly demonstrate” that Coca-Cola’s requested price increases were indeed anticompetitive. Coca-Cola appealed against this preliminary injunction.

On 29 September 2022, the court then reversed its view after an oral hearing on 23 September 2022 and ruled in favor of Coca-Cola. It rejected Edeka’s request to force Coca-Cola to supply products under the previous conditions and lifted the preliminary injunction.

2. Legal analysis

In Germany, preliminary injunctions will only be granted if:

1. The claimant can credibly demonstrate an infringement; and
2. It is sufficiently probable that waiting for a court decision in ordinary proceedings would have serious and irreversible negative consequences for the claimant.

As a result of the appeal, the court found that Edeka failed to demonstrate Coca-Cola's abuse of its dominant position or that the situation was sufficiently urgent to merit an obligation to supply in interim proceeding decision.

a. No competition law infringement

Abuse of dominance

According to the court, Edeka did demonstrate Coca-Cola's dominant position on the carbonated sweet beverage market. It also took the view that Coca-Cola did not refute the assumption of dominance, which in Germany is triggered if the market share is at least 40 percent.

In addition, the court held that Edeka did not sufficiently show that Coca-Cola had abused its market power to increase prices. One reason for this is that Edeka had considered the average price increase for the entire product range instead of assessing the price increases for the relevant products—meaning only those products that belong to the market(s) where the manufacturer is dominant. The court also took the view that Edeka did not demonstrate that Coca-Cola's price increase deviated significantly from increases that would result from regular competition in a comparable market, when compared with the prices of competitors, or when looking at pricing factors:

- **Comparable market:** Edeka used the market for beer and beer-mixed beverages for its comparison, but in the court's view this was not appropriate, as those are alcoholic beverages for which there is a significantly different customer base than for carbonated sweet beverages. Instead, the court considered the markets for water or non-carbonated sweet beverages to be more comparable.
- **Competitor prices:** The court left open whether a price comparison of Coca-Cola's competitors could be based only on its largest competitor (Pepsi), or if such comparison should also include other competitors (including private-label ones). In any event, Edeka did not provide sufficient information on this. It also did not add a safety margin or a surcharge so as to show the red line between Coca-Cola's freedom to set prices and when the pricing abuse allegedly began. The court reiterated that not just any price increase would be abusive; rather, only a significantly higher price. More important here is what constitutes "permissible pricing" versus "abusive price increases." Here, it was not clear to the court whether and why the prices previously agreed between Edeka and Coca-Cola in January 2022 should be the maximum permissible price.
- **Pricing factors:** Where no comparable markets exist, pricing factors can also be examined to assess whether the increased prices significantly deviate from those in competitive markets. However, Edeka did not submit any arguments in this regard.

Relative market power

In Germany, special rules apply not just to dominant companies but also when other companies are dependent on a particular company. This could be the case, for example, if a retailer has no sufficient and reasonable options to switch to another supplier, or if there is a significant imbalance of power between the parties. Such dependency could, for instance, be presumed where a manufacturer offers so-called "must-have" products so that the retailer has no other choice but to source these products from it.

Here the court rejected any claim under the relative market power concept. Instead, it took the view that there is no imbalance between the parties as there is no unilateral dependency of Edeka on Coca-Cola. Rather, Edeka and Coca-Cola are co-dependent, as both are strong players. Not only does Edeka need to purchase Coca-Cola products, Coca-Cola needs to sell to Edeka, as it is one of the largest retailers in Germany.

b. No urgency

The court also rejected the possibility that, in the event of non-delivery, Edeka would likely face serious and irreversible negative consequences that would justify forcing Coca-Cola to continue supplying it under the previous conditions. It stated that an interim injunction can only be granted under stringent conditions. For instance, if non-delivery would put the retailer's existence at stake, or if—from a balance-of-interests perspective—the damage suffered by the retailer because of the non-delivery would be disproportionate to the damage suffered by the manufacturer as a result of the forced supply at a lower price. Here, the court neither found that Edeka's existence would be threatened nor that it had sufficiently demonstrated what damage it would suffer in the event of non-delivery. Most importantly, the court stated that Edeka could still reclaim the (allegedly) abusively inflated prices from Coca-Cola at a later stage if they ultimately were found to be abusive. Lastly, when balancing the parties' interests, it also needs to be taken into account that the case is not straight forward but raises difficult factual and legal questions that should be dealt with in the main proceedings.

3. What does the decision mean for companies?

Manufacturers will welcome the decision, as the court has set the bar quite high for retailers to credibly demonstrate that a price increase is abusive and that civil courts need to step in.

As things stand now, for large German retailers, arguing that they are dependent on the supply will not be enough, as using the relative market power concept won't work if the parties are co-dependent on each other. Large retailers will therefore have to prove that the manufacturer holds a dominant position in respect of the goods whose pricing is in dispute.

Also, retailers who do not want to accept a manufacturer's new prices will face an uphill battle should they turn to the courts in hopes of a preliminary injunction to force delivery at the previous prices. They will have to provide detailed evidence to credibly demonstrate that the prices charged by the manufacturer are excessively high. The following points are particularly relevant:

- When arguing and submitting evidence of pricing abuse, retailers must do so for the specific products subject to the price increase on the relevant market where the manufacturer is dominant. Simply referring (more generally) to, or providing evidence for, the entire product range or submitting evidence (e.g. terms and conditions) without clearly identifying the relevant products will not be sufficient. Otherwise, the court may throw out the claim for this reason alone.
- Moreover, if using other markets for comparison when demonstrating excessive pricing, retailers will need to be careful in choosing the market and must carefully justify in their argument why it is a "comparable" market.
- If referring to competitors' prices to show excessively high pricing, it will not be sufficient to merely indicate the average percentage price increases of the competitor. Instead, the retailer must indicate the price increases for specific products of the competitor; otherwise, the competitor's prices cannot be compared with the price increases of the manufacturer. Here, it is not the percentage price increase that is relevant; the specific (absolute) price must be abusive. The retailer must show the prices charged by the competitor, the prices they agreed upon and that that competitor is not demanding additional price increases.

- Ultimately, retailers will have to demonstrate what the maximum permissible price would be.

The most critical issue for retailers is that it will be very difficult to credibly prove the necessary urgency necessitating the preliminary injunction for these reasons:

- Manufacturers will argue—in line with the Regional Court of Hamburg—that retailers can claim a refund of an proven excessive prices at a later stage.
- Also, and especially for large retailers, it will be very challenging to argue that the (temporary) non-delivery of products would threaten their existence.
- Retailers would also need to demonstrate what damage they would suffer as a result of the non-delivery. Any alleged loss of profits must take into account retail price increases (passing-on) and increased sales of private label products of the retailer. It will not be sufficient to just refer to a projected and lump-sum revenue loss.

Manufacturers should, in particular, note the following:

- Besides market shares, a market-share lead over the next-largest competitor and the possibility for retailers to source the products from other manufacturers will continue to play a central role in the assessment of their market position. In particular, merely claiming that their market share does not confer any advantages in negotiations with retailers or that the retailer can switch to other branded goods manufacturers (excluding private labels) will not be sufficient; rather, this must be plausibly demonstrated.
- The court also expressed doubts that the market position of retailers must be taken into account when assessing market dominance. This means that, unlike in case of (only) relative market power, it will be difficult for manufactures to successfully argue that they do not have a dominant position simply because the large retailers also have significant market power in Germany.
- In addition, manufacturers with (allegedly) strong market power are well advised to have guidelines in place making sure that their price increases are in line with competition rules. The reasons for price increases and their underlying justifications should also be well-documented internally to ensure antitrust compliance. This will also help manufacturers to prove that the new prices are not excessively high in case customers challenge them during the negotiations or in court proceedings.

Outlook

According to the press, Edeka appealed the court's latest decision to the Higher Regional Court of Hamburg. Not only the parties to this dispute but also other manufacturers and retailers will continue to closely follow the next round of this legal dispute. While tough negotiations and disputes about price increases are not uncommon, they rarely end up in court. Thus, the court decisions in this case will be important for manufacturers, retailers and any other companies holding strong market positions.

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