

Fairness in business

# **Guidance for fair conduct in business**



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**COMPETITION**  
**AUTHORITY**

**Fairness  
matters!**

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# I. Introduction

## Content of this guidance

Over the past few years the Austrian Federal Competition Authority (BWB) has consistently received complaints about business practices resulting from the economic imbalance among contracting parties in the supply chain. The design of terms and conditions is one of the main issues raised. BWB faces two challenges in this context:

- ➔ first of all, these practices are often difficult to pin down from an antitrust perspective and
- ➔ secondly, the companies affected are usually not prepared to disclose more details or to give evidence for various reasons (fear factor).

The Competition Commission, as the advisory body of BWB, has examined this issue in great detail, focusing on the food retail industry. On 3 July 2017 it published its findings in the form of a recommendation<sup>1</sup> (in German), in which it proposes, among other things:

- ➔ a redesign of the internet-based whistleblowing system (whistleblower hotline), which had been introduced following the 2017 Cartel and Competition Law Amendment Act (KaWeRÄG 2017), such that it can also be used to report problematic business practices in supplier/buyer relationships and
- ➔ the publication of a guidance (a code of conduct) based on the example of BWB's Guidance on Vertical Price Fixing, which can be used by market participants as a source of information.

This guidance draws on the Competition Commission's recommendation and may be applied within the scope of **compliance programmes**. It should provide unambiguous information on how to evaluate corporate behaviour and on what is understood by good conduct (page 7 onwards). It provides a list of business practices that are deemed to be incompatible with good conduct, irrespective of their legal interpretation by the courts in the individual case (page 12).

General principles of interpretation (page 10 onwards) should help in the assessment of individual practices. Finally, this guidance provides an overview (not exhaustive) of various pieces of legislation including practical examples (page 13 onwards), which should help with the legal classification of individual cases. It concludes with recommendations for companies that are affected by unfair practices (page 31 onwards).

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[https://www.bwb.gv.at/de/institutionen/wettbewerbskommission/empfehlungen\\_der\\_wettbewerbskommission](https://www.bwb.gv.at/de/institutionen/wettbewerbskommission/empfehlungen_der_wettbewerbskommission).

## Documentation:

Companies that are confronted with unfair business practices should document them (while observing data protection rules), even if they do not intend to take immediate action. Important information is thus saved for possible later proceedings, subject to the statutes of limitation, or can be used for submission to interest groups. In this way, interest groups can collect information from similar cases and confront those businesses that have breached the rules with anonymised data or inform the general public about problems affecting certain industry sectors.

### The following information should be documented:

- ➔ summary of the facts of the case;

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- ➔ records of conversations (date, name of contact including their position in the company, other contacts);

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- ➔ relevant documents (e-mails, other correspondence).

Various European initiatives such as the Communication from the Commission tackling unfair trading practices in the business-to-business food supply chain<sup>2</sup>, the Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe<sup>3</sup> or the Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain<sup>4</sup> underline that supplier/buyer relationships are a Europe-wide issue. Many Member States of the European Union have tried to find national solutions, with the Groceries Supply Code of Practice of the UK<sup>5</sup> possibly being the most well-known initiative. The BWB's Guidance for fair conduct in business has been prepared in line with these initiatives, albeit with a much larger area of application in mind.

This guidance might need to be updated in future in response to new legislation, developments in case law, and also previously unheard of situations, such as circumstances arising in connection with digitisation. BWB will therefore evaluate its guidance three years after its initial publication and make any necessary amendments.

2 COM(2014) 472.

3 COM(2013) 37.

4 COM(2018) 173.

5 <https://www.gov.uk/government/publications/groceries-supply-code-of-practice>

## Scope of application

This guidance is not solely aimed at individual branches of industry or groups of products but should be applied, where goods and services are concerned, to supplier/buyer relationships across all sectors. It should be noted in particular that the economic imbalance can positively or negatively affect the supplier or the buyer side, depending on sector.

## Is this guidance obligatory?

This guidance is intended to inform market participants and to prevent breaches of good conduct, and constitutes BWB's current legal opinion. It is not binding on Austrian courts, other authorities or European institutions.

# II. Business practices contrary to good conduct



The practices listed below are considered incompatible with **good business conduct** as they can prevent competition on the merits, consequently shrinking the range of different offers and reducing the quality of goods and services, while also stifling innovation and pushing up prices. When assessing an individual case, the interpretation criteria as given in Chapter III. should be considered. Our use of the term "good business conduct" is not exactly the same as defined in § 1 of the Local Supply Act (NVG) but applies in a broader sense.

Unfair business practices can basically be divided into three categories:

- ➔ Practices that hinder the economic development of competitors (exclusionary practices).

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- ➔ Practices that materially disadvantage, or exploit, one side in the business relationship (exploitative practices).

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- ➔ Other practices that cannot clearly be assigned to one of the above.

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## Exclusionary practices

**Boycott/call to refuse business** (blocking by third parties by not entering into new or breaking off existing business relationships); **simple cases of non-delivery or non-ordering or related threats** only under certain circumstances (freedom of contract).

**Discrimination** (pursuing unfair purposes, applying unlawful means or otherwise infringing the principles of competition on the merits).

**Barriers to sales** (e.g. intercepting customers in front of another's shop, interfering in pending sales negotiations or removing third-party labels).

**Price war** or **price slashing** under certain circumstances such as targeted destructive competition.

**Market congestion** or a related threat, e.g. where companies with a strong market position distribute free goods with the intention of crowding out competitors, subject to certain circumstances.

**Discounts** and loyalty bonuses granted by companies with a strong market position (suppliers in this case) in order to bind business partners to their company and obstruct competitors.

**Contractual constraints** under certain circumstances, e.g. oppressive exclusivity clauses.

**Abuse of power** where the public sector is acting in a private capacity (misuse of powers conferred on a public institution).

Demands for a **best price guarantee** (the customer contractually obliges the supplier not to sell its goods/services at more favourable prices to other customers) made by companies with a strong market position.



## Exploitative practices

**Demands for inappropriately low purchase prices** (compared with prices that could be demanded in a fair competition environment) made by companies with a strong market position.

**“Tapping”** companies, particularly where companies with a strong market position **demand non-justifiable discounts or special terms** without consideration.

**Abusing a monopolistic position** by exploitatively refusing to conclude a contract.

**Risk transfer** without a justifiable reason (excessive or unpredictable passing on of cost and risk).

**Discriminatory contract terms**, e.g. right of withdrawal in case of delay in delivery without granting a period of grace, inappropriately high contractual penalties for minor breaches of contract, demanding a guarantee for correct labelling where the labels are specified by the contracting partner (the extent of the individual restriction and the number of discriminatory contract terms must be considered in terms of overall effect).

Unilaterally demanded **confusing terms or retroactive abuse of these unclear contract terms**.

**Deliberate** creation of legal uncertainty by **refusing to sign written contracts**.

**Tying bonuses** to the **disclosure or submission of customer data or sales figures** or demanding this information for no objective reason.

## Other practices

**Breach of contract** is in contrast only inadmissible where unfair conduct is a result of circumstances that arise in addition to the mere infringement of the contract.

Contractual amendments introduced retroactively to the detriment of the contracting partner.

Unilateral interpretation of ambiguous contract terms.

**Unconscionable general terms and conditions** (i.e. terms and conditions that are generally unlawful).

Practices that involve harassment, compulsion and undue coercion (fear factor).

Companies with a strong market position **pressing** an obligation on their contracting partners, possibly even before those partners make their actual main order or as a “supplement” to the contract.

## III. Principles of interpretation

In assessing the above practices conducted by companies when dealing with their business partners, the following aspects are of particular significance:

### 1. Qualitative and quantitative elements of business-to-business relationships

Basically, every company is free to act and contract as it sees fit. Where a business partner's freedom of action and contract is (clearly) restricted, he will not be able to develop his full business potential.

The duration of the involved companies' business relationship must be considered: it might be in the form of a contract for the performance of a continuing obligation, a service level agreement or frequently recurring individual contracts. A permanent business relationship creates a special relationship of mutual trust and loyalty among those business partners.

## **2. Practices in working business relationships**

Long-standing practices among companies make the behaviour of the other party predictable and therefore projectable. Any unilateral, unfounded or short-term deviation from practices that had been employed by common consent for a long time are therefore problematic, particularly when the deviation is effected by a business partner with a strong market position. The length of production cycles that cannot easily be changed by production at short notice must also be considered.

## **3. Extent of imbalance among business partners**

Where one business partner can wield economic power over the other, it should be ensured that the weaker partner is not forced to accept unobjective terms in the business relationship. In this context it is not really necessary that the stronger of the two partners is actually exerting pressure but sufficient that he is “aware of” his latitude resulting from his business partner’s dependence on him.

## **4. Taking account of the positive effects of competition**

Not each and every condition which is perceived as discriminatory or unobjective is actually discriminatory or unobjective when viewed impartially; we only focus on market practices here. Business shortcomings that were caused by the company’s own management cannot be construed as unfair practices, not even when conducted by business partners with a strong market position.

## **5. Unfair business practices do not take a specific form**

Irrespective of their form, actions or omissions causing negative consequences of unfair business practices are problematic and to be judged according to their impact. This also includes all types of circumvention (e.g. an action that does not formally infringe a legal provision but equates to an infringement in terms of its impact). Typical means of competition on the merits are permitted and only considered problematic when certain circumstances apply.<sup>6</sup> Measures that are taken with the sole intention of hindering a business partner or competitor are normally not compatible with good business conduct.

## **6. Consideration of interests**

When assessing whether behaviour constitutes unilateral abuse of power, the conflicting interests must be carefully weighed against one another. Particular emphasis must be placed on assessing whether the practices of a dominant company are necessary to uphold its business interests or whether they go beyond a level that would be appropriate considering the economic interests of the parties involved.

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Cf. for example price war on page 8.

## IV. List of unfair business practices

The following business practices conducted by an economically superior company when dealing with a business partner are considered unfair practices, irrespective of their legal interpretation by the courts in the specific case:

1. Refusing to conclude written contracts on the reciprocal provision of services, on components of the contract or the amendments of contracts;
2. Unilaterally amending contractual obligations with retroactive effect, particularly with regard to:
  - a. the amount of the agreed fee, e.g. by fixing discounts,
  - b. the deadlines for fulfilment,
  - c. frequency or time of deliveries, and
  - d. quality or quantity of the goods or services to be provided.
3. Demanding payments or other acts in money's worth without any corresponding consideration (e.g. demanding an annual bonus because sales figures in a product group had been below expectations);
4. Imposing excessive requirements including any related costs, particularly concerning technical standards, examinations and certification mechanisms that are not indispensable to guarantee the product's quality or intended use;
5. Demanding to change important aspects of the contracting partner's supply chain or product specifications during an existing contractual relationship for reasons caused by the demanding party itself, unless the related costs are reimbursed;
6. Returning unsold goods to the supplier at the latter's cost (expenses in connection with the return and reimbursement of the invoiced amount), unless this had been determined expressly and of the supplier's own free will in the supply agreement;
7. Excluding another delivery or purchase and related threats in the event that a business partner resists the practices listed under numbers 1 to 6, particularly with demands made on him;
8. Other practices, particularly those named in Chapter II, primarily where unfairness or abuse of dominance exists.

### **Example of performance being demanded without consideration**

A retailer demands from its suppliers that they pay a fee for stocking their products (slotting allowance). For providing shelf space and presenting the new product, the supplier is charged a higher sum for several weeks. In fact, however, no shelf space is provided for presenting the products and the products are only piled on others or stacked at the back of shelves. In this case, charging a slotting allowance is unfair business conduct since no

consideration was given in return for the supplier's payment. Similar cases may arise in connection with obligatory marketing charges without consideration. A slotting allowance may be justified where considerable expenses must be covered (e.g. logistical expenses, expenses that arise because old products can no longer be sold when the new ones become available).

## **V. Existing legal provisions**

Austrian legislation includes many different provisions that can be classed as relating to the issue of good business conduct or unfair business practices. Some particularly important provisions are outlined below in order to provide some examples of the available options for taking action against breaches of good conduct.

# V.1 The Cartel Act

The Cartel Act (KartG) prohibits certain anti-competitive practices, namely cartels and the abuse of a dominant position, which can be relevant in connection with unfair business practices. An infringement of the KartG may also constitute a breach of § 1 of the Unfair Competition Act (UWG), with possible legal action being brought before the civil courts with jurisdiction over commercial matters.

## Ban on cartels

Cartels restrict or prevent competition by way of price fixing, quota agreements and sharing markets among competitors. § 1 para. 2 KartG lists a number of prohibited practices by way of example, with concerted discrimination of a trading partner (subpara. 4) and coordination of tie-in transactions (subpara. 5) being of significance in connection with unfair trading practices.



### Federal Cartel Act § 1

**(1)** Any agreements between undertakings, decisions of associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition (cartels) shall be prohibited.

**(2)** Pursuant to para. 1, it shall particularly be prohibited to:

1. directly or indirectly fix purchase and selling prices or any other trading conditions;
2. limit or control production, markets, technical development or investments;
3. share markets or sources of supply;
4. apply dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage;
5. make the conclusion of contracts subject to acceptance by the other contract parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

**(3)** Any agreements and decisions prohibited pursuant to para. 1 shall be automatically void.

**(4)** Any recommendations to maintain certain prices, price limits, calculation guidelines, trade margins and discounts which aim at or result in the restriction of competition shall be equivalent to a cartel under para. 1 ("recommendation cartels"). This shall not apply to recommendations which explicitly state to be non-binding and which are not or shall not be enforced by exerting economic or social pressure.

## Exemptions

§ 2 para. 1 KartG lays down a general exemption from the ban on cartels, provided that all the given conditions are met. The companies concerned must judge for themselves whether the exemption applies to them. Apart from sector-specific exemptions, para. 2 also includes rules on "minor" cartels. The classification as "minor" is based on the market shares of the companies involved. However, the fixing of selling prices, the restriction of production or distribution and the sharing of markets all remain absolutely inadmissible (hardcore restrictions).

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## Federal Cartel Act § 2

**(1)** Cartels which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits and which do not

- a. impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or
- b. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question shall be exempt from the prohibition pursuant to § 1.

**(2)** In any case, the following cartels shall be exempt from the prohibition pursuant to § 1:

Cartels in which undertakings are involved which compete with each other and jointly hold a total share of not more than 10% of the relevant market, or cartels in which undertakings are involved which do not compete with each other and which hold a total share of not more than 15% each of the relevant market, provided that in both cases they do not aim at fixing selling prices, restricting production or distribution, or sharing markets (minor cartels);

[...]

## Examples related to the ban on cartels

**Example 1:** Two resellers exchange information about their cost prices. Together they hold a market share of more than 60% in both the purchase and sales markets for the relevant products. This exchange of information is highly likely to lead to costs being adjusted as well as to competition being markedly restricted in the sales markets. Exchanging information is therefore to be considered an infringement of the ban on cartels (§ 1 KartG). There is no evident justification for it.

**Example 2:** The producers of a certain product group that are organised within an association to represent their economic interests together decide not to supply these products to certain retail channels, which means they will achieve a higher price for them. The manufacturers claim that this supply boycott is necessary because consumers will only get the quality they expect if they are supplied directly with the products.

An agreement between companies or an association of companies' decision not to supply products basically constitutes an infringement of the ban on cartels (§ 1 KartG). While quality assurance is a legitimate objective in itself, the least severe means (e.g. provision of objective and comprehensible supply criteria) would have to be chosen to qualify for an exemption from the ban on cartels (§ 2 para. 1 KartG).

**Example 3:** A customer with a market share of more than 30% in the purchase market for a certain product demands that the supplier stop delivering the product to a competitor. The supplier agrees as it fears losing this business partner altogether. Such a limitation of the supplier's market opportunities constitutes an infringement of the ban on cartels (§ 1 KartG). No justification is evident.

**Example 4:** A customer with a market share of more than 30% in the purchase market for a certain product obliges a supplier not to deliver its products (or services) at more favourable prices to other customers. Such a best price guarantee restricts the supplier's ability to determine its own prices and therefore constitutes an infringement of the ban on cartels (§ 1 KartG). No justification is evident. The Supreme Court also considers a mere economic tying of the supplier as an inadmissible best price clause. Such treatment applies where the supplier undertakes to always grant the requesting customer a price that is at least as favourable as the price for any other customer.<sup>7</sup>

**Example 5:** A manufacturer (A) enters into a selective distribution agreement with a retailer (B) regarding the delivery of certain products; these products do not require special advice, e.g. on how to avoid using them wrongly. The agreement stipulates that the products from B may only be sold in a physical room and in the presence of a staff member of B who has been trained by A. Such a clause is to be considered a general ban on online sales. There is no objective justification evident for B generally banning online sales in this way, which is why it is not admissible from a cartel law perspective.

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See the decision by the Supreme Cartel Court of 8 October 2015, reference code 16 Ok 2/15b.



## Abuse of a dominant position

The KartG also stipulates a ban on abusive practices conducted by dominant companies. A company that is not subject to any relevant competition pressure can behave independently of its competitors and ultimately also its customers or suppliers. Practices are abusive where companies disadvantage other companies or customers of companies in a way that would not be possible in an environment of effective competition.



### Federal Cartel Act § 5

**(1)** The abuse of a dominant position shall be prohibited. In particular, the following shall be deemed to be an abuse:

1. demanding purchasing or selling prices or other business terms which differ from those which would be very likely to arise if effective competition existed, particularly taking into account the conduct of undertakings in comparable markets where effective competition exists;
2. limiting production, markets or technical developments to the detriment of consumers;
3. discriminating contract partners in competition by applying dissimilar business terms to equivalent transactions;
4. making the conclusion of contracts subject to acceptance by the other contract parties of supplementary obligations, which neither by their nature nor according to commercial usage are related to the subject of the contract;
5. selling goods below cost price without any objective justification.

**(2)** In the case of para. 1 subpara. 5, the dominant undertaking shall bear the burden of proof for the rebuttal of the presumption of sales below cost price as well as for providing an objective justification for such sale.

The ban on abuse of a dominant market position as defined in § 5 KartG is targeted solely at dominant companies, covering cases of market dominance both by a single company and by several companies together. To determine a case of market dominance, it is first of all necessary to define the product market and the geographic market relevant to the specific case. A **relevant product market** comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use. The **relevant geographic market** comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different within those areas.<sup>8</sup>

Market dominance is defined in § 4 KartG. A (single) company is deemed to be dominant where, in its capacity as a supplier or customer:

- ➔ it is not exposed to any competition or is only exposed to it to an insignificant extent (para. 1 subpara. 1); or
- ➔ it holds a predominant market position in relation to the other competitors; in this regard, particular attention should be paid to the company's financial strength, its relations to other companies, its opportunities to access supply and sales markets, as well as other circumstances that restrict market entry for other companies (para. 1 subpara. 2).

If a company holds a market share of more than 30% in a relevant market, a market dominant position is assumed, unless rebutted.

Austrian legislation on cartels also includes the concept of **relative market dominance**, which refers to a company's predominant market position compared with its customers or suppliers. Such a predominant market position exists where a customer or supplier depends on the continuation of the business relationship to avert grave economic disadvantages. This relative market power does not constitute an additional abuse of dominance offence but merely substantiates the principle of a lack of effective competition as defined in § 4 para. 1 subpara. 1 KartG. The decisive factor here is that other options are available.<sup>9</sup>

8 Commission notice on the definition of relevant market for the purposes of Community competition law, Official Journal C 372 of 9.12.1997, p. 5., paragraph 7 et seq.

9 Vartian/Schuhmacher in Petsche/Urlesberger/Vartian, (Hrsg), KartG 2005 2 (2016) § 4 para. 44.

The following descriptions of types of dependencies are based on types of cases established following decision practice in Germany:

In connection with relative supply power, a distinction can be made between the following types:

➔ **Dependency relating to product range:** On the demand side, customers' dependency on a certain product range is based on their own customers' expectation that they will stock certain items (must-stock items). A dependency based on customers' expectations exists if the supplier's good or service holds a top position among the goods or services in the relevant product market.<sup>10</sup> However, it also exists if the goods or services belong to a top group within the relevant product market and the retailer must stock all or some of them because its customers expect it to do so.<sup>11</sup>

➔ **Dependency caused by the company itself:** This type of dependency is rooted in decisions the company made in the past which cannot be easily corrected in retrospect. For example, the relationships that authorised dealers have with certain producers (lock-in effects).<sup>12</sup>

These types of dependency may also arise in connection with relative buying power:

➔ **Dependency relating to product range:** A supplier needs a certain buyer as a sales channel in order to be able to successfully launch its product in the market (gatekeeper function).<sup>13</sup>

➔ **Dependency caused by the company itself:** This type of dependency may be caused by a supplier's sole focus on demand.<sup>14</sup>

The ban on abuse of a dominant market position as defined in § 5 KartG lists examples of prohibited practices.

10 For example: dependency of a sporting goods retailer on the manufacturer of a skiing brand with a market share of just 8%. Other known brands are not a sufficient alternative. Essential factors: global brand, racing success, extensive advertising, many brand-loyal customers. (Decision of the German Federal Court of Justice of 20 November 1975, reference code KZR 1/75.)

11 For example: dependency of a furniture store on continued supply with designer upholstered furniture. Essential factors: 80% of 166 comparable stores stock this brand (high rate of distribution) and its unique product variety meant that when it was no longer part of the company's product range it could only compensate by stocking several other manufactures. The top group consisted of seven manufacturers, four of which refused to supply the store and one supplied its products only at terms for occasional traders. The company was therefore dependent on the top group including the brand in question. (Decision of the German Federal Court of Justice of 9 May 2000, reference code KZR 28/98.)

12 For example: dependency of car dealers that concentrated their entire business operations on one single manufacturer. This involved extensive investments as per contract, which means changing to another manufacturer would entail major competitive disadvantages.

13 For example: top group dependency of an importer of medicinal products on a major pharmaceutical wholesale company with a 14% market share. Essential factors: No other wholesaler was prepared to purchase these products either; selling to the pharmacies directly was not a sufficient or reasonable option. A risk to the company's ongoing survival is not a prerequisite of dependency. (Decision of the German Federal Court of Justice of 21 February 1995, reference code KVR 10/94).

14 Cf. example 2 on page 20.

## Examples of a dominant market position being abused

**Example 1:** Example 1: Manufacturers of brand products request that their authorised workshops render services as part of the manufacturer's warranty or guarantee in a certain way, which will only be paid for if those requests are met. However, such requests may exceed the legitimate interest in standardisation and protection against unjustified claims and may constitute abuse if:

- ➔ the time specified for repairs is systematically less than the time needed to actually make those repairs;
- ➔ the time spent making the necessary preparations and finishing the job (e.g. finding the error, check for proper operation) is systematically not reimbursed;
- ➔ overheads to keep a workshop running or keep a spare parts storage facility stocked are systematically not reimbursed;
- ➔ form requirements are used as a pretext for withholding payment for the services actually rendered.

**Example 2:** A retailer (E) acquires a chain store in the same industry (P) and compares its own purchasing conditions with those of P. E subsequently approaches its suppliers (L) and requests:

- ➔ an adjustment of the conditions where P's were more favourable (these advantages not only existed at the time of the takeover but some have been applicable for a long time and some only periodically),
- ➔ an overall adjustment of its own terms of payment to match P's, and
- ➔ that costs incurred for converting P's outlets be shared (partner reimbursement).

➔ E holds relative market power over L since:

- ➔ its market share in selling L's products is high,
- ➔ the products generate low sales in the P stores,
- ➔ there are few alternatives for L to sell the products,
- ➔ consumers show little brand loyalty for the products made by L, and
- ➔ hardly any opportunities exist to market the products to other important buyers.

In conclusion, E has abused its market power over L by demanding the mentioned terms and conditions ("wedding rebates").<sup>15</sup>

## V.2 The Federal Act on Improvement of Local Supply and Competitive Conditions

The Local Supply Act (NVG) is to be viewed as a supplementary act to the Cartel Act. While it assumes an imbalance of power among companies, it does not assume a position of market dominance. It should also be noted that the NVG may be applied in addition to the UWG (§ 9 NVG). An infringement of the NVG may also constitute a breach of § 1 UWG, with possible legal action being brought before the civil courts with jurisdiction over commercial matters.

### Threats to competition on the merits/good business conduct

§ 1 para. 1 NVG includes a general clause on good business conduct and para. 2 lists examples of practices that can pose a threat to competition on the merits.<sup>16</sup>



#### Local Supply Act § 1

**(1)** Business practices of any undertakings in commercial transactions among each other may be prohibited if they are likely to jeopardise competition on the merits.

**(2)** Such practices include, but are not limited to offering or requesting, granting or accepting money or other benefits, also discounts, special conditions, special product features, take-back obligations or assumption of liability among suppliers and resellers, which are not objectively justified, especially if the additional benefits are not offset by appropriate compensation.

<sup>16</sup>

The Federal Economic Chamber published a code of conduct on 10 October 1977 (ÖBl 1977; 150), listing cases that contradict good business conduct in the view of the business community involved and that can pose a threat to competition on the merits.

## Example of an infringement of the NVG

The supplier of a branded product demands that a retailer, which is the exclusive seller of products of this brand, furnish its sales rooms in a certain manner. This requirement exceeds the supplier's legitimate interest in standardised presentation and in maintaining a certain brand image by:

- ➔ demanding investments (e.g. for building work and interior design) that are disproportionate to the retailer's sales and income opportunities,
- ➔ requiring investments that do not make economic sense,
- ➔ creating an investment cycle that clearly deviates from the usual period of depreciation,
- ➔ demanding the use of named providers for services or certain goods (e.g. fitments), particularly where the prices and/or quality of these providers are not comparable to those of third-party providers.

## Discrimination

§ 2 NVG defines a ban on discrimination in relationships between suppliers and authorised resellers.



### Nahversorgungsgesetz § 2

- (1)** A supplier who grants or offers different conditions to authorised resellers in the same circumstances without objective justification may be sued for a cease-and-desist order.
- (2)** Similarly, a reseller may be sued for requesting or accepting objectively unjustified conditions from suppliers.

## Ensuring local supply and competitiveness

§ 4 NVG defines an obligation to contract for companies that usually deliver to final sellers where otherwise local supply would be threatened or the final seller's competitiveness impaired.

## Local Supply Act § 4

**(1)** Unless otherwise specified in other legal provisions, undertakings shall be free, particularly in choosing their final sellers. Undertakings which usually deliver to final sellers may be obliged to conclude a contract if non-supply to a final seller threatens local supply or significantly affects the final seller's competitiveness in the goods not supplied.

**(2)** Local supply is deemed to be threatened if a substantial number of consumers is not able to purchase the goods necessary to satisfy needs of daily life at reasonable costs and time without using a motor vehicle or public transport.

**(3)** The obligation to supply shall be conditional upon counterperformance, taking into account the terms and conditions granted to comparable final sellers as well as the supplier's ability to deliver.

**(4)** Such an obligation to supply shall not be ordered particularly in those cases in which a delivery

- a. is economically unreasonable for the supplier, or
- b. violated a statutory provision or were contra bonos mores.

**(5)** An ordered obligation to supply shall be revoked upon application if reasons that were decisive for ordering such obligation cease to exist. Upon application, the obligation to supply shall be restricted or revoked if the competitors' economic existence is substantially jeopardised by such obligation.

## V.3 The Federal Act Against Unfair Competition

The aim of the provisions on fair trading in the Unfair Competition Act (UWG) is to ensure that competition is conducted fairly and on the merits.

### Unfair business practices

The general clause of § 1 para. 1 UWG determines the relationship between companies under subpara. 1 (see below). Case law on § 1 UWG is extensive, dividing unfair practices into various different groups of cases.



#### Unfair Competition Act § 1

**(1)** Anyone who in the course of business

➔ resorts to an unfair commercial practice or another unfair practice which is likely to distort not only insignificantly the competition to the detriment of enterprises or, (...)

may be sued for a cease-and-desist order and in case of fault for payment of damages.

### Examples of infringements of the UWG

**Example 1:** A trading firm that had already concluded annual agreements with its suppliers demanded additional payments from them for an originally unplanned advertising campaign to mark a company anniversary. There was no specific consideration since the company can also use the payments for purposes other than advertising its suppliers' products.



Where a supplier:

- ➔ has no or nearly no scope for negotiating with the buyer, and
- ➔ this buyer forces the supplier to accept special terms without consideration because of its market power,
- ➔ this might constitute anti-competitive behaviour as defined in § 1 UWG in relation to the buyer's competitors. The inherent threat is that (smaller) trading firms that are not granted special terms by manufacturers might be pushed out of the market.

This applies in particular if:

- ➔ contracts have already been negotiated and additional agreements are subsequently demanded without any form of consideration,
- ➔ this demand is likely to give suppliers the impression that economic disadvantages will result if it is not met.<sup>17</sup>

Regarding the entitlement to assert a cease-and-desist order as defined in § 1 UWG, please refer to page 32. In the case on hand the payments demanded must also be viewed as additional obligations as defined in § 1 para. 2 NVG which are not accompanied by appropriate consideration. Regarding the right to make an application pursuant to § 1 NVG, please refer to page 32.

Finally, if a case of market dominance pursuant to § 4 KartG exists, abuse of dominance according to § 5 KartG will also apply. Regarding the right to make an application, please refer to page 31.

**Example 2:** A retailer (E), which had not agreed any exclusivity clauses with its suppliers (L), demands that they no longer deliver to a named competitor (M). If they continued to deliver to M, their products would be delisted.

This constitutes a demand for boycott by E with the intention of hindering a competitor (M). In this case E is the party inducing the boycott (boycotter), L is the party responding to the boycott request and M is the boycotted party, the victim. This constitutes an unfair business practice as defined in § 1 UWG, with the crucial aspect being that the boycotter and the boycotted company are in competition with each other.

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See the decision of the Supreme Court of 17 December 1996, reference code 4 Ob 2365/96i.

## Aggressive business practices

As can be seen from § 1a UWG, the ban on aggressive business practices also applies in relation to companies (market participants). The annex to the UWG lists practices under subparas. 24 to 32 that are banned but primarily concern relationships with consumers. Subpara. 32 prohibits booking platforms from demanding best price or best terms clauses from accommodation providers.



### Unfair Competition Act § 1a.

**(1)** A commercial practice shall be deemed to be aggressive if it is capable of significantly impairing the market participant's freedom of choice or conduct with regard to the product by means of harassment, coercion or undue influence, and of causing it to take a transactional decision that it would not have taken otherwise.

**(2)** In determining whether an aggressive commercial practice exists, the following factors must be taken into consideration:

- ➔ the time, place, type or duration,
- ➔ the use of threatening or offensive expressions or practices,
- ➔ the exploitation by the company of specific situations of bad luck or circumstances of such gravity that would impair the consumer's judgement, of which the company is aware, using this knowledge to influence the consumer's decision in relation to the product,
- ➔ any onerous or disproportionate non-contractual barriers with which the company tries to hinder the consumer from exercising his contractual rights – especially the right to terminate the contract or to switch to another product or company,
- ➔ threats of legally inadmissible actions

**(3)** The commercial practices mentioned in the annex under subparas. 24 to 31 are deemed to be aggressive in all cases.

**(4)** The commercial practice given under subpara. 32 is also always deemed to be aggressive. Any such agreements are absolutely null and void.

## V.4 The General Civil Code

Provisions of the General Civil Code (ABGB) may also be relevant in connection with unfair business practices. Two significant standards from the ABGB pertaining to the conclusion of contracts and the admissibility of their content are outlined below by way of example.

### Surprising contract clauses

§ 864a of the ABGB introduces a validity check and § 879 para. 3 a content check for general terms and conditions. While § 879 para. 3 only applies to those clauses that do not regulate the mutual main contractual obligations,<sup>18</sup> all clauses are subject to the validity check of § 864a. The checking of the general terms and conditions must be carried out by that party who introduced them to the contract.<sup>19</sup>

§ 864a is intended to protect the contracting partners of a user of general terms and conditions from detrimental clauses which they would not have had to expect at the time of concluding the contract under the given circumstances (unusual provisions). This covers both provisions that are unusual from an objective point of view and others that could only be surprising for this contracting party in the case on hand.<sup>20</sup> Any terms of a contract that deviate from requirements of dispositive law to the detriment of the contracting partner of the user of general terms and conditions are deemed detrimental. Where dispositive law does not stipulate a rule, it must be examined whether the contracting partner would be better placed if the clause in question were invalid.<sup>21</sup>



#### General Civil Code § 864a.

Unusual provisions used by a contractual party in general terms and conditions or standard forms do not become part of the contract if they are detrimental for the other party and he would not have to expect these provisions due to the circumstances, in particular due to the formal appearance of the contract; unless one contractual party has expressly made the other aware thereof.

<sup>18</sup> The main contractual obligations are the subject matter of any legal transaction; contracts are concluded because of them (generally contract goods and price).

<sup>19</sup> Graf in Kletečka/Schauer, ABGB-ON 1.04 § 864a para. 35 et seq. (as at 1 October 2017, rdb.at).

<sup>20</sup> Graf in Kletečka/Schauer, ABGB-ON 1.04 § 864a para. 39 et seq. (as at 1 October 2017, rdb.at).

<sup>21</sup> Graf in Kletečka/Schauer, ABGB-ON 1.04 § 864a para. 46 et seq. (as at 1 October 2017, rdb.at).

## Example of unusual provisions in general terms and conditions

A manufacturer's general terms of delivery stipulate (without typographic emphasis) at the end of the item "Prices, terms of payment", among other things, that any discounts, rebates and bonuses granted would be void and reclaimed in the event of default in payment. This could mean a substantial increase of the usual market prices for intermediaries. Such a provision would therefore have to be viewed as unusual and surprising as defined in § 864a ABGB. With the clause being placed at the end of the item "Prices, terms of payment" without emphasis, even an ordinarily careful reader could not be expected to anticipate such excessive consequences of default in payment. In the absence of a specific reference to this clause, it would not become part of the contract.<sup>22</sup>

## Unlawfulness and unconscionability

§ 879 ABGB limits private autonomy. Paragraph 1 stipulates that contracts are null and void if they breach a statutory prohibition. This nullity applies where it has been expressly ruled in relation to the prohibition concerned (cf. § 1 para. 3 KartG) or results from the scope of the rule.<sup>23</sup> Reference to good morals is to protect a contracting party from crucially detrimental contract obligations or grossly discriminatory contract terms. Protection in this way is important, particularly where the parties involved are on an unequal footing. The bigger the imbalance between the parties, the stricter the requirements in relation to deviations from dispositive law.<sup>24</sup> Regarding the special offences listed under para. 2, particular attention should be awarded to usury (subpara. 4). Paragraph 3 is not only intended to check general terms and conditions but is also to be used for checking contractually agreed regulations if the contract is concluded in a situation of imbalance that is comparable to a situation in which a contract is concluded based on general terms and conditions.<sup>25</sup>

22 See the decision by the Supreme Court of 2 July 2009, reference code 6 Ob 57/08p.

23 Graf in Kletečka/Schauer, ABGB-ON 1.04 § 879 para. 3 (as at 1 October 2017, rdb.at).

24 Graf in Kletečka/Schauer, ABGB-ON 1.04 § 879 para. 66 f (as at 1 October 2017, rdb.at).

25 Graf in Kletečka/Schauer, ABGB-ON 1.04 § para. 296 (as at 1 October 2017, rdb.at).

**General Civil Code § 879.**

**(1)** A contract which violates a legal prohibition or public policy is void.

**(2)** In particular the following contracts are void:

[...]

4. if someone exploits the simple mindedness, situation of duress, mental incapability, inexperience or excitement of someone else in a way that he is promised or granted consideration for a service by a third party in an amount of striking imbalance to the value of the service.

**(3)** A contractual provision contained in general terms and conditions or contractual forms which does not determine either of the mutual main obligations is void in any event if it is materially detrimental to one party when considering all circumstances of the case.

**Example of unconscionability**

In the event that a contract is not fulfilled, not properly fulfilled or not fulfilled on time, the contracting parties may agree on a penalty. However, such penalty must not be disproportionate. Recent case law assumes that an individually agreed penalty (§ 879 para. 1) may only cover an amount that is likely to arise when a damage occurs, i.e. the breach of contract that was to be sanctioned by the penalty; this also applies to any penalty agreed in the general terms and conditions (§ 879 para. 3).<sup>26</sup> Agreements on the amount of any default interest are also deemed agreements on penalties.<sup>27</sup>

26 Graf in Kletečka/Schauer, ABGB-ON 1.04 § 879 para. 118 (as at 1 October 2017, rdb.at).

27 Graf in Kletečka/Schauer, ABGB-ON 1.04 § 879 para. 121 (as at 1 October 2017, rdb.at).

## V.5 The Corporate Code

In its fourth book on company-related transactions (applicable to companies as defined in § 1 to § 3 of the Code and to legal entities under public law), the Austrian Corporate Code (UGB) contains provisions on grossly discriminatory contract terms in connection with default in payment.

### Grossly discriminatory contract terms or business practices

§ 459 UGB limits the possibility to deviate from regulations under the law of obligations on the grounds of private autonomy. An abuse of the freedom of contract to the detriment of the creditor is forbidden. Such abuse is assumed, for example, where the debtor intends to create liquidity at the creditor's expense.<sup>28</sup>



#### Corporate Code § 459.

- (1)** A term of contract pertaining to the date of payment, term of payment, default interest rate or reimbursement for the costs of enforcement is null and void if materially detrimental to the creditor. Similarly, no legal effect can be derived from a business practice concerning one of these issues if they are materially detrimental to the creditor.
- (2)** In assessing whether a term of contract or business practice is materially detrimental, the extent to which it deviates from accepted standards must be taken into account, whether an objective reason for the deviation exists and which contractual obligation is affected. Where a term of contract is agreed on default interest deviating from the amount set forth under § 456 or on a flat-rate reimbursement amount deviating from the first sentence of § 458 that is detrimental to the creditor, the possibility of an objective reason must be considered.
- (3)** The agreement on a term of payment of up to 60 days is in no case materially detrimental.
- (4)** The exclusion of default interest is in any case materially detrimental.
- (5)** The exclusion of reimbursement for operating expenses pursuant to § 458 is deemed materially detrimental, unless exceptionally and objectively justified owing to the circumstances of the relevant legal transaction.

# VI. Practical information

## Responsibilities

In the event of the legal provisions presented in this guidance being infringed, there are various legal remedies available and responsibilities to be considered. These are outlined in brief below.

### Ban on cartels and abuse of a dominant position

Infringements of the ban on cartels or on the abuse of a dominant market position are the responsibility of **BWB**: the Authority is responsible for investigations and for filing an application with the Cartel Court (§ 36 KartG) to end the infringement or impose a fine. The Federal Cartel Prosecutor enjoys the same rights to make applications.

Applications for terminating the infringement may also be filed by the regulators, the Federal Economic Chamber, the Federal Chamber of Labour and the Presidential Conference of the Austrian Chambers of Agriculture, as well as any company and **any association of companies with a legal or economic interest in the decision.**

Proceedings to effect the termination of an abuse of a dominant position or a related complaint to BWB or the Federal Cartel Prosecutor must not be taken as a reason to exclude the company directly affected by such abuse from further supply or purchase on reasonable terms (§ 6 KartG). Infringements against this prohibition of retaliatory measures must be terminated at the Cartel Court's request and also constitute offences that are liable for fines.

Regarding claims for damages under civil law for harm caused by an infringement of cartel law, the KartG contains special provisions in § 37a onwards to facilitate them.

## Local Supply Act

**BWB**, the Federal Cartel Prosecutor, the Federal Economic Chamber, the Federal Chamber of Labour, the Presidential Conference of the Austrian Chambers of Agriculture, associations that represent economic interests of companies if these interests are affected by the subject of the proceedings, as well as **any company whose legal or economic interests are affected** by the subject of the proceedings (§ 7 para. 2 NVG) are entitled to file applications with the Cartel Court pursuant to § 1, § 2 and § 4 NVG.

Any proceedings pursuant to § 1 and § 2 must not be taken as a reason to exclude the company affected by the conduct as defined in these provisions from further supply or purchase on reasonable terms (§ 3 NVG). The Cartel Court is the competent authority for prohibiting such practices (prohibition of retaliatory measures).

## Unfair Competition Act

In the event of unfair business practices, which includes aggressive practices, § 1 UWG provides for cease-and-desist orders and, in case of fault, for payment of damages. A claim for a cease-and-desist order may be filed by competitors or by associations to promote the economic interests of companies, provided that such associations represent interests which are affected by the offence, by companies, by the Federal Chamber of Labour, the Federal Economic Chamber, the Presidential Conference of the Austrian Chambers of Agriculture, the Austrian Trade Union Federation or by BWB (§ 14 para. 1 UWG). However, BWB does not hold any investigative powers,<sup>29</sup> and the Authority bears the cost risk connected with a civil court case.



Where questions of fair trading (UWG) are concerned, the Association for protection against unfair competition (Schutzverband) is an important point of contact. The association represents its members comprising more than 600 professional organisations of all Economic Chambers in Austria including their companies as well as other statutory interest groups and business associations. Companies wishing to report a breach of competition law may contact their professional organisation within the Federal Economic Chamber or another interest group. If the latter is a member of the Schutzverband, documents to be examined or needed to intervene under competition law may be submitted to it ([www.schutzverband.at](http://www.schutzverband.at)).

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Matousek in Petsche/Urlesberger/Vartian (eds.), KartG 2005<sup>2</sup> (2016) § 2 WettbG para. 14.



## Claims under civil law

Any claims arising under civil law must always be asserted before the competent civil courts.

## Corporate Code

The legal consequence of a term of contract being inadmissible pursuant to § 459 UGB is its relative nullity, which means that the disadvantaged contracting partner (the creditor) must invoke it.<sup>30</sup>

§ 460 para. 1 UGB provides for the possibility of a class action lawsuit. A company that in the course of business uses materially detrimental terms of contract within the meaning of § 459 UGB or applies materially detrimental business practices within this meaning may be sued for a cease-and-desist order by associations to promote the economic interests of companies, provided that such associations represent interests which are affected by the offence. A claim for a cease-and-desist order may also be asserted by the Federal Economic Chamber and the Presidential Conference of the Austrian Chambers of Agriculture. The out-of-court proceedings set forth in § 460 para. 2 UGB provide a cost-effective way for the parties in dispute to settle their dispute.<sup>31</sup> It means that the company using a materially detrimental term of contract or business practice issues a declaration of discontinuance secured by an appropriate penalty after being warned by an association that is entitled to bring action.

## Contact information and whistleblowing system

Companies that are confronted with unfair business practices that fall within the scope of BWB's remit as well as individuals who become aware of such infringements may contact BWB at any time (**anonymously if required**).



### Whistleblowing system:

§ 11b para. 6 WettbG stipulates that BWB may establish an internet-based whistleblowing system for the anonymous reporting of well-founded information on possible infringements of the ban on cartels, the prohibition of abuse of dominance and the prohibition of retaliatory measures (in connection with abuse proceedings against the company affected by the abuse of market dominance). The system has been up and running since February 2018. With communication taking place via secure anonymous mailboxes, it is technically impossible for BWB or third parties to trace the information submitted. [https://www.bwb.gv.at/en/cartels\\_and\\_abuse\\_control/whistleblowing\\_system/](https://www.bwb.gv.at/en/cartels_and_abuse_control/whistleblowing_system/)

<sup>30</sup> Haberer/J. Zehetner in Straube/Ratka/Rauter, UGB I4 § 459 para. 4 (as at 1 March 2014, rdb.at).

<sup>31</sup> Haberer/J. Zehetner in Straube/Ratka/Rauter, UGB I4 § 460 para. 9 (as at 1 March 2014, rdb.at).

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