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Reform Options for Competition Policy in Austria

From the experience with the current antitrust law regime in force for the last six years a number of reform options may be derived for optimising the institutional setting and procedures of competition policy in Austria. The focus of such considerations are an institutional reorganisation by strengthening the Federal Competition Authority and a repositioning of the Competition Commission, the reinforcement of the means of investigation in cases of cartel law abuses as well as the implementation of a forward-looking approach to competition policy supported by monitoring on the basis of quantitative indicators.

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Further developing the institutional setup of competition policy

The institutional arrangement of competition policy with civil law courts and administrative authorities operating in parallel needs further adjustment.

The current institutional arrangements of competition policy entered into force on 1 July 2002 in the context of a comprehensive reorganisation as part of an amendment to the antitrust and competition law of 2002. That amendment should be seen as the direct reaction by Parliament to the pressure for reform within Austria and from the EU, with the main aim of bringing about the much-needed institutional upgrading of competition policy as applied in Austria.

The reformed institutional setup is characterised primarily by a substantially reduced role of the social partners in cartel law decisions. While the social partners retained their right of petition in cases of presumed cartels or abuse of market power, their key role as interested parties in examining corporate mergers was transferred to two newly-established government institutions, the Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP). Furthermore, the expert lay judges nominated by the social partners lost their majority in the senate of the Cartel Court and the superior Cartel Court with the appointment of additional professional judges.

In the reformed institutional setting, the FCA functions as the pivotal authority of competition policy. While from an organisational point of view it is affiliated to the Federal Ministry of Economics and Labour, the federal constitution stipulates that in performing its tasks it is independent and exempt from instructions. Its major task is the investigation into and abolition of distortions of competition of all kind. To this end, it was granted the status of official party in all Cartel Court cases with extensive rights of investigation and initiation.

In addition to the FCA, the FCP was installed at the Federal Ministry of Justice. By strictly implementing the prosecution principle, the FCP (similar to the public prosecutor in criminal cases) is called upon to defend before the Cartel Court the public interest in matters of competition law. The FCP is directly attached to the Federal Minister of Justice and bound by his instructions. As (second) official party it enjoys the same right of initiation as the FCA. Although both official parties are obliged to co-operate, requests for examination by the Cartel Court are not contingent upon a mutual agreement on how to proceed. Thus, obstruction between the two institutions is excluded since both parties may act independently from each other.

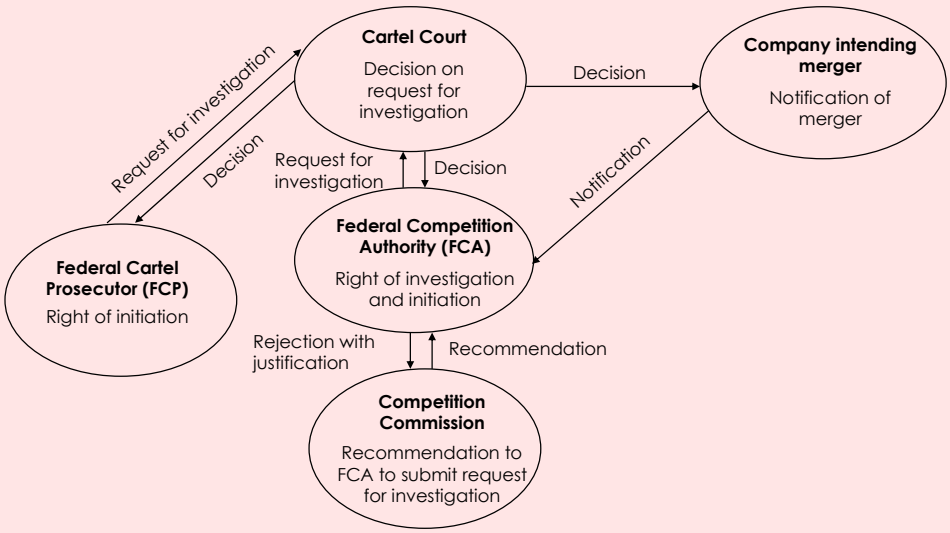
This duplication of responsibilities between FCA and FCP has been pointedly labelled ironically as "one-stop-shop the Austrian way" (*Ablasser – Hemetsberger,* 2002). The mandate by Parliament, whereby the two authorities "should supplement

each other in performing their tasks rather than acting in parallel or rivalry"[1], should be defined in operational terms in order to avoid such duplication. From the point of view of substance, the existence of the FCP could best be justified by the protection of consumer interests in deciding on competition cases, which would, however, require the Minister of Justice (as the "political superior" of the FCP) having a responsibility for consumer protection, which at present is not the case.

Parliament also installed the Competition Commission as an advisory body to the FCA. Four of its eight members are appointed by the Federal Minister for Economics and Labour, the other four by the social partner institutions. In merger control cases, the Competition Commission may recommend to the FCA to submit a request for an in-depth phase II examination before the Cartel Court. Such a recommendation is, however, not binding for the FCA and may be declined subject to a justification. In addition, the Competition Commission may, upon request by the Economics Minister or the FCA, deliver expert appraisals general issues of competition policy.

Even after the reform of the cartel law in 2002, the decision in competition cases is conferred to the Cartel Court in the first and the superior Cartel Court in the second instance. What has been changed is the composition of the panel of judges of the Cartel Court and the initiation of investigation procedures. In the judges panels of the Cartel Court and the superior Cartel Court the expert lay judges nominated by the social partners no longer have a majority, such that they cannot outvote a decision by the professional judges. The initiation ex officio of an investigation procedure, heavily criticized for principal reasons of legitimacy (i.e., the identity of prosecutor and judge) has been abolished. The right of initiation from the public interest has been transferred to the FCP.

Figure 1: Structure and procedure of merger control in Austria



Source: WIFO.

The most important changes implied by the 2002 amendment of the cartel law concerned merger control, where the social partners lost their right of petition for an investigation. Their role is now confined to presenting their position and to participation in the Competition Commission via their representatives. The institutional framework for the examination of mergers after the reform is summarised in Figure 1. The only change in procedure consists in the requirement whereby as from the beginning of 2006 mergers have to be reported directly to the FCA.

Need for institutional reform

With the 2002 amendment of the antitrust and competition law, the institutional competition framework in Austria was brought closer to European standards, while retaining specific national particularities. Over the six years that have passed since,

[1] EB 1005 d. B. (XXI. GP), Allgemeiner Teil lit b, 17f.

practical experience has revealed a considerable scope for improvement of the system (*OECD,* 2003, 2005, *Böheim,* 2003).

Federal Competition Authority

The establishment of the FCA as the focal investigation and initiation authority has in principle proved successful. It is the FCA that bears the major responsibility of examining mergers, both in quantitative and qualitative terms, rather than the Cartel Court as the legal provisions would suggest. However, the transfer of key tasks of merger control to the FCA has not gone hand-in-hand with an appropriate increase in the legal competencies of the latter:

- Many notifications of mergers are submitted in incomplete form. However, the FCA itself cannot give order to complete the dossier, but the Cartel Court has to intervene in the (only) way of demanding an improvement which of necessity is coupled with a request for carrying out also an examination in court of the planned merger. Incomplete notifications therefore necessarily trigger an examination by the court, even if there is not always the necessity in substance for such examination.
- Also inadmissible notifications cannot be rejected by the FCA through an administrative decision, but the Cartel Court has to intervene upon request by the FCA.
- The antitrust jurisdiction (in particular in the second instance) has come to adopt a restrictive interpretation of the cartel law and the competition law to the disadvantage of the official parties. Thus, it is current jurisdiction, for example, that the FCA during an examination procedure in stage 2, i.e., during a court examination (requested by the FCA), can no longer succeed in court with a request for information. This is all the more difficult to understand as many requests for examination simply result from the fact that the statutory period of four weeks for definite clarification has proved too short.

The most important restrictions in practice relate, however, to the rights of investigation by the FCA. It is true that the competition law reflects a commitment to rather extensive rights of investigation, notably with regard to "requests for information". If, however, companies decline to provide such information, the FCA is advised to "take legal action". As the investigations in the context of the food sector (*Federal Competition Authority*, 2007) have shown, the inevitable intervention of the Cartel Court may lead to an "endless loop of legal appeals" that may cause long delays in the procedure.

The draft 2005 amendment of the competition law had already foreseen that the FCA officially decides in individual cases on the obligation to provide information. Thereby, companies which as a matter of principle decline to comply with their legal (competition law) obligations to provide information would no longer be privileged, as this is de facto possible in the current system via excessive recourse to legal protection. Such an extension of investigation rights would strengthen the role of the FCA as investigating authority; legislators should therefore maintain their efforts in that regard.

The investigation tools of the FCA have been substantially improved by the institution of a chief witness introduced in Austria with the amendment of the cartel law and the competition law of 2005. Its intention is to create incentives, via a reduction of fines, for a co-operation by cartel members with the competition authorities in disclosing cartels[2]. This method is in recognition of the fact that without exact knowledge of internal corporate operations it is very difficult for the competition authorities to produce hard evidence for the existence of cartels that can withstand in court[3].

[2] The provisions concerning the chief witness and the requirements for their application are laid down in § 11 lit. 3 to 6 of the competition law. According to the law it is a matter of discretion for the FCA whether and to what amount a fine will be recommended to the Cartel Court. The exact procedure of the FCA in applying the chief witness regulation in practice is laid down in a manual (*Bundeswettbewerbsbehörde,* 2005).

[3] With the administration of fines of a total € 75.4 million against five producers of elevators, the chief witness regulation passed the test of practical application in a convincing way in December 2007; http://www.bwb.gv.at/BWB/Aktuell/aufzuge_fahrtreppen_141207.htm).

Reform option 1: Reversal of burden of proof in legal proceedings of abuse of market power

In legal proceedings of abuse of market power, the competition authorities are confronted with a similar problem of investigation as with the disclosure of cartels, i.e., the burden of proof of market power abuse by a market-dominating company is with the competition authorities. In practice, such violation of competition is extremely difficult to identify and even more difficult to prove. For this reason, a strict merger control as a necessary ex-ante device of competition policy remains of paramount importance (*Tichy,* 2000, 2001). The competition authorities will therefore rarely be able to deliver a firm proof of abuse of a market-dominating position that can withstand in court. A reversal of the burden of proof would therefore strengthen their position considerably, i.e., if market-dominating companies would have to prove that they have NOT abused their market power. In this way, the control of abuse provided for by the cartel law would be greatly reinforced.

An ex-post control of market outcomes via a reversal of the burden of proof is nevertheless no substitute for an efficient self-regulation via the mechanism of competition. It can by no means address the economic causes of a lack of competition on the markets concerned (*Monopolkommission,* 2007). The long-term goal of competition policy must be to achieve more intensive competition through the dismantling of market entry barriers. The goal is to encourage potential competitors to enter a market and to render markets contestable (*Baumol – Panzar – Willig,* 1982). In order to increase the number of players in a market and hence enhance the intensity of competition, also a territorial extension of markets may be envisaged[4].

A lowering of market entry barriers will, however, not immediately exhibit its competition-enhancing effect. Compared with the control of abuse it nevertheless has the advantage of addressing the causes and of impacting in a lasting way, thereby actually intensifying competition (*Monopolkommission,* 2007). Still, a reinforcement of abuse control through a reversal of the burden of proof may serve as a meaningful supplement of the legal toolkit for competition, since it would have an early impact until the establishment of well-functioning competitive markets.

In the German law against barriers to competition ("Gesetz gegen Wettbewerbsbeschränkungen" – GWB) a corresponding provision has been included since 2007[5]: § 29 GWB, due to expire (for the time being) at the end of 2012, applies only to market-dominating energy suppliers and has the objective of enforcing the control of abuse in the energy sector (electricity and gas) as long as smoothly-functioning competition has not taken hold on energy markets.

The justification given for this legal change argues that the markets upstream and downstream of the energy networks have not yet become fully-functioning competitive markets during the more than eight years since the legal market opening. Energy prices have allegedly risen to a questionable level from a macro-economic perspective that can no longer be justified by cost developments for primary energy and put an excessive burden on recipient manufacturers and private households. The purpose of the new regulation would be a reinforcement of the instruments offered by the cartel law to fight the abuse of excessive energy prices with a tailor-made solution for the energy sector. Within a time horizon of five years, the enforcement of the ban on abuse would be facilitated for the cartel authority; the move would not amount to the introduction of price regulation, but would allow an ex-post control, at the discretion of the cartel authority, of market-dominating companies in specific cases.

The considerations underlying the modification of the German GWB may be applied in toto also to the Austrian energy sector (*Bundeswettbewerbsbehörde,* 2006A, 2006B). A similar amendment of the Austrian cartel law in order to strengthen the position of the FCA in cases of abuse is therefore deemed advisable, as the existing investigation instruments have proved insufficient in practice (*Wettbewerbskommission,* 2008). The reversal of the burden of proof according to this regulation for a par-

[4] On the energy market this may be achieved through an upgrading of frontier hubs and the abolition of network bottlenecks (*Bundeswettbewerbsbehörde,* 2006A, 2006B).

[5] According to § 29, lit. 1 (2) of GWB, a market-dominating energy supplier is not acting abusively i fit can prove that a deviation from the lower reference price is justified. The actual burden of proof for such justification in substance is thereby imposed on the market-dominating company (*Lotze – Thomale,* 2008).

ticular sector, to be applied only for procedures initiated by an official authority, should be limited in time up to the presumed establishment of properly-functioning competitive markets.

Subject to a positive evaluation of the experience made, it may be envisaged to extend the reversal of the burden of proof to other sectors which in the context of a quantitative monitoring (see below) are considered problematic from a competition policy perspective.

Federal Cartel Prosecutor

Next to the independent FCA, the FCP has been installed as an official institution subject to directives, which is to take care of the political responsibility in cases of general public interest.

The expectations which legislators had set in this "institutional duplication" have hardly been met in practice. In most legal antitrust cases both institutions have acted in the same sense, i.e., when one party submits a request for examination by the Cartel Court, the other endorses it. This close co-operation implies that even in controversial cases the FCP does not play its supposed role of control of the FCA. Thus, on competition policy grounds it would have been imperative to subject the "Austrian gas solution" (Econgas) to an enhanced phase-2-examination by the Cartel Court, or lodge an appeal to the superior Cartel Court against the controversial passing of the merger between postal and railway bus traffic. In these cases of undoubtedly high public interest, the FCP did not intervene. Likewise, in the important current debate on the strengthening of competition on Austrian energy markets the FCP plays no major role, although the functioning of competition on energy markets is of considerable public interest. In only few exceptional cases, the FCP resolved to an independent way of action, such as against cartel-like forms of co-operation in the asphalt mixing industry or against an inadmissible corporate merger in the Austrian pulp industry.

Reform option 2: Establishing a comprehensive competition authority

Against the background of scarce resources of the FCA, a discussion about the future role of the FCP is deemed necessary. An option would be the abolition of the FCP and the integration of the two (highly-valued) posts into the FCA. A second option would consist in leaving the FCP as independent initiation authority, while defining precisely the division of tasks between the two official institutions. In this way, the FCA may specialise on investigation and examination of cases, the FCP on their representation in the Cartel Court. A third option would be to grant the FCP an own area of responsibility (and additional resources), such as giving it the role of a "consumer protection authority" in legal cartel cases.

In order to avoid duplication, the present government programme provides for the integration of responsibilities between the FCP and the FCA (*Bundeskanzleramt,* 2007, p. 41). After an unsuccessful attempt at the beginning of the current legislation period, this initiative is not being pursued with high priority. Efforts in this regard ought to be resumed with the aim of establishing a single all-encompassing competition authority.

Competition Commission

The Competition Commission has been attached to the Federal Minister of Economics and the FCA as an advisory board of experts. It replaces the Parity Committee in cartel matters, without taking over its role as "official expert" of the Cartel Court. The main tasks conferred by law to the Competition Commission, apart from making suggestions for priority activities of the FCA, consist of issuing recommendations on mergers on the one hand, and in drafting expert opinions on general issues of competition policy upon request by the Minister of Economics, on the other.

The involvement in the day-to-day work of the FCA via recommendations on corporate mergers is a matter to be questioned. Only in rare cases can the members of the Competition Commission be provided with sufficiently up-to-date information on the entire state of internal discussion at the FCA. However, such high level of information is indispensable for the issuing of qualified recommendations that are based upon an independent opinion of the members of the Competition Commission. Adding to this are time constraints set by the tight cartel law deadlines, such that it would make sense to withdraw the Competition Commission from the day-to-day work of the FCA. The role of the Competition Commission in issuing recommenda-

tions on corporate mergers should thereby be terminated without looking for substitutes. The right to be kept informed about mergers should be maintained.

Reform option 3: Repositioning of the Competition Commission as independent panel of experts

In return, the role of the Competition Commission as independent panel of experts acting autonomously with a focus on background analysis of competition policy, like the German Monopolkommission (monopoly commission), should be strengthened. Having not been given a mandate by the Federal Minister in charge to issue expert reports during its first period in office (2002-2007), the Competition Commission has been asked in January 2008 to draft a study on possible competition-induced factors behind the acceleration of inflation in Austria. Carrying out such a study is severely constrained by the scarcity of resources, as the Competition Commission has neither own human nor financial resources at its disposal.

In order for the Austrian Competition Commission to draft a report on competition at least every two years, it needs its own budget (of relatively modest amount) to allocate at its own discretion. The provision of an own staff[6] appears less necessary, however, as the members of the Competition Commission may draft studies themselves and be appropriately compensated for their effort.

However, as long as the remuneration of activity in the Competition Commission is confined to attendance allowances ("Sitzungsgeld")[7], the basic analytical work for reports on general competition policy issues, of the kind of the regular and special reports by the German Monopolkommission, will remain an abstract commitment, rendering the Competition Commission as expert committee on competition policy largely irrelevant. If the Competition Commission were to carry out background analytical work according to its legal mandate, its financial resources would have to rise to at least 5 to 10 percent of the budget of the FCA.

Cartel Court

The reform of the cartel law of 2002 retained the role of the Cartel Court as the first instance of jurisdiction, with the new initiation authorities being "superimposed" onto the existing system. Like Ireland, Austria takes a special position in this regard within the EU: in all other EU member states, the first-instance jurisdiction is conferred to the national competition authority. Problems arising from such a mixed system of civil law court and administrative authority, as applied in Austria, have already been discussed above[8].

For the further evolution of the current system, two alternatives may be considered. If the mixed system of cartel authorities were to be maintained in Austria, its "points of friction" would have to be abolished, functions defined in more concrete terms and the responsibilities of the FCA enhanced, as discussed above.

Reform option 4: Federal Competition Authority taking decisions in first instance

A second alternative would be the devolution of the decision in the first instance to the FCA, an option being considered also by the current federal government programme (*Bundeskanzleramt,* 2007, p. 41). This arrangement has proved successful in Germany: the cartel authority decides (given an appropriate resource endowment) in the first instance via administrative act; against that decision an appeal can be lodged, by following well-defined procedural rules that are not biased against competition, at a special court in the second instance where the factual and legal situation will be clarified (Figure 2).

Beyond that level, a third instance (superior court) may be installed. In that case, however, constraints on the means of legal or factual redress would have to be introduced, as applied in legal disputes at the Supreme Court ("Oberster Gerichtshof") and the Administrative ("Verwaltungsgerichtshof") as well as the Constitutional Court ("Verfassungsgerichtshof"), according to the respective codes of procedure. In this way, comprehensive legal protection in cartel matters would still be ensured, while the problems and frictions arising from a mixed system of civil court and administrative authority in the first instance would be removed once and for all. In view of the

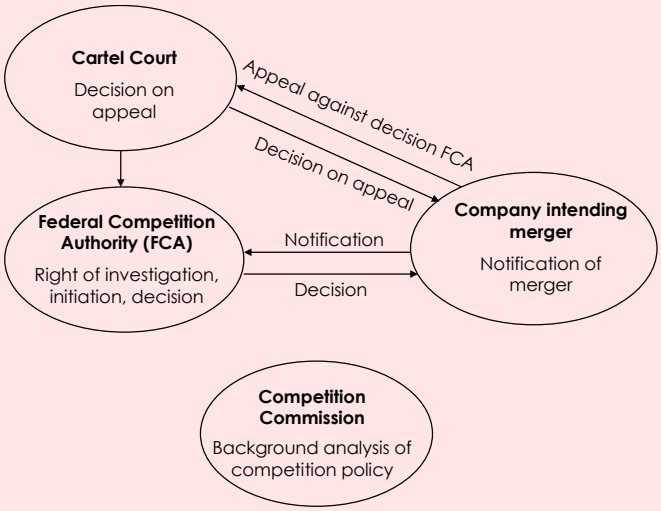
[6] Thus, the German Monopolkommission has a professional staff, including its secretary general, of ten research fellows and four non-research support members.

[7] § 16 (7) of the competition law provides for an appropriate remuneration of the working time spent. The regulation concerning the remuneration of the members of the energy control commission may serve as a benchmark in this regard.

[8] For a short overview of the implicit problems with European law, see *Frey* (2008).

strict interpretation given in Austria (as different from, say, Germany) to the principle of separation between jurisdiction and public administration, such stages of appeal from an administrative body to a legal court would require a constitutional amendment and thus a broad political consensus.

Figure 2: Structure and procedure of merger control in a new institutional setting (reform option)



Source: WIFO.

Competition policy

Competition policy goes beyond dealing with concrete legal cartel cases. An up-to-date setting of competition policy requires a comprehensive strategy in coordination with other policy areas like industrial, energy, environmental and other policies.

Such a comprehensive approach to competition policy is nowhere visible in Austria. Economic policy actors are apparently not interested in the matter, and the government institutions in charge of the competition agenda, dealing with individual cases, lack resources for further-reaching strategic deliberations. However, an entirely casuistic policy approach runs the risk of losing sight of essential macroeconomic linkages, for which reason an overall strategy for Austrian competition policy ("competition policy in a small open economy") should be developed with urgency (*Böheim,* 2006).

Reform option 5: Forward-looking competition policy with competition monitoring

Points of reference for such a strategy may be offered by a pro-active and investigating competition policy underpinned by economic analysis, as outlined by Denmark in its National Reform Programme (*Janger,* 2006).

The Danish competition authority identifies on the basis of competition policy targets – i.e., reduction by 50 percent of the number of sectors with low degree of competition (64 in 2001), lowering of the retail price level on a net basis towards the EU average – the "problem sectors" in forward-looking reports by means of a grid of economic indicators designed for that purpose and of cross-country comparisons ("benchmarking"). In a first step, the importance of the sector is identified by indicators of size (turnover, employment), in order to ensure that priority is given to the major economic sectors. Subsequently, a quantitative analysis is carried out on the basis of a weighted set of indicators; what is important here is the overall picture conveyed by the indicators, in order to avoid wrong decisions taken on the basis of single indicators. Thus, a high degree of market concentration does in itself not point to severe competition problems. If, however, the analysis shows at the same time only small variations in market shares, high earning-mark-ups, above-average wage levels and below-average rates of business start-ups, it creates a presumption of existing barriers to competition. If the total score across all indicators exceeds a certain ceiling, the competition authority proceeds to an additional qualitative assessment

of the sector, e.g., a comparison of practices of regulation and competition in that sector with the situation in other countries and the EU.

Table 1: Indicators for the identification of sectors with low degree of competition

		Weight
Government regulation	Competition limited by regulation; yes = 1, no = 0	3
Concentration	Turnover share of four largest companies (CR4) over 80 percent	2
Concentration including imports	Turnover share of four largest companies (CR4) over 50 percent	1
Start-up rate	Share of business start-ups in total enterprise population for manufacturing below 3 percent, services below 8 percent	2
Variability of market shares	Range of variation of market shares below 10 percentage points per year	2
Range of variation of productivity growth	25 percent above the average	2
Wage level	15 percent above the level in manufacturing	1
Rate of return	50 percent above the average in manufacturing	2
Price level	3 percent above the euro area average	3
Assessment by competition authority		

Source: WIFO.

The introduction of the Danish assessment grid in Austria would require the collection of data that are relevant for competition policy analysis (Table 1). A FCA endowed with adequate resources would be able to cope with the setting-up and servicing of such a data base. Alternatively, the monitoring of competition may also be assigned to an upgraded Competition Commission which may present current developments in its annual report. At present, Austria does not collect official data on business concentration; a legal obligation to do so would have to be made for Statistics Austria. The data required could be supplied with limited additional effort and cost via special programmes of data processing for the survey of performance and structure of the business sector.

A useful addition to such competition monitoring could be provided if Austria were to participate in international comparisons of regulation. By participating in the "OECD Reviews of Regulatory Reform", a rigorous analysis and evaluation of competition and regulation policy in different countries, Austria's competition policy could be put on a rational quantitative footing, and the international comparison would facilitate an unbiased assessment. The cost of participation is relatively low when set against the considerable gain of information implied.

Summary conclusions and policy recommendations

In a Cartel Court case the burden of proof for the actual abuse of market power by dominating companies is with the competition authorities. Since the abuse of market power is difficult to identify in practice and even more difficult to prove unequivocally in court, a reinforcement of the instruments of investigation should be considered.

To this end, it is recommended to introduce a *reversal of the burden of proof in cases of market power abuse (reform option 1)*, as is the case in Germany (§ 29 GWB): market-dominating enterprises have to prove that they did not abuse their market power. In this way, the position of the competition authorities would be strengthened substantially and the legal surveillance of cartel abuse importantly enhanced.

Such an ex-post control of market results is, however, no substitute for an efficient self-regulation through competition. It is therefore all the more important to address the economic causes of a lack of competition in the markets concerned and dismantle barriers to competition in the longer term. A reinforcement of surveillance against abuse via the reversal of the burden of proof represents therefore a meaningful addition to the array of legal instruments, since it will have an effect already in the short run until competitive markets have been firmly established.

The 2002 amendment of the cartel and competition legislation has turned the Austrian institutional setting into a mixed system of civil court and administrative authority, as the newly installed initiation authorities (Federal Competition Authority and Federal Cartel Prosecutor) have been "superimposed" on the existing system of Cartel Courts.

In order to improve the system, the legal and institutional infrastructure should be transformed by integrating the FCA and the FCP into a single competition authority of comprehensive responsibility (reform option 2), in line with European standards. This intention, agreed in the federal government programme but no longer actively pursued, should therefore be implemented without delay.

The Competition Commission has been attached to the Federal Minister for Economics and Labour and to the FCA as an advisory panel of experts. A *re-positioning of the Competition Commission as independent expert committee along the lines of the German Monopolkommission (reform option 3)* would enable it, relieved from the daily business of the FCA, to put greater emphasis on background analysis of issues in the area of competition policy. The right to address recommendations to the FCA in the examination of corporate mergers should be withdrawn while retaining a right of information. What should be strengthened, however, is its role in issuing reports on general aspects of competition policy, like the annual and special reports of the German Monopolkommission. This would require the endowment with own financial resources as well as an improved legal basis for the remuneration of the members of the Competition Commission.

The 2002 reform of the cartel law maintained the Cartel Court as the decision authority of first instance. In this respect, Austria, together with Ireland, holds a special position within the EU, as in all other member states the national competition authority also has the right of decision of first instance.

After removal of the duplication between FCA and FCP and the installation of a single competition authority with comprehensive responsibility (reform option 2), the possible *transfer of the first-instance right of decision in cartel cases to the FCA (reform option 4)* should be given consideration.

Competition policy goes far beyond the legal proceeding of individual cartel cases. An up-to-date competition policy requires an overall strategy in co-ordination with other policy areas, such as industrial, energy, environmental policy etc. The *implementation of a forward-looking competition policy on the basis of a transparent quantitative monitoring (reform option 5)* should be given high priority in Austria.

The pro-active and investigation-based competition policy conducted in Denmark may serve as an example, where all economic sectors are subject to a quantitative competition monitoring with regard to well-defined political targets.

With a view to putting Austria's competition and regulation policy on a transparent quantitative footing, Austria should participate in the "OECD Reviews of Regulatory Reform". At the same time, the competition-related data base should be improved, such as by Statistics Austria setting up statistics on corporate concentration. On that basis, annual reports on developments of competition in the Austrian economy should be issued. In order to ensure political independence, unbiased ness and transparency, such annual competition reports may be drafted by the then-reformed Competition Commission (reform option 3). Comments on each competition report ought to be made mandatory for the companies concerned as well as for the competition and regulation authorities. Reports and comments should be discussed by Parliament, and the competition and regulation authorities should be liable to submit a catalogue of concrete measures to address the issues dealt with in the reports.

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Reform Options for Competition Policy in Austria – Summary

By the 2002 amendment to the antitrust and competition legislation, the structure of Austria's competition institutions was approximated to European standards, however, not without maintaining some specific Austrian peculiarities. Six years of practical application have revealed considerable opportunities of optimisation and development, which let to the identification of five concrete reform options.

- *Reform option 1 – Introduction of a reversal of the burden of proof in cartel proceedings:* Since it is difficult to successfully prove market power abuse in legal proceeding, it is recommended to strengthen the competition authorities' position in abuse proceedings and substantially sharpen cartel-related abuse control by introducing of the reversal of the burden of proof in abuse proceedings following the German example (section 29 of the Law on Restraints of Competition – GWB).
- *Reform option 2 – Establishment of a single competition authority with comprehensive responsibility:* By the year 2002 amendment to the cartel and competition law, a mixed system of civil court and administrative authority was created in the organisation of cartel authorities in Austria. To optimise the system, it is therefore recommended to speedily implement the integration of Federal Competition Authority and Federal Cartel Prosecutor – a measure that was laid down in the government programme, but stagnated due to inter-ministerial disagreements.
- *Reform option 3 – Repositioning of the Competition Commission as an independent expert panel following the example of the German monopoly commission:* The Competition Commission should be repositioned as an independent expert panel that focuses on fundamental tasks relating to competition law independently of the daily business of the Federal Competition Authority, following the example of the German monopoly commission.
- *Reform option 4 – Transfer of the right of decision of first instance in cartel proceedings to the Federal Competition Authority*: The 2002 cartel law reform maintained the Cartel Court as the decisive authority of first instance. In this context, Austria, just as Ireland, has a special position within the European Union. In all other EU member states, the national competition authority also has the right of decision of first instance. It is recommended to adopt this proven European standard construction also in Austria.
- *Reform option 5 – Implementation of a forward-looking competition policy based on transparent quantitative competition monitoring:* It is recommended to implement a pro-active and investigative competition policy that subjects all branches of industry to objective and transparent quantitative competition monitoring, as it is done in Denmark.

  On the basis of competition data, the repositioned Competition Commission (reform option 3) should publish annual reports about the competitive situation of the Austrian economy, comparable to the main reports ("Hauptgutachten") issued by the German monopoly commission.

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