"If it walks like a duck and quacks like a duck … "

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"The new Fairness Catalogue for corporations: stand for corporate good practice" ("*Fairnesskatalog für Unternehmen: Standpunkt für unternehmerisches Wohlverhalten*") by the Austrian Federal Competition Authority ("*Bundeswettbewerbsbehörde*" or "*BWB*").

The Federal Competition Authority has decided to publish the abovementioned catalogue to strengthen competition. It states in the introduction that the catalogue was published since the Federal Competition Authority was receiving a number of claims stating misconduct which could not be settled under antitrust regulations and parties did not come forward. This applied in particular to the food trade but should be taken into account for other branches as well. The Agency tries to define good conduct and a list of actions, even if they are not antitrust violations which are considered bad conduct and may have civil law consequences. The catalogue also offers advice with regard to legal interpretation of certain actions, statutory provisions involved and what companies may do if affected by corporate bad conduct.

The introduction already contains specific advice that the company, in observance of data protection provisions, should document bad conduct in the business, even if they do not plan to act immediately which should contain:

Summary of facts
Meeting memos (date, name of people present and their job description/position)
Storing the files (emails and other correspondence).

The Agency concedes nevertheless that this is a European problem and that changes in the industry might make a change of the catalogue necessary and promises to do so within a year.

The Agency clarifies that the Fairness Catalogue constitutes its legal view of the problem and is non-binding for courts and/or other government institutions. However, the phrasing itself will make it difficult to defend conduct within the catalogue since the opposing party will be able to argue that it has the Federal Competition Authority on its side and a court would have to argue that the Federal Competition Authority is wrong. This seems unlikely.

After the first chapter, there follows a description of what actually constitutes corporate bad practice. They are deemed to hinder competition and consequently to lead to a reduction in variety and quantity of goods and services, a slowdown in innovation and a rise in prices. It states that the definition of the corporate bad practice is not the same as used in the Local Food Supply Code ("Nahversorgungsgesetz" or "NVG") but goes beyond.

The Fairness Catalogue divides corporate bad practice into three categories:

A corporation obstructs another in its economic development ("obstructive practices")
One side is unfairly treated in a transaction ("exploitative practices")
Other practices which may not be summarized under the first two categories.

Obstructive practices

The catalogue first mentions all different forms of boycott, which is probably the most obvious form of corporate bad practice. This goes from refusing to contract to threating the end of contractual relations. The Agency however clarifies that principles of freedom of contract and obligation to contract must be kept in mind.

The catalogue then proceeds to discrimination by unlawful means, and done in a way that opposes the principle of fair competition. Obstruction of Sales (e.g. interception of clients in front of a competitor's shop, intervention in open sales proceedings or removing of business identification). Price war or extreme discounting of prices with the aim to destroy the competition are also mentioned. It also describes the practice of market clogging, by flooding the market with products free of charge by dominant players in the market with the intent of driving other products out of the market. The use of a rebate system by producers to bind sellers contractually to obstruct competitors. Contractual provisions restricting the other parties' freedom to act (e.g. exclusivity clause). Use of the power of publicly owned companies (unfair use of the power inherent in publicly owned corporations). Request of best price guarantees by market domineering companies (a clause which obligates the seller not to sell the goods cheaper to a third party).

Exploitative practices

The catalogue proceeds to describe exploitative practices:

- request of inappropriately low purchase prices by companies with a strong market position;
- tapping, in particular by requesting unjustified rebates or special conditions by such companies;
- abuse of monopoly by refusal to contract;
- unjustified transfer of contractual risk to the other party;

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- disadvantageous contractual conditions, such as right to rescind from the contract without warning in case of delay;
- unreasonably high contractual damages;
- request of a warranty regarding the correct labelling;
- request by one party to use unclear conditions, in particular if they are then used retroactively;
- intentional creation of legal uncertainty by a refusal to provide a written contract;
- connecting bonification to the disclosure of client data or sales number or the request of other information without legal justification.

The intention behind this list seems to be to make corporations aware that these practices are illegal, even if their lawyers haven't.

Other practices

It continues with a list of other practices not falling under the above definitions but nevertheless illegal: breach of contract (whereas this is only significant competition-wise if the bad conduct goes beyond the mere breach of contract); changes of the contract after signing; single-handed interpretation (and probably application of thus devised rights) of unfavourable general conditions; general conditions in violation of public policy; practices which are accompanied by harassment, coercion or inappropriate pressure (fear factor); and forcing a contractual partner to accept services which they have not requested.

Rules of interpretation

The Federal Competition Authority goes one step further and offers guidelines regarding the legal standard to be applied when interpreting these acts and omissions. It suggests: the intensity of the business contact between the parties should be taken into account; the way the parties live their business relationship and the kind of production in question; and the difference in negotiation power. The emphasis is that not all actions which are felt to be personally discriminatory constitute discrimination but it must be carefully examined as to whether they have an impact on competition.

Catalogue of bad corporate practice

The Federal Competition Authority lists certain actions which it considers to be bad practice apart from their other legal ramifications. Apart from the obvious, that changing the price retroactively is considered to be bad practice, there are also other less obvious examples. One of them is the question of imposing technical standards on your partner which are not absolutely necessary for the functioning of the product. It is unclear what kind of practice this should be, since management will have very good arguments to justify being technically one step ahead.

Existing legal protection

The Federal Competition Authority continues in describing the existing legal protections, starting with antitrust regulations. What follows are classic examples of cartel violations (i.e. joint agreement of certain dominant companies not to deliver goods to a certain party). The catalogue also includes examples of market abuse. The catalogue rightly points out that under Austrian law there are cases of relative market dominance which mean a far larger market presence than the other market participants. Relative market dominance is present if the buyer must contract with the dominant party or face grave business disadvantages. The lesser-known legal provisions are those of the Local Food Supply Code which has to be seen as an addition to the Antitrust Regulations in the Cartel Code. In addition, there is also the Unfair Competition Code ("Gesetz gegen den unlauteren Wettbewerb") which regulates a party's civil law defences against competition offences. These codes cover most competition violations where a party does not necessarily have a domineering market position.

Last but not least, the code refers to the Civil Law Code ("Allgemeine Bürgerliche Gesetzbuch"). The catalogue mentions the prohibition of surprise clauses (para.864a ABGB) and the public policy clause (para.879 ABGB) and the corresponding provision in the Commercial Code ("*Unternehmensgesetzbuch*"). Simply said, the code offers protection for the weaker parties that the stronger party may not single-handedly impose conditions less favourable than the code.

Practical tips

The Catalogue closes with a brief summary of the different jurisdictions for the different claims and a reference to the whistleblowing system. The system may be accessed online and anonymously. However, the device has to be handled carefully since competition cases may not be as black and white and a corporation may opt for official whistleblowing at a later stage to get a lenient sentence. If the Federal Cartel Authority is aware of the cartel at this point, this road is closed.

Conclusion

The Fairness Catalogue does not contain any legal surprises. As the summary of laws and regulations show, there are several laws in play to deal with unfair competition. However, it demonstrates that the Federal Cartel Authority intends to take a more active role in supervising competition. It remains to be seen whether the Federal Competition Authority will also claim the powers to prosecute these violations below the antitrust threshold of market domineering.