

# **Federal Act of 19 October 1988 on Cartels and other Restrictive Trade Practices (1988 Cartel Act – KartG 1988)**

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Amendment of 1988 CARTEL ACT (in the version published in BGBL I Nr 33/2003)

## **CHAPTER I General provisions**

### **Economic point of view**

Section 1. For the assessment of a situation pursuant to Chapters II to V, from an economic point of view, the actual economic content and not the external appearance of the situation shall be relevant.

### **Calculation of market shares**

Section 2. In applying this Federal Act, market shares shall be calculated pursuant to the following principles:

1. calculations shall focus on a specified commodity or service (Section 3);
2. enterprises that are associated as described in Section 41 shall be deemed a single enterprise;
3. in calculating shares in the domestic market, the domestic market shares of foreign entrepreneurs shall also be taken into account.

### **Calculation of turnover**

Section 2a. In applying this Federal Act, turnover shall be calculated in accordance with the following principles:

1. Enterprises that are associated as described in Section 41 shall be deemed a single enterprise; turnover from deliveries and services between these enterprises (internal turnover) shall not be included in the calculation;
2. In the case of banks and building and loan associations, turnover shall be replaced by the sum of the following income items:
  - a. Interest income and similar proceeds,
  - b. Income from shares, other equity interests and non-fixed-interest securities, income from stakes, and income from shares in associated enterprises,
  - c. Commission income,
  - d. Net income from financial transactions, and
  - e. Other operating income;
3. In the case of insurance companies, turnover shall be replaced by the premium income.

### **Specified goods or services**

Section 3. All goods (services) that under the given market conditions serve to supply the same demand shall be deemed specified goods (services) within the meaning of this Federal Act

### **Jurisdiction of the provinces**

Section 4. (1) This Federal Act shall not be applied in matters which, with respect to legislation or execution, are within the jurisdiction of the provinces.

(2) (**Constitutional provision**) Without prejudice to the provision set forth in para 1, this Federal Act shall also be applied to matters of public electricity supply (Article 12 para 1 Z 5 B-VG).

### **Exemptions**

Section 5. (1) Save as provided in Section 7, chapters II to IV shall not be applied:

1. (note: repealed by FLG No 693/1993)
2. to circumstances which by virtue of statutory provisions are subject to the supervision of the supervisory authority for financial markets over banks, building and loan associations, or private insurance companies, or of the Federal Minister for Public-Sector Economy and Transport over transportation enterprises; the exemption shall not apply to corporate rate premiums for motor insurance,
3. to government monopoly enterprises, provided that they exercise monopoly powers conferred on them by law,
4. to enterprises provided that they are subject to the Act State Law Gazette No 180/1920.

(2) Save as provided in Section 7, chapter II shall not be applied to cartel contracts binding the final sellers in the book, art, music, magazine, and newspaper trades to the selling price fixed by the publisher.

(3) Save as provided in Section 7, chapters II and IIa shall not be applied to restrictive trade practices:

1. between members of a cooperative as well as between them and the cooperative, provided that these restrictive trade practices are justified by the fulfilment of the promotional mandate of \* (Section 1 of the (Act governing Acquisition and Business Cooperatives), Imperial Law Gazette No 70/1873)
2. between the members of a banking group within the meaning of Section 30 para 2a BWG (*Banking Act*).

(4) Chapter II shall not be applied to vertical distributional restraints (Section 30a).

### **Territorial scope of application**

Section 6. (1) This Federal Act shall similarly be applied to any circumstances pursuant to chapters II to IV that are realised abroad, provided that it affects the domestic market.

(2) Save as provided in Section 7, this Federal Act shall not be applied to any circumstances where they affect the foreign market.

### **International agreements**

Section 7. (1) The exemptions pursuant to Sections 5 and 6 para 2 shall not apply, provided that the realisation of such facts as are regulated in chapters II to IV is apt to impair commercial intercourse that is governed by one of the following international agreements:

1. Treaty between the Republic of Austria and the European Economic Community,
2. Treaty between the Republic of Austria on the one side and the member states of the European Coal and Steel Community and the European Coal and Steel Community on the other side,
3. Treaty establishing the European Free Trade Association,
4. Treaty on the European Economic Area.

(2) Provided that the provisions to be applied thereunder concern the domestic market, they shall be applied *mutatis mutandis* to the affected foreign market where applicable.

### **Relation to other legal provisions**

Section 8. Legal provisions that fix prices, price limits, or calculation guidelines or authorise their fixing, shall not be affected by this Federal Act.

### **Declaration of facts**

Section 8a. (1) Upon request, the Cartel Court shall declare whether and to what extent a specific situation is subject to this Federal Act.

(2) The following parties shall be entitled to submit a request pursuant to para 1:

1. the official parties (Section 44),
2. associations that represent economic interests of entrepreneurs if they substantiate an interest in a prompt declaration,
3. any entrepreneur or any association (Section 31 Z 2) that has a legal or economic interest in a prompt declaration,
4. the Austrian Economic Chamber,
5. the Federal Chamber of Labour,
6. the Presidential Conference of the Austrian Chambers of Agriculture,
7. Authorities established by federal laws to regulate specific economic sectors (regulators).

## **CHAPTER II**

### **Cartels**

#### **Types of cartels**

Section 9. Cartels within the meaning of this Federal Act shall be agreement cartels (Section 10), conduct cartels (Section 11), and recommendation cartels (Section 12).

### **Agreement cartels**

Section 10. (1) Agreement cartels shall be agreements between entrepreneurs remaining economically independent, or between associations of entrepreneurs if, in the mutual interest, they are intended to restrict competition, particularly with regard to production, distribution, demand or prices (intention cartels), or if they actually cause such effect without this being intended (effect cartels).

(2) Agreements within the meaning of para 1 shall be either contracts (contract cartels) or concerted actions (concerted action cartels). Not included shall be concerted actions whose non-bindingness has been expressly agreed and for whose enforcement economic or social pressure is neither intended to be exercised nor is being exercised.

(3) Restrictions of competition with respect to prices also exist if prices are mutually communicated, directly or indirectly, unless they have been out of date for at least one year (price registration office).

### **Conduct cartels**

Section 11. (1) Conduct cartels shall be mutually coordinated, i.e., neither coincidental nor merely market-induced, practices, of entrepreneurs remaining economically independent or of associations of entrepreneurs, provided that they are intended to restrict competition (intention cartels), or if they actually cause such effect without this being intended (effect cartels).

(2) Excepted shall be coordinated practices

1. that are based on a recommendation (Section 12) or a non-binding recommendation by an association (Section 31),
2. that emerge in cooperation with a statutory entity representing professional interests acting within its legal scope of operation,
3. that emerge as a result of compliance with statutory provisions or
4. that are economically justified (Section 23 Z 3) as stated in a concurrent notice to the involved entrepreneurs by the Federal Chamber of Commerce, the Federal Chamber of Labour, the Presidential Conference of the Austrian Chambers of Agriculture, and the Austrian Federation of Trade Unions.

### **Recommendation cartels**

Section 12. (1) Recommendation cartels shall be recommendations for the observance of specified prices, price limits, calculation guidelines, trade margins, or discounts, through which a restriction of competition is intended to be achieved or is achieved. Excepted shall be recommendations that expressly indicate their non-bindingness and for whose enforcement economic or social pressure is neither intended to be exercised nor is being exercised.

(2) Announcements of goods or services containing price information, which do not originate from the final seller (provider of the service) and become known to the ultimate consumer, shall be deemed to be recommendations within the meaning of para 1.

### **Resale price maintenance**

Section 13. Cartels (Sections 10 to 12) that bind one or several members of one, several, or all subsequent economic stages to the same prices for goods or services, shall constitute resale price maintenance.

### **Standards and types cartels**

Section 14. Standards and types cartels aim at ensuring the uniform application of standards or types, particularly by restricting production or use to standardised or homologised products.

### **Rationalisation cartels**

Section 15. Rationalisation cartels pursue rationalisation objectives through the regulation of investment, production, or research programmes, or of distribution measures.

### **Minor cartels**

Section 16. Minor cartels shall be cartels which, at the time of their formation,

1. hold a share of less than 5% of the entire domestic market and
2. where applicable, hold a share of less than 25% of a domestic local submarket.

### **Exemption by ordinance**

Section 17. (1) By ordinance, the Federal Minister of Justice may:

1. specify which forms of inter-company cooperation or announcements of goods or services containing price information are not subject to this Federal Act, and
2. exempt classes of cartels from the application of this Federal Act provided that they are obviously necessary for economic reasons.

(1a) If an ordinance pursuant to para 1 contains special provisions for banks, contractual insurance businesses, or pension funds, it shall be issued in agreement with the Federal Minister of Finance; if it contains an exemption pursuant to para 2a, in agreement with the Federal Minister of Agriculture and Forestry and with the Federal Minister of Economic Affairs, otherwise in agreement with the Federal Minister of Economic Affairs.

(2) The authorisation to issue ordinances pursuant to para 1 shall relate in particular to agreements and concerted practices whose subject matter concerns solely:

1. the joint implementation of research and development projects, the joint awarding of research and development contracts, and the allocation of research and development projects among the parties involved, provided that the results are available to all parties involved and may be used by all parties involved,
2. the creation and use of joint transportation, loading, and storage facilities, joint showrooms, and a joint staff of representatives,

3. the joint advertising by entrepreneurs holding a combined share of the entire domestic market of less than 5% with respect to the goods or services being advertised,
4. the joint advertising by other entrepreneurs, provided that no prices are indicated,
5. the joint use of accounting and invoicing equipment, or
6. the creation and use of joint information systems (databases).

(2a) The authorisation to issue ordinances pursuant to para 1 shall also apply to the coordination of the production and the distribution of forestry products between forestry manufacturers provided that they do not entail any resale price maintenance.

(3) The authorisation to issue ordinances pursuant to para 1 shall also apply to:

1. (Note: repealed by FLG No 693/1993)
2. announcements, with price information, of goods or services of tourism and transportation entrepreneurs for the purpose of joint advertising, and
3. offers of combined services of different transportation and tourism entrepreneurs at lump-sum prices (package arrangements).

#### **Prohibition of implementation**

Section 18. (1) The implementation, even if only partially, of cartels shall be prohibited under the following conditions:

1. before the final approval (Sections 23 and 26); effect cartels and minor cartels shall be exempt unless the limits specified in Section 16 are exceeded by an entry;
2. provided that the Cartel Court has finally or by temporary injunction prohibited the implementation (Section 25) or revoked the approval (Section 27);
3. upon expiry of the approval period (Section 24).

(2) However, after the final approval of intention or recommendation cartels, the modification of prices and terms of payment may be implemented as soon as its approval has been applied for; this shall not apply to resale price maintenance (Section 13).

(3) The exemption pursuant to para 1 Z 1 shall not apply to effect cartels if the Cartel Court has, pursuant to Section 8 a, finally declared that such a cartel exists and that it is not a minor cartel. Such a cartel may, however, continue to be implemented for six months after the date of the declaratory order having become final; if within this period an application is filed for approval of the cartel and the proceedings are duly continued, the cartel may continue to be implemented until the final decision by the Cartel Court.

#### **Implementation of resale price maintenance**

Section 19. (1) The modification of the nature of a commodity or service that is the subject matter of resale price maintenance shall be deemed a modification of the cartel, unless, upon request by the cartel representative, the Cartel Court finally declares that there is no deterioration of quality.

(2) The reduction of a maintained price may be implemented without approval by the Cartel Court; however, the cartel representative shall notify the Cartel Court thereof prior to its implementation.

(3) If the implementation of a resale price maintenance is prohibited (Section 25) or its approval is revoked (Section 27), the cartel representative shall promptly inform in writing the entrepreneurs bound by the prices.

### **Invalidity of cartel contracts**

Section 22. Cartel contracts shall be invalid if their implementation is prohibited.

### **Approval of cartels**

Section 23. The Cartel Court shall approve cartels, with the exception of minor cartels, upon application of the cartel representative, if:

1. the agreement contains no obligations or provisions
  - a. to exclusively sell such goods or perform such services that are the subject matter of the cartel,
  - b. to sell goods or perform services of the same kind as or similar to those covered by the cartel only under specific limitations concerning the price (consideration) or the quantity,
  - c. to exclude, wholly or in part, from the sale of the goods or the performance of the services that are the subject matter of the cartel, certain persons or groups of persons despite their willingness to comply with the prescribed terms; however, these terms shall not go beyond existing legal provisions as regards the professional qualification requirements,
2. the cartel does not violate a statutory prohibition or public policy (Section 879 ABGB / *General Civil Code*), and
3. the cartel is economically justified. This is definitely not the case if a cartel is incompatible with the international agreements referred to in Section 7 para 1. Furthermore, in examining the economic justification, special regard shall be paid to the interests of the ultimate consumers. In the case of resale price maintenance, economic justification definitely does not exist if the individual margins exceed such average margins as are customarily granted. In the case of other cartels, it shall also be taken into consideration whether the cartel is necessary for the avoidance of severe commercial disadvantages.

### **Approval period and period of validity**

Section 24. (1) In the approval decision, the Cartel Court shall fix the period for which the approval is valid (approval period). From the taking effect of the decision, the approval period shall be fixed in consideration of the period for which the economic justification of the cartel can be assessed, but shall not exceed five years.

(2) The Cartel Court shall extend the approval if the cartel representative has filed an application to this effect not later than six months prior to the expiry of the approval period, and if the conditions for the approval of the cartel (Section 23) are still being met. Para 1 shall apply analogously to the extension.

(3) Until the final decision on the application for extension filed within the prescribed period, the cartel may continue to be implemented even after the expiry of the approval period, provided that the proceedings are duly continued.

(4) Para 3 shall apply analogously if after the final approval of an intention cartel, the approval of the extension is applied for not later than six months prior to the expiry of the agreed period of validity.

### **Prohibition of implementation**

Section 25. (1) The Cartel Court shall prohibit the implementation of cartels that may be implemented without approval:

1. upon application, if such cartel lacks the conditions for approval (Section 23); if the proceedings show that the cartel fulfils the conditions for approval, the Cartel Court shall approve the cartel unless it is a minor cartel;
2. if it refuses an application for approval of such cartel or rejects it pursuant to Section 65.

(2) Upon application, the Cartel Court shall prohibit the implementation of cartels whose implementation is prohibited pursuant to Section 18 para 1 Z 1.

(3) The following shall be entitled to make an application pursuant to para 1 Z 1 and para 2:

1. the official parties (Section 44),
2. associations that represent economic interests of entrepreneurs if these interests are affected by the cartel,
3. any entrepreneur whose legal or economic interests are affected by the cartel,
4. the Austrian Economic Chamber,
5. the Federal Chamber of Labour,
6. the Presidential Conference of the Austrian Chambers of Agriculture,
7. authorities established by federal laws to regulate specific economic sectors (regulators).

### **Modification and supplementation of cartels**

Section 26. Sections 23 and 25 shall apply *mutatis mutandis* to the modification and supplementation of cartels.

### **Revocation of the approval**

Section 27. (1) The Cartel Court shall revoke the approval of a cartel wholly or in part,

1. provided that the cartel representative has submitted an application to this effect;
2. upon application, provided that after the approval one of the conditions pursuant to Section 23 is no longer met. In the case of resale price maintenance, the economic justification ceases to exist particularly if the prices paid in business transactions by the ultimate consumer are for the major part of the total sales considerably below the cartel prices.

(2) The following shall be entitled to make an application pursuant to para 1 Z 2:

1. the official parties (Section 44),
2. associations that represent economic interests of entrepreneurs, if these interests are affected by the cartel,
3. any entrepreneur whose legal or economic interests are affected by the cartel,
4. the Austrian Economic Chamber,
5. the Federal Chamber of Labour,
6. the Presidential Conference of the Austrian Chambers of Agriculture,
7. authorities established by federal laws to regulate specific economic sectors (regulators).

### **Termination and withdrawal**

Section 28. (1) A cartel contract concluded for an unlimited time, or – in consideration of extension provisions – for more than two years may be terminated at the end of the second and any following year subject to six months' notice; a resale price maintenance can be terminated at the end of the first year and of every following half-year, subject to two months' notice. The dates for termination shall be calculated from the taking effect of the approval decision, or, if the cartel contract may be implemented without approval, as of the date of its formation.

(2) In the event of standards, types and rationalisation cartels (Sections 14 and 15), the Cartel Court in its approval decision (Section 23) shall also approve the non-terminability of the cartel contract for a maximum of five years provided that economic reasons speak for such non-terminability.

(3) Each cartel member may withdraw from a contract cartel before the agreed date for an important reason, especially if the maintenance of the cartel contract would, notwithstanding its exercising the diligence of a prudent businessperson, cause a serious threat to its entrepreneurial activities, which, after balancing the interests of both sides, it cannot reasonably be expected to accept.

(4) If the cartel contract cancels or restricts the right of termination (paras 1 and 2) or the right to withdraw before the agreed date (para 3), it shall be invalid.

### **Reduction of contractual penalties**

Section 29. Section 348 of the Commercial Code shall not apply to a contractual penalty that has been promised in a cartel contract.

### **Judicial assistance against boycotts**

Section 30. (1) Supply or contracting boycotts instituted by a body of the cartel or a third party under the cartel contract because of its having been violated shall not be implemented prior to the expiry of fourteen days from the affected party having been informed of the measure. A supply boycott shall be understood as the right to withdraw from contracts concluded with another cartel member or to withhold performances that are due to the latter under the contract; a contracting boycott shall be understood as the obligation not to conclude specified legal transactions with another cartel member.

(2) The affected party may, within the period specified in para 1, apply for judicial assistance at the Cartel Court; in this case the boycotts (para 1) shall not be implemented for one month from the filing of the application.

(3) The Cartel Court shall declare the boycotts (para 1) wholly or partially invalid or convert them into a reasonable contractual penalty if, considering all circumstances, they are unreasonably hard on the affected party. On principles of fairness, the Cartel Court shall, for a defined period, establish an obligation to conclude legal transactions at appropriate prices and other terms, to the same extent as the business relationship that existed prior to the contracting boycott; however, such extent shall be appropriately limited if the total orders exceed the supply capacity. In the event of well-founded doubts with respect to the solvency of the affected party, the obligation to deliver against advance payment shall be established.

## **Chapter IIa Vertical distributional restraints**

### **Definition**

Section 30a. (1) Vertical distributional restraints are contracts between an entrepreneur (restraining entrepreneur) and one or several entrepreneurs who remain economically independent (restrained entrepreneurs) that limit the latter's procurement or distribution of goods or their use or performance of services.

(2) Resale price maintenances (Section 13) shall not be regarded as vertical distributional restraints.

### **Notification duty**

Section 30b. The restraining entrepreneur shall notify the Cartel Court of the vertical distributional restraints prior to their implementation. A model of the agreements with the individual members shall be attached to the notification.

### **Prohibition**

Section 30c. (1) Upon application, the Cartel Court shall prohibit the implementation of a vertical distributional restraint, if:

1. the vertical distributional restraint violates a statutory prohibition or public policy (Section 879 ABGB / *General Civil Code*),
2. the vertical distributional restraint is not economically justified. This is definitely the case if the vertical distributional restraint is incompatible with the international agreements referred to in Section 7 para 1. In examining the economic justification, the justified interests of the restraining entrepreneur, of the restrained entrepreneurs, and of the ultimate consumer shall be considered equally. Furthermore, the economic freedom of choice of the restrained entrepreneurs shall not be unreasonably restricted, nor shall the market access for other competitors be unreasonably impeded.

(2) The following shall be entitled to make an application pursuant to para 1:

1. the official parties (Section 44),

2. associations that represent economic interests of entrepreneurs, if these interests are affected by the vertical distributional restraint,
3. any entrepreneur whose legal or economic interests are affected by the vertical distributional restraint.
4. the Austrian Economic Chamber,
5. the Federal Chamber of Labour,
6. the Presidential Conference of the Austrian Chambers of Agriculture,
7. authorities established by federal laws to regulate specific economic sectors (regulators).

### **Legal consequences of prohibition**

Section 30d. (1) The implementation, even in part, of vertical distributional restraints shall be prohibited if the Cartel Court has prohibited their implementation finally or by temporary injunction.

(2) Vertical distributional restraints shall be invalid if their implementation is prohibited.

### **Exemption by ordinance**

Section 30e. (1) The Federal Minister of Justice may determine by ordinance that for specified categories of vertical distributional restraints there shall be no grounds for prohibition pursuant to Section 30c.

(2) If an ordinance pursuant to para 1 contains special provisions for banks, contractual insurance businesses, or pension funds, it shall be issued in agreement with the Federal Minister of Finance, in other respects in agreement with the Federal Minister of Economic Affairs.

## **CHAPTER III**

### **Non-binding recommendations by associations**

#### **Definition**

Section 31. Non-binding recommendations by associations within the meaning of this Federal Act shall be recommendations for the observance of fixed prices, price limits, or calculation guidelines which:

1. are not recommendation cartels (Section 12);
2. are initiated by associations whose objective is the representation of economic interests of entrepreneurs; associations within the meaning of this provision shall be deemed to be legal entities representing professional interests, and associations of entrepreneurs;
3. are not addressed to members of a liberal profession.

#### **Conditions for issuance**

Section 32. A non-binding association recommendation may only be issued one month after notification thereof, with reasons attached, has been made to the Cartel Court.

### **Revocation order**

Section 33. (1) The Cartel Court shall order the recommending association to expressly revoke within fourteen days the recommendation vis-à-vis the recipients under the following conditions:

1. if it rejects the notification of the recommendation;
- 1a. upon application, if the recommendation was issued contrary to Section 32;
2. upon application, if the recommendation is not economically justified (Section 23 Z 3);
3. *ex officio* upon the expiry of five years from notification of the recommendation. If notification of the recommendation is again made to the Cartel Court within this period in compliance with Section 32, the period shall begin to run again.

(2) The following shall be entitled to file an application pursuant to para 1 Z 1a and 2:

1. the official parties (Section 44),
2. associations that represent economic interests of entrepreneurs, if these interests are affected by the recommendation,
3. any entrepreneur whose legal or economic interests are affected by the recommendation,
4. the Austrian Economic Chamber,
5. the Federal Chamber of Labour,
6. the Presidential Conference of the Austrian Chambers of Agriculture,
7. authorities established by federal laws to regulate specific economic sectors (regulators).

## **CHAPTER IV**

### **Market-dominating entrepreneurs**

#### **Definition**

Section 34. (1) An entrepreneur shall be deemed market-dominating within the meaning of this Federal Act which, as supplier or demander (Section 2):

1. is exposed to no or only insignificant competition, or
2. has, in relation to the other competitors, a superior position in the market; in particular, due regard shall be given to financial strength, relations with other entrepreneurs, access to the procurement and sales markets, as well as circumstances limiting market access for other entrepreneurs.

(1a) If an entrepreneur as supplier or demander in the entire domestic market or another relevant geographic market,

1. holds a share of at least 30%, or
2. holds a share in excess of 5% and is exposed to the competition of no more than two entrepreneurs, or
3. holds a share in excess of 5% and belongs to the four largest entrepreneurs in this market, which hold a combined share of not less than 80%,

it shall have to prove the non-existence of conditions pursuant to para 1.

(2) An entrepreneur shall also be deemed market dominating if it has, in relation to its customers or suppliers, a superior position in the market; such particularly exists if the latter are dependent on the maintenance of the business relationship if they are to avoid severe business disadvantages.

### **Abuse control**

Section 35. (1) Abuse of a market-dominating position shall be prohibited; upon application, the Cartel Court shall order the enterprises involved to cease such abuse. Such abuse can, in particular, include the following:

1. the direct or indirect enforcement of unreasonable buying or selling prices or other business terms, such as, in particular, unreasonable periods of payment and interest on defaulted payment,
2. the restriction of production, distribution, or technical development to the detriment of consumers,
3. the creation of competitive disadvantages for contracting parties through application of different terms to equivalent performances,
4. the condition, attached to the conclusion of the contract, that the contracting parties accept additional performances which are not related to the subject matter of the contract, neither for material reasons nor in accordance with commercial usage,
5. the sale of goods below cost price that cannot be justified on material grounds.

(1a) In the event of para 1 Z 5, the burden of proof to refute the appearance of a sale below cost price and to provide justification for such sale shall rest on the market-dominating entrepreneur.

(2) If the Cartel Court orders a market-dominating entrepreneur that belongs to one of the categories enumerated in Section 42 c para 1 to act pursuant to para 1, the former shall, upon application, additionally order the latter to take measures to mitigate or eliminate the market-dominating position, if

- a) (note: repealed by FLG I No 62/2002)
- b) the abuse is able to impair media diversity, and
- c) it is to be expected that, without such measures, further abuses of this kind will occur.

(2a) Media diversity shall be understood to mean a diversity of independent media enterprises which are not associated within the meaning of Section 41 and through which news reporting with due regard to different opinions is ensured.

(3) In applying para 2, the previous conduct of the market-dominating entrepreneur, the degree of market domination, and the other market conditions shall be particularly taken into consideration.

(4) When issuing orders pursuant to para 2, the measures ordered shall, with adequate consideration of the interests of the market-dominating entrepreneur on the one hand and the entrepreneurs affected by the abuse, as well as of the interest in the maintenance of media diversity, on the other hand, reach their goal with the minimum expenditure and minimum burden for the parties involved.

(5) If the relevant circumstances change after the issuance of an order pursuant to para 1 or 2, the Cartel Court may, upon application of a party, modify or revoke the order.

### **Prohibition of retaliatory measures**

Section 36. Proceedings pursuant to Section 35 shall not be taken as an opportunity by the opposing party to exclude the entrepreneur directly affected by the abuse of a market-dominating position from further supply or purchase on reasonable terms; upon application, the Cartel Court shall order the opposing party to cease such practices.

### **Right of application**

Section 37. The following shall be entitled to make an application pursuant to Sections 35 and 36:

1. the official parties (Section 44),
2. associations that represent economic interests of entrepreneurs, if these interests are affected by the conduct to be prohibited,
3. any entrepreneur whose legal or economic interests are affected by the conduct to be prohibited,
4. the Austrian Economic Chamber,
5. the Federal Chamber of Labour,
6. the Presidential Conference of the Austrian Chambers of Agriculture,
7. authorities established by federal laws to regulate specific economic sectors (regulators).

### **Publication of decisions**

Section 38. Upon application, the Cartel Court shall grant the prevailing party, if it has a justifiable interest therein, the authority to publish, at the expense of the opposing party, the decision on the application for prohibition of the abuse of a market-dominating position (Section 35) within a specified period. The extent and manner of publication shall be determined in the decision.

### **Costs of publication**

Section 39. After publication, the presiding judge of the Cartel Court shall, upon application by the prevailing party, determine the costs of the publication and order the opposing party to reimburse them.

## **CHAPTER V Concentrations**

### **Definition**

Section 41. (1) Within the meaning of this Federal Act, the following shall be deemed concentrations:

1. the acquisition of an enterprise, in whole or in substantial part, by an entrepreneur, in particular through merger or transformation,
2. the acquisition by an entrepreneur of a right to the operational facility of another entrepreneur through company surrender agreements or business management agreements,
3. the direct or indirect acquisition of shares of a company that is an entrepreneur, by another entrepreneur, both in the event of achieving or

exceeding a stake of 25%, and in the event of achieving or exceeding a stake of 50%,

4. if at least half of the members of the management bodies or the supervisory boards of two or several companies that are entrepreneurs are caused to be identical,
5. any other combination of enterprises, on the basis of which an entrepreneur can directly or indirectly exercise a dominating influence on another enterprise.

(2) The establishment of a joint venture shall also be deemed a concentration, provided that it:

1. permanently fulfils all functions of an independent economic unit, and
2. does not entail any coordination of the competitive behaviour of the founding enterprises in relation to each other or in relation to the joint venture.

(2a) The conclusion of contractual obligations by banks within the meaning of Section 30 para 2a BWG (*Banking Act*) shall also be deemed a concentration.

(3) If all enterprises involved are part of a corporate group (Section 15 of the 1965 Stock Corporation Act (*Aktiengesetz*), FLG No 98, Section 115 of the Act Governing Limited Liability Companies (*Gesetz über Gesellschaften mit beschränkter Haftung*), Imperial Law Gazette No 58/1906), this shall not be deemed a concentration.

### **Concentrations subject to notification**

Section 42a. (1) Concentrations shall be subject to notification of the Cartel Court, if the entrepreneurs or enterprises involved, in the last financial year preceding the concentration, have achieved at least the following turnover:

1. a total of € 300 million worldwide,
2. a total of € 15 million domestically,
3. at least two entrepreneurs or enterprises worldwide, € 2 million each.

(2) Each of the entrepreneurs involved in the concentration shall have the right of notification.

(3) The Cartel Court shall promptly publicise the notification in the “Amtsblatt zur Wiener Zeitung”. The notice shall state the names of the parties involved, a short description of the type of concentration, the affected lines of business and any other circumstances relevant for the proper execution of the concentration. Similarly, any change in the notification which affects facts required to be publicised shall be publicised.

(3a) Each entrepreneur whose legal or economic interests are affected by the concentration, may submit to the Cartel Court a written statement within 14 days of publication pursuant to para 3; mention of this shall be made in the publication. The intervener shall not be entitled to any specific treatment of the statement.

(4) The implementation of concentrations subject to notification shall be prohibited prior to the issuance of a confirmation pursuant to Section 42b para 1 or 5, or before the final declaration of the Cartel Court that the concentration is not prohibited (Section 42b paras 3 to 5). Contracts shall be invalid if they violate this prohibition.

(5) Upon application, the Cartel Court shall determine whether a concentration was implemented in a prohibited way. The following parties shall be entitled to apply:

1. the official parties (Section 44),
2. associations that represent economic interests of entrepreneurs, if these interests are affected by the concentration,
3. any entrepreneur whose legal or economic interests are affected by the concentration,
4. the Austrian Economic Chamber,
5. the Federal Chamber of Labour,
6. the Presidential Conference of the Austrian Chambers of Agriculture
7. Authorities established by federal laws to regulate specific economic sectors (regulators).

### **Examination of concentrations**

Section 42b. (1) The official parties (Section 44) may, within four weeks from service of the copy of the notification, apply for the examination of the concentration. If the official parties forego filing an application for examination, do not file an application for examination or withdraw any applications for examination filed, the Cartel Court shall promptly issue a confirmation thereof.

(2) If the examination of the concentration pursuant to para 1 was applied for, the Cartel Court shall:

1. if there is no concentration pursuant to Section 41, make a statement to this effect;
2. prohibit the concentration, if it is to be expected that the concentration will cause or strengthen a market-dominating position (Section 34); or, if this is not the case,
3. declare that the concentration is not prohibited.

(3) Despite the existence of the prerequisites for prohibition pursuant to para 2, the Cartel Court shall declare that the concentration is not prohibited, if

1. it is to be expected that the concentration will also lead to improvements in the conditions of competition that outweigh the disadvantages of the domination of the market, or
2. the concentration is necessary for the maintenance or improvement of the international competitiveness of the enterprises involved and is economically justified.

(4) Unless the prerequisites are met in other respects, the Cartel Court may combine the declaration of non-prohibition of the concentration with appropriate restrictions or conditions. If a change of relevant circumstances occurs after this declaration, the Cartel Court may, upon application by an entrepreneur involved in the concentration, modify or revoke imposed restrictions or conditions.

(5) The Cartel Court may prohibit the concentration solely within five months after receipt of the notification; upon expiry of the period, it shall promptly issue a confirmation thereof. If a correction order pursuant to Section 65 (Section 68a para 2) has been issued, the period shall be calculated from the receipt of the corrected notification. The Supreme Cartel Court shall rule on appeals against the decision of the Cartel Court within two months of receipt of the last counter-statement.

(6) Upon their taking effect, the Cartel Court shall publicise the decisions not prohibiting a concentration, with restrictions or conditions within the meaning of para 4, in the Amtsblatt zur Wiener Zeitung.

(7) Upon a notifiable concentration being carried out as permitted, the Cartel Court may, upon the application of a body or person as set forth in Section 42a para 5, with due regard to the principle of proportionality, subsequently order the enterprises involved in the said concentration to take measures which will mitigate or eliminate the effects of the concentration, if:

1. the failure to prohibit the concentration or the refusal to file an application for examination, the omission to file an application for examination, or the withdrawal of an application for examination is based on incorrect or incomplete information for which any of the enterprises involved is responsible, or
2. any stipulation tied to the non-prohibition is contravened.

### **Media concentrations**

Section 42c. (1) A concentration shall be deemed a media concentration if at least two of the entrepreneurs or enterprises involved belong to one of the following categories:

1. Media enterprises or media services (Section 1 para 1 Z 6 and 7 Media Act),
2. Media support companies (para 2), or
3. Enterprises that individually or jointly, indirectly or directly hold a stake of not less than 25% in a media enterprise, media service, or media support company.

(2) The following enterprises shall be deemed media support companies within the meaning of this Federal Act:

1. Publishing houses, provided that they are not media enterprises,
2. Printing houses and enterprises of the pre-printing stage (reproduction and typesetting offices),
3. Enterprises procuring or brokering advertising orders,
4. Enterprises that handle the distribution of media products on a large scale,
5. Film rental businesses.

(3) A concentration shall similarly be deemed a media concentration if only one of the enterprises involved belongs to the enterprises enumerated in para 1 Z 1 to 3, and if one or several media enterprises, media services or media support companies, indirectly or directly, jointly hold a stake of not less than 25% in at least one other enterprise involved in the concentration.

(4) In applying Section 42a para 1 Z 1 and 2 to media concentrations, the turnover of media enterprises and media services shall be multiplied by 200, the turnover of media support companies – by 20.

(5) A media concentration shall also be prohibited pursuant to Section 42b if it is to be expected that media diversity (Section 35 para 2a) will be impaired by the concentration. Section 42b para 3 Z 2 shall also be applicable to this case.

### **Authorisation to issue ordinances**

Section 42d. (1) In agreement with the Federal Minister of Economic Affairs, the Federal Minister of Justice may order by ordinance that in applying Section 42 a para 1 Z 1 and 2 the turnover proceeds achieved in a specified market (Section 3) shall be multiplied by a specified factor.

(2) An ordinance pursuant to para 1 may be issued if, due to the special features of the affected market, even concentrations of enterprises with lower turnovers can lead to serious impairment of competition in this market and such impairment cannot be prevented through other measures of competition or trade policy. Thus special regard shall be paid to the following circumstances:

1. the volume of the total turnover achieved in the affected market,
2. circumstances that limit market access for other entrepreneurs,
3. interlinking of the affected market with foreign markets.

### **Exemptions**

Section 42e. (1) Sections 42a to 42c shall not apply to the acquisition of shares of a company that is an entrepreneur,

1. if a bank acquires the shares for the purpose of selling them;
2. if a bank acquires the shares for the purpose of reorganising an ailing company or securing claims against the company;
3. if the shares are acquired through the exercising of an equity participation business or equity fund business (Section 1 para 1 Z 11 and 12 Credit System Act / *Kreditwesengesetz*, FLG No 63/1979, as amended) or otherwise by a company whose only purpose is the acquisition of shares in other enterprises and the administration and utilisation of these shares, without directly or indirectly interfering with the administration of these enterprises.

(2) If, without the exemption pursuant to para 1, the acquisition of shares were a concentration subject to notification, the following restrictions shall apply to the acquirer of the shares:

1. The acquirer shall not exercise the voting rights connected with the shares in order to influence the competitive behaviour of the enterprise; however, the voting rights may be exercised in order to maintain the full value of the investment as well as to prepare the sale of the enterprise in whole or in part, or of its assets, or the sale of the shares;
2. in the event of para 1 Z 1, the acquirer shall resell of the shares within one year, in the event of para 1 Z 2 – after completion of the reorganisation or securing task.

(3) Upon application, the Cartel Court shall order the acquirer of the shares to cease a behaviour that violates para 2; Section 42 a para 5 shall apply to the right to file an application. In this context, the Cartel Court shall extend the one-year period pursuant to para 2 Z 2, if a sale within this time limit cannot reasonably be expected.

## **CHAPTER Va**

### **Application of EC law on competition**

Section 42f. (1) The Cartel Court shall be competent to issue decisions on a case-to-case basis, which decisions shall be taken by government authorities of the Member States in accordance with Articles 84 to 86 EC Treaty and the regulations adopted pursuant to Article 83 EC Treaty. In doing so, the Cartel Court shall apply the procedural provisions of this Act.

(2) In the event of Article 85 para 2 EC Treaty, the Cartel Court shall take those remedies with regard to which it is authorised by the Commission decision; in other respects the Cartel Court shall apply, *mutatis mutandis*, the provisions of this Act regarding violations of the law.

## **CHAPTER VI**

### **Proceedings before the Cartel Court and the Supreme Cartel Court**

#### **Type of proceedings**

Section 43. The Cartel Court and the Supreme Cartel Court shall decide in matters under this Federal Act in accordance with the proceedings in matters other than legal disputes.

#### **Official parties**

Section 44. The Federal Competition Authority (Section 1 WettbG) and the Federal Cartel Prosecutor (Section 112) shall have standing as parties even when they are not applicants (official party); this shall not, however, apply to proceedings for judicial assistance against boycotts (Section 30).

#### **Reimbursement of costs**

Section 45. (1) In proceedings before the Cartel Court and the Supreme Cartel Court pursuant to Section 30, the provisions of the Code of Civil Procedure on the reimbursement of costs shall be applied *mutatis mutandis*.

(2) In proceedings pursuant to Sections 8a, 25 para 1 Z 1 and para 2, Section 27 para I Z 2, Section 30c para 1, Section 33 para 1 Z 1a and 2, Sections 35, 36, Section 42a para 5 and Section 42e para 3, the provisions of the Code of Civil Procedure on the reimbursement of costs shall be applied *mutatis mutandis*, subject to the proviso that the duty of the losing party to reimburse costs shall only exist if the bringing of the action or defence against the action was wilful. Section 273 ZPO / Code of Civil Procedure shall be applied *mutatis mutandis* to the decision on costs.

#### **Written statements of the case**

Section 46. A sufficient amount of copies of written statements and enclosures shall be filed, so that every party, including the official parties, can be served with a copy.

### **Notification of the official parties**

Section 47. The presiding judge of the Cartel Court shall notify the official parties (Section 44) of notices of the reduction of maintained prices (Section 19 para 2), of vertical distributional restraints (Section 30b) and of concentrations (Section 42), as well as of reports pursuant to Section 66, by forwarding one copy of the notice or of the report to each of them.

### **Time limits**

Section 48. If time limits are not determined by law, the presiding judge of the Cartel Court shall fix such as are reasonable; upon application by a party, s/he shall extend them for reasons worthy of consideration.

### **Statements by the chambers**

Section 49. The Austrian Economic Chamber, the Federal Chamber of Labour and the Presidential Conference of the Austrian Chambers of Agriculture shall be entitled to submit statements in all matters of Cartel Court proceedings.

### **Statements by the regulators**

Section 50. The Cartel Court may request authorities established by federal law to regulate specific economic sectors (regulators) to furnish statements on issues concerning the respective economic sector even in such cases where they are not applicants; the regulators shall have the right to furnish such statements even without being requested to do so by the Cartel Court.

### **Court hearings**

Section 51. (1) Upon request by a party a court hearing shall take place. The court hearing shall be public, but the public shall be excluded upon request by a party, if this is necessary for the protection of trade or business secrets.

(2) Each party shall be served with a copy of the record of the court hearing.

### **Temporary injunctions**

Section 52. (1) Provided that the conditions for the prohibition of the implementation of a cartel pursuant to Section 25 or a vertical distributional restraint pursuant to Section 30 c or for the revocation of the approval of a cartel pursuant to Section 27 para 1 Z 2 are certified, the Cartel Court, upon application by a party, shall take the measures referred to by temporary injunction.

(2) Provided that the conditions for judicial assistance in connection with contracts (Section 30) or for abuse control measures pursuant to Sections 35 and 36 are certified, the Cartel Court, upon request by a party, shall take the measures referred to through temporary injunction.

(3) In the case of judicial assistance in connection with contracts, the Cartel Court may make the temporary injunction contingent upon the provision of adequate security.

(4) The opposing party shall be heard prior to the issuance of a temporary injunction. The appeal from such a decision shall have no suspensive effect. The Cartel Court shall, upon application by the appellant, grant the appeal a suspensive effect if this is justified after all interests involved have been balanced.

### **Appellate Procedure**

Section 53. (1) The legal remedy of remonstrance shall be excluded.

(2) The appeal period shall be four weeks. Within four weeks after service of the appeal, the other parties may file a counter-statement.

## **CHAPTER VII**

### **Special procedural provisions for cartels, non-binding recommendations by associations, and concentrations**

#### **Cartel representative**

Section 54. (1) In proceedings before the Cartel Court and the Supreme Cartel Court about the application for approval of a cartel as well as in all matters of an approved cartel, the cartel members shall be represented by a cartel representative; subject to the provisions applying to professional party representatives, the cartel representative shall be resident in Austria. For his/her appointment and the revocation of the authorisation, a simple majority shall be sufficient.

(2) The cartel representative shall be deemed authorised to represent the cartel members collectively before courts and administrative authorities in all cartel matters including the assertion of the *acquis communautaire vis-à-vis* individual members. S/he shall further be deemed authorised to modify the agreement if the modifications are insignificant or are requested or suggested by the Cartel Court.

(3) If a cartel has only one member and if this is a natural person or a legal person represented by a single natural person, the appointment of a cartel representative shall not be required; as long as no cartel representative is appointed, the provisions applying to the cartel representative shall apply to the natural persons mentioned.

#### **Appointment by the Cartel Court**

Section 55. (1) The presiding judge of the Cartel Court shall request the cartel members, fixing a maximum period of one month, to appoint a cartel representative, if:

1. the cartel representative dies,
2. the cartel representative becomes unable to continue representing the cartel members,
3. the cartel is authorised pursuant to Section 25 para 1 Z 1 and the cartel members have not yet appointed a cartel representative.

(1a) It shall be sufficient to serve the request on just one cartel member. In the event of the Cartel Court not having been notified of the appointment of a cartel representative within the specified period, the presiding judge of the Cartel Court shall appoint a cartel representative. This shall be indicated in the request.

(2) The cartel representative appointed by the presiding judge of the Cartel Court shall represent the cartel members at their risk and their expense until they themselves have appointed another cartel representative. S/he shall be entitled to reimbursement for his/her cash outlays and payment for his/her activities. The presiding judge of the Cartel Court shall decide on the amount in consideration of the expenditure of time and trouble necessary for the representation, with due regard to the compensation customarily paid for comparable activities.

### **Changing the cartel representative**

Section 56. (1) If after the application for approval or after the approval of a cartel, a new cartel representative is appointed, s/he shall without delay notify the Cartel Court of his/her appointment.

(2) The cancellation of the authorisation of the cartel representative through revocation or termination shall take effect vis-à-vis the courts and authorities before which the cartel representative shall represent the cartel members (Section 54) only after notification of the appointment of a new cartel representative.

### **Modification and supplementation of effect cartels**

Section 59. (1) In the event of effect cartels being modified or supplemented after the application for approval or after their approval, application for the approval of such modification or supplementation shall be filed within fourteen days of their having been effected. Upon application by the cartel representative, the presiding judge of the Cartel Court shall extend the deadline for reasons worthy of consideration.

(2) If the deadline is missed, any further - even only partial - implementation of the modification or supplementation of the cartel shall be prohibited until the approval is applied for.

### **Contents of applications for approval**

Section 60. Applications for the approval of cartels (Section 23) shall include:

1. accurate and exhaustive information necessary to make an assessment of the economic justification (Section 23 Z 3), primarily:
  - a. information about the size of the total production in the economic sector concerned and of that part of the production which is covered by the cartel,
  - b. identification of the major entrepreneurs in the same economic sector who do not join the cartel, unless it is a matter of resale price maintenance or distributional restraint, and
  - c. information about relationships with existing cartels;
2. in the case of agreement cartels, such explanations as are necessary for understanding the essential provisions of the agreement;
3. in the case of agreement cartels that are concerned with resale price maintenance, information whether – and if so, when – the first agreement was concluded on the basis of the model agreement (Section 62 Z 1);
4. in the case of recommendation cartels, the exact identification of the group of persons to which the recommendation is addressed or intended to be addressed;

5. in the case of cartels that deal with price limits or calculation guidelines and do not concern the transportation sector, the indication of all prices charged at the time of notification that are covered by the cartel; the cartel representative shall promptly notify the Cartel Court of any modifications of such prices.

### **Contents of applications for extension**

Section 61. Applications for the extension of the approval of a cartel (Section 24) shall contain the information described in Section 60 Z 1.

### **Documents to be annexed**

Section 62. The following documents shall be annexed to applications for approval (Section 23):

1. in the case of agreement cartels, a document concerning the agreement; however, in the case of resale price maintenance, it shall suffice to attach a model agreement for the agreements with the individual members;
2. in the case of recommendation cartels, the text of the recommendation;
3. if the cartel is implemented or proposed to be implemented by an organisation, the articles of association of said organisation;
4. in the case of resale price maintenance, an exact description of the commodity that is the subject matter of the cartel.

### **Contents of the agreement**

Section 63. (1) The document about the agreement (Section 62 Z 1) shall contain the following information:

1. names (firm) and addresses of the cartel members,
2. where applicable, the name (firm), legal structure, and address of the implementing organisation (Section 62 Z 3) as well as the names and addresses of its representatives,
3. the subject matter of the agreement, in particular goods, categories of goods, geographical limitation, quotas, and prices, and
4. the date of the conclusion of the agreement and, if applicable, its period of validity.

(2) In the case of concerted action cartels, indication of the date of formation shall not be required.

(3) Para 1 shall apply to model agreements (Section 62 Z 1) with the proviso that it shall not be required to indicate the name (the firm) and the registered office of the cartel members involved in the subsequent economic stages and the date of the conclusion of the agreement.

(4) The cartel representative shall promptly notify the Cartel Court of subsequent modifications of the circumstances set forth in para 1 Z 1 and 2.

### **Unclearness of the agreement**

Section 64. If an agreement or a model agreement becomes unclear as a result of modifications, the cartel representative shall, upon request of the presiding judge

of the Cartel Court, submit the authoritative version within a reasonable period to be fixed by the latter.

### **Correction of applications**

Section 65. (1) If the application for approval, the application for extension, or the documents to be annexed do not comply with Sections 60 to 63, the presiding judge of the Cartel Court shall, *ex officio* or upon application by an official party (Section 44), order the cartel representative, under threat of rejection of the application, to make the correction, and shall fix a reasonable period for this purpose (Section 48).

(2) The period for the filing of the application by an official party pursuant to para 1 shall be one month from the service of the copy of the documents listed in para 1, while in the case of standards, types, and rationalisation cartels, this period shall be fourteen days.

### **Order to report**

Section 66. (1) If, due to the particular circumstances of an authorised cartel, it is likely that the economic circumstances relevant for its assessment will change within the foreseeable future, the Cartel Court shall, *ex officio* or upon application by an official party (Section 44), order the cartel representative to report annually, at a fixed date, about the circumstances relevant for the assessment of the economic justification (Section 60 Z 1). This order may be issued in the approval decision, but also later in a separate decision.

(2) If the cartel representative fails to comply on schedule with the order to report, the presiding judge of the Cartel Court shall, under threat of revocation of the approval of the cartel (Section 27), grant an additional period not exceeding one month.

(3) If the report submitted in due time fails to comply with Section 60 Z 1, the presiding judge of the Cartel Court shall, *ex officio* or upon application by an official party (Section 44), order the cartel representative under threat of revocation of the approval of the cartel (Section 27), to make the correction, and shall for this purpose fix a reasonable period not exceeding one month. The period for the filing of the application of an official party shall be one month.

(4) The Cartel Court shall, *ex officio* or upon application by the cartel representative or an official party (Section 44), withdraw the order to report, if the conditions for its issuance have ceased to exist.

### **Notice of non-binding recommendations by associations**

Section 67. (1) The notice of a non-binding association recommendation (Section 32 Z 3) shall contain the exact description of the group of persons to which the recommendation is intended to be addressed; the text of the recommendation shall be annexed.

(2) If the notice fails to comply with para 1, the presiding judge of the Cartel Court shall, under threat of rejection of the notification, order the recommending association

to correct it, and shall for this purpose fix a reasonable period not exceeding one month.

### **Correction of cartels and non-binding recommendations by associations**

Section 68. (1) Prior to rejecting an application for extension of the approval of a cartel (Section 24 para 2) or for the approval of extension of the period of validity (Section 24 para 4), prohibiting the implementation of a cartel pursuant to Section 25 para 1 for reasons related to its contents, revoking the approval of a cartel pursuant to Section 27 Z 2, or ordering the recommending association to revoke the recommendation (Section 33), the Cartel Court shall, where applicable, declare which modifications or supplementations of the cartel or of the recommendation can serve to avoid these measures, and shall set a reasonable period for the cartel representative and/or the recommending association to submit an appropriate application or notice (Section 48).

(2) If the cartel representative or the recommending association fails to observe the time limit (para 1), the presiding judge of the Cartel Court shall, without further procedure, decide the measure indicated in para 1. The presiding judge shall also decide on applications and notices submitted in due time.

### **Contents of notifications pursuant to Section 42 a**

Section 68a. (1) Notifications pursuant to Section 42a shall contain:

1. accurate and exhaustive information about the circumstances which may cause or strengthen a market-dominating position, primarily:
  - a. the structure of the enterprise, in particular for each enterprise involved the following data:
    - the ownership structure, including associations of enterprises within the meaning of Section 41,
    - turnover (amount and proceeds) achieved in the last financial year preceding the concentration, broken down by specified goods and services within the meaning of Section 3,
  - b. for each enterprise involved, the market shares with respect to the goods and services listed in a),
  - c. the general market structure;
2. in the event of a media concentration, also accurate and exhaustive information about the circumstances that might additionally impair media diversity.

(2) Section 65 shall be applied *mutatis mutandis* to notifications pursuant to Section 42a.

(3) The Federal Minister of Justice may, in agreement with the Federal Minister of Economics and Labour, issue an ordinance specifying more detailed provisions on the form and content of notifications pursuant to Section 42a.

## **CHAPTER VIII Cartel Register**

### **Competence**

Section 69. The Cartel Register shall be kept by the Cartel Court.

### **Internal organisation of the Cartel Register**

Section 70. The Cartel Register shall consist of three divisions: division K shall be used for the registration of cartels, division V – non-binding recommendations by associations, and division Z – concentrations.

### **Subject matter of registration**

Section 71. The Cartel Register shall serve for the registration of:

1. the approval of cartels, the approval of their modification or supplementation as well as the revocation of the approval,
2. the notification of the reduction of a maintained price,
3. the notification of minor cartels and the notification of their modification or supplementation,
4. the prohibition of the implementation of a registered minor cartel,
5. the notification of non-binding recommendations by associations and the notification of their modification or supplementation,
6. the order for the revocation of a registered non-binding recommendation by an association,
7. (note: repealed by FLG I No 126/1999),
8. the notification of concentrations, as soon as they cannot be prohibited anymore,
9. the prohibition of concentrations.

### **Order for registration**

Section 72. (1) If a decision of the Cartel Court is the subject matter of a registration (Section 71 Z 1, 4, 6, and 9), this decision shall also order the registration in the Cartel Register; if a criminal court judgment (Section 71 Z 1 and 4 in connection with Section 129 para 3) is the basis of the registration, or a notice or notification is the subject matter thereof (Section 71 Z 2, 3, 5, 7 and 8), the presiding judge of the Cartel Court shall order the registration in the Cartel Register.

(2) The decree ordering a registration in the Cartel Register shall specify the content of the registration.

### **Content of the registrations**

Section 73. (1) Any registration in the Cartel Register shall contain the date and reference number of the underlying decision, the subject matter of the registration (Section 71) and, where applicable, also a specification of the essential content of the cartel or of the non-binding recommendation by an association, as well as such information as is required for the identification of the cartel, of the non-binding recommendation by an association, or of the concentration.

(2) If the Cartel Court is notified of a modification of the circumstances registered in the Cartel Register that do not cause any modification or supplementation of the cartel or the non-binding association recommendation, the presiding judge of the Cartel Court shall order that this modification be entered in the Cartel Register.

(3) Analogously, the presiding judge of the Cartel Court shall, *ex officio* or upon application by a party, order the expiry of the approval period (Section 24) or the termination of a cartel to be entered.

### **Implementation of the registrations**

Section 74. (1) The presiding judge of the Cartel Court shall order the registration in the Cartel Register to be implemented after the taking effect of the underlying decision, but in the event of a temporary injunction (Section 52) – immediately upon its issuance.

(2) Where a registration has lost its relevance through a later registration, this shall be shown clearly.

(3) In the Cartel Register, nothing shall be erased or made illegible; clerical errors or other obvious errors in a registration shall be corrected upon decree of the presiding judge of the Cartel Court; the correction entry shall be signed by the registrar, with indication of the date of correction.

### **Document collection**

Section 75. (1) A collection of the documents to be annexed to applications for approval and to notices (Sections 62 and 67) such as were used for carrying out the registration, shall be kept with the Cartel Register (document collection).

(2) Upon execution of the registration, the registrar shall verify whether the copies furnished by the parties for the document collection match the original or certified copy of the document, and confirm such matching on the copy where applicable. The registrar may correct minor clerical errors as well as minor omissions, but shall confirm such corrections by signing in the margin of the copy.

(3) If the parties did not furnish a usable copy, the registrar shall advise them that the original or the certified copy of the documents will be retained and, until the binding of the document collection, may be exchanged for a usable copy.

(4) Notifications of vertical distributional restraints (Section 30b) and the documents to be annexed to them shall also be included in the document collection.

### **Auxiliary indexes**

Section 76. The following auxiliary indexes shall be kept with the Cartel Register:

1. an index of the registered cartels arranged by economic sectors,
2. an index of the registered non-binding association recommendations arranged by economic sectors,

3. an index of the cartel representatives, specifying for which cartel they have been appointed,
4. an index of the representatives of the parties (Section 44),
5. an index of the notified distributional restraints arranged by economic sectors.
6. an index of the registered concentrations arranged by economic sectors.

### **Preservation**

Section 77. The Cartel Register, the document collection, and the auxiliary indexes shall be permanently preserved.

### **Inspection**

Section 78. (1) The Cartel Register, the document collection, and the auxiliary indexes shall be available for public inspection.

(2) The public shall be entitled to request copies and excerpts of the registrations in the Cartel Register. Irrelevant registrations (Section 74 para 2) shall only be included upon request or if the circumstances require it. Copies and excerpts shall be certified upon request.

## **CHAPTER IX Court fees**

### **Fees in proceedings pursuant to Section 30**

Section 79. To proceedings for judicial assistance against boycotts (Section 30), rate items 1 and 2 of the Court Fees Act shall apply *mutatis mutandis*; the value in dispute shall be assumed at € 7,200.

### **Fees in other proceedings**

Section 80. In other respects, the following court fees shall be paid in proceedings before the Cartel Court and the Supreme Cartel Court:

1. for proceedings concerning an application for the approval of a cartel, a variable fee ranging from € 1,500 to € 30,000;
2. for proceedings concerning an application for the approval of the modification or supplementation of a cartel, for a declaration pursuant to Section 19 para 1, as well as for extension of the approval of a cartel, a variable fee from € 750 to € 15,000; in the event of combined applications for approval of the modification or supplementation and for extension of the approval of a cartel, the fee shall be paid only once;
3. for proceedings concerning the prohibition of the implementation of a cartel pursuant to Section 25 para 1 Z 2 and para 2, as well as for the revocation of the approval of a cartel pursuant to Section 27 para 1 Z 2, a variable fee from € 750 to € 15,000; however, if a minor cartel is concerned, the lower limit of the fee shall be € 375;
4. for proceedings concerning the prohibition of implementation of a vertical distributional restraint pursuant to Section 30c, a variable fee from € 375 to € 15,000;
5. (note: repealed by FLG No 693/1993)

6. for proceedings concerning a notification of a price modification pursuant to Section 19 para 2 as well as pursuant to Section 60 Z 5, a flat-rate fee of € 90;
7. for proceedings concerning a notification of a non-binding recommendation by an association, a flat-rate fee of € 30;
8. for proceedings concerning the issuance of a revocation order pursuant to Section 33 Z 1a and 2, a variable fee from € 150 to € 7,500;
9. for proceedings concerning the issuance of orders pursuant to Sections 35 and 36, a variable fee from € 750 to € 30,000; however, if the modification or rescission of an order pursuant to Section 35 para 5 is concerned, the lower limit of the fee shall be € 375;
10. for proceedings concerning a notification of a vertical distributional restraint (Section 30 b), a flat-rate fee of € 30;
- 10a. for proceedings concerning the notification of a concentration, a flat-rate fee of € 75, but in the event of the institution of an examination procedure pursuant to Section 42b, a variable fee from € 1,500 to € 30,000; if, however, a modification or abolition of restrictions or conditions pursuant to Section 42b para 4 is concerned, the lower limit of the fee shall be € 750;
- 10b. for proceedings pursuant to Sections 8a, 42a para 5 and Section 42e para 3, a variable fee from € 375 to € 15,000;
11. for an excerpt or copy from the Cartel Register, € 20 per sheet even if used only in part; the supplementation of excerpts or copies already made out shall also be subject to this fee even if no further sheet is used. Excerpts and copies shall only be made out upon payment of the fee. Requests for the issuance of excerpts or copies shall be free of charge.

#### **Exclusion of additional fees**

Section 81. Apart from the variable and flat-rate fees pursuant to Section 80, no additional court fees shall be due; this shall apply similarly in the event of the lodging of an appeal.

#### **Persons liable to pay**

Section 82. The following shall be liable to pay the fee pursuant to Section 80:

1. for the fee pursuant to Z 1, 2, and 6, the cartel members;
2. for the fee pursuant to Z 7, 10, and 10 a, the notifying association or the entrepreneur submitting the notice, notification, or application;
3. for the fee pursuant to Z 3, 4, 8, 9 and 10b:
  - a. The opposing party, if the proceedings were instituted upon request by an official party (Section 44) and provided that the request has been granted, even if only in part;
  - b. (note: repealed by FLG I No 62/2002)
  - c. If the applicant is no official party, the obligation to pay shall be imposed, subject to the outcome of the proceedings, on the applicant, the opposing party, or on both proportionally.

#### **Liability of several persons**

Section 83. Several persons who are liable to pay the same amount of fees, shall be jointly and severally liable.

### **Fixing the variable fees**

Section 84. After the conclusion of the proceedings, the amount of the variable fee shall be fixed per decision by the presiding judge of the Cartel Court at his/her discretion; in particular, due regard shall be given to the significance of the proceedings with respect to economic policy, the expenditure connected with the official act, the economic conditions of the party liable to pay, and the fact to what extent the party liable to pay has given occasion for the official act.

### **Court costs**

Section 85. The persons who are liable to pay the court fees shall be liable for the payment of other costs, particularly fees for experts and compensations for the expert lay judges of the Cartel Court and the Supreme Cartel Court, calculated according to the number of meetings or court hearings.

### **Exemption of settlements from fees**

Section 86. The conclusion of a settlement shall not be subject to fees.

### **Collection**

Section 87. The collection of fees and costs shall comply with the rules applying to civil cases; however, the fees and costs incurred at the Supreme Cartel Court shall be collected by the fees official of the Cartel Court.

## **CHAPTER X Cartel jurisdiction**

### **Organisation of courts**

Section 88.(1). The Vienna Court of Appeal acting as Cartel Court shall have jurisdiction for the entire federal territory.

(2) Appeals from orders of the Cartel Court shall be to the Supreme Court acting as the Supreme Cartel Court in the second and last instance.

### **Composition of the panels**

Section 89. (1) When exercising cartel jurisdiction,

1. the panels of the Vienna Court of Appeal shall consist of one judge as the presiding judge, a second judge and two expert lay judges.
2. the normal panels of the Supreme Court shall consist of one judge as presiding judge, two further judges and two expert lay judges,
3. the enlarged panels of the Supreme Court shall consist of seven judges and two expert lay judges.

(2) One half of the expert lay judges on a panel shall belong to the group of persons assigned by the Federal Chamber of Labour and one half to the group of persons assigned by the Austrian Economic Chamber.

(3) If a cartel exclusively has as its subject matter goods listed in the Annex to this Federal Act, in lieu of the expert lay judge assigned by the Federal Chamber of Labour, an expert lay judge assigned by the Presidential Conference of Austrian Chambers of Agriculture shall belong to the panel of the Cartel Court. If the subject matter of a cartel are goods listed in the Annex to this Federal Act as well as other goods, separate proceedings shall be conducted for each category of goods.

### **Division of responsibilities**

Section 90. (1) Sections 45 and 46 of the Court Organisation Act, Imperial Law Gazette No 217/1896, shall be applied with the proviso that matters of cartel jurisdiction at the Vienna Court of Appeal shall be assigned to at least two, but at most five, panel departments.

(2) Section 13 of the Federal Act on the Supreme Court, FLG No 328/1968, shall be applied with the proviso that matters of cartel jurisdiction at the Supreme Court shall be assigned to only one panel department.

(3) The expert lay judges who belong to the individual panels shall also be designated according to the division of responsibilities.

### **Reporter**

Section 91. The presiding judge of the panel at the Vienna Court of Appeal may appoint an expert lay judge as reporter unless s/he reports personally.

### **Decision by the presiding judge of the Cartel Court and the three-judge panel of the Supreme Cartel Court**

Section 92. (1) Interlocutory decisions by the Cartel Court shall be made by the presiding judge alone; final decisions, including declaratory orders pursuant to Section 68 para 1, shall be made by the presiding judge alone only when one party files an application therefor and the other parties agree, except in the cases otherwise provided for in this Federal Act.

(2) The Supreme Court, acting as the Supreme Cartel Court, shall decide, in a panel of three judges (Section 7 of the Federal Act Governing the Supreme Court), on legal remedies against decisions made by the presiding judge alone, and against decisions on fees and costs.

### **Voting**

Section 93. Section 10 para 2 of the Jurisdiction Code shall apply to voting, with the proviso that the older expert lay judges vote before the younger. In the event of a tie, the presiding judge shall have the casting vote.

### **Position of the expert lay judges**

Section 94. (1) The expert lay judges shall have the right to use the title "Kommerzialrat". If an expert lay judge has been a member of the Cartel Court or the

Supreme Cartel Court for at least five years, this right shall continue to exist even after the end of the term of office.

(2) The expert lay judges shall be independent in exercising their office; they shall have the full authority connected with a judge's office.

(3) For each meeting or court hearing, the expert lay judges at the Cartel Court shall be entitled to a compensation of 4.68%, the expert lay judges at the Supreme Cartel Court - to a compensation of 6.68%, of the salary of a civil servant of the general administration, salary group V, salary level 2, plus applicable cost-of-living allowances. If an expert lay judge acts as reporter, s/he shall be entitled to double compensation.

(4) If there are several meetings or court hearings in different cases on one day, full compensation shall be due for each meeting or court hearing.

(5) The expert lay judges shall be entitled to reimbursement for their travel and living expenses as well as to compensation for loss of time in accordance with the provisions applying to witnesses of the 1975 Act Governing Fees Schedules / *Gebührenanspruchsgesetz* (GebAG 1975), FLG No 136 as amended, with the proviso that for the duration of the meetings and court hearings no compensation shall be due for loss of time, and that the respective amount as set forth in Section 18 para 1 Z 1 of the said Federal Act shall be increased by fifty percent.

### **Appointment**

Section 95. The expert lay judges of the Cartel Court and the Supreme Cartel Court shall be appointed by the Federal President upon nomination by the Federal Government.

### **Qualification**

Section 96. Only such persons may be appointed as expert lay judges who

1. are prepared to assume the office;
2. are qualified for the position of a jury member or lay judge;
3. have completed a domestic university study of law, business, or economics;
4. have extensive professional experience in the legal or economic area.

### **Incompatibility**

Section 97. An expert lay judge shall not

1. simultaneously be appointed upon nomination by several bodies entitled to nominate, or simultaneously be appointed to the Cartel Court and to the Supreme Cartel Court;
2. be a member of the Federal Government or of a provincial government, of the National Council or the Federal Council;
3. be a cartel representative.

### **Nomination**

Section 98. (1) Five expert lay judges each of the Cartel Court shall be put forward by the Federal Government on the basis of nominations by the Austrian Economic Chamber, the Federal Chamber of Labour, and by the Presidential Conference of the Austrian Chambers of Agriculture. Ten expert lay judges each of the Supreme Cartel Court shall be put forward by the Federal Government on the basis of nominations by the Austrian Economic Chamber and by the Federal Chamber of Labour.

(2) The bodies entitled to make nominations shall submit their nominations to the Federal Minister of Justice. Their proposal shall include at least two nominees for each expert lay judge and a ranking of these nominees. Proof shall be furnished of the conditions for the appointment and the consent of the nominees.

(3) In each case, the Federal Government may put forward only one of the nominees; if, however, the nomination right is not exercised within a reasonable period to be set by the Federal Minister of Justice, the Federal Government, in the submission of its proposal, shall not be bound by the nominations of said bodies.

### **Term of office**

Section 99. (1) The term of office of an expert lay judge shall terminate upon expiry of the year in which s/he has completed his/her sixty-fifth year.

### **Removal from office**

Section 100. (1) An expert lay judge shall be removed from office if:

1. the conditions for appointment did not exist or subsequently ceased to exist;
2. circumstances with which the office of an expert lay judge is incompatible existed or occurred subsequently;
3. s/he repeatedly neglects without sufficient excuse the duties of office;
4. s/he is guilty of conduct which is incompatible with the standing of his/her office.

(2) The Supreme Court shall decide about the removal pursuant to para 1 Z 1 to 3 in the proceedings provided in Section 93 para 1 RDG (Judges Service Act), about the removal pursuant to para 1 Z 4 in the proceedings provided by Sections 112 to 120, 122 to 138, 142 to 144, 146 para 1, Sections 147 to 149, 151, 152 lit.a, 153, 154, 155 para 1, Sections 157, 161 to 163 and 165, with the proviso that, except for the removal, no penalty may be imposed.

(3) Furthermore, an expert lay judge shall be removed from office at his/her request by the Federal Minister of Justice.

### **Duty to report**

Section 101. The expert lay judges shall promptly report to the president of the court (the presiding judge of the panel) the following circumstances:

1. any circumstance that prevents them from obeying a summons to act as an expert lay judge,
2. any change of residence,

3. any protracted prevention from their exercising their office,
4. any occurrence of an incompatibility, and
5. the loss of the preconditions of the right to vote in National Council elections.

### **Disqualification of expert lay judges**

Section 102. Expert lay judges may also be disqualified because they fail to meet the prerequisites for the appointment or because of circumstances that are incompatible with the office of an expert lay judge.

### **Experts in cartel matters**

Section 103. (1) The President of the Vienna Court of Appeal shall register twelve generally sworn court experts for cartel matters in a special experts list. Sections 5 and 8 of the Federal Act on the Generally Sworn Court Expert and Interpreter, FLG No 137/1975, shall be applied.

(2) The experts shall be newly registered after every five years. If an expert quits prior to the expiry of this period, a replacement shall be registered for the remaining time.

(3) Judges of active status and expert lay judges under this Federal Act shall not be registered as experts.

(4) In appointing experts, the Cartel Court shall not be restricted to the experts registered in the special experts list pursuant to para 1.

### **Activity report of the Supreme Cartel Court**

Section 111. The Supreme Cartel Court shall, after the end of each year, having heard the Cartel Court, write a report on the activities of the Cartel Court and the Supreme Cartel Court, and the experience gained thereby, with due regard to the protection of the trade and business secrets of the entrepreneurs concerned, and submit it to the Federal Minister of Justice. Suggestions for the preparation of legislative measures or the issuance of ordinances can also be included in the report. The Federal Minister of Justice shall publicise this report in the *Amtsblatt der österreichischen Justizverwaltung*.

## **CHAPTER XI Federal Cartel Prosecutor**

### **Duties**

Section 112. (1) It shall be incumbent upon the Federal Cartel Prosecutor to represent the public interests in matters of competition law at the Vienna Court of Appeal. In performing his/her duties, s/he shall be independent of the Cartel Court.

(2) The Federal Cartel Prosecutor shall directly report to the Federal Minister of Justice.

(3) A deputy shall be appointed for the Federal Cartel Prosecutor (Deputy Federal Cartel Prosecutor).

### **Appointment**

Section 113. (1) The Federal Cartel Prosecutor and his/her deputy shall be appointed by the Federal President for a period of five years. Either may have their term of office renewed.

(2) The Federal Cartel Prosecutor shall be appointed upon nomination by the Federal Government, his/her deputy shall be appointed upon nomination by the Federal Minister of Justice.

(3) The nominations, respectively, by the Federal Government and the Federal Minister of Justice shall be preceded by a notice of job vacancies by the Federal Minister of Justice. The notice of job vacancies shall be published in the *Amtsblatt zur Wiener Zeitung*.

Section 114. (1) In order to be appointed Federal Cartel Prosecutor or deputy to the Federal Cartel Prosecutor, a person shall:

1. be suitable in character and qualifications to serve in that office,
2. have completed the study of law or economics, and
3. have acquired at least five years of professional experience in administration, law or science in the field of competition law.

(2) No person may be appointed Federal Cartel Prosecutor or Deputy Federal Cartel Prosecutor if s/he is entitled to payment 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) The offices of Federal Cartel Prosecutor and Deputy Federal Cartel Prosecutor shall be held on a full-time basis. For the term of their offices, the Federal Cartel Prosecutor and the Deputy Federal Cartel Prosecutor shall not carry out any other activity which obstructs them in the performance of their duties or which is liable to raise doubts about their full impartiality or which may impair any other essential interests of their offices; this shall apply, without limitations, to activities described in Section 4 of the 1983 Act Governing Incompatibilities (*Unvereinbarkeitsgesetz*).

(4) The Federal Cartel Prosecutor (Deputy Federal Cartel Prosecutor) 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 expiry of the year in which he/she has completed his/her 65<sup>th</sup> year.

(5) Upon proposal of the Federal Government, the Federal President shall remove the Federal Cartel Prosecutor from his/her office, and upon proposal by the Federal Minister of Justice, the Federal President shall remove the Deputy Federal Cartel Prosecutor from his/her office, in the event that:

1. s/he submits a request in writing;

2. 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;
3. s/he is unable to fulfil his/her responsibilities as Federal Cartel Prosecutor (Deputy Federal Cartel Prosecutor) due to his/her physical or mental health (inability to meet the demands of the office) and is unlikely to regain his/her ability;
4. s/he is unable to serve in his/her office for more than six months due to an illness, accident or infirmity.

### **Employment and payment law**

Section 115. (1) Appointment to the position of Federal Cartel Prosecutor (Deputy Federal Cartel Prosecutor) shall not affect his/her position under employment law as a federal employee under public law or contractually employed federal employee. For the duration of his/her service in the office, s/he shall be relieved of his/her previous employment duties and his/her pay for such previous employment shall be cancelled. The Federal Minister of Justice shall be the competent employment authority.

(2) A fixed payment shall be due to him/her:

1. for the duration of employment as Federal Cartel Prosecutor, amounting to the salary of a judge of salary group R2, salary level 8;
2. for the duration of employment as Deputy Federal Cartel Prosecutor, amounting to the salary of a judge of salary group R2, salary level 7.

(3) The time of office as Federal Cartel Prosecutor (Deputy Federal Cartel Prosecutor), if such person is a federal employee, shall be counted towards any entitlements based on the period of service.

(4) If a person is appointed Federal Cartel Prosecutor (Deputy Federal Cartel Prosecutor) who is not employed under public law nor a contractually employed federal employee, an employment relationship shall be established under the 1948 Act Governing Contractual Employees (Vertragsbedienstetengesetz, FLG No 86/1948) for the duration of office (Section 115 para 1), and a payment as set forth in Para 2 above shall become due. Upon reappointment, Section 4 para 4 of the Vertragsbedienstetengesetz 1948 shall not be applicable; reappointment shall establish another limited employment relationship.

### **Office business and expenditure**

Section 116. (1) The office business of the Federal Cartel Prosecutor shall be performed by the Office of the Vienna Court of Appeal.

(2) The service of letters to the Federal Cartel Prosecutor or to the Deputy Federal Cartel Prosecutor shall be made on the Office of the Vienna Court of Appeal.

(3) Personal and office expenditure by the Federal Cartel Prosecutor shall be financed from the budget of the Vienna Court of Appeal.

### **Co-operation with the Federal Competition Authority**

Section 117. (1) Any petition to the Federal Cartel Prosecutor that proposes an application to institute proceedings at the Cartel Court or to perform an examination to this end may be passed on by the Federal Cartel Prosecutor to the Federal Competition Authority for further action. Any petition which refers to an intended notification of a concentration to the Cartel Court shall be passed on by the Federal Cartel Prosecutor to the Federal Competition Authority.

(2) Prior to filing an application for examination pursuant to Section 42b, the Federal Cartel Prosecutor shall grant the Federal Competition Authority an opportunity to comment.

(3) To the extent required to perform his/her duties, the Federal Cartel Prosecutor may:

1. request information from the Federal Competition Authority,
2. inspect records of the Federal Competition Authority, and
3. require the Federal Competition Authority to carry out investigations.

### **Waiver of application for examination**

Section 118. (1) With reference to a notification of a concentration, the Federal Cartel Prosecutor may waive filing an application for examination, which waiver shall also be effective vis-à-vis the Cartel Court. With reference to a notification of a concentration, the Federal Competition Authority may request a written statement from the Federal Cartel Prosecutor whether s/he will waive filing an application for examination. If the Federal Cartel Prosecutor fails to make a statement within two weeks of service of such request, this shall be deemed to constitute a waiver of filing an application for examination.

(2) Para 1 above shall also apply to intended notifications of concentrations; in such case, the Federal Cartel Prosecutor's waiver statement shall be valid only when the intended notification matches the actual notification and the waiver statement does not rest on incorrect or incomplete data supplied by any of the enterprises involved.

## **CHAPTER XII**

### **Provisions related to civil proceedings and provisions of execution law**

#### **Civil proceedings concerning cartel contracts**

Section 122. (1) Disputes arising from a cartel contract, as well as disputes relating to its existence or non-existence, shall be submitted in the first instance to the provincial courts having jurisdiction in civil cases, irrespective of the amount in dispute, while in Vienna, the Vienna Commercial Court shall have exclusive jurisdiction.

(2) (Note: repealed by FLG No 91/1993)

(3) At the provincial courts, jurisdiction in the civil cases mentioned in para 1 shall be exercised by the commercial panels, unless the judge sitting alone gives a ruling.

(4) (Note: repealed by FLG I No 62/2002).

### **Action for boycotts**

Section 123. Whoever has applied to the Cartel Court for judicial assistance against boycotts (Section 30) may bring before a court of general jurisdiction an action for performance or for a declaratory judgment that concerns the same measure, only within four weeks from the filing of this application.

### **Restriction of arbitration agreements**

Section 124. (1) In disputes arising from a cartel contract, particularly with regard to a contractual penalty or boycott imposed on the basis of a cartel contract (Section 30), or with regard to its existence, the decision by a court of general jurisdiction may be requested in any individual case, even if it was agreed that these disputes should be settled by an arbitral tribunal. Prior to granting the right to be heard, the arbitration tribunal shall instruct the party opposing the applicant, which has not participated in the appointment of the arbitral tribunal, on said right by registered letter.

(2) A party may no longer request a decision by a court of general jurisdiction as soon as it has appointed or applied for the appointment of an arbitrator in the matter under consideration, or has applied for the matter to be settled by the arbitration tribunal. However, a party opposing the applicant not represented by a lawyer may make this request until the rendering of the arbitral award, if the instruction pursuant to para 1 was not given.

(3) Agreements to the contrary shall have no effect.

### **Execution on the basis of Cartel Court decisions and settlements**

Section 126. (1) Temporary injunctions of the Cartel Court and final orders of the Cartel Court and the Supreme Cartel Court, as well as settlements concluded before them in proceedings on judicial assistance in connection with contracts (Section 30) and on the abuse control over market-dominating entrepreneurs (Sections 35 and 36), shall be executory titles.

(2) Apart from the applicant in the Cartel Court proceedings, the entrepreneur directly affected by the abuse of a market-dominating position shall also be entitled to file an application for the authorisation of execution by virtue of orders in proceedings pursuant to Sections 35 and 36.

(3) By virtue of executory titles issued by the Cartel Court, the authorisation and implementation of the execution shall be applied for at the district court in whose area district the party against whom execution proceedings are to be instituted has its general venue in matters in dispute (Sections 66, 75 JN Jurisdiction Code / *Jurisdiktionsnorm*) or at the execution court designated in Sections 18 and 19 EO Code Governing Executions / *Exekutionsnorm*.

## **CHAPTER XIII**

### **Prohibition of non-binding price recommendations**

#### **Authorisation to issue ordinances**

Section 127. (1) If the prices paid in business transactions by the ultimate consumer for a substantial part of the total sales of a specified commodity or class of goods fall considerably below the recommended prices, the Federal Minister of Economic Affairs may, for the promotion of price competition, prohibit by ordinance the issuance of recommendations that are neither cartels pursuant to section 12 nor non-binding association recommendations for the observance of calculation guidelines pursuant to section 31. Such prohibition may be declared only for specified goods or classes of goods.

(2) The ordinance may be issued for a maximum of two years. Its period of validity may be extended, each time for not more than one year, if, due to the market situation, it is to be assumed that upon expiry of the period of validity the conditions for issuance will recur.

#### **Exemptions**

Section 128. Ordinances pursuant to Section 127 shall not apply to recommendations between entrepreneurs of different commercial levels which, by virtue of contracts, are in a special close economic and organisational relationship (chain stores); however, this exemption shall not apply to the advertising-type announcement of prices vis-à-vis the ultimate consumer and to price recommendations for goods or classes of goods that are labelled with house brands of trading firms.

## **CHAPTER XV**

### **Violations**

#### **Fines**

Section 142. Upon application of an official party (Section 44), the Cartel Court shall impose fines as follows:

1. on enterprises or associations of enterprises, to the amount of € 10,000 to € 1 million or, in excess of such amount, up to 10% of the global sales achieved in the past business year by each of the enterprises involved in the violation, if they:
  - a. establish a cartel, vertical distributional restraint or concentration that is prohibited (Sections 18, 42a para 4, Section 59 para 2) or otherwise frustrate the effect of the prohibition to establish a cartel, vertical distributional restraint or concentration or repeal of the approval of a cartel; this shall not apply to retail sellers in a retail resale price maintenance chain;
  - b. abuse a market-dominating position (Section 35) or violate the ban on retaliatory measures (Section 36);
  - c. fail to meet the requirements of Section 35 para 2 or Section 42 para 7;
  - d. offend against Article 81 para 1 or Article 82 EC Treaty, provided that the Cartel Court is competent pursuant to Section 42f;

2. on enterprises or associations of enterprises, to the amount of € 3,500 to € 35,000, if they:
  - a. provide incorrect or incomplete information in an application to determine facts pursuant to Section 19 para 1, an application for approval pursuant to Section 23, an application for extension pursuant to Section 24, a notification pursuant to Section 30b or a notification pursuant to Section 42a;
  - b. violate the notification duty pursuant to Section 30b;
  - c. issue a non-binding association recommendation contrary to Section 32;
  - d. fail to comply with the order to repeal a non-binding association recommendation;
  - e. fail to comply with a decision by the Cartel Court pursuant to Section 42e para 3;
  - f. issue a recommendation contrary to an ordinance pursuant to Section 127;
  - g. fail to comply with an order by the Cartel Court pursuant to Section 11 para 4 WettbG;
3. on enterprises, to the amount of € 700 to € 7,000, if they violate their duty of notification pursuant to Section 19 para 2, Section 60 Z 5. or Section 63 para 4;
4. on cartel representatives, to the amount of € 140 to € 1,400, if they:
  - a. violate a duty of notification pursuant to Section 56,
  - b. fail to comply with a request pursuant to Section 64.

### **Assessment of fine**

Section 143. In assessing a fine, due regard shall be given to the severity and duration of the violation, the enrichment achieved by the violation, the degree of fault and the economic capacity. In the case of a cartel established although prohibited pursuant to Section 142 Z 1 lit.a, due regard shall also be given to the contribution in clearing up the violation.

### **Collection**

Section 143a. The fine shall accrue to the Federal Government and shall be collected pursuant to the provisions governing the collection of court fines.

### **Publication of the decision**

Section 143b. If the Cartel Court imposes a fine pursuant to Section 142 Z 1, it may, upon application by an official party (Section 44) order that the decision be published at the cost of the enterprises or association of enterprises involved, if the type and severity of the violation makes it expedient in order to counteract further violations of the law. The type of publication shall be specified in the decision.

### **Lapse of time**

Section 143c. A fine pursuant to Section 142 may be imposed only when the application has been filed within three years of the violation being ceased.

## 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, FLG No 125/1993, on the Enforcement of Competition Rules in the European Union (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 a case-to-case basis, in particular, 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 procedures pending on the date of entry into force of Article II 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 orders to the Joint Committee to submit expert opinions (Sections 49 and 112 para 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 Z 1 and Z 2 lit.a of the 1988 Cartel Act as amended in this Federal Act shall not apply to any situation realised prior to the date on which Article II has entered into force.