

Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

Federal Competition Authority, AUSTRIA

The following template is submitted by the **Federal Competition Authority of Austria (BWB)** pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures ("CAP").

I. Introduction

The Federal Competition Authority of Austria (BWB) was established in 2002 and is based in Vienna. The tasks of BWB arise out of both national law (mainly competition and antitrust law) and European competition law. Our general aims may be summarized as follows:

Safeguard competition

BWB aims to ensure and maintain competition in Austria with the means at its disposal, such as merger control, detection and prosecution of cartel agreements and the abuse of market power or general market research and sector inquiries.

Build awareness

BWB aims to promote public awareness concerning cartel and antitrust practices by means of publicity, transparency and external communication in order to deter antitrust offences in advance and to facilitate their detection.

National and international cooperation

BWB aims to improve cooperation with domestic and foreign public authorities and other stakeholders to increase efficiency and facilitate antitrust and cartel regulation operations.

Efficiency

BWB aims to obtain and enhance appropriate and sufficient human resources and the infrastructure necessary for the effective and efficient maintenance of competition. Knowledge management, quality management and human resources management, as well as professional education and training, play a significant role.

To reach these aims, the BWB is assigned with the following tasks:

- Act as a party (prosecutorial model) in procedures before the Cartel Court and the Supreme Cartel Court,
- Apply European competition rules in Austria,
- Conduct general investigations if there are substantial grounds for assuming distortions or restrictions of competition,
- Provide assistance to the Cartel Court, the Supreme Cartel Court, courts and administrative authorities including regulatory authorities and the Federal Cartel Prosecutor,
- Cooperate and exchange information with courts, authorities and the European Commission,
- Give opinions on economic policy issues ('competition advocacy') and legislative proposals in competition law

- Enforcement of the [Local Supply Act](#) and specific provisions of the [Unfair Trading Practices Act](#)
- Specific tasks of [consumer protection](#).

To effectively ensure the accomplishment of its tasks, BWB has the following powers:

- Request information from companies and associations of companies,
- Access to business documents and records including the right to make copies and/or transcripts,
- Carry out searches of business premises (inspections/dawn raids) after a warrant has been issued by the President of the Chamber of the Cartel Court – if necessary with the help of public security officers – if there are substantial grounds for assuming violations of competition law or [Art 101](#) and [Art 102](#) TFEU and to support the European Commission and Competition Authorities of the other EU Member States in their investigations,
- conduct oral interviews

For general information about BWB, please see our English [BWB website](#).

As far as English translations or websites are applicable, we have outlined the relevant links in English. As the official language in Austria is German, the authentic versions of all laws is always the German version. Therefore, many laws, materials and further information are available on our German [BWB website](#) only.

In case of questions, please do not hesitate to contact us (ralph.taschke@bwb.gv.at; natalie.harsdorf@bwb.gv.at; daniela.trampert@bwb.gv.at).

II. Laws, Regulations, and Policies relevant for the implementation of the CAP

The tasks of BWB arise out of both national and European competition law. As Austria works with a statutory law system, all tasks and procedures of a public authority, such as BWB, have to be based on written law (Art 18 para 1 [Constitution of the Republic of Austria](#)- principle of legality). Similar cases may be used as point of reference to support individual cases, but a case cannot be based solely on older cases without referring to a specific written legal provision.

All national laws are published on the Legal Information System of the Republic of Austria, which is accessible for everybody and free of charge (please see [RIS](#)). European legislation is accessible on the [European Commissions' website](#), which is publicly accessible and free of charge as well.

The most important national material law is the Federal Cartel Act 2005, which lays down the general provisions regarding cartels (Chapter 1- Articles 1 to 3), the abuse of a dominant market position (Chapter 2- Art 4 to 6) and the prerequisites for national merger control (Chapter 3- Art 7 to 19); please see [Federal Cartel Act 2005](#) .

The national prohibitions of cartels and the abuse of a dominant market position mirror the relevant European competition regulation in [Art 101](#) Treaty on the Functioning of the European Union (TFEU) on cartels and [Art 102](#) TFEU on the abuse of a dominant market position.

Regarding the enforcement of competition law in Austria, the relevant powers of the BWB and the legal procedure are determined in the [Federal Competition Act 2002](#)

b) Non-Discrimination

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

The prohibition of discrimination on national origin as well as on further grounds is based on Art 14 of the [European Convention of Human Rights](#) (ECHR), which is directly applicable in Austria as part of the [Constitution of the Republic of Austria](#) .

Art 14 ECHR states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Furthermore, Art 21 of the [EU Charter of Fundamental Rights](#) prohibits any discrimination on grounds of nationality.

Consequently, any discrimination based on the reasons outlined above is illegal and all persons, undertakings and association of undertakings are treated the same way.

c) Transparency and Predictability

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

The tasks of BWB arise out of both national and European competition law. As Austria works with a statutory law system, all tasks and procedures of a public authority, such as BWB, have to be based on written law (Art 18 para 1 [Constitution of the Republic of Austria](#)- principle of legality).

All national laws are published on the Legal Information System of the Republic of Austria , which is publicly accessible for everybody and free of charge (please see [RIS](#)). European legislation on competition law, such as Art 101 and 102 TFEU (Treaty on the Functioning of the European Union) and corresponding EU Regulations and Directives are accessible on the [European Commissions' website](#), which is publicly accessible and free of charge as well.

In addition, the most relevant provisions in competition law, such as the Austrian Competition Act, Cartel Act and Local Supply Act, are published on the BWBs website as well (please see: [BWB website - factual information](#))

Furthermore, BWB published various soft law instruments (“standpoints”) to explain the most relevant provisions and increase transparency and predictability in competition law matters. Please see [BWB website - standpoints](#) for

[Position on Settlements](#)

[Handbook on Leniency Programme](#)

[Standpoint on Resale Price Maintenance](#)

[Guidance on Dawn Raids](#)

[Joint guidance on new transaction value threshold](#)

[Fairness in business - Guidance for fair conduct in business](#)

Additionally, BWB publishes an [Annual Report](#), outlining the major cases and most relevant events of each year.

d) Investigative Process

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

Regarding cartel and abuse of a dominant position cases, Art 13 [Federal Competition Act 2002](#) constitutes the right to be heard during the investigative process conducted by BWB:

“§ 13 (1) If the Federal Competition Authority intends to file an application to initiate proceedings pursuant to §§ 26, 27 or 28 [Federal Cartel Act 2005](#) and such application is preceded by investigations pursuant to §§ 11, 11a or 12 [Federal Competition Act 2002](#), the opposing party shall be given the opportunity to be informed of the results of the investigations and to take a position on them within a reasonable period of time.”

Therefore, BWB issues a written statement of objections including the alleged conduct, a definition of the relevant market(s), a legal analysis and an explanatory statement before the BWB files an application for the termination of an infringement (Art 26 [Federal Cartel Act 2005](#)) / commitments (Art 27 [Federal Cartel Act 2005](#)) / findings (Art 28 [Federal Cartel Act 2005](#)) or fines (Art 29 [Federal Cartel Act 2005](#)) to the Cartel Court. The opposing party/parties concerned are therefore informed

about the state of the investigation and receive the right to be heard, i.e. to provide a written statement to the BWB regarding their responsibility and/or challenges to the BWB's case analysis.

In case of dawn raids, oral interviews and information requests, the opposing party/parties are informed about their rights and obligations, including the right to be heard, as soon as the respective investigation method is applied.

Regarding information requests, Art 11(a) [Federal Competition Act 2002](#) states, that "to the extent required to perform its duties as laid down in this Federal Act, the Federal Competition Authority shall also be authorised to request information from undertakings and associations of undertakings to be submitted within a reasonable period of time. These requests for information are always issued in writing and include an instruction regarding the duty to answer the information request and the consequences of non-compliance (provision of no, wrong, misleading or incomplete information).

Regarding oral interviews, Art 11 (2) [Federal Competition Act 2002](#) states that the BWB is authorised to consult experts and call witnesses and other parties concerned, analogously applying the [General Administrative Procedure Act \(AVG\)](#). The AVG provides a detailed description of the rights and duties of the BWB as well as of witnesses and other parties. These include i.a. the definition of persons involved and parties (§ 8 AVG), information on appeal (§ 13a AVG), minutes (§14 AVG), summons (§ 19 AVG), objective and course of the investigation procedure (§ 37 AVG), witnesses (§48 AVG), right to refuse to testify/to remain silent (§§ 49-51 AVG).

Inspections (dawn raids) are based on Art 12 [Federal Competition Act 2002](#), which states that "where there is reasonable suspicion that an infringement of §§ 1, 5 or 17 [Federal Cartel Act 2005](#) or [Art 101](#) or [Art 102](#) TFEU exists and where this is necessary to obtain information from business documents, the Cartel Court shall order, upon application by the Federal Competition Authority, that the premises be searched."

In addition, BWB has published a [Guidance on Dawn Raids](#) to increase transparency. This Guidance explains the procedure, rights and duties of BWB and the targeted undertaking or association of undertakings during a dawn raid.

Regarding [merger control](#), the parties of a notified merger are in contact with the competent case handler from the beginning and are informed about the steps the case handler takes to evaluate whether the merger can be cleared with or without conditions or will be forwarded to the Cartel Court for an in-depth investigation (so called "phase 2" - merger).

e) Timing of Investigations and Enforcement Proceedings

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

In general, BWB endeavors to keep investigation proceedings as short as possible.

The [Federal Cartel Act 2005](#) outlines certain limitation periods (deadlines) for specific categories of cases, such as merger applications: phase 1 = maximum of 4 weeks, which can be extended by parties for another 2 weeks, phase 2 = maximum of 5 months, which can be extended by parties for another month (please see §§ 11, 14 [Federal Cartel Act 2005](#))

Regarding cartel infringements and the abuse of a dominant position, § 33 [Federal Cartel Act 2005](#) outlines a 5-years-limitation period for the application of fines:

“A fine may be imposed only if an application to impose a fine was filed within five years of termination of an infringement. This limitation period shall be interrupted with effect from the date on which action aimed at the investigation or prosecution of the infringement by the Federal Competition Authority is notified to at least one of the undertakings or associations of undertakings, which has participated in the infringement. Each interruption shall start time running afresh; however, the limitation period shall in any case expire no later than ten years from termination of such infringement. The duration of any proceedings before a Court shall not be included in the limitation period.”

Regarding the procedures at the Austrian Cartel Court and Supreme Cartel Court, § 44 [Federal Cartel Act 2005](#) states: “Where time limits are not set by law, the chairperson shall set reasonable time limits; upon application of a party concerned, the chairperson shall extend such time limits under specific circumstances worthy of consideration.” However, an unjustifiable long procedure in front of the Austrian Courts would cause an infringement of Art 6 [European Convention of Human Rights](#) (right to a fair trial).

f) Confidentiality

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

The [principle of confidentiality for all public services](#) is based on in Art 20 para 3 of the [Constitution of the Republic of Austria](#) as follows:

“All officials entrusted with federal, provinces and municipal administrative duties as well as the officials of other public law corporate bodies are, save as otherwise provided by law, pledged to confidentiality about all facts of which they have obtained knowledge exclusively from their official activity and which have to be kept confidential in the interest of the maintenance of public peace, order and security, of comprehensive national defense, of external relations, in the interest of a public law corporate body, for the preparation of a ruling or in the preponderant interest of the parties involved (official confidentiality).“

This constitutional principle is reiterated in public services law (in § 46 [Beamten Dienstrechtsgesetz](#) and § 79 [Vertragsbedienstetengesetz](#)), which apply to all staff of the BWB and outline severe punishment up to dismissal of the employee in question, if the obligation to confidentiality is violated

In this context, the Cartel Court and Supreme Cartel Court shall have regard to the legitimate interest of undertakings in the protection of their business secrets, when publishing their decisions (please see § 37 (1) and (2) [Federal Cartel Act 2005](#)).

g) Conflicts of Interest

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

Employees of the BWB have to abstain from working on cases, which could result in material, personal or financial conflicts (see § 47 Beamten Dienstrechtsgesetz 1979 and §5 Vertragsbedienstetengesetz 1948 in conjunction with § 7 [General Administrative Procedure Act \(AVG\)](#)).

§ 7 para 1 [General Administrative Procedure Act \(AVG\)](#) states:

“In exercising their duties, administrative officers shall abstain from exercising their office and cause to have appointed a substitute:

1. in matters in which they themselves are involved, or one of their relatives (§ 36a) or one of the persons under their guardianship is involved
2. in matters in which they were or are appointed representative of a party
3. if there are any other important reasons resulting in doubts as to them being fully unbiased
4. appeals proceeding if they were involved in issuing the ruling appealed against or the preliminary decision on appeal.”

h) Notice and Opportunity to Defend

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

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Inspections (dawn raids) are based on Art 12 [Federal Competition Act 2002](#), which states that “where there is reasonable suspicion that an infringement of §§ 1, 5 or 17 [Federal Cartel Act 2005](#) or [Art 101](#) or [Art 102](#) TFEU exists and where this is necessary to obtain information from business documents, the Cartel Court shall order, upon application by the Federal Competition Authority, that the premises be searched.”

In addition, BWB has published a [Guidance on Dawn Raids](#) to increase transparency and predictability. This Guidance explains the procedure, rights and duties of BWB and the targeted undertaking or association of undertakings during a dawn raid.

If BWB files an application to the Cartel Court or Supreme Cartel Court, the party's defence rights are outlined in §§ 38 ff [Federal Cartel Act 2005](#). Part III (Art 38 to 49) [Federal Cartel Act 2005](#) outlines the proceedings in front of the Cartel Court and the Supreme Cartel Court. Regarding the nature of the

proceedings, the Cartel Court and the Supreme Cartel Court shall decide in matters under this Federal Act by way of non-contentious proceedings ([Außerstreitgesetz](#)).

The further Articles define and outline the parties to the proceedings (Art 40 [Federal Cartel Act 2005](#)), the protection of business secrets (Art 39 [Federal Cartel Act 2005](#)), the reimbursement of costs (Art 41 [Federal Cartel Act 2005](#)), hearings (Art 47 [Federal Cartel Act 2005](#)), interlocutory injunctions (Art 48 [Federal Cartel Act 2005](#)) and Appeal proceedings (Art 48 [Federal Cartel Act 2005](#)).

The Cartel Courts decision may be appealed to the Supreme Cartel Court. The period of time to appeal against final decisions is four weeks, the period of time to appeal against interlocutory injunctions is fourteen days. The other parties may submit a reply to the appeal within the same periods of time from receipt of the appeal. An appeal may be based on a disagreement of the legal analysis of the Cartel Court or on the fact that due to the contents of the files significant doubts exist regarding the correctness of the relevant facts on which the decision of the Cartel Court was based on.

i) Representation by Counsel and Privilege

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

During the investigation period as well as at the Cartel Court and Supreme Cartel Court, all accused representatives of undertakings or associations of undertakings are free to decide to involve legal counsel for their defence. However, there is no legal obligation to do so (§ 4 [Außerstreitgesetz](#)).

Regarding legal privilege, we need to distinguish between EU and Austrian competition law. While legal privilege is derived from case law of the European Court of Justice for cases based on [Art 101](#) and/or [Art 102](#) TFEU (Treaty on the Functioning of European Union), there is no corresponding principle in the Austrian competition law legislation. Consequently, all evidence gathered by BWB may be used for the application of sanctions in a Cartel Court procedure, if the case in question is exclusively based on national competition law (for further information please see *Xeniadis/Harsdorf in Petsche/Urlesberger/Vartian* (Hrsg), KartG² (2016) § 12 WettbG Rz 22 ff).

j) Decisions in Writing

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions.*

Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.

- ii. *Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

According to § 36 [Außerstreitgesetz](#) every Cartel Court decision has to be issued in writing, while § 39 [Außerstreitgesetz](#) lists the compulsory content a court decision has to include, i.e.

name of the court and the case number

parties of the case, personal details of the parties, legal representatives

issue of litigation

court decision (conclusion)

reasoning (finding of facts, explanation of imposed remedies)

Decisions of the Cartel Court are published in the [Ediktsdatei](#), section Entscheidungen des Kartellgerichts, whereas decisions of the Supreme Cartel Court are published on the Legal Information System of the Republic of Austria ([RIS](#)). Both websites are publicly accessible for everybody and free of charge.

Furthermore, BWB publishes all cases after their [decisions](#) have become final on its website.

k) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

The Cartel Court is an independent decision making body, which imposes sanctions and prohibitions in competition matters upon application of the BWB. The BWB is the investigative body and acts like a prosecutor in competition matters, but does not have the power to decide on cartel or abuse of dominance cases by itself.

Regarding [merger control](#), the BWB has the power to clear merger applications with or without remedies in phase 1. If the BWB deems remedies necessary for the clearance of a merger, these remedies have to be mutually agreed between the merger applicants and the BWB. If the BWB is not satisfied with the remedies presented, or of the opinion that the merger would still create a dominant market position of the merger applicants, the case is be forwarded to the Cartel Court for an in-depth investigation (so called “phase 2” - merger).

The parties may appeal to the Austrian Supreme Court as Court of Appeal in all competition matters (Supreme Cartel Court) against the Cartel Court’s decision (please see above, question h, and § 58 [Federal Cartel Act 2005](#)).