

David versus Goliath: FCA submits draft guidelines on good conduct of entrepreneurs

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Overview

Draft guidelines

Comment

The Federal Cartel Authority (FCA) has published for consultation draft guidelines on the good conduct of entrepreneurs.⁽¹⁾ Interested parties had until 27 August 2018 to submit their comments.

Overview

For many years, issues have been raised – although few cases brought – regarding complaints against certain business practices, particularly, relating to the negotiation and enforcement of terms of contract resulting from a gross economic imbalance between contractual partners in the supply chain.

Many of these issues relate to big retail chains negotiating prices, rebates, bonus payments and terms of contract with small and medium-sized suppliers, partly across national borders. This is not a new problem and it has occurred in many other jurisdictions. For example, in 2009 the Groceries Supply Code of Practice⁽²⁾ was published in the United Kingdom. At the EU level, several initiatives took place which led to a proposal for a European Parliament and Council directive on unfair trading practices in business-to-business relationships in the food supply chain.⁽³⁾

In the same tradition, the FCA has published its draft guidelines. However, these guidelines are not binding and generally only summarise long-observed facts and existing laws.

Draft guidelines

The draft guidelines identify the various kinds of unfair trading practice and divide them into obstructive and exploitative practices, as follows:

- Obstructive unfair trading practices:
 - boycotts and denial of business;
 - discrimination;
 - obstruction of sales;
 - predatory pricing;
 - market blockage;
 - use of rebates and bonuses by dominant undertakings;
 - unusual contractual restrictions; and
 - most favoured treatment clauses.
- Exploitative unfair trading practices:
 - requests for unreasonable low purchase prices;
 - requests for unjustified rebates and special conditions;
 - abuse of market power;
 - undue transfer of risks;
 - discriminating contractual clauses and ambiguous or retroactive abuse of certain contractual clauses;

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- intentional creation of legal uncertainty by way of refusing written contracts; and
- withholding of information.

The FCA's guidelines then describe the laws and remedies thereunder available to counter such unfair trading practices:

- The Cartel Act – prohibits cartels, certain vertical collusions and the abuse of a dominate position.
- The Local Supply Act – dates back to the late 1970s and requires good conduct by businesspeople, particularly those supplying goods for resale.
- The Act Against Unfair Competition – proven to be effective against certain practices, particularly cases relating to advertising.
- The General Civil Code – contains clauses that could invalidate contractual provisions which are unusual, unfair or against good morals.

If violations of the Cartel Act or the Local Supply Act occur, the FCA and the affected undertakings can bring an action before the Cartel Court. Violations of the Act Against Unfair Competition and invalid contractual provisions can be filed with the general civil courts. In various combinations, interim measures, cease and desist orders and damage claims are available.

Finally, the FCA's guidelines hint at its recently established whistleblowing system, where complaints can be filed anonymously.

Comment

Generally, neither the practices nor the laws as described by the FCA are new. The major issue is fear: smaller and less aggressive enterprises are afraid to lose business if they stand up to their dominant contractual partners in cases where the loss of a contract could lead to their financial collapse.

However, in this respect, times are changing. Authorities all over Europe – including the FCA – are taking a keen interest in this issue and have pledged their support to well-founded complaints. Eventually, the results of the match between David and Goliath may be repeated, the historic outcome of which may not be out of reach.

For further information on this topic please contact [Dieter Hauck](#) at Preslmayr Attorneys at Law by telephone (+431 533 16 95) or email (hauck@preslmayr.at). The Preslmayr Attorneys at Law website can be accessed at www.preslmayr.at.

Endnotes

(1) www.bwb.gv.at/fileadmin/user_upload/PDFs/Leitfaden/Code_of_Conduct_13-07-18_final.pdf.

(2) www.gov.uk/government/publications/groceries-supply-code-of-practice.

(3) 12 April 2018, COM (2018) 173 final.

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