

62nd Federal Act to enact a Federal Act on the establishment of a Federal Competition Authority (Competition Act, WettbG) and to modify the Cartel Act of 1988, the Criminal Code and the Federal Budget Act of 2002

The National Council has adopted the following Act:

Article I
Federal Act on the Establishment of a Federal Competition Authority
(Competition Act, WettbG)

Establishment of a Federal Competition Authority

Section 1. (1) A Federal Competition Authority shall be established at the Federal Ministry of Economics and Labour, which shall aim to ensure that competition will work and that the 1988 Cartel Act (KartG), Federal Law Gazette no. 600/1988, will be applied in accordance with the *acquis communautaire* and in connection with the regulators' decisions (Section 4 (2)).

(2) The Federal Competition Authority shall be headed by a Director General for Competition. In the event of the Director General being prevented from attending his/her duties, the director of the Office shall substitute for him. The Director General for Competition shall lay down rules of procedure at least once a year, which shall provide more detailed regulations of the responsibilities of the head of the Office.

(3) **(Constitutional provision)** The Director General for Competition and, in the event that s/he is prevented, his/her deputy shall be independent and not bound by instructions in carrying out the responsibilities set forth in Section 2 below.

Responsibilities of the Federal Competition Authority

Section 2. (1) In order to achieve its aims as set forth in Section 1 above, the Federal Competition Authority shall be authorised:

1. to investigate alleged competitive distortion on a case-to-case basis and to eliminate such distortion through its standing as an official party in proceedings before the Cartel Court and the Supreme Cartel Court (Section 44 KartG),
2. to ensure that competition will work by applying the European Rules on Competition in Austria (Section 3),
3. to generally investigate any business sector provided that circumstances point to any limitation or distortion of competition in such business sector,
4. to provide official assistance in matters of competition to the Cartel Court, the Supreme Cartel Court, courts and administrative authorities, including the regulators and the Federal Cartel Lawyer,
5. to furnish statements on general issues of economic policy, and
6. to head the Commission on Competition (Section 16).

(2) The Federal Competition Authority shall act *ex officio*.

(3) The Federal Competition Authority shall publish a report on its activities in regular intervals of not more than one year. Upon giving a hearing to the Commission on Competition, the Federal Minister of Economics and Labour shall promptly submit this report to the National Council.

Authority to apply the European Rules on Competition

Section 3. (1) Except when competence rests with the Federal Minister of Economics and Labour or with the courts, as set forth in Para 2 below, the Federal Competition Authority (as defined in Section 1 above) shall be the competent authority in Austria for implementing the European Rules on Competition (Section 4 (1)). It shall be incumbent on the said Authority to, i.a., support and co-operate with the European Commission in the cases specified in the said legal instruments.

(2) Any rights of member states, as provided under Community law, to contribute to the issuance of regulations, directives and other general-abstract instruments to enforce Articles 81 to 86 EC shall be exercised by the Federal Minister of Economics and Labour. In the event that said instruments should affect solely or primarily enterprises or associations of enterprises in the transport sector, the Minister shall act in agreement with the Federal Minister of Transport, Innovation and Technology. The Federal Competition Authority and the Federal Cartel Lawyer shall be granted the right to make comments at any time.

(3) In the performance of his/her duties as set forth in Para 2 above, the Federal Minister of Economics and Labour may request information from the Federal Competition Authority.

Definitions

Section 4. (1) The European Rules on Competition within the meaning of this Federal Act shall comprise Articles 81 to 86 EC and Articles 65 and 66 ECSC, and the regulations, directives and decisions issued to enforce these provisions, including, without limitations:

1. Regulation (EEC) no. 17/62 to enforce Articles 85 and 86 EC,
2. Regulation (EEC) no. 4064/89 to monitor company mergers,
3. Regulation no. 1017/68, Regulation no. 4056/86, Regulation No. 3975/87, and
4. the general decisions of the European Coal and Steel Community (Decision no. 26/54, Decision no. 715/78, Decision no. 379/84).

(2) Regulators within the meaning of this Federal Act shall mean authorities which are established by a federal act and which are authorised to exercise regulatory responsibilities in specified sectors.

Exemption from application

Section 5. Proceedings pursuant to Article 86 (3) EC shall be exempt from the application of this Federal Act, provided that their subject concerns

matters of state monopolies in accordance with Item E.5, Federal Law Gazette no. 76/1986, Part 2 to the annexe to Section 2 of the 1986 Act Governing Federal Ministries (Bundesministeriengesetz) as amended in Federal Law Gazette no. 78/1987.

Appointment of the Director General

Section 6. The Director General of the Federal Competition Authority shall be nominated by the Federal Government and appointed by the Federal President for a period of office of five years as set forth in Section 141 of the 1979 Act Governing Civil Servants (Beamten-Dienstrechtsgesetz, BDG), Federal Law Gazette no. 333/1979. There shall be no limit to the reappointment of the Director General. The nomination by the Federal Government shall be preceded by a general notification of job vacancy by the Federal Minister of Economics and Labour, which notification shall be governed by the 1989 Act Governing Tenders (Ausschreibungsgesetz), Federal Law Gazette no. 85/1989.

Prerequisites for appointment

Section 7. (1) A person may be appointed Director General provided that s/he:

1. is suitable in character and qualifications to serve in that office;
2. has completed the study of law or economics; and
3. has acquired at least five years of experience in competition law.

(2) No person may be appointed Director General if s/he is entitled to payment for active service under the Federal and State regulations governing pay. Neither may a person be appointed who has been a member of the Federal or a State Government or a secretary of state at any time during the past four years.

(3) For the term of his/her office, the Director General of the Federal Competition Authority shall not carry out any other activity which obstructs him/her in the performance of his/her duties or which is liable to raise doubts about his/her full impartiality or which may impair any other essential interests of his/her office; this shall apply, without limitations, to activities described in Section 4 of the 1983 Act Governing Incompatibilities (Unvereinbarkeitsgesetz).

(4) The Director General shall leave office:

1. upon expiry of his/her term of office, unless reappointed;
2. upon termination of the employment relationship;
3. upon removal from office; or
4. upon retiring or being retired.

(5) Upon proposal of the Federal Government, the Federal President shall remove the Director General from his/her office in the event that:

1. s/he has become guilty of serious misconduct of a kind or dimension which, if s/he were to continue in his/her office, would be detrimental to the interests of the office;
2. s/he submits a request in writing; or

3. s/he is unable to fulfil his/her responsibilities as Director General due to his/her physical or mental health (inability to meet the demands of the office) and is unlikely to regain his/her ability.

(6) The employment relationship of the Director General shall be terminated, at the latest, upon the last day of the year in which s/he has completed his/her 70th year of life.

Employment and payment

Section 8. (1) In being appointed, the Director General enters into a permanent employment relationship under public law with the Federal Government, unless s/he is already thus employed.

(2) Sections 4 (1) 4 (appointment requirements), 10 (provisional employment), 11 and 12 (permanent employment), 24 to 35 (basic training), 38 (transfer), 39 to 41 (service assignment and change in employment), 41a (appeal), 75b (effects of parental leave on the job), 90 (report on the provisional civil servant), 138 (training phase) and 139 (employment hours and basic training) of the 1979 BDG shall not apply to the Director General.

(3) The official title within the meaning of Section 63 BDG shall be the functional title regulated in Section 1 (2) above.

(4) The Director General shall be entitled to the fixed salary of service group 9 of level A 1 as set forth in Section 31 of the Act Governing Salaries (Gehaltsgesetz), Federal Law Gazette no. 54/1956.

(5) Any duty assigned to the superior or head of the Office under the 1979 BDG shall be performed by the Director General. The competent authority shall be the Federal Minister of Economics and Labour.

Office

Section 9. (1) The Director General and his/her deputy shall be administratively supported by an Office, with regard to which the Director General shall issue internal rules.

(2) The Office shall consist of a head of Office and a requisite number of other staff. The head shall manage the internal operations of the Office. The staff assigned to the competition department at the Federal Ministry of Economics and Labour shall be deemed employees of the Office of the Federal Competition Authority as of the entry into force of this Federal Act.

(3) (**Constitutional provision**) In performing their responsibilities, the staff shall be bound solely by the instructions given by the Director General or, in the case s/he is prevented, by his/her deputy.

(4) The head of the competition department at the Federal Ministry of Economics and Labour shall become head of Office as of the entry into force of

this Federal Act. The head of Office shall be entitled to a salary of level A 1. To this, the relevant allowance of service group 6 shall be added.

Co-operation with other authorities

Section 10. (1) To the extent required to perform the responsibilities conferred upon it and provided that no obligations under Community law run counter to it, the Federal Competition Authority shall be authorised, with due regard to non-disclosure interests warranting protection within the meaning of the 2000 Data Protection Act (Datenschutzgesetz), Federal Law Gazette I no. 165/1999, to provide any and all information and furnish documentation to the Cartel Court, the Supreme Cartel Court, the Federal Cartel Lawyer, the Commission on Competition, the European Commission, competition authorities in other European Union member states and the regulators, such as are required by the said bodies to perform their duties. The Federal Competition Authority shall furnish non-binding recommendations by the Austrian Economic Chamber, the Federal Chamber of Labour and the Presidential Conference of Chambers of Agriculture.

(2) To the extent required to perform their responsibilities, the Cartel Court and Supreme Cartel Court may request to receive information and reasoned comments from the Federal Competition Authority.

(3) To the extent required to perform its responsibilities, the Federal Competition Authority may request information from the Federal Cartel Lawyer and get access to the said Federal Cartel Lawyer's records.

(4) In the event that the aviation sector is affected, the Federal Minister of Transport, Innovation and Technology shall be given an opportunity to comment; if the media sector is affected, KommAustria (Federal Law Gazette I no. 32/2001) shall be granted a similar opportunity.

(5) In the event that the Federal Competition Authority, for reasons including, but not limited to, modifications to the original merger project which ensure that the merger will be compatible with the KartG, intends to:

- a) declare that it will not file an application under Section 42b KartG, or
- b) withdraw an application filed under Section 42b KartG,

the Federal Competition Authority shall grant the Federal Cartel Lawyer – and the Commission on Competition, if it has made a recommendation within the meaning of Section 17 below – an opportunity to comment.

Investigations

Section 11. (1) Subject to this Federal Act, the Federal Competition Authority shall be authorised to carry out any investigations which it may require to perform its responsibilities under this Federal Act. Any information and knowledge obtained within the scope of investigations may be used only for the purpose aimed for by the investigation, unless it is authorised to co-operate as provided in Section 10 (1) above.

(2) The Federal Competition Authority shall be authorised to avail itself of experts and to question witnesses and parties involved, by applying, *mutatis mutandis*, the Law Governing General Administrative Procedures (Allgemeines Verwaltungsverfahrensgesetz, AVG), Federal Law Gazette no. 51/1991. Sections 7, 13 to 16, 18, 45 (1) and (2), 46, 47, 74 (1), 75 (1) and (2), and Sections 4 and 5 of Part I of the AVG shall be applied.

(3) The Federal Competition Authority shall be furthermore authorised, to the extent required to perform its responsibilities under this Federal Act, beyond the scope of Para 2 above:

1. to request information from enterprises and associations of enterprises within a reasonable period, to be defined on a case-to-case basis,
2. to peruse and examine business documents regardless of the form in which they are available, or to have them perused and examined by suitable experts, to make copies and excerpts thereof and therefrom and,
3. to request, *in situ*, all information required to carry out investigations.

(4) The proprietors of enterprises and their representatives, and, in the case of legal entities and partnerships of partial legal capacity, their representatives authorised by the law or by charter shall be obliged to furnish the requested information (Items 1 and 3 of Para 3), except when in doing so they risk criminal prosecution. The same shall apply to the furnishing of business documents and the permission to examine them and the production of copies of and excerpts from such documents.

(5) Upon application by the Federal Competition Authority, the Cartel Court, through the presiding judge acting as a judge sitting alone, shall issue a court order to provide information and submit business documents within a reasonable time. The sole remedy against such court order shall be by recourse. Upon application by the Federal Competition Authority, the Cartel Court shall refuse the suspensive effect of a recourse to the extent that this is necessary to ensure the success of the investigation.

Search of premises

Section 12. (1) If it is necessary to obtain information from business documents, the Cartel Court shall, upon application by the Federal Competition Authority and upon reasonable suspicion:

1. of abuse of a market-dominating position (Section 34 KartG), or of an offence against the prohibition to form a cartel (Section 18 KartG) or a merger (Para 3 of Section 42a KartG), or
 2. of an offence against Article 81 or 82 EC,
- order a search of the premises.

(2) The Cartel Court shall furthermore, upon application by the Federal Competition Authority, order a search of the premises based on a decision ordering the investigation issued by the European Commission on the suspicion of an offence against the Competition Rules. The application shall be

accompanied by the original or a certified copy of such decision. In addition to checking whether the decision issued by the European Commission is genuine, the Cartel Court shall examine only whether the intended search of the premises is arbitrary or unreasonable when measured against the subject of the investigation.

(3) The search shall be ordered by the presiding judge of the Cartel Court acting as a judge sitting alone in legal proceedings in matters other than legal disputes (comment: Act Governing Legal Proceedings in Matters Other than Legal Disputes, Imperial Law Gazette no. 208/1854 as amended). The sole remedy against such court order shall be by recourse; this remedy shall not have any suspensive effect. The Federal Competition Authority shall be ordered to carry out the search, and it shall serve the search order on the person named in Para 4 of Section 11 above immediately or, at the latest, within 24 hours.

(4) Section 142 of the Code of Criminal Procedure (Strafprozessordnung, StPO), Federal Law Gazette no. 631/1975 shall be applied subject to the proviso that the court witnesses will be replaced by a representative who may be called in by the person affected by the search, and that in the event of a search ordered pursuant to Para 2 above no confirmation as per the second sentence of Para 4 of Section 142 StPO will be given. Para 1 of Section 145 shall apply analogously. The Federal Competition Authority shall be authorised as specified in Items 2 and 3 of Para 3 of Section 11 above.

(5) In the event of a search ordered pursuant to Para 1 above, the proprietor of the enterprise or his/her representative, or in the case of legal entities and partnerships of partial legal capacity, their representatives authorised by the law or by charter shall be interrogated on the prerequisites for the search, except when this would imperil the success of the investigation due to imminent danger. In the event that the owner/holder of business documents refuses to have them searched or inspected in the course of a search as named above, such documents shall be suitably secured against unauthorised inspection or modification and shall be submitted to the Cartel Court; prior to this, such documents shall not be searched or inspected. It shall be incumbent upon the Cartel Court to examine the documents and to rule, through the presiding judge acting as a judge sitting alone, whether and to what extent they may be searched, inspected and copies and excerpts may be made of or from them or whether they shall be returned to their owner/holder. The sole remedy against such court order shall be by recourse. This remedy shall not have any suspensive effect.

Due process of law

Section 13. (1) In the event that investigations pursuant to Section 11 (2) to (5) or Section 12 of this Federal Act have preceded an application intended to be filed by the Federal Competition Authority to initiate proceedings under the Cartel Act pursuant to Sections 8a, 25 (3), 27 (3), 30c (2), 33 (2), 37, 42a (5), 42b (6), 142 (1) a, b, or 142 (3) KartG, the opponent shall be given an opportunity to be informed of the results of the investigations and to comment on them within a reasonable period of time.

(2) In the event that the investigations as set forth in Para 1 above, made by the Federal Competition Authorities with a view to filing an application, find no cause to make an application by the Federal Competition Authority as set forth in Para 1 above, the opponent shall upon request be informed thereof.

Use of law enforcement agencies

Section 14. The law enforcement agencies shall assist the Federal Competition Authority upon the latter's request in securing investigations and searches (Sections 11 and 12) within the scope of their legal sphere of action.

Representation

Section 15. (1) In performing its responsibilities under this Federal Act, the Federal Competition Authority shall be authorised to represent itself vis-à-vis all government authorities and courts, except when representation by a lawyer is mandatory.

(2) The Federal Competition Authority may entrust its representation to the Federal Law Office or a lawyer.

Commission on Competition

Section 16. (1) A Commission on Competition ("Commission") shall be established with the Federal Competition Authority as an advisory body. This Commission shall be commissioned by the Federal Competition Authority or the Federal Minister of Economics and Labour to prepare expert opinions on general competition issues, and it may make recommendations on notified mergers (Section 17). The body ordering the expert opinion shall define a reasonable period of time for such expert opinion. Furthermore, the Commission shall submit, annually and by 1 October at the latest, to the Federal Competition Authority proposals for focal points in performing its responsibilities for the next calendar year.

(2) The Commission shall be made up of eight members who need to have special knowledge and experience in macroeconomics, business and management economics, social policy, technology or economic law. A substitute member shall be appointed for each member. No expert lay judge of the Cartel Court or Supreme Cartel Court and no authorised cartel representative may be a member of the Commission. The Commission shall elect its chairperson from its members.

(3) The members (substitute members) of the Commission shall be appointed by the Federal Minister of Economics and Labour for a term of four years. One member (substitute member) each shall be appointed on nomination by the Austrian Economic Chamber, the Federal Chamber of Labour, the Austrian Trade Union Federation and the Presidial Conference of Chambers of Agriculture. Members may serve repeat terms.

(4) The members (substitute members) shall be removed from their office upon their own request by the Federal Minister of Economics and Labour, or upon the request of the body that has appointed them. In other respects, Para 5 of Section 7 shall apply *mutatis mutandis* to the removal of members (substitute members) from office.

(5) In carrying out their activities, the Commission members shall not be bound by any instructions and shall be bound by official secrecy.

(6) Upon hearing the Commission, the Federal Minister of Economics and Labour shall issue internal rules regulating, i.a., election of a chairperson and his/her deputy, convening method, opinion-forming and working of the Commission in its plenary and in senates. The Commission shall adopt its decisions by a majority of votes, and in the event of a tie, the chairperson shall have the casting vote; the Commission shall be convened by the chairperson. The chairperson shall convene the Commission upon the request of two or more of its members. In matters of merger control (Section 17 below), any member may request that the Commission on Competition be convened. In such event, the chairperson shall call a meeting to be held within one week. Upon a request made by a Commission member, the Commission shall furnish to the Federal Competition Authority a written recommendation on whether or not an application to examine a notified merger be filed. The Director General (deputy) of the Federal Competition Authority shall have the right to attend the meetings, but shall not be eligible to vote.

(7) The Commission members shall be paid a lump-sum compensation, which shall be calculated with due regard to the number and duration of meetings, travel expenses and time input. This compensation shall be determined by the Federal Minister of Economics and Labour. The Federal Minister of Economics and Labour shall provide the Commission with the necessary funds.

Contribution of the Commission on Competition to matters of merger control

Section 17. (1) The Commission on Competition shall be authorised to furnish the Federal Competition Authority with a recommendation on whether or not to file an application with the Cartel Court to examine a notified merger, which recommendation shall be in writing and shall state the reasons therefor. Such a recommendation shall be received by the Federal Competition Authority not later than one week prior to expiry of the term provided for filing such an application.

(2) In order to perform the responsibilities within the scope of merger control, each member of the Commission on Competition shall, upon request, be granted the right to inspect the notification documents and, upon request, be furnished with copies thereof.

(3) The Federal Competition Authority shall be entitled to offer the Commission on Competition an opportunity to furnish a recommendation pursuant to Para 1 above.

(4) In the event that the Federal Competition Authority fails to file an application to examine a notified merger in spite of a recommendation to the contrary which has been filed by the Commission in good time and in accordance with Para 1 above, the Commission shall be informed of the significant reasons therefor as soon as possible. Such reasons and the recommendation made by the Commission on Competition shall be publicised on the homepage of the Federal Competition Authority promptly upon expiry of the term for examination, while duly observing legal secrecy obligations.

(5) The Commission's recommendation and the reasons of the Federal Competition Authority as set forth in Para 4 above, shall be included in the report pursuant to Para 3 of Section 2 above with due observance of legal secrecy obligations.

(6) Without prejudice to other legal secrecy obligations, information and knowledge obtained in applying this Section 17 shall be used solely for the purpose of issuing a recommendation within the meaning of Para 1 above.

Linguistic non-discrimination

Section 18. Where this Federal Act uses only the masculine form for person-related designations, it shall apply equally to women and men. When applied to a given individual, the gender-specific form shall be used.

References

Section 19. Where a reference to other federal acts is made in this Federal Act and in the absence of any derogation, such reference shall apply to the respective federal act as amended.

Enforcement

Section 20. This Federal Act shall be enforced:

1. by the Federal Minister of the Interior with regard to its Section 14,
2. by the Federal Minister of Justice and the Federal Minister of Economics and Labour depending on their respective sphere of competence with regard to its Sections 11 and 12, and
3. by the Federal Minister of Economics and Labour with regard to its other provisions, and in agreement with the Federal Minister of Transport, Innovation and Technology with regard to its Para 2 of Section 2.

Article II

Amendments of the Cartel Act (Federal Law Gazette 600/1988)

Article III

Amendments of the Criminal Code, Federal Law Gazette 60/1974

Article IV
**Amendment of the 2002 Federal Financial Act, Federal Law Gazette I,
38/2001**

Article V
Entry into force and transition regulations

(1) **(Constitutional provision)** Article I of this Federal Act shall enter into force as of 1 July 2002. At the same time, the Federal Act of 18 February 1993, Federal Law Gazette no. 125/1993, on the Enforcement of Competition Rules in the European Union (EU-Wettbewerbsgesetz/EU-WBG) shall become ineffective. The organisational regulations of Sections 6 to 8 of Article I shall enter into force on the day following the publication. Articles II and III shall similarly enter into force as of 1 July 2002.

(2) Ordinances based on this Federal Act may be issued as of the day following its publication, and administrative acts on individual cases, including, without limitation, appointments, may be performed as of this day, but they shall not become effective prior to 1 July 2002.

(3) Any procedures pending at the Cartel Court on the date of entry into force of Article II which have been instituted *ex officio* on the basis of Section 44a KartG as amended may be continued *ex officio*.

(4) In any procedure pending on the date of entry into force of Article II and which has been instituted upon application by an official part pursuant to Section 44 KartG as amended, the official party filing the application shall retain its standing.

(5) The office of the members (substitute members) of the Joint Committee pursuant to Section 112 KartG as amended shall terminate six months after Article II has entered into force. Any instructions to the Joint Committee to submit expert opinions (Sections 49 and 112 (2) KartG as amended) shall become invalid upon expiry of this period.

(6) Chapter XIV of the 1988 Cartel Act (Sections 129 to 141) shall continue to apply to punishable acts committed prior to the date on which Article II has entered into force.

(7) Section 142.1 and 2.a of the 1988 Cartel Act as amended in this Federal Act shall not apply to any situation implemented prior to the date on which Article II has entered into force.