

Unclassified

English - Or. English

5 November 2021

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Environmental Considerations in Competition Enforcement – Note by Austria

1 December 2021

This document reproduces a written contribution from Austria submitted for Item 1 of the 136th OECD Competition Committee meeting on 1-3 December 2021.

More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm>.

Please contact Mr Antonio Capobianco if you have questions about this document [Email: Antonio.CAPOBIANCO@oecd.org].

JT03484647

Austria

1. Executive Summary

1. In Austria, with the amendments of the Austrian Cartel Act (KaWeRÄG 2021)¹, which entered into force on 10 September 2021, sustainability criteria are explicitly included in Austrian antitrust law for the first time. An exemption of business cooperation for the purpose of an eco-sustainable or climate-neutral economy from the cartel prohibition was introduced. The new provision extends the general exemption from the cartel prohibition in Section 2 (1) Cartel Act to the effect that consumer sharing in efficiency profits is considered to exist whenever these efficiency profits contribute to an ecologically sustainable or climate-neutral economy (including hence out of market efficiencies).

2. Sustainability criteria in Austrian antitrust law

2. In September 2021, extensive amendments of the Austrian Cartel Act entered into force. The Austrian legislator has explicitly expanded the scope of the exemption from the cartel prohibition under section 2 (1) Cartel Act (which is the equivalent to Art. 101 (3) TFEU at EU level)². Pursuant to Section 1 Cartel Act, cartels which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits shall be exempt from the prohibition. The new version of Section 2 (1) Cartel Act broadens the limited legal exceptions to the cartel prohibition: Consumers shall also be considered to have a fair share if the profit arising from the improvement of the production or distribution of goods or the promotion of technical or economic progress contributes significantly to an environmentally sustainable or climate-neutral economy.

3. The newly created exemption provision is intended to exempt business cooperations while in principle keeping the established scheme of examining exemptions from the cartel prohibition - i.e. the four conditions mentioned in section 2 (1) Cartel Act. The exception is primarily based on the appropriate participation of consumers and declares this participation to be fulfilled if the efficiency gain achieved from the restrictive agreement contributes significantly to an ecologically sustainable or climate-neutral economy. In the legislator's view³, such a sustainability exemption is justified because the effects of such an economy per se accrue to the general public, even if this may only be the case with a time lag - namely for future generations. The affected consumer group, as part of the general public, therefore also profits from the exemption.

4. In this context, legislative materials ("explanatory notes") clarify that sustainability includes climate protection (e.g. use of renewable energy, reduction of emissions of greenhouse gases) and sustainable use and protection of water resources (e.g. protection of the environment from the adverse effects of wastewater discharge), as well as transition to a recycling economy (e.g. promotion of the recyclability of products, increased use of

¹ Federal Law amending the Cartel Act 2005 and the Competition Act, BGBl. I No. 176/2021.

² See Section 2 Cartel Act 2005, as amended by BGBl. I No. 176/2021.

³ See also legislative materials on Section 2 Cartel Act 2005, as amended by BGBl. I No. 176/2021.

secondary raw materials) and the protection and restoration of biodiversity and ecosystems (e.g. sustainable forest management).

5. As mentioned above, the exception can only be fulfilled if the conditions of Section 2(1)(a) and (b) Cartel Act are also met. The restrictions to achieve a significant contribution to an ecologically sustainable or climate-neutral economy must be indispensable, i.e. cannot be achieved by other economically feasible and less restrictive options. Moreover, competition must not be eliminated for a substantial part of the products concerned. In general, hardcore restrictions (in particular price, quantity and territorial agreements) cannot fulfil the conditions of section 2(1) Cartel Act. A significant contribution to environmental sustainability or climate neutrality is given if a significant improvement in one of the two areas is evident, while no significant deterioration is to be expected in the other (along the lines of the European “Do no significant harm” principle).

6. The term economy is intended to be a broad definition encompassing different stages of production as well as the qualities of the final product or service. An improvement in the production or distribution of goods or a contribution to the promotion of technical or economic progress can also be given if this measure or innovation makes a significant contribution to an ecologically sustainable or climate-neutral economy, i.e. the benefit consists in a contribution to sustainability. A further economic efficiency gain is not required.

7. The question remains, whether agreements between undertakings that may partially restrict competition can be exempted due to broader sustainability benefits. Until yet, no practical experience can be reported. The difficulty will be that not every contribution to ecological sustainability can be represented in concrete figures. It remains to be seen to what extent it will be necessary to appropriately wage the restriction of competition against the benefits in terms of ecological sustainability for society. The Austrian legislator has envisaged a specification on this point through guidelines of the Federal Competition Authority. The Authority is currently in the drafting process that will be followed by a broad consultation process.

8. The provision is thus intended to allow flexibility for business cooperation in favour of sustainable agreements that would otherwise be prohibited under Austrian national law. To sum up, the Austrian legislator clearly intends to demonstrate that cartel law can also contribute to fighting climate change.