

Unclassified

English - Or. English

13 November 2023

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

Out-of-Market Efficiencies in Competition Enforcement – Note by Austria

6 December 2023

This document reproduces a written contribution from Austria submitted for Item 12 of the 141st OECD Competition Committee meeting on 5-8 December 2023.

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

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08.

JT03531582

Austria

1. Introduction

1. Traditionally, in most cases, out of market efficiencies are not fully taken into consideration in competition law. Recently, however, there have been signs that these factors are becoming more important in the assessment. At least this is the case in Austria. Against this background, two examples are outlined below, concerning the Austrian sustainability exemptions and the Austrian merger control regime.

2. Out of market efficiencies pursuant to Article 2(1) Austrian Cartel Act

2. In late 2019, the European Commission (EC) presented the European Green Deal to enable Europe to become the first climate-neutral continent. Even though competition law may not be considered the ultimate tool to tackle climate change at first sight, a high number of academics as well as practitioners have uttered their willingness to contribute substantially to a sustainable and climate-neutral economy by reinterpreting or amending Article 101 of the Treaty on the Functioning of the European Union (TFEU) as well as national competition laws. At the same time, there was a lot of scepticism towards changing and thereby weakening established European and national competition law principles with the risk of greenwashing cartels.

3. As a result of the discussions on sustainability agreements outlined above as well as the EU Green Deal, the Green Movement in general and particularly in Austria, the Austrian legislator decided to become a first mover by adding an explicit sustainability exemption to Article 2(1) Austrian Cartel Act.

4. In the explanatory note, the legislator outlines that the Austrian government programme 2020–2024 supports the efforts and targets of the EU Green Deal and holds that a sustainable economy will be a competitive economy in the future. In particular, it refers to the European “Do No Significant Harm” principle as well as to European documents, such as the EC’s Horizontal Guidelines (2011/C 11/01) or the communication from the Commission on Next steps for a sustainable European future (COM/2016/0739 final). However, the legislator concludes that the discussions at European level do take too long, and consequently undertakings would refrain from engaging in sustainability initiatives due to a lack of legal certainty, which is contrary to the identified urgent need for action.

5. Consequently, by amending the criteria for cartel exemptions under Article 2(1) Austrian Cartel Act, the national legislator created a currently unique national provision explicitly targeting sustainability cooperation. By introducing explicitly that—from September 2021 onwards—even out of market efficiencies may suffice to fulfil the criteria for the national sustainability exemption, the Austrian legislator entered uncharted territory. Thereby, the legislator placed Austria and the Austrian Federal Competition Authority (AFCA) in pole position in integrating sustainability considerations into competition law assessments as the first European country to lay down a sustainability exemption in statutory law. In the explanatory note, the Austrian legislator provides examples of fields of potential sustainability cooperation: (i) climate protection, (ii) climate change adaptation, (iii) transition to a circular economy, (iv) reduction of pollution, (v) prevention of harm to the environment, (vi) protection and/or restoration of biodiversity

and ecosystems (vii) support for the sustainable use, and (viii) protection of marine and water resources.

6. More in detail, the legislator outlined, *inter alia*, that cooperation regarding the transition to a circular economy may benefit if it improves a product's durability, repairability, reusability or recyclability. Equally, a contribution to pollution prevention and control may benefit, in particular, if emissions into the air, water or land are prevented or reduced. Regarding the protection and restoration of biodiversity and ecosystems, the legislator mentions the example of sustainable forestry management. Another example is cooperation for joint distribution to cut transport movements and therefore CO₂ emissions, which contribute to climate protection.

7. Importantly, the legislator underlined that cooperation which resembles mere price-fixing or market-allocation agreements is not capable of profiting from the sustainability exemption, even though it might lead to reduced production of certain goods and thereby achieve a positive effect on the environment. In addition to the amendment of Article 2(1) Austrian Cartel Act, the legislator held that a complementary soft law instrument, such as guidelines issued by the AFCA, on how the national competition authority will evaluate potential sustainability cooperation in practice would be useful and appreciated. Therefore, the AFCA started a fact-finding mission and the drafting process for the Sustainability Guidelines in the autumn of 2021.

8. The finalisation and publication of the AFCA Sustainability Guidelines following a broad public consultation that took place in early summer 2022 may be considered an important step to create transparency and legal certainty about the AFCA's interpretation of the new provisions and enhance their practical relevance. As the Sustainability Guidelines are intended to be a living document, further experience on the topic gained in practice will be incorporated into future versions.

2.1. General considerations

9. Unlike Union law, in which the competition rules are anchored directly in the primary law of the TFEU and are, therefore, hardly amenable to revision, the rules of national law can be adapted more easily to new challenges and changes in political objectives. The Austrian legislator has made use of this circumstance and created a possibility of wider consideration of sustainability effects that emanate from cooperation between undertakings that otherwise restrict competition by integrating those rules into the existing regulations on the exemption of agreements in the Austrian Cartel Act. Specifically, Article 2(1) Austrian Cartel Act, which is materially identical to Article 101(3) TFEU, was supplemented with the following subparagraph: "*Consumers shall also be deemed to enjoy a fair share of the benefits which result from improvements to the production or distribution of goods or the promotion of technical or economic progress if those benefits contribute substantially to an ecologically sustainable or climate-neutral economy.*"

10. However, this foundation in national law alone is also the first major restriction of applicability of this regulation and needs to be kept in mind: Agreements which, due to their scope, their nature or the size or activities of the companies involved, are likely to affect trade between Member States, may only benefit from a national rule as long as the application of Union law does not lead to a different result (Art. 3(1) Reg. 1/2003). This was explicitly acknowledged by the Austrian legislator in its explanatory note to the law.

11. Conversely, various forms of cooperation between companies in pursuit of sustainability goals are conceivable in a fashion that is unproblematic from the point of view of competition law or can be designed in a competition-neutral manner. The

Guidelines do address this issue, very much in line with the relevant section of the Horizontal Guidelines.

12. The first experiences gained in the discussion with companies and other stakeholders, as well as the results of the public consultation of the draft Guidelines held by the AFCA in early summer 2020, confirm this assessment. So far, not many practical examples of facts could be found that would not either fall outside of the sustainability exemption for their potential to affect trade between Member States or would not have been classified as permissible under antitrust law anyway, without the need to apply the new regulation. In this context, it is symptomatic that two of the examples of possible facts presented in the explanatory note to the bill—a cooperation between (international) manufacturers of detergents to reduce the packaging volume and a cooperation to produce cars that emit less CO₂—would almost certainly fall within the scope of EU law. On the other hand, purely regional cooperation without effects on cross-border trade, such as in the area of improved transport logistics, could often benefit from the *de minimis* rule or could be eligible for exemption based on the cost savings achieved.

13. It should also be noted in advance that the Austrian sustainability exemption is limited to aspects of ecological sustainability and (due to its special importance as an explicitly mentioned subcategory) climate-neutral economy. This includes contributions to the protection of the climate, the sustainable use and protection of water resources, the transition to a circular economy and the protection and restoration of biodiversity and ecosystems.

14. Other societal goals, for example in the area of social standards or animal welfare (unless these also contribute to ecological sustainability)—though equally legitimate—are not included. However, those may benefit indirectly from the new interpretation of Article 101(3) TFEU.

15. The central regulatory concept of the sustainability exemption relates to a modification of the criterion of consumer participation (“fair share”). As the European discussion shows, this is where the greatest difficulties lie in recognising sustainability effects as relevant efficiencies within the meaning of competition law. If the other conditions are met, the legal fiction of a fair share counters the problem of considering efficiency gains, which actually do not accrue to the consumer group affected by the restriction of competition, but elsewhere, in particular to an unspecified general public (“out-of-market-efficiencies”). In the same way, a time delay with regard to the occurrence of positive effects (“next generations”) can also be addressed. In this way, the Austrian exemption certainly allows taking account of sustainability goals in a broader way.

16. However, the efficiencies gained still must substantially outweigh negative effects on competition, so it does not suffice for a cooperation to create only negligible benefits towards sustainability in order to fulfil the exemption (“criterion of substantiality”—see below).

17. Having said that, the AFCA applies the following adapted test scheme for the evaluation of sustainability agreements (note: for reasons of procedural economy, the AFCA will examine the fourth requirement—indispensability—before the second).

2.2. The cooperation produces efficiencies

18. As a basic requirement, the cooperation must lead to an improvement in the production or distribution of goods or the promotion of technical or economic progress. By adhering to this requirement of an “innovative step”, anti-competitive forms of cooperation

are excluded from the scope of application, even if this leads to a reduction in emissions, for example by restricting the volume of production.

2.2.1. Those efficiencies contribute to an ecologically sustainable or climate-neutral economy

19. Efficiency gains stemming from the cooperation in question must result in a contribution to sustainability goals in the areas mentioned above. In practice, questions concerning the quantifiability and demonstrability of these effects will arise. The larger and clearer the contribution towards sustainability goals is, the lower the requirements for their demonstration and documentation will be. Keeping in mind that the scope of the sustainability exemption is limited beforehand (no effect on trade between Member States), these requirements as well as possible positive effects come to factual limits.

2.2.2. This contribution to an ecologically sustainable or climate-neutral economy is essential (“criterion of substantiality”)

20. The inclusion of this criterion of substantiality is an important mechanism to distinguish true efforts on sustainability from only alleged sustainability arguments (“greenwashing”). At the same time, it can be seen as a substitute for the traditional “full compensation” of the negative effects on competition that would otherwise be required under the “fair share condition.” The contribution to a relevant sustainability goal must therefore be suitable for compensating for the distortion of competition. Conceptually, for example, a price increase caused by a cooperation would have to be offset by a sustainability advantage that can be quantified at least as high.

2.2.3. Only restrictions that are indispensable to the attainment of this contribution are permissible

21. This requirement is taken unaltered from the “normal” exemption under Article 2 Cartel Act/Article 101(3) TFEU and serves to implement the principle of proportionality. Only the mildest means necessary to achieve the goal are permitted. If companies may also achieve these goals of the sustainability agreement individually, cooperation is not necessary. Likewise, restrictions on competition that do not contribute to the achievement of those objectives are not permitted. This may, in particular, affect the scope or duration of the cooperation.

22. In principle, the AFCA intends a strict interpretation of this criterion but is aware of the need to balance effective enforcement of competition rules with the legislator’s intention to encourage initiatives in the field of sustainability, thus not setting up a hurdle that can hardly ever be overcome in practice.

2.2.4. The cooperation does not afford the possibility of eliminating competition for a substantial part of the goods or services in question

23. This criterion also remains unchanged. In accordance with the views of the EC, in order to benefit from the exemption, the cooperation must enable residual competition. This is the case, among other things, if a restriction of competition only relates to one of several relevant parameters of competition or only to parts of the market. A restriction of competition limited in time is also permissible if this has no negative effects on long-term market development.

2.2.5. Conclusion

24. The Austrian legislator pioneered with the recognition of certain forms of cooperation as justified under competition law and the AFCA chose to provide further guidance at an early stage in the absence of wider practical experience. This can be seen as an attempt to overcome the chicken-or-egg situation by providing some additional legal certainty as well as encouraging undertakings to come forward and discuss their ideas for cooperation with the competition authority. Many positive reactions from stakeholders to the publication of the guidelines and broad interest from other states confirm the existing demand for guidance in this area. It is this exchange that will be considered in future updates of the guidelines and will help to further enhance their benefit.

3. Out of market efficiencies in the Austrian merger control regime

25. Claims of out of market efficiencies have generally not been in the focus of most merger investigations by the Austrian official parties (Austrian Federal Competition Authority and Federal Cartel Prosecutor) and Phase II proceedings at the Austrian Cartel Court. However, Austrian law provides a basis for parties' arguments towards considering broader potential benefits of mergers that might occur out of market. These potential benefits can include effects outside of the relevant product or geographic markets and can also include effects on labor markets.

26. According to the Austrian Cartel Act, any merger where the Austrian Cartel Court assumes that a dominant position is created or strengthened ("**dominance test**") or a significant impediment to effective competition arises ("**SIEC test**"), the so-called "**justifications**" of Article 12 (2) Austrian Cartel Act must be examined. If these justifications are deemed valid, the Austrian Cartel Court can clear an otherwise anti-competitive merger, or impose effective remedies such that these justifications can still realize. The Austrian law allows for three possible justifications:

1. It is expected that the merger will bring about improvements in competitive conditions which outweigh the disadvantages of the merger ("improvements in competitive conditions criterion"), or
2. the merger is necessary to maintain or improve the international competitiveness of the undertakings concerned ("international competitiveness criterion") and is economically justified ("economic justification criterion"), or
3. the economic advantages of the merger significantly outweigh its disadvantages ("economic advantages criterion").

27. Both (1.) as well as (2.) have been a feature of Austrian Competition Law since the introduction of mandatory merger reviews. (3.) was introduced at a later stage in the 2021 reform of the Austrian Cartel Act.

28. Any within-market efficiencies (e.g. "classical" variable cost efficiencies) are taken into account during the parallel dominance and SIEC tests. The same is true for compensating factors counteracting the merger-specific harm on the relevant markets. This includes countervailing buyer power, (potential) market entry and the criteria for a failing firm defense. Beyond that, the three possibilities set out above remain to justify an anti-competitive merger.

3.1. Improvements in competitive conditions criterion

29. Since improvements in competitive conditions on the relevant market are already tested during the parallel dominance and SIEC tests, this criterion additionally looks specifically at improvements in competitive conditions out of market for an otherwise anti-competitive merger. The Austrian Supreme Court clarified in *Wolters Kluwer / Linde (2001)* that all competitive conditions need to be considered when assessing a merger, i.e. also out of market efficiencies.

30. The merger *Goldenes Kreuz / PremiQaMed (2016)* was an example, where the Austrian Cartel Court found this criterion fulfilled. On the one hand, the court found that the merger might lead to a dominant position on the market for acute hospital treatments (privately insured patients, private hospitals). On the other hand, the court stated that the merger would lead to improvements in competitive conditions, among these a reduction in overtreatment, better monitoring of private hospitals and doctors, stronger incentives to adopt innovations, stronger incentives for health insurance and achievement of an optimal company size. However, the court found that these positive effects would only occur if there was no foreclosure of private clinics. For this reason, the Austrian Cartel Court imposed remedies aimed at guaranteeing the envisaged improvements in competitive conditions.

3.2. International competitiveness and economic justification criterion (cumulative)

31. If a merger is deemed necessary for the international competitiveness of the parties and is economically justified, it has to be cleared under Austrian law. In *Lenzing / Tencel (2004)*, the Austrian Cartel Court interpreted the rather vague concept of international competitiveness as companies' ability to operate profitably when competing with foreign undertakings. It held that increasing the international competitiveness might require efficiency gains and minimum efficient scale, but also found that size alone is not sufficient to achieve or sustain international competitiveness. Moreover, if an undertaking is worldwide market leader - in *Lenzing / Tencel (2004)* the merged entity would have held a monopoly-like position in lyocell fibres - it is highly likely that this undertaking is already operating at internationally competitive levels. The Austrian Cartel Court rejected the international competitiveness criterion on the grounds that a necessity for a merger to monopoly cannot be established (the parties could break even at current prices and output levels). The Supreme Court confirmed this finding in the appeals trial.

32. Two points of the case deserve particular emphasis with regard to the question of improving international competitiveness: First, in the appeals proceedings, the parties asserted, among other things, that when assessing the international competitiveness criterion, the court should only look at the activities of the parties on the relevant market. The Supreme Court clearly disagreed and confirmed the ultimate relevance of the competitiveness of the undertakings involved as a whole.

33. Second, the Austrian Cartel Court found that three quarters of the claimed (potential) savings post-merger were due to decreases in fixed costs, including a significant proportion of personnel costs. The decision also referred to evidence relating to possible job creation or retention. The exact role of job savings and job creation for assessing whether an anti-competitive merger might be justified was left open (no necessity of the merger) and thus remains unclear. The government proposal for the 2021 cartel law reform initially provided for a decoupling of the international competitiveness criterion from the economic justification criterion. In the comments to the reform, it was pointed out that an increase in international competitiveness through cost savings from closures or job savings

(as was argued in *Lenzing / Tencel*) could potentially lead to the exceptional approval of a merger. This might contradict the legislator's intention of the economic justification criterion: The latter had so far been interpreted in the literature as a means to take employment aspects and further macroeconomic objectives into account (albeit no relevant jurisprudence exists). Based on this feedback, the legislator abandoned the planned decoupling and instead introduced a third option for justifying an anti-competitive merger.

3.3. Economic advantages criterion

34. This newly introduced provision has not yet been tested in practice. The explanatory notes to the reform hint at macroeconomic variables such as growth, innovation and full employment as key goals of Austrian economic policy ("the foundation of a stability-oriented macro policy"). In addition, a broad set of goals such as wealth growth, job security, income growth, fair income distribution and appropriate social and environmental standards are mentioned as potential economic advantages.

35. The economic advantages criterion poses several questions for competition law practitioners. It is not clear what the relation is between a merger that is economically justified (second justification) and a merger where economic advantages significantly outweigh economic disadvantages (third justification). The literature quickly pointed out that it is quite hard to come up with scenarios, where a merger that negatively affects competitive parameters such as price, quality or innovation would have significant economic advantages outweighing this merger-specific harm. The more likely effect on macroeconomic variables seems to be a negative one. In particular, with relation to job creation and job security, anti-competitive mergers tend to reduce the demand for labor and other input factors (thereby reducing the overall number of jobs) and might even negatively affect worker's bargaining power vis-à-vis employers.

36. Whether and to what extent the Austrian Cartel Court will take a broader stance towards including societal goals (such as fair income distribution or environmental standards) when assessing potential economic advantages of anti-competitive mergers remains to be seen.

3.4. Conclusion

37. Overall, the justifications for anti-competitive mergers contained in the Austrian Cartel Act have so far played a subordinate role in Austrian jurisprudence. This implies that the criteria for taking out of market efficiencies into account in merger proceedings remain somewhat vague. For both, competition enforcers and undertakings, this provides scope for legal uncertainty.