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**THE OBJECTIVES OF COMPETITION LAW AND POLICY
AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY**

-- GERMANY --

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OPTIMAL DESIGN OF A COMPETITION AGENCY

1. Problematic

The task of a competition authority is to protect competition. A competition authority can only be considered to be optimally structured and organised if it can fulfil this function to the full. Therefore the question as to the optimal design of a competition agency is above all one of its effectiveness. At the same time the competition agency moves within a complex environment which is determined by legal provisions and court jurisdiction. A competition authority does not have direct influence on either of these two areas. An assessment which is to focus exclusively on the authority can therefore only be an abstract one.

The work of a competition agency can be assessed according to the extent to which it is able to protect competition on the basis of existing laws. What is important in this process is that the law is interpreted consistently, existing gaps are filled adequately and proceedings are conducted efficiently. However, an exact assessment of an agency's effectiveness with regard to the protection of competition achieved is extremely difficult. Are the decisions made by the competition authority right in the sense that they either prevent the lessening of competition or lead to more competition? Here the next question which has to be asked is whether the agency adequately covers economic activity or if this is not the case in major areas. The difficulties involved in making such an assessment are obvious.

In merger control in particular it is rarely possible to exactly determine in retrospect actual successes in the application of competition law. However, in uncovering cartels or conducting abuse proceedings the positive effects of an intervention may be directly observed much more often, above all in the form of significant price reductions.

2. Characteristics of an optimally designed competition authority

Even though it is difficult to verify quantitative success criteria it is possible to identify and concretise qualitative features of the organisation of a competition authority which encourage a high level of effectiveness. These are factors which are largely independent of the other basic conditions. However, the obvious prerequisite for effective competition protection, without the realisation of which no competition authority can be successful, is first of all the existence of adequate substantive and procedural legal bases. As the international comparison shows, a whole range of solutions are conceivable and can prove successful without the various legal systems and traditions resulting in varying levels of protection. In the Bundeskartellamt's experience four such qualitative criteria have proved of particular importance.

2.1 *Independence*

The first and most important criterion is the independence of the competition authority. It must be ensured that the competition authority is safeguarded from political and other pressure and that its decisions are influenced by competitive criteria only.

Its independence *vis à vis* other authorities, in particular ministries, should be legally protected and embodied in the law. This is true in the case of the Bundeskartellamt. Although in organisational terms

it is assigned to the Ministry of Economics and Labour it receives no specific instructions from the latter. Instead the Bundeskartellamt decides on the basis of its competence in the subject matter. At the Bundeskartellamt the decision-making powers rest with collegiate bodies in the form of decision divisions, which are comparable with the tribunals of the courts (chambers and senates). The decision divisions alone are responsible for deciding individual cases and are not bound to any instructions from the directorate of the Bundeskartellamt. Decisions are made in a similar way to court proceedings by two rapporteurs, one of which conducts the investigations and prepares a decision and the chairman of the respective decision division. The majority of votes are the deciding factor, whereby each of the three persons mentioned has only one vote. As a consequence even the chairman of a decision division can be outvoted by the rapporteurs.

Apart from having its independence legally safeguarded, it is also crucial that the competition authority makes use of and defends it. Especially cases of economic significance are often also of political relevance. Hence attempts to politically influence the competition authority cannot be ruled out, even if its independence is embodied in law. For this very reason the authority must always fight hard to regain and secure this independence in the long term. A legal provision guaranteeing the independence of a competition authority is of little value if it is not put into practice by the authority.

In Germany as well considerations outside the area of competition law can play a role in decisions concerning the authorisation of mergers or cartels. However, such considerations have no effect on the examinations conducted by the Bundeskartellamt. It is left entirely to the Ministry of Economics and Labour to take such considerations into account when a so-called “ministerial authorisation” is applied for by the companies concerned to have a merger granted or a cartel exempted after prohibition by the Bundeskartellamt. However, the danger of the independence of a competition authority being jeopardized by such meta-competition powers can only be prevented if extremely rare use is made of them, which has been the case in Germany so far.

2.2 Competence

The second criterion is best expressed with the keyword “competence”.

It is the responsibility of a competition authority to apply competition law and effect the necessary interpretation of the law in the individual case. A precondition for this is sound knowledge of the fundamental principles of law, economics and business administration which needs to be constantly updated and expanded. As well as being able to evaluate its own experiences and observations, a well-organised competition authority must therefore be in a position to absorb new results of research, discuss these and to incorporate freshly raised arguments in its decision-making. If necessary, it also must be able to react to new developments by making organisational changes. This also means that an optimal organisational structure is not static. Rather, it needs to be reviewed constantly to see whether it still appropriately reflects the current conditions of the economy. Accordingly, in order to be able to react adequately to such changes, the Bundeskartellamt has in the past years effected a number of reorganisational measures with a view to improving the combat against cartels and creating new competencies in response to the liberalisation of the energy market. However, this flexibility must not lead to organisational changes which may jeopardise the authority and acceptance of well-proved tribunals among lawyers and within industry.

The essential prerequisite for the effectiveness of a competition authority is an adequate number of qualified staff and sufficient material resources. The Bundeskartellamt operates a policy of employing legal experts and economists in its senior officer ranks in a 50:50 per cent ratio. Such a mix of vocational qualification is required under German competition law which is situated at the interface between law and

economics. Cooperation between lawyers and economists ensures that both sides benefit from each other's special knowledge in day-to-day administrative practice.

As well as sufficient personnel and material resources, a competition authority also requires regular training schemes, the international exchange of experience and an ongoing dialogue with academics, for example in the form of regular conferences with university professors. This ensures that the competition authority can counter the ever-changing threat to competition with an application of competition law which is up-to-date. On the other hand, the competition authority can apply its knowledge, which is constantly updated in this way, to initiate improvements to the legal basis by the lawmaker.

2.3 *Transparency*

Another important criterion against which a competition authority must be measured is the transparency of its work. The assessment of cases of competitive significance is often a tightrope walk. Different evaluations are conceivable. Mistakes can never be ruled out, even in the case of an well-organised competition authority. It is therefore all the more important that a competition authority is prepared to have its decisions reviewed. The companies affected must therefore have the possibility to have a competition authority's decision reviewed by the courts. The possibility of judicial review must be ensured by law. In this respect, it should also be ensured that the courts reviewing the cases have the necessary knowledge of competition law.

It is the responsibility of the competition authority to ensure the highest possible degree of transparency in its decision-making. The reasons and considerations on which a decision was based must be notified to the companies and explained. The companies affected should be kept informed about the state of the decision process during the proceedings and not just at the end. In this way uncertainties on both sides can be cleared at an early stage and mistakes avoided. Such an approach also raises the acceptance of the decision by the companies.

A further aspect of establishing transparency is public access to the decisions of a competition authority. Decisions should be made public as far as possible through press releases, press conferences and publications in specialist magazines. Only this ensures that third parties such as the press and academics can critically discuss the evaluations made by the competition authority. The resulting dialogue between the competition authority and third parties positively affects a competition authority's competence.

2.4 *Efficiency*

The fourth and last criterion for shaping the structure and organisation of a competition authority dealt with here is its effectiveness. With its decisions a competition authority intervenes in the economic process. This places burdens on companies. If these burdens are heavier than need be this can also be detrimental to competition. The time and energy which the competition authority's investigation and decision activities involve for the companies concerned should therefore be limited to the minimum necessary to ensure the protection of competition. This includes, for example, quickly processing cases in order to limit the uncertainty factor for companies. Information should be requested successively so that cases which are evidently unproblematic from the start are not burdened with unnecessary obligations to supply information.

What is also essential in this respect is the confidential handling of all business secrets. The authority will only obtain the necessary information for assessing any restraints of competition if it is

trustworthy. If information is dealt with in an untrustworthy manner this could cause excessive costs for the companies and considerable damage to competition.

However, the principle to keep the burden on the companies concerned as limited as possible must not mean that the competition authority should be over-cautious in applying competition law and shy away from the risk of failure in court, particularly in cases where new legal provisions are applied. If competition authorities are not prepared to take a risk, no progress will be made in competition. Lost court cases do not diminish competition authority's effectiveness.

3. Summary

There is no definite answer to the question as to the optimal design of a competition authority. Each competition authority acts within the scope that is determined by its respective legal culture and system and which differs internationally. This results in differing demands on the optimal design of the respective competition authority. At a more abstract level, however, features can be identified which each competition authority should have. Independence, competence, transparency and efficiency form the foundation for the success of a competition authority. Without this, the effective protection of competition cannot be guaranteed.