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AUSTRIAN COMPETITION POLICY: QUO VADIS?

In Austria competition policy has so far been a neglected policy field with disastrous consequences on market concentration in key economic sectors. By substantially reforming the institutional framework in 2002 the way seems now open for implementing the modern "more economics-based approach" in Austrian competition policy. Because of far-reaching reforms on the European level concerning both the Council Regulation No. 17/1962 and the Merger Regulation, which will be discussed in some detail, it is still an open questions where the "journey" is exactly off to – despite some "landmarks" already being visible.

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What is the raison d'être of competition policy?

Economic models predict that more competition will lead to greater allocation efficiency through the effect that the price of a good will converge towards the marginal costs of its production. If competition is *perfect*, a no-profit state will ensue according to this model, because prices will be identical with marginal costs (*Bormann – Finsinger,* 1999).

Producers thus have an incentive to raise their profits at the expense of consumers by taking measures to restrain competition. A laissez faire government would not be able to counter this strategic option. But what is a strategy to maximise profits at the individual (producer's) level, results in serious consequences that are detrimental to the economy as a whole – concentration of power in just a few hands, risk of collusion and welfare losses (*Tichy,* 2000).

Empirical analyses confirm that *market concentration* will have the general effect of raising prices and profits, even though the link is certainly not linear (*Bain,* 1951, *Collins – Preston,* 1969, *Geroski,* 1981, *Utton,* 1986, *Scott,* 1989). But the real threat to competitive markets is not so much market concentration per se (which is actually just an indicator of market power), but the danger of collusion which grows with concentration ratio. The incentive for a few market participants to collude is as big as it is real, especially since it offers them a chance to boost their profits (at the expense of consumers or suppliers).

The *danger of collusion* is the greater the fewer participants there are in a given market[1]. *Selten* (1973) showed in his game theory model that the incidence of collusion will decline markedly only when there are more than five competitors, because an outsider can exploit the situation to increase his own market share (and thus his own profit) by behaving contrary to the cartel (i.e., by charging lower prices): In Selten's model, the probability of collusion is 100 percent for a clutch of four or fewer competitors; for five competitors it drops to 22 percent, and for more than five competitors it is down to 1 percent. Several empirical studies have confirmed his theoretical findings (*Hay – Kelley,* 1974, *Bresnahan – Reiss,* 1991).

Concentrated markets have another effect that is frequently underestimated: they concentrate power in private hands, which, through lobbying, can exert their influence beyond the purely economic sphere right into the political sphere[2]. The fact that major companies can bring their power to bear on politics is as democratically dubious a practice as it is widespread. "Big firms represent a concentration of power in private hands rather than democratically chosen governments. Such private power can cross economic boundaries and poses the threat of an extra-market power which can change the rules of the game in favour of the dominant corporations" (*Jacquemin – de Jong,* 1977, p. 198).

[1] *Selten* (1973), *Tichy* (2000).

[2] This applies particularly to the media sector, which, like no other sector, combines and interlinks economic and political interests. See the discussion below.

Restrictions on competition may have a wide range of effects: higher prices, limited choice of products, displacement of competitors, creation of market entry barriers, price pressure on suppliers, wage pressure on workers, loss of jobs – these are just a few of the potential effects that may occur if powerful companies were to abuse their market-dominating position. Yet for all the diversity of potential effects, they are identical in causing welfare losses owing to the misallocation of resources.

Studies in the USA (*Harberger,* 1954, *Leibenstein,* 1966) show that static resource misallocation (i.e., resources are not efficiently utilised in the production process) due to inadequate competition is not very grave (it is estimated at 1 percent of GDP at most). Yet, according to current OECD studies (*Ahn,* 2002), *dynamic efficiency gains* obtained in the long term by competition-fostering measures should be markedly higher, in spite of their being difficult to quantify overall.

Dynamic efficiency gains come in the form of productivity increases, welfare gains and higher economic growth. These are triggered by a burst in innovation activities on the part of companies (actuated by the motto "competition drives innovation"): when market participants can no longer improve their market position by anticompetitive practices, they will have to make efforts to become more innovative and more productive than their competitors. Empirically, the premise that greater competition leads to more (economically desirable) innovation and economic growth can be evidenced by the robust positive connex between competition intensity and productivity growth (*Nickell – Nicolitsas – Dryden,* 1997, *Aghion – Howitt,* 1998, *Grosfeld – Tressel,* 2001, *Januszewski – Köke – Winter,* 2001).

Reforming competition policy in Austria

Endogenous pressure to reform

The Austrian competition law regime before the 2002 amendment to the cartel act was characterised by substantial influence of the social partners on antitrust enforcement: The social partners were official parties with the right of bringing cartel cases to court, they had the right to nominate the majority of the (laymen) judges at the cartel court tribunal and they acted as official experts to the cartel court in the parity committee in competition matters. Despite performing these tasks with different natural persons – but in the same case – the incompatibilities of this institutional framework especially concerning independence are obvious.

Without going too much into the details of the critique of the former cartel regime, it can still be noted that, in spite of widely including the economic and social partners in the cartel court system[3], the legal and institutional framework was inadequate in preventing large-scale market concentrations in key sectors of the Austrian economy (Table 1).

Table 1: Sectors showing high market concentration in Austria

	Concentration rates in percent				Number of market participants enjoying a market share of . . .		
	Market leader	CR2	CR3	CR4	over 30 percent	20 to 30 percent	10 to 20 percent
Political news magazines	~100	–	–	–	1	0	0
Private health insurances	50	71	84	94	1	1	2
Drugstores	28	52	76	82	0	3	0
Food retailing	32	59	72	83	1	1	2
Furniture retailing	38	61	70	78	1	1	1
Sports articles retailing	38	55	67	73	1	0	2
DIY stores	32	48	60	72	1	0	3

Source: Regioplan, WIFO calculations. CR2, CR3, CR4 are the sums of market shares in percent of the two, three or four main market participants, respectively.

What the industries listed in Table 1 have in common is not just the high concentration rates but also that they operate in markets shared among fewer than five major competitors. As already outlined above, game theory deduces a considerable risk of collusion from such closed oligopolistic markets (*Selten,* 1973), which potentially impairs the functioning of competition.

Market concentration in Austria is particularly noticeable in the field of political news magazines, with a single group controlling the entire market, enjoying, in fact, a mo-

[3] Some commentators would even go so far to replace "in spite of" by "because of" in this sentence to express their contempt for the role of the social partners in Austrian competition policy. Despite the fact that the role of the social partners in Austrian competition policy was not a fortunate one, this would be too simple an answer for explaining the complex matter.

nopoly position and in various retailing branches – especially in food retailing where two corporations dominate three fifth of the market.

Developments in the media and (food) retailing markets are exemplary for the failure of competition policy, and they impressively demonstrate that the former cartel law regime was an unsuitable tool to ensure "workable competition".

Austrian competition policy under the old legal regime

Political news magazines

The concentration of political news magazines started off with the (in)famous "Formil" ruling of the cartel court[4], which accepted the merger of the KURIER group ("Profil") and the NEWS group ("News", "Format"). This was, without doubt, the most important competition case to be decided by the cartel court since merger supervision was introduced in 1993. From a cartel law point of view, the case was, on the one hand, an issue of competition: whether assembling all Austrian political news magazines (Profil, News and Format) under a single roof would lead to a dominant position on the Austrian market for political weeklies; and on the other hand, it involved a democratic issue: whether this merger would reduce media variety.

If politicians and the social partners[5] had had their way, the merger would have been approved without even asking the cartel court to review the case. Contrary to government announcements, neither the Republic of Austria nor the social partners had filed an application for the court to review the case[6].

Based on an ex officio review, a procedure which was introduced in 1999 and which could be initiated by the cartel court itself if public interests are at stake, the Formil merger had its day in court. Even though the cartel court reasoned for much of its argument that the merger should be prohibited, in the end it gave its permission[7], although tying it to conditions[8]. No appeal was filed against the ruling of the first instance[9], so that the merger of Profil, News and Format became final.

The Formil case produced such an amassment of "sins" concerning competition policy[10] that a veritable avalanche of a public discussion was launched on the defects and inadequacies of Austrian competition law which went far beyond the case in dispute. Intense negotiations have since produced a new competition regime which certainly is more suitable as a legal foundation to ensure functioning competition than was the previous one[11].

Food retailing

The merger of Spar, the second largest food retailing chain with Maxi Markt, a local hypermarket chain with outlets in Upper Austria and Salzburg, was one of the very last competition cases falling under the old Austrian competition law regime. It shows, however, once again the problem of applying serious competition policy given the old institutional framework.

In line with the market definition used by the European Commission for food retailing cases, *relevant product markets* are made up of competing types, such as discounters, food shops, supermarkets or hypermarkets, which sell the usual assortment of food and non-food-1 products (hygienic articles of daily use) expected by the consumer. Special shops that sell a restricted range of products (bakeries, butchers, greengrocers, petrol station shops) are not included in the relevant product market because of their narrow range of products (see cases no. IV/M. 784 – Kesko/Tuco; IV/M. 803 – Rewe/Billa; IV/M. 1303 – ADEG/Edeka).

[4] File nos 26 Kt 342, 369, 380, 381, 382, 383/00.

[5] Under the old legal status the chambers of Labour, of Commerce and of Agriculture acted as official parties (Amtsparteien) in cartel court procedures which gave them the right to take competition cases to court.

[6] The ruling of the cartel court was preceded by agitated political discussion of the project – the dailies (without so much as a shred of evidence) even reported of interventions and attempts at intimidation among the highest political ranks. While it appears futile today to speculate on why no such application was filed, it is at least remarkable to consider the hesitancy evinced by public officeholders in their conduct.

[7] According to unconfirmed rumours, the regular judge acting as the chairwoman at the decisive session was overruled by the two lay judges appointed by the social partners. This would no longer be possible under the 2002 amendment to the cartel law which provides for two regular judges and two lay judges.

[8] Conditions are a widespread practice also used in EU competition policy. Nevertheless, they are rarely the result of strict rules but are usually negotiated in advance. Yet they are rarely more than an alibi (*Neven – Nuttall – Seabright,* 1993, *Sleuwaegen,* 1998).

[9] In this connection it is remarkable to look at the reasoning given by the minister of justice for foregoing an appeal ("no prospect of success").

[10] . . . which were, moreover, highly profiled in public due to the media having a field day in reporting on the case.

[11] See *Böheim* (2002A) and the discussion below.

The *relevant geographic market* is defined by the European Commission through the time required by the consumer to access the shop (see case no. IV/M. 784 – Kesko/Tuco). In Austria, this catchment area thus limited for a food retail outlet approximately covers a (small) political district as a *local sales market*. When consumers accept a longer distance in order to enjoy a wider assortment of goods, such as is offered by hypermarkets, interdependencies and overlapping may occur between local markets, which justifies a wider market delimitation. In such a case, the territory of a whole Bundesland may be designated as a *regional sales market*. Any market definition beyond this regional level, which would comprise the entire territory of Austria, however, does not appear feasible in this case.

As noted above, food retailing is one of the most concentrated sectors in Austria. It is dominated by two groups: the two market leaders Rewe Austria and Spar together control almost three-fifths of the market, and their lead is rising inexorably. Behind-runners Hofer and ADEG take up about a quarter of the overall market. The four leaders all grow at the expense of other market participants (Table 2).

Table 2: Percentage share of sales held by the main food retailers

	1997	1998	1999	2000
	Percentage shares			
Rewe Austria	29.0	29.4	30.1	31.9
Spar	24.2	24.5	25.2	27.1
Hofer	11.5	11.9	12.2	13.0
ADEG	10.8	10.7	11.1	11.3
Other	24.5	23.5	21.4	16.7
CR2	53.2	53.9	55.3	59.0
CR3	64.7	65.8	67.5	72.0
CR4	75.5	76.5	78.6	83.3

Source: Regioplan, WIFO calculations. CR2, CR3, CR4 are the sums of market shares in percent of the two, three or four main market participants, r espectively.

Market concentration in the Austrian food retail sector has been rising continuously since the mid 1990s. Each of the concentration rates (CR2, CR3 and CR4: sums of market shares in percent of the two, three or four main market participants, respectively) is showing an upward surge.

Beyond market concentration at the national level it is imperative to focus on the competitive situation prevailing for the relevant local and regional sales markets. The economic competition analysis shows that, with the exception of Burgenland, the respective regional market leader already enjoys a market share of more than 30 percent, that the measure of concentration CR4 (sum of market shares of the four main providers) already exceeds the 80 percent threshold, at which a market-dominant position must be assumed according to Section 34 (1a) 1 and 3 KartG

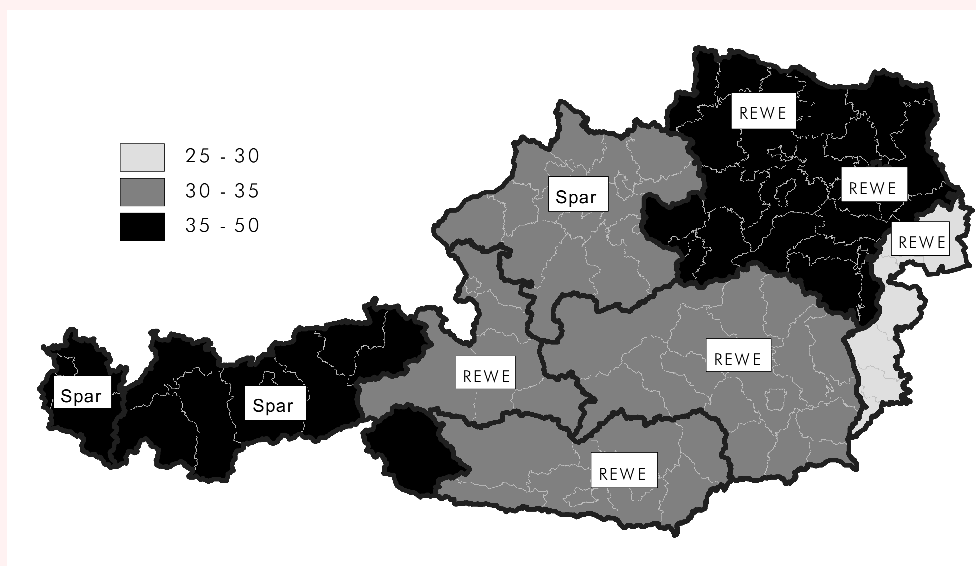
Rewe Austria is the market leader in Burgenland, Styria, Salzburg, Lower Austria and Vienna, at market shares ranging between 30 and 50 percent; Spar dominates in Upper Austria and Tyrol, with similarly large market shares. In Carinthia, the two groups are about equal in strength, with market shares of about 30 percent each (Figures 1 and 2).

It can thus be assumed that most regional sales markets are dominated by the respective market leader. The situation is even worse at the local level: in nine political districts, the market leader has market shares of 50 to 70 percent, in another 27 districts, the rate is over 40 percent. With the exception of five political districts, the measure of concentration CR4, which is of relevance under the Austrian cartel act, is generally between 80 and 100 percent among local Austrian sales markets (Figures 3 and 4).

The hazard of such a high market concentration in terms of competition policy is further aggravated by the existence of barriers to market entry. In view of zoning plans that operate against large shop formats, it is extremely difficult to obtain building permits for new hypermarkets. Yet it is exactly these formats which are eagerly sought after by food retailers due to their constant widening and deepening of the product range; combined with legal restrictions on the available land, this means that a market leader with a basis of established hypermarkets has an almost "uncontestable" market position vis-à-vis newcomers or expanding competitors.

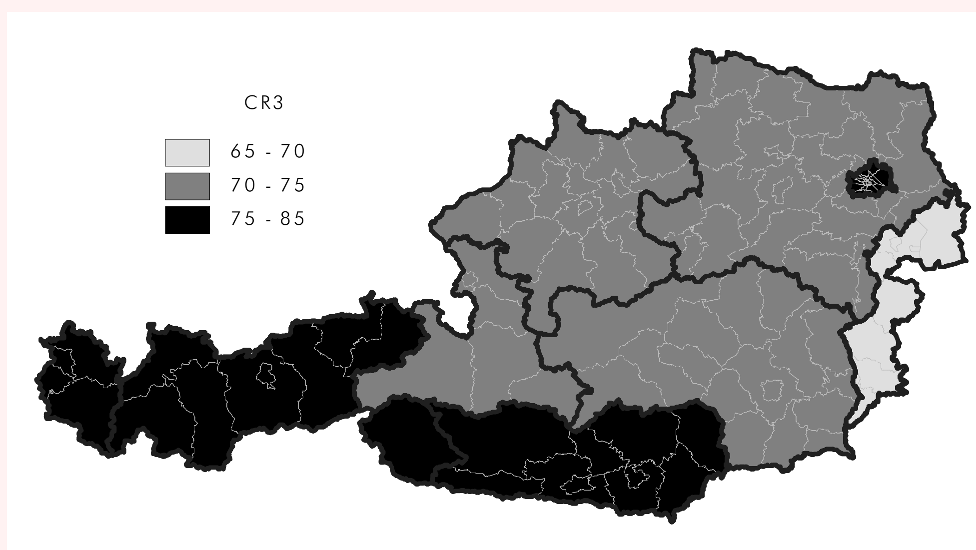
Figure 1: Market shares held by the market leaders in the Länder

In percent



Source: Regioplan, WIFO calculations.

Figure 2: Market concentration (CR3) in the Länder



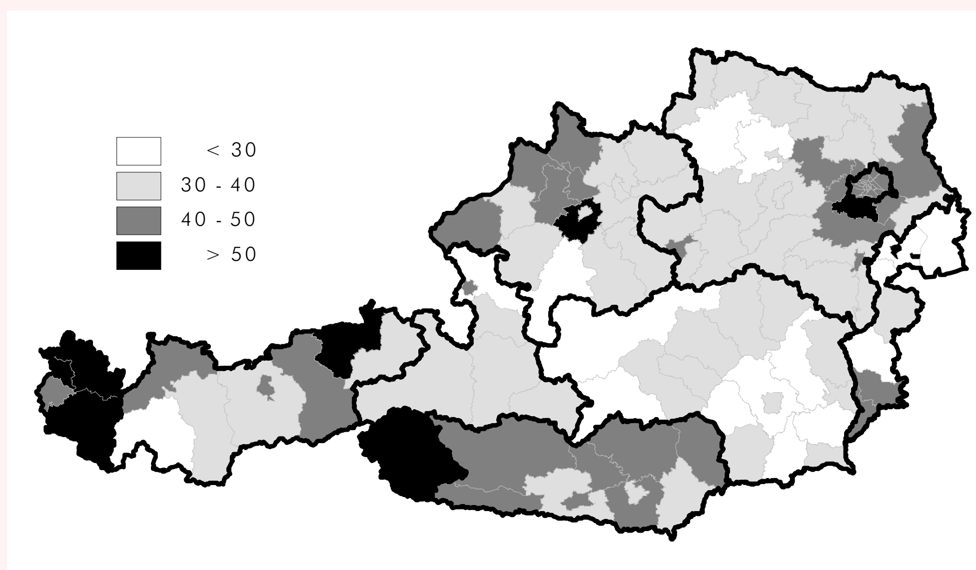
Source: Regioplan, WIFO calculations. CR3 . . . sum of market shares in percent of the three main market participants.

In terms of attractive locations for hypermarkets, the Spar group (Interspar and Eurospar hypermarkets) has the strongest market position in Austrian food retailing, with the Merkur markets operated by Rewe clearly trailing behind: in western Austria (Nielsen areas I West and II North; *ACNielsen*, 2001), Spar operates about three times as many hypermarkets as Rewe Austria[12]. In the rest of Austria, the gap between Rewe and Spar is narrower, but Rewe is still lagging far behind. By taking over the Maxi hypermarkets Spar was able to further expand its already dominant position in big shop formats (Figure 5).

[12] If the acquisition of the Maxi markets were to be put through, Spar would further bolster its already market-dominating position among hypermarkets in western Austria (five locations in Upper Austria, one in Salzburg).

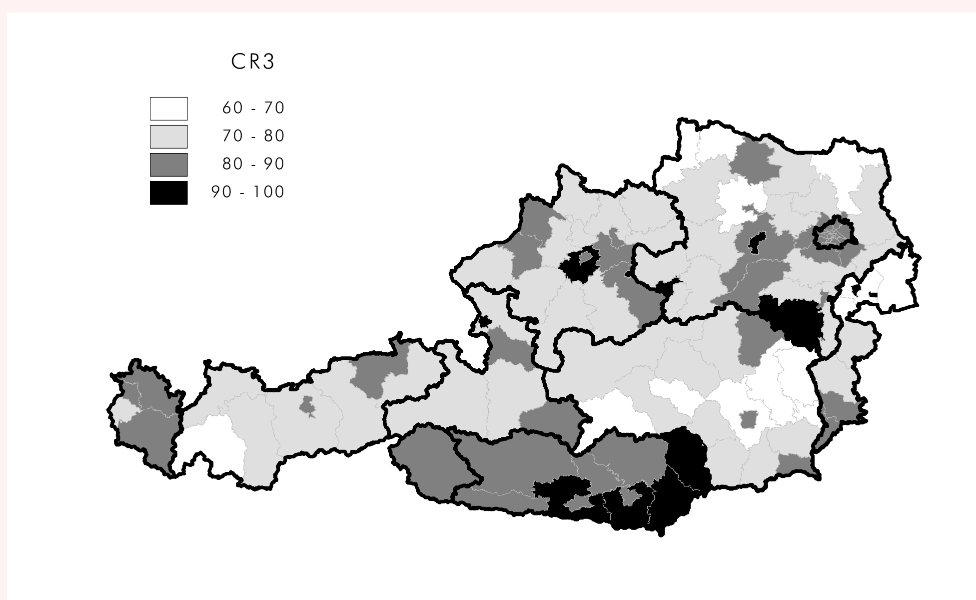
Figure 3: Market shares of market leaders in the political districts

In percent



Source: Regioplan, WIFO calculations.

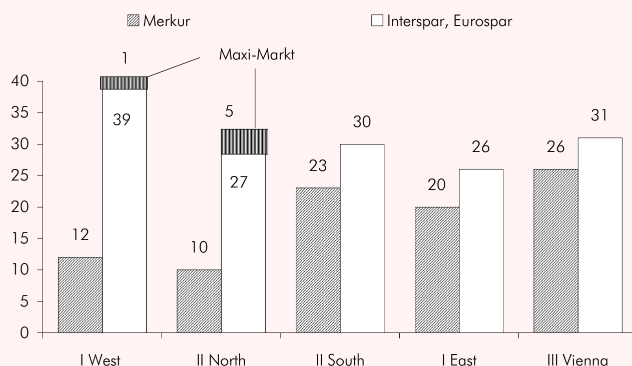
Figure 4: Market concentration (CR3) in the political districts



Source: Regioplan, WIFO calculations. CR3 . . . sum of market shares in percent of the three main market participants.

Given these market conditions (high market concentration, few market participants, high barriers to entry), one would have expected that additional mergers in the Austrian food retailing business would have been viewed with more investigative scepticism in terms of competition policy. This applies in particular to mergers like Spar – Maxi Markt, which greatly impact on a market already highly concentrated, not only since they raise market concentration per se, but also because a merger means that a competing provider is removed from the market ("oligopolisation"). Closed-shop local oligopolies – a regular feature in the Austrian food retailing scene – of fewer than five major market participants (minimum market share) and market leaders which in some cases dominate more than half of the market from an economic standpoint no longer offer the necessary prerequisites for functioning competition.

Figure 5: Number of hypermarkets broken down by Nielsen areas



Source: *ACNielsen* (2001), WIFO calculations. – I West . . . Salzburg, Tyrol, Vorarlberg; II North . . . Upper Austria; II South . . . Carinthia, Styria; I East . . . Lower Austria, Burgenland; III Vienna.

According to the evidence presented here, market concentration in Austrian food retailing has already reached a measure that gives rise to macroeconomic concerns and that makes any further rise unacceptable in competition policy terms. For competition policy, the logical consequence thus would have been to prevent any further strengthening of market-dominant positions because of their potential threat to competition and attendant macroeconomic disadvantages. Specifically, the market-dominating food retailers should not be permitted to take over any further enterprises in the local (and regional) markets dominated by them. This applies specifically when a merger would further raise existing barriers to market entry, such as is the case when large shop formats (hypermarkets) are "snatched up" by the market leader.

This conclusion is legally covered by Section 42b (2) 2 combined with Section 34 of the KartG, according to which a merger must be prohibited when it is expected to create or strengthen a market-dominant position. In the case of Austrian food retailing, the extremely high market concentration in the geographically relevant sales markets will make it impossible to achieve a "circumventory" merger permit through presenting evidence in exoneration pursuant to Section 34 (1a) KartG or evidence for the existence of the prerequisites as set forth in Section 42b (3) KartG[13]. The extent to which stipulations[14] pursuant to Section 42b (4) KartG can outweigh the disadvantages of reducing competition by a merger appears to be doubtful, to say the least. In order to be effective, stipulations need to be extremely stringent (e.g., forcing the applicant to give up locations in local sales markets in which the merger applicant has a particularly high market share) as well as strictly monitored.

Despite this straightforward arguments against a further merger in Austrian food retailing the Spar-Maxi Markt merger was approved by the cartel court covered by a positive appraisal of the economic consequences of the merger given by the Parity committee for competition matters.

The "sins" concerning competition policy of the past, which have been highlighted by presenting two recent cases, cannot be revoked even if a generally restrictive practice is applied to further efforts at concentration (especially in the form of mergers), but having a clear goal will help ensure that competition will in the future work better in highly concentrated markets in Austria. The competitive burdens accumulated in the past will continue to press upon us. The past failure to prevent market concentrations cannot realisti-

[13] According to Section 42b (3) KartG, a merger must not be prohibited when an improvement in competitive terms will outweigh the disadvantages of market dominance (Item 1) or when the merger is necessary and macroeconomically justified to sustain or improve international competitiveness (Item 2).

[14] Stipulations are also widely used in European competition policies. However, they are rarely the outcome of strict rules but are usually negotiated (in advance). Yet they are rarely more than alibi actions (*Neven – Nuttall – Seabright,* 1993, *Sleuwaegen,* 1998).

cally be made good again in the future[15]. Accordingly, what is clearly needed is ongoing monitoring of sectors that run the risk of or are already in the throes of high concentration, in order to uncover and prevent future abuse of dominant positions within markets.

Austrian competition policy under the new legal regime

In order to promote a more efficient implementation and enforcement of Austrian antitrust law the 2002 amendment to the Austrian cartel act has substantially reduced the influence of the social partners on antitrust enforcement by implementing large-scale restructuring of the institutional framework.

The 2002 amendment to the cartel act provides for the establishment of new public enforcement authorities. In the new institutional framework the *Federal Competition Authority* (Bundeswettbewerbsbehörde) within the Federal Ministry of Economics and Labour, which is independent and not bound by any instructions in the execution of its duties, acts as the main enforcement authority. The main duty of the Federal Competition Authority is the investigation of suspected or alleged violations of antitrust law and the prosecution and elimination of such violations in order to ensure effective competition. In addition the Federal Competition Authority has the status of an official party with the right to bringing competition cases to court.

As complimentary authority the *Federal Cartel Prosecutor* (Bundeskartellanwalt) within the Federal Ministry of Justice represents the public interest in competition matters by replacing the power of the cartel court to open proceedings ex officio. By being bound to the instructions of the Minister of Justice this institution also ensures political responsibility in competition cases. As (second) official party the cartel prosecutor has the same right in applications to the cartel court as the Federal Competition Authority which ensures that the two institutions cannot block each other. In merger control proceedings only the two official parties have the individual right to apply for an in-depth investigation of a merger.

In addition the *Competition Commission* (Wettbewerbskommission) which is made up of eight members, four appointed by the Minister of Economics and Labour and four by the social partners, was established to serve as an advisory board to the Federal Competition Authority. In merger control proceedings the Competition Commission can issue a recommendation for the opening of an in-depth examination of the merger to the Federal Competition Authority. Although the Federal Competition Authority is not bound by this recommendation it may not fail to act upon it without giving sufficient reasons which also have to be made public. Beyond its duties in merger control proceedings the Competition Commission can provide comments on general competition matters.

Without having the extensive rights of official parties regulatory authorities (e.g., E-Control or the Austrian Regulatory Authority for Broadcasting and Telecommunications) are granted the right to issue statements in proceedings concerning their respective sector of the economy. The same applies for the chambers of Labour, of Commerce and of Agriculture which are entitled to make comments on all competition cases without any sector-specific restriction[16].

The decision in competition cases stays with the *Cartel Courts* (of first and second instance) as under the old institutional framework. Following criticism on the cartel court, however, the right to open proceedings ex officio was abolished and the influence of the expert lay judges on the decisions of the cartel court was reduced. Henceforth the cartel court will decide in panels of four instead of three judges of which two are professional judges instead of one with the casting vote granted to the presiding professional judge. The same pattern of reform applies for the court of appeals where a panel made up of three professional judges and two expert lay judges decides. This reform guarantees that the laymen judges cannot enforce a decision against the professional judges – what is said without further official evidence to have happened in the Formil merger.

The new institutional framework came into effect on 1 July 2002. Since then only a few "critical" cases have had to be investigated by the Federal Competition Authority. This is clearly much too less evidence for answering the question if anything has *substantially* changed in practice because of the different institutional framework.

[15] The reformed cartel law certainly makes ultima ratio provision for tools to deglomerate powerful corporate groups in the media sector. For other sectors such legal provisions do not exist. Yet the option as such does not yet say anything about whether such a drastic tool will be actually used.

[16] The right of the three chambers to issue non-binding statements is somewhat of a (weak) concession to the former official parties which lost their position as official experts to the cartel court since the parity committee for competition matters had been abolished.

Although far-reaching conclusions cannot be drawn from recent evidence yet some problems are already visible by looking at some recent cases falling under the new competition law regime.

The natural gas market

The "merger"[17] of the natural gas trading activities of OMV, Wiengas, EVN, Begas, Oberösterreichische Ferngas and Linz AG into one single firm ("Econgas") was one of the last cases under the old cartel law regime and simultaneously the first one for the Federal Competition Authority and the Federal Cartel Prosecutor. This "hybrid" status" between the old and the new cartel law regime makes Econgas a case of special interest as its application happened before 1 July 2002 but the deadline for application to the cartel court ended well after this cut-off date. This special constellation made it possible for the "new" public enforcement authorities (Federal Competition Authority, Federal Cartel Prosecutor) to step in. From the "old" official parties only the Chamber of Labour filed an application.

The merger of the gas trading activities of the mentioned companies lead to a market dominating position of the merged company with a market share of 80 percent of the relevant Austrian natural gas market. Despite this severe market concentration the deal was cleared by realising a bargaining solution off the road of the cartel court by what was called by the Federal Competition Authority "a bundle of sufficient conditions". Under these circumstances the official parties involved (Chamber of Labour, Federal Competition Authority, Federal Cartel Prosecutor) declined the need for an in-depth investigation of the case and decided to withdraw their applications.

The Director-General for Competition commented on the case by saying "This is a compromise . . . If it does not work, we will intervene"[18]. From the viewpoint of competition policy it is highly doubtful whether this "compromise" is not seriously flawed right from the start. A market structure which is close to a monopoly embodies the realistic danger of anticompetitive effects through easier collusion and abuse of a market dominating position. It is well accepted with competition economists that competition policy has to act preventively to be successful. Any intervention "afterwards" is at best a second-best solution and at worst without any impact on the competitive situation of the market. Since an ex lege deglomeration is only possible in the media sector following the abuse of a dominant position the market structure in the Austrian natural gas market will be more or less irreversible.

Together with the fact that proposed efficiencies from mergers seldom materialise (*Tichy*, 2001), it cannot be completely ruled out that substantial negative consequences on competition will materialise as a consequence of this merger. A "quick deal" without entering into a Phase-II investigation may be a comfortable solution for both the competition authority and the involved companies but it is without doubt not feasible in cases with vital importance for the Austrian economy like Econgas with necessarily complex efficiency defences.

In the Econgas case only an in-depth investigation could have given definite evidence whether the positive effects of the merger outweigh the negative consequences on competition. This seems all the more important as there is serious empirical evidence (*Gugler et al.*, 2000) that only about 30 percent of successful corporate acquisitions may be really due to utilisation of synergies and corporate control which are the ones that clearly increase shareholder value *and* social welfare. In contrast around the same percentage of mergers increase shareholder value *at the cost of* consumer welfare by corporate exercising of market power[19].

The fact that both new official parties have failed to enforce a doubtlessly necessary in-depth investigation "on their first mission" is clearly no progress towards a better practice in Austrian competition policy. Both institutions will not be credible in applying for an in-depth investigation in comparably "unimportant" cases, if they fail to catch the "big fishes" (like Econgas). Moreover a compromise-friendly attitude is sensibly uncalled for in cases where private monopolies threat to emerge.

[17] Some competition law experts even doubt that Econgas is a merger at all and argue that it is in fact a (forbidden) cartel. Evidence for this opinion can be found within a couple of arrangements which clearly show "cartel-like" features like the purchasing clause concerning electricity generated from water power – all companies involved in Econgas have committed themselves to purchase water power electricity *exclusively* from Verbund (*Schellhorn*, 2002).

[18] See "Gasallianz ist ausverhandelt: Freiwillige Selbstbeschränkung brachte Okay von Kartellbehörde und Regulator", Der Standard, 16 October 2002.

[19] As *Tichy* (2001) points out this empirical result – maximising profits by raising prices and accepting lower sales – is fully consistent with oligopoly theory.

The merger between Deloitte & Touche and Andersen/Auditor has to be seen as a consequence of the bankruptcy of Arthur Andersen following its involvement in the Enron scandal in the USA. This case shows once again the preferred practice of the Federal Competition Authority namely to decide cases on its own without investigation by the cartel court.

The market for auditing services

In this case the Competition Commission issued a recommendation for the opening of an in-depth examination of the merger to the Federal Competition Authority arguing that the merger will lead to combined market shares of the four biggest firms (CR4) above the 80 percent threshold of the cartel act for a dominant position on the relevant market. Despite the well-founded arguments of the Competition Commission the Federal Competition Authority declined (in agreement with the Federal Cartel Prosecutor) to file an application to the cartel court thus preventing an in-depth investigation of this case.

The mandatory publication of the reasons for failing to act upon a recommendation of the Competition Commission uncovers that only a superficial and insufficient investigation of the case was done by the Federal Competition Authority. Even worse and embarrassing substantial flaws concerning even basic economic reasoning can easily be detected in the text. Overall the statement of the Federal Competition Authority was by no means capable to refute any of the considerations made by the Competition Commission.

The signalling effect of such flawed decisions should not be underestimated. In order to prevent the Federal Competition Authority to make a fool of itself again in future cases, a better co-operation between the Federal Competition Authority and its expert advisory panel seems to be called for. Beyond that serious measures to foster economic literacy within the Federal Competition Authority have to be taken, i.e., in the short-term professional training in competition economics for the present staff and in the medium-term hiring of senior competition economists.

Exogenous pressure to reform

Recently, developments at the European level have conspired with domestic discussions to press for reform of competition policy in Austria.

Competition has always been one of the key policies used by the European Union to define itself. Consequently, developments at the European level are of eminent importance for its member states when it comes to designing their own policies on competition.

Currently, European competition policy is undergoing large-scale change[20]. In presenting its white paper on modernising the rules to apply Articles 81 and 82 of the EC Treaty (reform of Council Regulation 17/1962), the European Commission opted for a fundamentally different approval system for competition-restraining arrangements by fostering decentralisation. This system of legal exemptions is based on the direct applicability of the exemption clause in Article 81 (3), and it is conditional upon the Commission, the national competition authorities and the courts applying this provision directly in all proceedings. Upon passage of the white paper, and following an in-depth consultation process, a draft has now been submitted for a Council regulation to implement the competition rules set forth in Articles 81 and 82 of the EC Treaty. The revised Council Regulation is expected to be finalised by early in the year 2003 at the latest.

In its Article 5, this draft regulation refers responsibility for applying Articles 81 and 82 of the EC Treaty to the national competition authorities. According to Article 36 of the regulation, the member states must identify the responsible competition authorities and comprehensively authorise them to apply the said articles directly and without qualifications.

Even though the regulation expressly leaves it to the member states to "identify the responsible competition authorities", these need to be *independent competition authorities* in order to comply with the Commission's intentions, which co-operate in a network involving the member states and the Commission, and which are primarily charged with relieving the Commission of cases concerning domestic markets.

The reform of the Austrian law on competition reflects developments at the European level with regard to institutional restructuring, by the establishment of an independent Federal Competition Authority (Bundeswettbewerbsbehörde) which does not take in-

[20] For details about new developments in European competition policy see *Monti* (2002).

structions from the government and which is granted comprehensive competencies to investigate and prosecute cases of restrictive competitive practices[21].

In addition to setting its institutional framework, the Austrian Federal Competition Authority will have to base its work on European best practices. Here again, the direction is determined by the European Commission which prefers a "more economics-based approach" in handling competition cases – an approach that is already known as the "European School" *(Hildebrand, 2000)*.

The European School of competition law

Towards a new paradigm in European competition policy

The pace of technological development and globalisation, together with the rapid convergence of whole sectors of the economy have rendered obsolete the traditional way of analysing markets with regard to the aspects of competition law.

In contrast to the American Antitrust Law, which since its inception has been based on the joint application of legal and economic analysis[22], traditional European competition policy was substantially influenced by German ordo-liberal ideas and thus more focused on the law. It has, through the change of its framework however, arrived at the limits of its analytical powers.

Starting in the 1990s with initiatives taken by Commissioner van Miert and developing the modernisation process further through efforts by Commissioner Monti, the European Commission has moved towards awarding a greater role to the economic analysis of competition issues in order to cope with these new developments (*Hildebrand,* 2000).

As a result, the drive to modernise European competition policy has made for an increased use of economic analysis methods in both designing and interpreting competition standards and in judging actual cases. Nevertheless important differences compared with US competition policy remain – e.g., concerning substantive competition tests where US authorities prefer the substantial lessening of competition (SLC) concept whereas the European Commission sticks to the market dominance doctrine.

The competition concept of the European School

Modern approaches to competition theory are increasingly gaining ground in Europe, not least due to the shift from law to economics in competition policy. The European Commission developed its own "more economics-based approach" as a theoretical underpinning of its economic analysis (*Hildebrand,* 2002).

Generally the view prevails that the more widespread use of economic methods in competition policy is not just highly desirable but actually indispensable (*van Miert,* 1998). This approach is most clearly expressed in current documents which explicitly outline the European Commission's ideas on approaching and evaluating facts of relevance for competition policy. Examples would be the "de minimis" notice[23], the notice on the definition of the relevant market[24], various regulations on group exemption regulations[25] and the guidelines for vertical agreements[26].

Even though the greater emphasis on economic analysis will certainly make for greater complexity in the decision-making process, the approach pursued by the European Commission is guided by a pragmatic view. In order to obtain as wide as possible a view of competition cases, both qualitative and quantitative methods have to be used, as is evidenced from the definition of the relevant markets. It is only the overall view, furnished by a qualitative as well as quantitative analysis, which ensures that the facts can be comprehensibly evaluated.

Reform of the EU merger control regime

Recently, however, the merger investigation and decision practise of the European Commission has come under serious pressure. With the unprecedented attacks by US authorities on the policies of the Commission in the context of the prohibited GE/Honeywell merger (Comp/M. 2220) in 2001 the fact that there are unresolved issues concerning the validity of substantive merger analysis has been noticed by a wider public for the first time. Followed by recent judgements of the European Court of First

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[21] Establishment of a Federal Competition Authority is only one part of the large-scale reform of the Austrian law on competition. The amendments were only recently adopted by Parliament (16 April 2002). For details about the new legal framework refer to the discussion above.

[22] The US Sherman Act of 1890 is generally viewed as the first competition law which requires both a legal and an economic aspect in analysing cases of competitive restraint.

[23] Commission Notice on Agreements of Minor Importance, OJ C 368, 22 December 2001.

[24] OJ C 372, 9 December 1997.

[25] Most recently for car sales and servicing: Commission Regulation (EC) No 1400/2002, OJ L 203, 1 August 2002.

[26] Guidelines on Vertical Restraints, OJ C 291, 13 October 2000.

Instance (CFI) in three decisions about appeals by the involved companies in 2002 (Case T-342/99 – Airtours versus Commission; Case T-310/01 – Schneider Electric SA versus Commission; Case T-5/02 – Tetra Laval BV versus Commission) the commission decision prohibiting the respective merger was annulled by severely criticising both the theoretical framework applied and the use of evidence by the EC Merger Task Force (MTF).

The 2002 EU Merger Control Reform "In a Nutshell"

Legislative Measures (Changes to the Merger Regulation)

- Clarification of the substantive standard for the analysis of mergers on competition grounds
- Rationalisation of the timing of the notification of proposed mergers
- Simplification of the system for the referral of merger cases from the Commission to member state competition authorities and vice versa (to avoid "multiple filing")
- Flexibilisation of the time frame for the purpose of ensuring a thorough investigation of competition cases
- Strengthening of the Commission's "fact-finding powers"

Non-Legislative Measures (Improvement of the Quality of the Decision-Making Process)

- Creation of the post of a *Chief Competition Economist* in DG Competition
- Appointment of a peer review panel (*"devil's advocate panel"*) for all in-depth (Phase II) merger investigations
- Allowing the merging companies to have an earlier opportunity to review the commission's file
- "State-of-play" meetings between the Commission and the merging companies at decisive points in the procedure
- Appointment of a *Consumer Liaison Officer* (to represent the "consumers' voice")
- Allocation of additional staff to the Commission's *Hearing Officers*

Acting rather quickly (at least for EC standards) upon this well founded critique from both the courts and academia (*Neven – Nuttall – Seabright,* 1993, *Kuehn,* 2003) the European Commission has decided what can be called *"the most far-reaching reform of its merger control regime since the entry into force of the EU Merger Regulation in 1990"*[27] by adopting a bundle of both legislative and non-legislative measures. This reform of the EU merger control system has to be seen in context of the large scale reform of Council regulation 17/1962 which forms the revised basis for the new EU competition law regime.

The merger control reform package consists of three main parts, i.e., 1. a proposal for a revision of the Merger Regulation accompanied by 2. a series of non-legislative measures intended to improve the decision-making process (see Box) and last but not least 3. draft guidelines on the appraisal of "horizontal" mergers[28].

Draft notice on horizontal mergers and efficiencies

The adoption of a draft Commission notice on the assessment of mergers between competing firms (i.e., "horizontal" mergers)[29] which is designed ". . . *to clearly and comprehensively articulate the substance of the Commission's approach to the appraisal of horizontal mergers, thereby providing transparency and predictability regarding the Commission's merger analysis, and consequently greater legal certainty*"[30] can be interpreted as a direct reaction to the reproaches of the CFI concerning flawed economic assessment of competition cases.

The improvement of economic soundness in merger decisions lies at the heart of the new guidelines. To comply with this demanding goal it is indispensable that clarity about key issues will be provided. In any case this must include inter alia clear statements on how the Commission will apply the notion of dominance in oligopolistic markets and how efficiency defences will be handled.

All three measures will be the subject of intensive discussion during 2003 and it is expected that they will come into force on 1 May 2004.

[27] "Commission adopts comprehensive reform of EU merger control", IP/02/1856, 11 December 2002.

[28] All three texts are available from the Commission's competition website: http://europa.eu.int/comm/competition/mergers/review/.

[29] It is intended that at a later stage comparable guidelines for "vertical" and "conglomerate" mergers will be adopted.

[30] "Commission Adopts Comprehensive Reform of EU Merger Control", IP/02/1856, 11 December 2002.

Consequences for Austrian competition policy

Recent developments at the European level have subjected Austrian competition policy to pressure to adjust, applied from outside on the institutional and methodological side.

As regards the institutional framework, the reform takes a major step in the right direction. Establishment of an independent Federal Competition Authority, which is not bound by government instructions and which is provided with the authority to investigate and prosecute, not only takes account of concepts concerning decentralisation of the EU competition law, but also closes a substantial institutional gap of the previous system which was unable to prevent significant market concentrations in Austria.

Methodologically, and viewed against the background of harmonisation and decentralisation of the EU competition law, the new Federal Competition Authority will have no choice but to adopt the "more economics-based approach" stipulated by the European Commission. In the future, a better understanding of competition economics and its methods will be the conditio sine qua non for successfully analysing the facts in cases of restrictive competitive practices. What this means for the rulings of the cartel court cannot yet be foreseen, but it is certainly expected that the enhanced use of economic tools for analysis will breathe new life into case assessments – which will doubtlessly be beneficial for competition in Austria.

Apart from the methodological shift towards a "more economics-based approach", there are some further conclusions to be drawn on the content of Austrian competition policy (*Tichy,* 2000, *Böheim,* 2002C).

In the past Austrian competition policy was either unable or unwilling to prevent the extreme market concentration in some sectors (media, food retailing, etc.). In view of these past failures and with a substantially revised institutional structure guaranteeing more independence from political interventions, it appears both necessary and useful *to take a stricter line against anti-competitive practices* (cartels, mergers and abuse of a market-dominating position). Although the political will and practical feasibility to repair past failures of competition policy appears to be limited in spite of legal tools being available, measures still need to be taken to ensure that an extremely stringent yardstick is applied to future cases. Thus, practices such as mergers would need to be prohibited in sectors already characterised by high market concentrations[31].

Apart from market concentration as such, more attention should be focused on the *number of competitors* in a given market. Mergers should be generally rejected if the number of key market participants in any given market is down to five (with a minimum market share). As is convincingly demonstrated by the theoretical literature and by empirical studies, the danger of collusion intensifies when that number is lower. It is important to pre-emptively prevent market structures that encourage collusion, because collusion is extremely difficult to uncover and even more difficult to prove.

Markets of fewer than five independent competitors should be watched even more closely. Market segments characterised by network externalities (media, telecoms, utilities, etc.) in particular require a minimum number of competitors. In extreme cases, the authorities should not shrink from divesting market structures that obstruct competition.

In order to preventively rein in sectors prone to concentration, but also as a tool of competition advocacy, constant *monitoring* of such sectors is recommended. Based on a standardised evaluation method, it should be possible to perform both dynamic *intra-sectoral* comparisons as well as static *inter-sectoral* comparisons of the competitive situation. Serious deviations (both within a sector over time and between sectors) would be a signal for economic policy to take competition-strengthening measures in the affected market.

Ultimately, competition policy will be effective only to the extent of its credibility with those affected. In this connection it may be a problem that consumers seem to be not sufficiently aware of the implications of competition policy on their welfare. The important role of information and involvement of the public in competition matters has also been emphasised recently by the European Commission (*Monti,* 2001). Provided that the Austrian Federal Competition Authority regularly updates and publishes the findings of its monitoring activities, a true picture of the competitive situation could emerge for major sectors of the Austrian economy. Armed with a transparent view of the competitive position, the interested public could then step up its demand for measures to make competition work. Public pressure on corporate offenders and competition authorities would be able to achieve much: no company can afford to be pilloried for anti-

[31] It would be a serious mistake to continue to "muddle along" by issuing a permit subject to questionable conditions, as had been established practice in the past.

competitive business practices. Such indirect pressure, which acts preventively and which is exerted by fully informing the public, might in many cases be more effective than direct pressure exerted through endless legal rounds at the cartel court.

Final remark

The recent reform of the Austrian cartel act was a long overdue step in the right direction, but much more steps have to follow to establish a truly credible and powerful competition policy regime. As long as the Federal Competition Authority is substantially understaffed (in both qualitative and quantitative terms) most of the above mentioned tasks will not be completed due to scarce resources. The current institutional setting looks good on paper but is at present no more than a "Potemkin's village" where behind the surface there is little substance. If there is no willingness from the politically responsible persons to change this awkward situation at short notice the new competition policy regime will loose its so far unearned laurels faster than some would expect. An old Latin proverb should be kept in mind: nihil ex nihilo – you can't make something out of nothing. This is also true for Austrian competition policy – if we like it or not.

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Austrian Competition Policy: Quo vadis? – Summary

Competition policy in Austria stands at the crossroads. After long years of lethargy, and their detrimental effect of having key segments of the Austrian economy labouring under high market concentration rates, Austrian competition policy has at last made a serious attempt to shake off its undeserved "wallflower" status, challenged by external as well as internal pressure to reform.

With its legal and institutional framework conditions recently updated, Austrian competition policy is now faced with the need to adapt to European standards governing handling and assessment of restraints on competition, further aggravated by the requirement to thoroughly revise its own policy objectives.

The prospect of an institutional reform of Austrian competition laws should be seen as an opportunity to put Austrian competition policy on an entirely new methodological and contentual footing. Exemplary models for this purpose are offered by the (at present itself reinventing) European Commission's Competition Directorate-General, as well as by other national competition authorities governed by a modern and more economics-based approach to competition.

In view of past deficiencies and failings in the field in Austria, it appears advisable in general to step up the pace of combating anti-competitive practices (cartels, anti-competitive mergers and abuse of a dominant position within a market). Even though the political will and practical capacity to repair past failures of competition policy appear to be limited in spite of the existence of legal tools, measures nevertheless need to be taken to ensure that an extremely stringent yardstick, based on a detailed economic market analysis, is applied in future assessments of restrictive practices. Most important will be the strengthening of preventive measures, e.g., closely monitoring high concentrated markets.

This ambitious agenda requires deployment of substantial resources both in qualitative and quantitative terms. As long as there is no remedy to this resource problem one should not expect that Austrian competition policy will work any better in the future.