

18 March 2013

The Higher Regional Court Dusseldorf strengthens the position of specialised retail shops: Luther successfully represented the German trading association *Deutscher Großhandelsverband Haustechnik e.V.* in court

Dusseldorf – In its recent ground-breaking decision, the Higher Regional Court Dusseldorf (OLG) strengthened the position of retail store holders vis-à-vis distance selling companies. The court found that the German wholesale association *Deutscher Großhandelsverband Haustechnik e.V. (DGH)* was not obliged to appoint a specialist distance selling company as a member. The final judgment was made at the beginning of March. DGH was represented by Luther in the case.

“The judgment takes up the cudgels on behalf of all retailers who run fixed businesses”, said Anne Wegner, Lead Partner at Luther. “These retailers employ experts to advise customers in their shops and have large show rooms where customers can view and test products. This type of service constitutes additional value and therefore justifies a differentiation between distance selling companies”. Anne Wegner added: “At the same time, the judgment creates legal certainty with regard to various unanswered questions in connection with claims relating to admission under German antitrust law. The judgment underpins that associations are autonomous, a principle that is constitutionally protected, and the fact that associations can continue to maintain a homogeneous membership structure”.

The proceedings

In August 2010, a Baden-Württemberg wholesale company asserted a claim against DGH arguing that it should be appointed a member of the association. The claim was

based on Sec. 20 (6) of the German Act against Restraints of Competition (GWB). According to these laws, associations may not treat similar companies unequally without any factual reason to do so. The applicable articles of association of the relevant association are decisive when determining whether or not admission should be granted.

DGH had previously refused the application for admission by referring to the articles of association of the association: according to DGH, retailers with a fixed place of business who offer their products mainly through distance selling are, according to the articles of association, not classed as specialised wholesale companies. It is only possible for a company to become a member of the association if they can prove that a full range of products is permanently on show in one or several show rooms and that they fulfil the typical service functions for this industry. Although the applicant had a show room in Baden-Württemberg, he sold his heating and sanitary products primarily in a catalogue.

The Regional Court (LG) Cologne dismissed the claim made by the wholesale company already in the first instance (88 O (file) 33/10, 09.02.2012). The Higher Regional Court Dusseldorf then confirmed this judgment and dismissed the appeal ((VI - U (file) 5/12 dated 23.01.2013); according to the Higher Regional Court, the dismissal does not constitute any unequal treatment towards the distance selling company that cannot be objectively justified:

- An association that mainly consists of retailers with a fixed place of business is entitled to exclude what is essentially a distance selling company from the association. According to the Higher Regional Court, this is justified by the different interests, as the distance selling company's business is to a large extent based on the advice and services provided by the stationary wholesale trade.
- The fact that a retailer maintains a show room or retail shop does not necessarily mean that this retailer is a stationary retailer. If the retailer's distribution structure allows for all the products to be sold by distance selling, this retailer has to essentially be deemed a distance selling company.
- Within the scope of the autonomy of the articles of association, an association may also amend its articles during the application period and even as a consequence of a concrete request for admission.

- If a company is rejected admission because it has not fulfilled the requirements set out in the articles, this is indeed discrimination, if the existing members of the trade association also do not fulfil these requirements. However, the applicant must bear the burden for demonstrating and proving that one or several members do not fulfil the admission requirements.
- The trade association is not only entitled but is actually also obliged to give its members a reasonable period of time to satisfy any changes to the requirements in the articles, without this constituting discrimination towards the applicant (who is classed on the basis of the amended articles of association).

Deutscher Großhandelsverband Haustechnik e.V.

Deutscher Großhandelsverband Haustechnik e.V. currently comprises 95 German wholesalers with more than 1,000 fixed places of business who sell sanitary-, climate-, ventilation- and heating-products to the specialised trade throughout Germany. Bathroom accessories as well as energy-efficient heating and cooling equipment are shown in approx. 800 German trade exhibitions. The association was established in 1900 and sees itself as a link between the industry and the trade.

On behalf of Deutscher Großhandelsverband Haustechnik e.V.

Luther Rechtsanwaltsgesellschaft, Dusseldorf: Anne C. Wegner (Lead Partner), Sophie Oberhammer (both Antitrust/Distribution).

On behalf of WS Weinmann & Schanz GmbH

CMS Hasche Sigle: Dr Markus Schöner, Antitrust

Contacts in case of questions regarding the judgment

Anne Caroline Wegner, LL.M.

Lawyer | Partner

Luther Rechtsanwaltsgesellschaft mbH

Graf-Adolf-Platz 15

40213 Dusseldorf

Phone: +49 211 5660 18742

Fax: +49 211 5660 110

anne.wegner@luther-lawfirm.com

Brief Profile Luther Rechtsanwaltsgesellschaft mbH

Luther is a leading German commercial law firm that offers comprehensive legal and tax services. The full-service law firm is represented at 11 German economic centres and at important investment locations and financial centres in Europe and Asia with international offices in Brussels, Budapest, London, Luxembourg, Shanghai and Singapore. Our clients are medium-sized enterprises and large corporations, as well as the public sector.

Luther works closely with other commercial law firms in all the prevailing jurisdictions worldwide. On the Continent, Luther is part of a group of independent leading law firms who have worked together for many years on joint cross-border projects. Luther is also the German member of Taxand, a global organisation of tax advisory firms.

Luther Rechtsanwaltsgesellschaft mbH is a law firm with a business approach: our innovative awareness aspires us to provide our clients with customised legal advice that addresses individual needs and delivers the greatest possible economic benefit. Our lawyers and tax advisors have a solid understanding of interdisciplinary matters and a wealth of experience in collaborating on complex tasks. Further information is available at: www.luther-lawfirm.com

Press contact

Luther Rechtsanwaltsgesellschaft mbH

Katja Hilbig | Press Officer

Anna-Schneider-Steig 22

50678 Cologne | Germany

Phone: +49 221 9937 25070

Mobile: +49 1520 16 25070

Email: katja.hilbig@luther-lawfirm.com