

# **Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperations (Sustainability Guidelines)**

Vienna, September 2022

## **Imprint**

Media owner, publisher and editor:

Austrian Federal Competition Authority, Radetzkystrasse 2, 1030 Vienna

Design and production: Austrian Federal Competition Authority

Vienna: September 2022.

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# Foreword

The question of whether and in what form cooperations that are anti-competitive, but simultaneously contribute to overarching societal objectives, ecological sustainability and climate neutrality in particular, are to be treated preferentially when they are assessed under cartel law, has been a preoccupation in the academic discussion just as much as in the work of competition practitioners.

With these guidelines on the application of Sec. 2 para. 1 Cartel Act (KartG) to what are known as sustainability cooperations (Sustainability Guidelines), the Austrian Federal Competition Authority (AFCA) wishes not only to make a theoretical contribution to the discussion about “green competition”, but breathe life into this topic in practice as well. When it passed the Cartel and Competition Law Amendment Act 2021 (KaWeRÄG 2021), the Austrian legislature grasped the initiative and oriented national cartel and cooperation law more strongly towards the EU’s sustainability objectives. At the same time it commented in the explanatory remarks to the bill that it would be helpful for the provisions of the amended Sec. 2 para. 1 Cartel Act to be enlarged upon with guidelines issued by the AFCA explaining their implications in greater detail.

Although it is beyond doubt that neither national nor European competition law can be the primary levers for the attainment of climate and sustainability objectives, the AFCA hopes to contribute to this aim with these Sustainability Guidelines. AFCA staff have spent a year examining the topic in depth with exactly this in mind.

The publication of the Sustainability Guidelines following the public consultation that took place in June 2022 and the drafting of a final text that reflects the results from this consultation is therefore an important step that will create transparency and legal certainty about the AFCA’s future interpretation of the new provisions and enhance their practical relevance.

The Sustainability Guidelines are also intended to be a living document, which means experience gained in practice is to be incorporated into future versions. We will be delighted to receive enquiries and suggestions, which can be submitted to [wettbewerb@bwb.gv.at](mailto:wettbewerb@bwb.gv.at).

Dr Natalie Harsdorf-Borsch, LL.M.,  
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# Introduction

- (1) With the **European Green Deal**, the European Commission has put forward a comprehensive strategic plan of action for the transformation of Europe's economy and society in the direction of sustainable and integrative growth. The global objectives of this plan that may be mentioned include, in particular, the attainment of greenhouse gas neutrality by 2050,<sup>1</sup> the decoupling of economic growth from resource use and the conservation and restoration of intact ecosystems and biodiversity. Although the pursuit of these objectives requires measures in the fields of energy generation, industrial production, transport and mobility, and agriculture in particular, all fields of EU policy are to be looked at to identify opportunities to make contributions that support these efforts.
  
- (2) This is true not least for **European competition policy** with its three areas of action, antitrust control, merger control and state aid, which is why a consultation on the **possible contributions** competition policy could make **to the Green Deal** was launched by the European Commission in the autumn of 2020.<sup>2</sup> Although it is beyond doubt (European) competition law cannot be the primary lever for the attainment of climate and sustainability objectives in the EU, the Commission's Executive Vice-President, Commissioner Margrethe Vestager, commented on the issue that,

*Green policies like regulations, taxes, and investment are the key to the Green Deal. But with so much to do in such a short time, all of us – including competition enforcers – also need to make sure that we're doing what we can to help.*<sup>3</sup>

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<sup>1</sup> The Austrian Federal Government's Government Programme 2020–2024 envisages climate neutrality being reached by 2040. See *Out of a Sense of Responsibility for Austria: Government Programme 2020–2024: Summary*, p. 17.

<sup>2</sup> European Commission, "Competition Policy supporting the Green Deal: Call for contributions" (2020), [https://ec.europa.eu/competition/information/green\\_deal/call\\_for\\_contributions\\_en.pdf](https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf) (accessed 7 March 2022).

<sup>3</sup> European Commission, "Competition policy in support of the Green Deal: Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference, delivered by Inge Bernaerts, Director, DG Competition" (2021), [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en) (accessed 7 March 2022).

- (3) In September 2021 the Commission published a progress report on the continuing discussion in its *Competition Policy Brief*.<sup>4</sup> This reaffirmed that European competition law was to take on a complementary, supporting role in the efforts to achieve the Green Deal's objectives. Furthermore, at around the same time the competition authorities in the Netherlands and Greece put forward their own ideas about how aspects of sustainability should be accounted for in cartel law.<sup>5</sup>
- (4) The objectives of the Green Deal were recognised to the very greatest extent as essential and correct, both by the authorities entrusted with enforcing competition law and in academic papers, but there was no consensus at this point in time on the extent to which (given the European Commission's interpretation of the legislation) sustainability agreements between competitors<sup>6</sup> pursuant to Art. 101(3) TFEU could be exempted from the prohibition on cartels. In particular, the question of the allocation of out-of-market efficiencies – in other words efficiency gains that may benefit the general community, but not (necessarily) consumers on the market affected by the restriction of competition due to a sustainability agreement – is and has been the subject of controversial discussion in relation to the assessment of the exemptions provided for in Art. 101(3) TFEU.
- (5) The latest developments in this discussion (at the time of publication) can be found in the draft revised versions of the R&D Block Exemption Regulation (R&D BER) and Specialisation Block Exemption Regulation (Specialisation BER), known jointly as the Horizontal Block Exemption Regulations (HBERs), and the **Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements** (Horizontal Guidelines) presented by the Commission for public consultation in March 2022.<sup>7</sup> The Guidelines on Vertical

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<sup>4</sup> European Commission, *Competition policy brief*, 2021-01, September 2021, <https://data.europa.eu/doi/10.2763/962262> (accessed 17 March 2022).

<sup>5</sup> Cf. Netherlands Authority for Consumers and Markets (ACM), "Guidelines on sustainability agreements are ready for further European coordination" (2021), <https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination> (accessed 17 March 2022); Hellenic Competition Commission (HCC), "Staff Discussion Paper on Sustainability Issues and Competition Law"; "Sustainable development and competition law: Towards a Green Growth Regulatory Osmosis" (conference programme, 2020); *Technical Report on Sustainability and Competition* (2021) <https://www.epant.gr/en/enimerosi/competition-law-sustainability.html> (accessed 24 March 2022).

<sup>6</sup> With regard to the concept of the sustainability agreement or cooperation, it may be noted these are not a distinct or new type of horizontal agreement, but include, for instance, production, purchasing or marketing agreements that contribute to sustainability.

<sup>7</sup> See European Commission, Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation

Restraints (Vertical Guidelines) that have been published in the meantime contain references to the possible consideration of sustainability benefits as well.<sup>8</sup>

- (6) The **Austrian Government Programme 2020–2024** also envisages national measures being oriented more strongly towards the Green Deal and the aim of making Austria a sustainable and competitive business location.
- (7) With this in view, the Austrian legislature acted on its own initiative to adopt the **Cartel and Competition Law Amendment Act 2021** and thus orient (national) cartel and competition law more strongly towards sustainability objectives, by doing which it wished to make a contribution to the discussion still ongoing at the European level.<sup>9</sup> Furthermore, the legislation was intended to send out a signal to undertakings that they should direct their attention primarily at the long-term aspects of competitive activity. Improvements in the quality of products and services and the innovations associated with them are to contribute substantially to an ecologically sustainable and/or climate-neutral economy from which consumers benefit in general.
- (8) It is therefore to be possible for business cooperations that restrict competition, but contribute substantially to an ecologically sustainable or climate-neutral economy<sup>10</sup> to profit **to a wider extent than in the past** from the possibility of exemption from the prohibition on cartels. In concrete terms, the following addition to the provisions on exemptions in Sec. 2 para. 1 Cartel Act created the possibility of greater consideration being given to **ecological benefits** when (potentially) **anti-competitive cooperations** are **assessed** under **cartel law**:

*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*

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agreements – Draft (2022), [https://competition-policy.ec.europa.eu/public-consultations/2022-hbers\\_en](https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en) (accessed 21 October 2022), in particular chap. 9, “Sustainability Agreements”. The final version of the revised legislation is expected to enter into force as of 2023.

<sup>8</sup> European Commission, 2022/C 248/01, Communication from the Commission – Guidelines on vertical restraints, paras. 8–9.

<sup>9</sup> Explanatory Remarks to the Government Bill, Annex 951 to the Stenographic Records of the National Council, 27th Electoral Period (ErläutRV 951 BlgNR 27. GP), p. 11.

<sup>10</sup> In the interests of readability, this document only refers below to ecological sustainability, which as a rule also includes climate neutrality as a partial aspect of sustainability.

*progress if those benefits contribute substantially to an ecologically sustainable or climate-neutral economy.*

- (9) These provisions in the last sentence of Sec. 2 para. 1 Cartel Act, which entered into force on 10 September 2021, have created a “**sustainability exemption**” that is unique to date in the European Union.
- (10) The Austrian and European conditions for the recognition of an exemption from the prohibition on cartels therefore diverge for the first time since the Cartel Act entered into force in 2005 – with the exception of the sectoral exemption laid down in Sec. 2 para. 2 Cartel Act – for the specific field of ecological sustainability. Within the scope of the Cartel Act, the Austrian legislature presumes fair consumer share by way of legal fiction if an anti-competitive sustainability cooperation contributes substantially to an ecologically sustainable economy through the resulting efficiency gains. The other conditions for exemption – provided for identically in Sec. 2 Cartel Act and Art. 101(3) TFEU – remain unaffected by these provisions and therefore continue to have to be fulfilled just as comprehensively as before.
- (11) In its explanatory remarks, the legislature suggested the AFCA should publish **guidelines** that enlarged upon how the new provisions would be applied in practice. The guidelines that are now being published are based on the draft of June 2022, which was drawn up with the **prior involvement** of the Federal Ministry for Climate Action,<sup>11</sup> and take account of the comments received by the AFCA in the course of a **public consultation**.<sup>12</sup> Despite the explicit appeal for suggestions that was made, it became apparent during this consultation how difficult it would be to find examples of situations with which to illustrate the provisions laid down in Sec. 2 para. 1 Cartel Act. The AFCA will add such examples as further experience of the provisions’ application is gained in future.

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<sup>11</sup> ErläutRV 951 BlgNR 27. GP, p. 10.

<sup>12</sup> We would like to express our gratitude to all those who discussed the issues with us and contributed to the consultation, in particular: Vienna Chamber of Labour, the Federal Ministry of Digital and Economic Affairs (BMDW; now the Federal Ministry of Labour and Economy, BMAW), the Federal Ministry of Justice (BMJ), the Federal Cartel Prosecutor, the Global Antitrust Institute, Henkel, the Austrian Chamber of Agriculture, Martin Amegah, Vienna Higher Regional Court (OLG) as the Cartel Court, ÖRAK Austrian Bar, Oxera, Studienvereinigung Kartellrecht, the Austrian Economic Chambers, Prof. Inderst (Goethe University Frankfurt), Prof. Robertson (Vienna University of Economics and Business), Prof. Schinkel (University of Amsterdam), Prof. Spiegel (Tel Aviv University), Prof. Steininger (University of Graz), Prof. Thomas (University of Tübingen) and Prof. Yontcheva (DICE Düsseldorf).



## Purpose of the AFCA's Sustainability Guidelines

- (12) These guidelines are principally intended to enable **undertakings engaged in competition** to carry out the requisite **self-assessment** of whether **sustainability cooperations** are permissible under cartel law. These include, in particular, agreements that contribute to sustainability in the course of the development or improvement of products or services and/or their distribution without having (potentially) international effects. However, many of the assessment steps described in these guidelines may be applied analogously to vertical cooperations, that is, business cooperations along the value chain.
- (13) It is to be noted at the outset that, in general, the observance of the rules of competition law does not stand in the way of a sustainable and climate-neutral economy especially, and in most cases **free competition is the best driving force for change**. This is true, in particular, when consumers are prepared to purchase (more) sustainable products and sustainability *per se* therefore represents an important parameter of competition. Free and fair competition consequently also has an essential role in innovation and investment for the creation of an ecologically sustainable and climate-neutral economy.
- (14) Furthermore, sustainability cooperations may also generate **economic efficiency gains** that are shared in fairly by consumers on the market so that, even when restrictions of competition exist, it is **not always necessary** to resort to the **sustainability exemption** to justify them under cartel law.
- (15) This is also consistent with the experience acquired by the AFCA and most European competition authorities, which suggests cartel law has certainly permitted the realisation of sustainability cooperations in the past.
- (16) In **individual cases**, however, the collaboration of competitors or undertakings along the value chain in the form of **sustainability cooperations** may **contribute** to the attainment of sustainability objectives, the objectives set out under the Green Deal for example, and may be **necessary** in certain circumstances if such objectives are to be attained. Nor does the sustainability exemption rule out in principle the possibility that relevant sustainability effects may also occur under cooperations that are not primarily oriented towards sustainability objectives.

- (17) First of all, the AFCA guidelines **clarify the provisions' technical and geographical scope**, among other things by setting out in concrete terms the conditions under which a cooperation actually restricts competition.
- (18) One concern addressed by the guidelines is – as intended too by the criterion of the **indispensability of a restriction of competition** (least severe means) – to highlight **competition-neutral approaches to cooperation** that are (also) used to pursue sustainability and climate-protection objectives, and frequently do not require any justification under Sec. 2 para. 1 Cartel Act (and/or Art. 101(3) TFEU).
- (19) Where a restriction of competition is to be assumed, the guidelines offer guidance on how – that is, by what steps and/or by reference to which aspects or factors – a specific sustainability cooperation is to be assessed.
- (20) In this respect, they also discuss possible methods for the **demonstration of efficiency gains**, which have to be taken as the basis (and quantified where applicable) when a restriction of competition is justified under cartel law and, in particular, when the sustainability exemption is cited because cooperations with unclear and/or merely negligible ecological benefits do not usually fulfil the conditions for a sustainability exemption. In contrast, cooperations that deliver substantial ecological benefits, which can be demonstrated with evidence that is credible and (permanently) verifiable, are markedly more likely to fulfil the criteria laid down in Sec. 2 para. 1 Cartel Act.
- (21) Despite the criteria set out in the AFCA guidelines, the **circumstances of the specific case in question** must not be disregarded. With this in view, attention is drawn to the **open door approach** to queries about the applicability of cartel law provisions that has been followed by the AFCA for years in many fields. Where it is not possible for the matter to be clarified conclusively by reference to the criteria set out below when an undertaking carries out a self-assessment, contact should be taken up with the AFCA in a timely fashion prior to the planned implementation of a sustainability cooperation for the purpose of discussing the matter. The AFCA's **Legal Service Department** acts as a **point of call for consultations** of this kind and can be contacted at [wettbewerb@bwb.gv.at](mailto:wettbewerb@bwb.gv.at).
- (22) Where the facts of the case have been clarified sufficiently, the AFCA may deliver an informal assessment on the basis of the documents presented pursuant to Sec. 2 para. 5 Austrian Competition Act. When the **AFCA's legal opinion** is **communicated** by these means, this is done subject to the proviso that circumstances may change,

and the opinion has no binding force over other courts or authorities that may be called upon to adjudicate on the matter at the national and/or European levels. In cases of this kind, however, the AFCA will periodically consult the second official party, the Federal Cartel Prosecutor, and seek to coordinate its approach with them.

### **Effects of the guidelines**

- (23) These guidelines explain how the **AFCA** interprets the conditions for the **application of the sustainability exemption** and how it intends to apply the last sentence of Sec. 2 para. 1 Cartel Act in practice. By ensuring predictability with regard to the official interpretation of the relevant legal foundations and therefore their enforcement by the AFCA, the guidelines are intended to contribute to **legal certainty** in this field.
  
- (24) **Courts**, in particular the Cartel Court, the Federal Cartel Prosecutor, **other** Austrian **authorities** and authorities of other member states are **not bound** by these guidelines when interpreting the Cartel Act.

# 1 Scope and definitions

## 1.1 Principles for the application of the AFCA guidelines

- (25) These guidelines explain when undertakings are able to use the sustainability exemption provided for in the last sentence of Sec. 2 para. 1 Cartel Act to justify a cooperation under cartel law.<sup>13</sup> In addition, further options are also highlighted that allow undertakings to promote sustainability through suitable cooperations without infringing cartel law.
- (26) In particular, there is no requirement for a cooperation to be justified under cartel law pursuant to the exemptions laid down in Sec. 2 para. 1 Cartel Act, and therefore for an examination of the sustainability exemption as well, if the cooperation does not fall under the prohibition on cartels pursuant to Sec. 1 Cartel Act in any event. This may be the case, for example, if the cooperation does not restrict competition (appreciably), has a pro-competitive background<sup>14</sup> or is covered by any applicable sectoral exemptions. The first step is therefore to examine the applicability of the prohibition on cartels and/or the possibility of the cooperation being implemented in a neutral manner under cartel law.<sup>15</sup>
- (27) Should, by contrast, a cooperation result in **competition being prevented, restricted or distorted** within the meaning of Sec. 1 Cartel Act, its justification subject to the two following conditions is to be examined:
- The cooperation contributes by means of the efficiency gains delivered to an ecologically sustainable or climate-neutral economy.

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<sup>13</sup> A flow chart depicting the process will be found in section 6.3.

<sup>14</sup> It is possible for competitive conditions to exclusively improve in comparison to the relevant reference scenario as a result of a cooperation (see section 4). There may be such a pro-competitive background, for example, if a cooperation makes a new market or additional competition possible in the first place. In concrete terms, a cooperation may, for instance, be necessary in order to achieve sufficient effects of scale or create production capacities for a sustainable, new product. Cooperations of this kind with a pro-competitive background are usually permissible.

<sup>15</sup> See section 3.

- **European competition law** is not applicable because the criterion of internationality is not fulfilled.<sup>16</sup>
- (28) Conversely, undertakings are not able to use the sustainability exemption to justify a cooperation under cartel law in the following circumstances:
- The cooperation exclusively promotes **aspects of sustainability other than ecological sustainability**, social aspects for example.
  - The cooperation fulfils the **criterion of internationality**, in other words it is likely to adversely affect trade between EU Member States.<sup>17</sup> This may, in particular, be the case with cooperations that cover the whole of Austria or a substantial proportion of Austrian territory, affect a market or markets in several EU Member States, are directly aimed at cross-border trade or are entered into by undertakings from several Member States.
- (29) Undertakings may, however, assess and/or, where relevant, also **justify cooperations of any kind** under cartel law, **even without** application of the **sustainability exemption**, by following the generally valid examination steps laid down in Secs. 1 and 2 Cartel Act and/or Art. 101 TFEU, the block exemption regulations and the guidelines issued by the European Commission on this subject.<sup>18</sup>

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<sup>16</sup> If the criterion of internationality is fulfilled, the parallel application of national cartel law must not lead to results that diverge from EU law, i.e. the cooperation is primarily to be reviewed in the light of the criteria laid down in Art. 101(3) TFEU – in particular consumer fair share – to ascertain whether it qualifies for an exemption. National law (including these guidelines) may therefore remain applicable in the individual case, provided it leads to the same outcome.

<sup>17</sup> ECJ, 9 July 1969, 5/69, *Völk/Vervaecke*, ECLI:EU:C:1969:35; cf. Wollmann in Jaeger and Stöger, eds., *EUV/AEUV*, “Art 101 AEUV”, paras. 98, 99, 103; ECJ, 14 July 1981, 172/80, *Züchner*, ECLI:EU:C:1981:178.

<sup>18</sup> Apart from the above-mentioned chap. 9 on sustainability agreements, undertakings assessing sustainability agreements that correspond to the forms of cooperation dealt with in the Horizontal Guidelines (such as R&D, production and purchasing agreements) may use the relevant chapters of the Commission’s Horizontal Guidelines to do this (and potentially also for cooperations without international effects). It should, however, be noted that the interpretation of European cartel law by the Commission does not (formally) have any binding effect in relation to the interpretation of national cartel law.

## 1.2 Definitions for the purposes of the guidelines

- (30) A number of terms connected with the sustainability exemption are defined below for the purposes of these guidelines. The definitions are based in part on the terminology of the Taxonomy Regulation.<sup>19</sup>
- (31) **Business cooperation.** A business cooperation is an arrangement under which the undertakings concerned conclude an agreement or reach an understanding on a concerted practice. Apart from (horizontal) agreements between competitors and (vertical) agreements between purchasers and suppliers, business cooperations also include decisions of associations of undertakings (e.g. Industry associations, professional organisations and employers' associations).
- (32) **Sustainability cooperation.** A business cooperation that contributes to an ecologically sustainable or climate-neutral economy by improving the production or distribution of goods or promoting technical and economic progress.
- (33) **Sustainability.** Sustainability refers to a form of development in which resources are managed in a careful, forward-looking manner ("sustainable development"). The goal of sustainable development is to consume and use currently available resources in such a manner that the needs of present and future generations can be satisfied.<sup>20</sup> In a broad sense, such sustainable development encompasses several dimensions, which – apart from an ecological dimension – may also include economic and social dimensions.<sup>21</sup>
- (34) **Ecological sustainability and ecological benefits.** In principle, ecological sustainability within the meaning of Sec. 2 para. 1 Cartel Act encompasses a large number of aspects, but in particular climate neutrality and climate protection,<sup>22</sup> the transition to a circular economy, the prevention and reduction of harm to the

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<sup>19</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 ("Taxonomy Regulation"). Legally, the Cartel Act is to be interpreted independently of the Taxonomy Regulation and is not bound by its terminology.

<sup>20</sup> European Commission, COM (2016) 739 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Next steps for a sustainable European future – European action for sustainability, p. 2.

<sup>21</sup> United Nations A/RES/70/01, Resolution adopted by the General Assembly on 25 September 2015: Transforming our world: the 2030 Agenda for Sustainable Development.

<sup>22</sup> ErläutRV 951 BlgNR 27. GP.

environment, the protection and restoration of biodiversity and ecosystems, and the sustainable use and protection of water resources.<sup>23</sup> If circumstances promote one or more of these aspects of ecological sustainability, they are described in these guidelines as ecological benefits.

- (35) **Climate neutrality.** In general, climate neutrality means the climate is not influenced by a process or activity. The climate is deemed not to be influenced either if such a process or activity does not release any emissions into the atmosphere or if the emissions released are compensated for fully and there is consequently no overall rise in emissions (net zero emissions).
- (36) **Climate protection.** Climate protection is to be understood as action that seeks to keep the rise in the Earth's average temperature clearly less than 2 °C above the pre-industrial level and limit it to 1.5 °C.<sup>24</sup> This also includes measures that achieve a reduction of emissions into the Earth's atmosphere.
- (37) **Circular economy.** A circular economy is an economic system in which efficient use ensures products, materials and other resources remain in circulation for as long as possible, and improvements to production and consumption bring about reductions in waste, negative environmental impacts and releases of hazardous substances.<sup>25</sup> Measures that promote the transition to a circular economy include, for example, the promotion of the reparability and recyclability of products or the increased use of secondary raw materials.<sup>26</sup>
- (38) **Harm to the environment.** The introduction of pollutants into the air, water or land brought about directly or indirectly as a result of human actions is regarded as environmentally harmful.<sup>27</sup> Harm to the environment is not just to be understood as previously caused environmental contamination and pollution, but also the mere creation of the conditions for contamination to occur;<sup>28</sup> this is, however, subject to

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<sup>23</sup> Recital 23 and Art. 9 Taxonomy Regulation; ErläutRV 951 BlgNR 27. GP; it is possible for spillover effects to arise between the various subsidiary areas of ecological sustainability. E.g. a climate-protection measure may subsequently have positive impacts on biodiversity.

<sup>24</sup> Cf. Art. 2(12) Taxonomy Regulation; Art. 2(1)(a) Paris Agreement, *Austrian Federal Law Gazette (Bundesgesetzblatt, BGBl.)* III No. 197/2016.

<sup>25</sup> Cf. Art. 2(9) Taxonomy Regulation.

<sup>26</sup> ErläutRV 951 BlgNR 27. GP.

<sup>27</sup> Art. 2(12)(a) Taxonomy Regulation.

<sup>28</sup> European Commission, 2014/C 200/0, Communication from the Commission – Guidelines on State aid for environmental protection and energy 2014–2020, paras. 19, 27.

the condition that there is an immediate danger of harm and there is a sufficient probability of such harm occurring in the near future.<sup>29</sup>

- (39) **Biodiversity.** Biodiversity has three dimensions: the diversity of ecosystems, the diversity of species and genetic diversity within species.<sup>30</sup> The factors that may encourage a loss of biodiversity include changes in land and water use, the excessive use of resources, climate change, pollution and the spread of invasive alien species.<sup>31</sup>
- (40) **Ecosystem.** An ecosystem is characterised by the interaction of flora, fauna and microorganism communities and their non-living environment so that they form a functional unit.<sup>32</sup>

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<sup>29</sup> Cf. Sec. 4 para. 3 Federal Act on Environmental Liability for the Prevention and Rehabilitation of Environmental Damage (Federal Environmental Liability Act, B-UHG).

<sup>30</sup> Cf. Art. 2(15) Taxonomy Regulation.

<sup>31</sup> European Commission, COM(2020) 380 final, Communication from the Commission – EU Biodiversity Strategy for 2030 – Bringing nature back into our lives.

<sup>32</sup> Art. 2(13) Taxonomy Regulation.



## 2 Principles for the assessment of business cooperations under cartel law

(41) This section discusses the assessment under cartel law of cooperations covered by the prohibition on cartels pursuant to Sec. 1 Cartel Act. A summary overview is provided below:

### 2.1 The prohibition on cartels in Sec. 1 Cartel Act

*§ 1. (1) Any agreements between undertakings, decisions of associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition (cartels) shall be prohibited.*

(42) Under Sec. 1 para. 1 Cartel Act, undertakings are, in principle, prohibited from entering into **agreements** that restrict competition. In this respect, it is immaterial whether these are written agreements or oral understandings. Even the exchange of information may in itself have negative impacts on competition and therefore constitute a possible infringement of the Cartel Act. The prohibition also covers any form of “concerted practice”, that is, contacts that have not yet crystallised into a formal meeting of minds.

(43) In particular, undertakings are prohibited from entering into agreements that involve what are known as **hardcore restrictions**. The hardcore restrictions ruled out by Sec. 1 para. 2 Cartel Act include, above all, pricing agreements, output agreements, territorial agreements, resale price maintenance arrangements and the like. Hardcore restrictions are usually to be assessed as restrictions by object that are, in themselves, objectively likely to bring about adverse effects on competition in comparison to the relevant reference scenario<sup>33</sup> and are therefore,

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<sup>33</sup> On this topic, see also section 4.

by their nature, harmful to competition. Further examination of the appreciability or concrete impacts of such agreements is not then necessary.

## 2.2 The provisions on exemptions in Sec. 2 Cartel Act

(44) Although undertakings are, in principle, prohibited under Sec. 1 Cartel Act from entering into an agreement that restricts competition, such an agreement may nevertheless be legally permissible under certain circumstances if it fulfils the **criteria for the justification of exemptions** laid down in Sec. 2 Cartel Act – irrespective whether it falls under the new sustainability exemption (last sentence of Sec. 2 para. 1 Cartel Act):

*§ 2. (1) 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 and which do not*

- a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or*
- b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*

*shall be exempt from the prohibition pursuant to § 1.*

(45) Where a cooperation they are seeking to establish will, in principle, restrict competition, undertakings are therefore able to demonstrate it cumulatively fulfils the following conditions for an exemption under Sec. 2 para. 1 Cartel Act and is consequently permissible:<sup>34</sup>

- attainment of **efficiency gains**,<sup>35</sup>
- **fair consumer share** in these efficiency gains,
- **indispensability** of the restrictions of competition,

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<sup>34</sup> In principle, it is also possible for undertakings to show a cooperation involving hardcore restrictions fulfils all the conditions for its justification under Sec. 2 para. 1 Cartel Act.

<sup>35</sup> In the form of a contribution to the improvement of the production or distribution of goods or a contribution to the promotion of technical or economic progress.

- **no elimination of competition.**

(46) The Cartel and Competition Law Amendment Act 2021 modifies the requirement for consumers to enjoy a fair share of the benefits from a cooperation to the effect that consumer fair share is presumed by way of legal fiction if the **(efficiency) gain that results from the cooperation contributes substantially** to an **ecologically sustainable or climate-neutral economy**.

*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.*

(47) However, the amendment to the legislation leaves it unchanged that business cooperations within the scope of the Cartel Act may fall under one of the other exemptions laid down in Sec. 2 para. 2 Cartel Act. No additional justification by reference to the sustainability exemption is necessary in these cases. This may apply, in particular, to cooperations between small and medium-sized enterprises, many of which are in themselves likely to fall under the **provisions on minor cartels** (Sec. 2 para. 2 subpara. 1), provided the cooperation does not involve any hardcore restrictions.<sup>36</sup>

(48) Furthermore, note is to be taken of the sectoral exemption laid down in Sec. 2 para. 2 subpara. 5 Cartel Act in favour of **agricultural** producers, associations of agricultural producers or associations of such producer associations. These entities may enter into cooperations for the production or sale of agricultural products or the use of joint facilities for the storage, treatment and processing of agricultural products, provided these cooperations do not involve any obligation to charge identical prices and competition is not excluded.

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<sup>36</sup> In particular, cartels in which undertakings are involved that compete with each other and jointly hold a total share of not more than 10% of the relevant market, or cartels in which undertakings are involved that do not compete with each other and that hold a total share of not more than 15% each of the relevant market, provided that in both cases they do not aim at fixing selling prices, restricting production or distribution, or sharing markets (minor cartels).

### 3 Permitted sustainability cooperations without restrictions of competition

- (49) Cooperations do not usually restrict competition if they are not focussed on important **parameters of competition** such as price, output, quality, innovation, the selection of products or distribution channels.
- (50) Although a comprehensive analysis of the individual case is usually necessary, the (sometimes cumulative) fulfilment of the following conditions may markedly reduce the likelihood that a cooperation restricts competition:<sup>37</sup>
- The cooperation is transparent and open to other undertakings – in so far as possible while preserving commercial secrets and without involving the exchange of competition-relevant information.
  - The cooperation is non-binding in so far as it does not directly or indirectly oblige any undertaking, irrespective of its involvement in the cooperation, to conduct itself in a particular manner on the market, so that undertakings' flexibility with regard to important parameters of competition remains preserved.
  - The cooperation does not limit in any form the performance or quality of the products in question.
  - The cooperation is focussed on a product feature that does not crucially influence consumers' purchasing decisions.
  - The cooperation does not have appreciable impacts on upstream or downstream markets.
- (51) Furthermore, pursuant to the case law of the ECJ, agreements may fall outside the scope of Art. 101 TFEU if the anti-competitive restrictions in question constitute **collateral agreements**, or are associated with the pursuit of a legitimate objective and/or are necessary for this purpose.<sup>38</sup> The application of this case law *mutatis*

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<sup>37</sup> See also e.g. European Commission, COMP.G.4/GM, Case AT.40178, *Car Emissions* (2021).

<sup>38</sup> ECJ C-309/99, *Wouters*, ECLI:EU:C:2002:98; ECJ C-519/04, *Meca-Medina*, ECLI:EU:C:2006:492; ECJ C-1/12, *OTOC*, ECLI:EU:C:2013:127; ECJ C-136/12, *CNG*, ECLI:EU:C:2013:489.

*mutandis* to sustainability cooperations in the context of Austrian cartel law is not ruled out, but must be examined in the individual case.<sup>39</sup>

### Practical examples

(52) Several examples of sustainability cooperations are listed below that, drawing on the views of the European Commission,<sup>40</sup> do not in the opinion of the AFCA usually restrict competition, including within the scope of purely national cartel law, and therefore do not infringe the prohibition on cartels either.

- Cooperations that do not restrict competitors' economic activities, but merely affect their **internal corporate conduct**. Undertakings may, for example, wish to improve their industry's reputation for sustainability and agree measures for this purpose that, for instance, restrict the use of plastics at their business premises, the temperature in their office buildings or the quantities of materials they print.
- Cooperations of competitors for the creation of a **joint database** and/or list of suppliers that use sustainable production processes or provide sustainable inputs, or of distributors that sell products in a sustainable manner, provided there is openness about who is listed<sup>41</sup> and the undertakings concerned are not obliged to purchase from these suppliers or sell to these distributors.
- Cooperations of competitors for the **organisation of industry-wide awareness-raising campaigns** or campaigns to raise consumers' awareness about the ecological footprint of their consumption, provided they do not amount to the joint advertising of particular products.

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<sup>39</sup> See, furthermore, European Commission, Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements – Draft (2022), [https://competition-policy.ec.europa.eu/public-consultations/2022-hbers\\_en](https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en) (accessed 21 October 2022), para. 548.

<sup>40</sup> See European Commission, C(2022) 1159 final, Annex to the Communication from the Commission – Approval of the content of a draft for a Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, sec. 9.2.

<sup>41</sup> Attention is to be paid here to the problems of market foreclosure, both in relation to the agreements themselves and in relation to their abuse.

- As a rule, cooperations of competitors **for the purposes of standardisation**, provided the resulting standardisation agreements are formulated openly and non-exclusively, and participation in them remains voluntary.<sup>42</sup>

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<sup>42</sup> Undertakings that wish to cooperate under an international standardisation agreement usually find themselves within the scope of EU law. Subject to the same conditions as posited by the AFCA, however, the Commission sees standardisation agreements on sustainability objectives as not having adverse effects: see European Commission, Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements – Draft (2022), [https://competition-policy.ec.europa.eu/public-consultations/2022-hbers\\_en](https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en) (accessed 21 October 2022), para. 572.

## 4 Anti-competitive sustainability cooperations

- (53) Pursuant to Sec. 1 para. 1 Cartel Act, a business cooperation is prohibited if a restriction of competition is either its object or its effect. A **restriction by object** exists if a business cooperation may, by its very nature, be regarded as harmful to the good functioning of free and fair competition.<sup>43</sup> A **restriction by effect** exists if a cooperation potentially or actually has negative impacts on competition.<sup>44</sup>
- (54) What is decisive for the competition assessment of a cooperation under Sec. 1 – and also Sec. 2 – Cartel Act is the **comparison of the competitive conditions** under the **cooperation** in question (scenario under examination) with the competitive conditions that would arise **in the absence of the cooperation (reference scenario)**.<sup>45</sup> On many occasions, it is possible to take the status quo as a relevant reference scenario for the sake of simplicity; in some cases, however, it will be appropriate to factor developments of which there is a sufficient probability in future into the reference scenario as well. By way of example, mention may be made of technological or regulatory developments that are already foreseeable at the time when the matter is examined.
- (55) With regard to sustainability agreements that correspond to a type of cooperation agreement exempted by one of the **EU block exemption regulations**, the block exemption regulation in question may, under certain circumstances, be drawn on as guidance for the assessment of the cooperation. This may limit the amount of effort undertakings have to devote to substantiating the relevant reference

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<sup>43</sup> ECJ C-32/11, *Allianz Hungária*, ECLI:EU:C:2013:160, para. 35; cf. Lager and Petsche in Petsche, Urlesberger and Vartian, eds., *KartG 2005*, 2nd ed. (2016), “§ 1”, para. 62.

<sup>44</sup> ECJ C-32/11, *Allianz Hungária*, ECLI:EU:C:2013:160, para. 38; cf. Lager and Petsche in Petsche, Urlesberger and Vartian, eds., *KartG 2005*, 2nd ed. (2016), “§ 1”, para. 65.

<sup>45</sup> ECJ, 30 January 2020, C-307/18, *Generics UK*, ECLI:EU:C:2020:52, para. 118; ECJ, 11 September 2014, C-382/12 P, *MasterCard*, ECLI:EU:C:2014:2201, para. 166; EGC, 12 December 2018, T-684/14, *Krka*, ECLI:EU:T:2018:918, para. 318.

scenario further to the extent provided for in the block exemption regulation and/or the Horizontal Guidelines.<sup>46</sup>

## 4.1 Restrictions by object

- (56) Given their inherently anti-competitive nature, it is as a general rule not to be assumed restrictions by object will be amenable to justification. This is deduced for the field of sustainability exemptions not least from the “innovative step” required by Sec. 2 para. 1 Cartel Act, from which a cooperation’s contribution to sustainability must result and that leads to the exclusion of mere pricing or territorial agreements.<sup>47</sup> Should a sustainability cooperation be entered into in the context of a **restriction by object**, however, there may under certain circumstances be a situation in which more than one objective is being pursued simultaneously: on the one hand, a (permissible) sustainability objective and, on the other hand, an (in principle impermissible) anti-competitive objective. In a situation of this kind, the actual and provable pursuit of a real sustainability objective is to be assessed.<sup>48</sup>
- (57) In the course of this assessment, the extent to which the cooperation actually and provably attains the sustainability objective and what impacts on competition it causes are to be demonstrated by the undertakings that wish to cooperate. Should the attainment of a sustainability objective be uncertain, it may not be factored into the assessment.<sup>49</sup> In particular, it is to be prevented that ostensible

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<sup>46</sup> Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements; Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices; Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector; Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements; Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements; Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia); Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway.

<sup>47</sup> ErläutRV 951 BlgNR 27. GP, p. 10.

<sup>48</sup> ECJ C-228/18, *Budapest Bank and ors*, ECLI:EU:C:2020:265, paras. 66, 69.

<sup>49</sup> See, analogously, ECJ C-307/18, *Generics (UK) and ors*, ECLI:EU:C:2020:52, paras. 107–108.



sustainability effects are misused to disguise the fact that a cooperation's essential object is to restrict competition (**greenwashing**).

## 4.2 Restrictions by effect

- (58) Should the object of a business cooperation not be a restriction of competition, it may nevertheless be prohibited if it has the effect of restricting competition – in this case, the current or probable effect of the cooperation is therefore to be examined.<sup>50</sup>
- (59) A **restriction by effect** exists if the cooperation may adversely affect competition on the market in question to such an extent that it is to be anticipated with a sufficient degree of probability there will be negative impacts on prices, production, innovation or the diversity and quality of goods and services in comparison to the relevant reference scenario.<sup>51</sup> When the impacts on competition are assessed, it is not only the actual, but also the potential impacts of the cooperation that are to be considered.<sup>52</sup>
- (60) The following **factors** may be referred to in particular for the **assessment** of a sustainability cooperation's potentially negative (and positive) **impacts** on competition:
- The market share of the products and/or services covered by the cooperation.
  - The remaining competition based on products and/or services not affected by the cooperation.
  - The significance of the products and/or services covered by the cooperation for investment and innovation.
  - Purchasers' power.
  - Production capacities.

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<sup>50</sup> Austrian Supreme Court of Justice (OHG), 26 June 2006, 16 Ok 51/05, *Asphaltnischanlage II*; cf. Lager and Petsche in Petsche, Urlesberger and Vartian, eds., *KartG 2005*, 2nd ed. (2016), "§ 1" para. 64.

<sup>51</sup> OHG, 23 June 2003, 16 Ok 4/03, *K-Hit-Radio*; OHG, 26 June 2006, 16 Ok 51/05, *Asphaltnischanlage II*; cf. Lager and Petsche in Petsche, Urlesberger and Vartian, eds., *KartG 2005*, 2nd ed. (2016), "§ 1", para. 72.

<sup>52</sup> OHG, 26 June 2006, 16 Ok 51/05, *Asphaltnischanlage II*; cf. Lager and Petsche in Petsche, Urlesberger and Vartian, eds., *KartG 2005*, 2nd ed. (2016), "§ 1", para. 74.

- Network effects.

(61) It is, however, to be taken into consideration that a restriction by effect has to be appreciable if it is to fall under the prohibition on cartels. The criterion of **appreciability** is to be understood as meaning the restriction has to have impacts on competition that are not merely negligible or insignificant.<sup>53</sup> Should, for example, a sustainability cooperation only cover a small part of the market, and should there be both sustainable and non-sustainable alternative products, it is usually not to be assumed the cooperation will have appreciable negative effects on competition.

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<sup>53</sup> Lager and Petsche in Petsche, Urlsberger and Vartian, eds., *KartG 2005*, 2nd ed. (2016), “§ 1”, para. 76.

# 5 Justification of an anti-competitive sustainability cooperation

## 5.1 Options for the justification of cooperations

- (62) Undertakings may justify **anti-competitive sustainability cooperations** under cartel law subject to the conditions laid down in Sec. 2 para. 1 Cartel Act. This may be done either using the examination steps laid down (hitherto) in Sec. 2 para. 1 Cartel Act or using the sustainability exemption, that is, additionally by citing the last sentence of Sec. 2 para. 1 Cartel Act.
- (63) The **examination steps applied hitherto**<sup>54</sup> may, in particular, be used to justify a sustainability cooperation when it leads in any event to the attainment of **efficiency gains**, which are **shared fairly by consumers on the market** but, like cuts to production costs for example, are **not (necessarily) connected with ecological benefits**.<sup>55</sup> However, some sustainability cooperations lead to increases in production costs rather than savings – at least in the short term – so it will not always be possible to justify them in this way.
- (64) The examination schema for the **sustainability exemption** may be used to justify a **sustainability cooperation** if **efficiency gains connected with ecological benefits are attained as a result of that cooperation**. It is then to be assumed *ex lege* that consumers enjoy a fair share of the benefits.

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<sup>54</sup> On this issue, see section 2.

<sup>55</sup> Efficiency gains from ecological benefits may be taken into consideration as well in the examination steps laid down hitherto in Sec. 2 para. 1 Cartel Act, provided consumers enjoy a fair share of the benefits; on this issue, see European Commission, Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements – Draft (2022), [https://competition-policy.ec.europa.eu/public-consultations/2022-hbers\\_en](https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en) (accessed 21 October 2022), para. 609.

With regard to domestic Austrian cooperations, undertakings may in such cases nevertheless decide to use the sustainability exemption rather than the examination steps applied hitherto to justify a cooperation; e.g. if the fulfilment of the sustainability exemption's conditions is easier to prove.

(65) The examination schema for the sustainability exemption includes **five conditions**, which have to be fulfilled **cumulatively**:

1. The cooperation leads to efficiency gains.
2. The efficiency gains contribute to an ecologically sustainable or climate-neutral economy.
3. Their contribution to an ecologically sustainable or climate-neutral economy is substantial.
4. The restrictions imposed by the cooperation are indispensable for the realisation of efficiency gains that contribute substantially to an ecologically sustainable or climate-neutral economy.
5. The cooperation does not open up opportunities for competition to be eliminated in respect of a substantial proportion of the goods or services in question.

(66) In practice, for reasons of procedural economy, the AFCA examines the fourth condition (indispensability) before the second (ecological sustainability).<sup>56</sup> This gives rise to two possible ways of shortening the examination of the matter under cartel law. Where a cooperation imposes restrictions of competition that, whether in themselves or on the scale that has been chosen, are more restrictive than is necessary to realise efficiency gains, it is prohibited and does not have to be examined any further. Likewise, efficiency gains for the realisation of which the cooperation is not necessary do not come into question in any event for the justification of cooperations pursuant to Sec. 2 Cartel Act, and therefore do not have to be examined any further either.

## 5.2 Examination schema for the sustainability exemption

### 5.2.1 Efficiency gains

(67) Firstly, the undertakings concerned must show the cooperation contributes to an **improvement** in the production or distribution of goods, or contributes to the promotion of technical or economic progress, that is, it contributes to an **efficiency**

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<sup>56</sup> See also European Commission, 2004/C 101/08, Communication from the Commission – Guidelines on the application of Article 81(3) of the Treaty, para. 39.

**gain.** An efficiency gain means an improvement in the use of scarce resources<sup>57</sup> so that the **welfare of society as a whole** is enhanced.<sup>58</sup> The mere redistribution of welfare between producers and consumers does not represent an improvement and is therefore not an efficiency gain. The use of scarce resources is improved, in particular, when the same output of a good or a service is delivered using fewer resources or – equivalently – greater output is delivered using the same amount of resources. An efficiency gain may be realised in **monetary form**, as a cost saving for example, or in **non-monetary form**, as an innovation or reduction of harm to the environment for example.

- (68) Undertakings have to state the time horizon within which the claimed efficiency gains will be realised. In principle, efficiency gains that will **not be realised quickly** at the beginning of the cooperation may also be factored in, including those that will benefit later generations. This may be appropriate, for example, where there is a threat of **irreversible harm to the environment**. However, the time horizon within which the efficiency gain will be attained should usually be certain or at least foreseeable.
- (69) In any event, efficiency gains have to be demonstrated cogently and cannot simply be assumed. They also have to be objective, concrete and verifiable. If the supposed efficiency consists, for example, in the improvement of a product, the undertakings concerned have to substantiate what product feature will be improved. For example, if the claimed efficiency gain is a reduction of water pollution, the undertakings concerned must explain exactly how the cooperation contributes to the reduction of water pollution, and to what possibly estimated extent and at what point in time efficiency gains will be attained.

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<sup>57</sup> See Immenga and Mestmäcker, *Wettbewerbsrecht*, vol. 1, *Kommentar zum Europäischen Kartellrecht*, 6th ed. (2019), paras. 129–135.

<sup>58</sup> Should a cooperation entail an improvement such as a cost saving, it is usually to be assumed it enhances general welfare because any restriction of competition that makes consumers worse off usually makes producers better off to the same extent at the same time. The net effect of the cooperation is then positive on account of the cost saving, provided consumers do not increasingly give up buying the product. The implication is that a decline in output is not a pure redistribution, but also leads to a loss of welfare (Harberger's triangle). With regard to cooperations that do not involve hardcore restrictions, however, it is usually to be assumed they lead to substantial reductions in output.

(70) In addition, it may be necessary to express efficiency gains in monetary units. However, the exact level of the efficiency gains and/or their value do not always have to be quantified; on this point, see sections 5.2.4 and 6.2.

### 5.2.2 Indispensability of restrictions of competition

(71) Secondly, the undertakings concerned must show the cooperation **exclusively involves restrictions of competition** that are **indispensable for the realisation of the claimed efficiency gains**. The basis for this is the principle of proportionality.

(72) It follows from this that undertakings have to show there is no possibility the cooperation could be implemented in a manner that realises the efficiency gains, but is less restrictive of competition.

(73) By contrast, should the cooperating undertakings **merely** show the restrictions of competition are indispensable in order to realise the efficiency gains **more cost-effectively** than in the absence of the cooperation, the examination steps provided for hitherto in Sec. 2 para. 1 Cartel Act are consequently to be applied,<sup>59</sup> including the provision of evidence of **consumer fair share**.

(74) In concrete terms, the indispensability of the restrictions is to be examined by reference to the following parameters:

- **Deadweight effects:** Should there be a sufficient incentive for undertakings to improve the production or distribution of goods or promote technical or economic progress (with connected ecological benefits, where applicable), even in the absence of cooperation, this is consequently to be taken into consideration in the relevant reference scenario. Within the framework of the sustainability exemption, only those efficiency gains may be taken into consideration that would be attained in any event under competitive conditions. Should an anti-competitive cooperation be aimed, for example, purely at fulfilling **minimum statutory requirements**, and should it, in addition, offer no further improvement to the production or distribution of goods or further promotion of technical or economic progress, the condition of indispensability is not fulfilled because the undertakings concerned are obliged to take measures in any event in order to fulfil statutory requirements. Undertakings may, however, prove the claimed efficiency

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<sup>59</sup> See section 5.1.

gains are not deadweight effects if they are able to cogently demonstrate statutory requirements could not be fulfilled in the absence of the cooperation, the cooperation enables them, for example, to **overcome** a substantial **first-mover disadvantage** connected with free-riding or the cooperation **triggers** positive **spillover effects** for undertakings that are not involved in it.

- **Appropriate duration:** The duration of the cooperation is to be stated and must not extend beyond the period of time that, according to objective criteria, is likely to be necessary in order to realise the ecological benefits.
- **Appropriate ambit:** The cooperation must not involve additional collateral agreements that are not indispensable for the realisation of its ecological benefits. This also applies if the main provisions of the cooperation are indispensable for the realisation of ecological benefits.

### 5.2.3 Contribution to an ecologically sustainable or climate-neutral economy

(75) Thirdly, the undertakings concerned must show the **efficiency gain** that results from improving the production or distribution of goods or promoting technical or economic progress contributes to an **ecologically sustainable or climate-neutral economy**, in other words results from ecological benefits (below: “**efficiency gains from ecological benefits**”).<sup>60</sup> Should this be the case, it is to be assumed the efficiency gain attained is also beneficial to the **general public**.<sup>61</sup>

(76) A contribution to ecological sustainability or climate neutrality within the meaning of the last sentence of Sec. 2 para. 1 Cartel Act is made, in particular, if the efficiency gain delivered by the cooperation contributes to the following aspects of **ecological sustainability** – which are mentioned in the explanatory remarks to the legislation:

- climate protection,
- climate change adaptation,
- transition to a circular economy,
- reduction of pollution,
- prevention of harm to the environment,
- protection and/or restoration of biodiversity and ecosystems,

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<sup>60</sup> It is immaterial in this respect whether these efficiency gains are attained on the market affected by the restriction of competition due to the cooperation, or on other markets.

<sup>61</sup> In principle, efficiency gains may also benefit the general public if they are realised outside Austria.

- support for the sustainable use and protection of marine and water resources.

(77) The undertakings concerned must credibly demonstrate

- **what aspect** of ecological sustainability the cooperation promotes,
- what outcome, in other words **what ecological benefits** exactly, will be attained,
- that the claimed improvement to the production or distribution of goods or claimed promotion of technical or economic progress actually **realises** the claimed ecological benefits,
- **how the cooperation contributes** to the realisation of ecological benefits,
- within what **period of time** the ecological benefits will be realised and
- that, in the spirit of the **do-no-significant-harm** principle, the cooperation will not cause any additional harm to the environment or such harm to the environment will be balanced out by any environmental improvements. Should, apart from a significant improvement in one area of ecological sustainability, a significant deterioration in any other area have to be anticipated, the business cooperation consequently does not fulfil the condition of contributing to an ecologically sustainable or climate-neutral economy.<sup>62</sup>

(78) The measures taken under a business cooperation that may contribute to an ecologically sustainable or climate-neutral economy are explained in greater detail below in relation to the six aspects of ecological sustainability that have been mentioned.

(79) **Contribution to climate protection.** A contribution to climate protection may be made if greenhouse gas emissions are avoided or reduced, and/or emitted greenhouse gases are stored.<sup>63</sup> A cooperation on joint distribution may, for instance, cut transport movements and therefore CO<sub>2</sub> emissions.<sup>64</sup> Should the undertakings concerned, however, be covered by a cap-and-trade system, such as the EU ETS system, it is to be taken into consideration that every reduction of emissions also saves emissions certificates, so that these certificates can be used elsewhere and CO<sub>2</sub> emissions therefore remain the same in total (waterbed effect).

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<sup>62</sup> ErläutRV 951 BlgNR 27. GP, “Zu § 2 Abs. 1”.

<sup>63</sup> Cf. Art. 10 Taxonomy Regulation.

<sup>64</sup> See also: ErläutRV 951 BlgNR 27. GP.



- (80) **Contribution to climate change adaptation.** A contribution to climate change adaptation may be made if possible adaptation solutions are developed and/or implemented that substantially reduce the risk of business activities having adverse impacts on the world's current and expected future climate.<sup>65</sup>
- (81) **Contribution to the transition to a circular economy.** A contribution to the transition to a circular economy may be made if products' durability, reparability, upgradability, reusability or recyclability, or the manner in which they are provided are improved, and the consumption of resources is therefore reduced. Such a contribution may also be made if the quantities of waste produced or incinerated are reduced, or the reuse and recycling of waste is improved. A reduction of hazardous substances in materials and products may also contribute to the transition to a circular economy.<sup>66</sup>
- (82) **Contribution to pollution prevention and control.** A contribution to pollution prevention and control may be made, in particular, if emissions (other than greenhouse gases) into the air, water or land are prevented or reduced, air, water or soil quality is improved, adverse impacts on human health and the environment caused by the production, use or disposal of chemicals are prevented or minimised, or litter and other pollution are cleaned up.<sup>67</sup>
- (83) **Contribution to the protection and restoration of biodiversity and ecosystems.** A contribution to the protection and restoration of biodiversity and ecosystems is made, in particular, by the conservation or improvement of natural and semi-natural habitats and species, and the protection and restoration of terrestrial, marine and other aquatic ecosystems, as well as sustainable land and forestry management, and the application of sustainable agricultural practices.<sup>68</sup>
- (84) **Contribution to the sustainable use and protection of water and marine resources.** A contribution to the sustainable use and protection of water and marine resources may be made if waters' environmental status is improved and/or any deterioration is prevented. Such a contribution may, for example, consist in

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<sup>65</sup> Cf. Art. 11 Taxonomy Regulation.

<sup>66</sup> Cf. Art. 13 Taxonomy Regulation.

<sup>67</sup> Cf. Art. 14 Taxonomy Regulation.

<sup>68</sup> Cf. Art. 15 Taxonomy Regulation.

measures for the reuse of water or the reduction of levels of contaminants of concern (pharmaceuticals, microplastics, nitrates etc).<sup>69</sup>

#### 5.2.4 Substantiality criterion

- (85) Fourthly, the undertakings concerned must show the efficiency gain that results from improving the production or distribution of goods or promoting technical or economic progress contributes **substantially** to an ecologically sustainable or climate-neutral economy. To this end, it is necessary to **analyse** the **positive** and **negative effects** of the cooperation while factoring in the efficiency gains from ecological benefits **in their entirety**, in other words from the perspective of the general public. It is then to be **assumed** consumers **enjoy a fair share** of the benefits.
- (86) On the one hand, the sustainability exemption is therefore consistent with the case law and practice established hitherto with regard to Sec. 2 para. 1 Cartel Act and/or Art. 101 TFEU, which also envisage an analysis of a cooperation's positive and negative effects.<sup>70</sup>
- (87) On the other hand, the sustainability exemption makes it possible to justify anti-competitive sustainability cooperations that may realise substantial efficiency gains from ecological benefits, but whose positive impacts **on consumers on the market in question** are not sufficient **on their own** to compensate for the negative impacts on competition on this market, as presupposed in the examination steps provided for hitherto under Sec. 2 para. 1 Cartel Act.
- (88) Substantiality criterion: The efficiency gain that results from the cooperation contributes **substantially** to an ecologically sustainable or climate-neutral economy when the **efficiency gains** from **ecological benefits** realised by the cooperation **at**

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<sup>69</sup> Cf. Art. 12 Taxonomy Regulation.

<sup>70</sup> The examination steps provided for hitherto by Sec. 2 para. 1 Cartel Act presuppose consumers on the market enjoy a fair share of the benefits, which, in line with the established practice of the European Commission, means the positive impacts on consumers on the market in question have to at least compensate for the negative impacts on competition on that market: see European Commission, 2004/C 101/08, Communication from the Commission — Guidelines on the application of Article 81(3) of the Treaty, paras. 85, 90–91; EGC T-29/92, *SPO and ors v. Commission*, ECLI:EU:T:1995:34.

**least compensate** for the cooperation's negative impacts on **competition** on the market in question.

- (89) This analysis of a cooperation's positive and negative effects ensures the efficiency gains from ecological benefits are **appropriately proportional** to the cooperation's anti-competitive effect.<sup>71</sup> Particularly severe restrictions of competition therefore also require particularly great efficiency gains from ecological benefits.
- (90) Should the efficiency gains from ecological benefits be **smaller** than the negative impacts on competition on the market in question, they do **not substantially** contribute to an ecologically sustainable or climate-neutral economy, and it is not possible to justify the cooperation by citing the sustainability exemption.
- (91) An **analysis of the positive and negative effects** of a cooperation may be conducted quantitatively or qualitatively. A quantitative analysis is necessary if it is not clear in advance how proportional the restriction of competition is to the efficiency gains from ecological benefits. In such more complex cases, the AFCA will, where applicable, deem it necessary for undertakings to estimate credibly both the effect of the restriction of competition and the level of the efficiency gains from ecological benefits. Where there are qualitative efficiency gains and qualitative restrictions of competition, it may furthermore be necessary to convert them **approximately** into monetary sums in order to be able to compare them more directly, that is, using the same unit of measurement.<sup>72</sup> This may apply, for instance, with regard to improvements in water and air quality or restrictions on the range of products.
- (92) Should just one partial aspect of the analysis be uncertain, the effort required of the undertakings concerned may be limited accordingly.<sup>73</sup> Should, for instance, the restriction of competition be indisputably small, but the value of a qualitative efficiency gain from ecological benefits be unclear, it may be sufficient for undertakings to merely quantify the latter.

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<sup>71</sup> See Erläuterung 951 BgNR 27. GP; formulated in abstract terms, consumers who do not buy the product in question and benefit from its improved ecological sustainability could hypothetically compensate in full the consumers who buy it for (net) losses due to the restriction of competition – a price increase for example – and would still be better off than if the cooperation had not gone ahead (Kaldor-Hicks efficiency).

<sup>72</sup> In many cases, a conservative approximation will be sufficient based on the upper and/or, where applicable, lower bounds of the standard deviation; further to this, see section 6.2.

<sup>73</sup> See also Erläuterung 951 BgNR 27. GP, p. 10.

(93) The conduct of a purely qualitative analysis is possible if it is clear in advance how proportional the restriction of competition is to the efficiency gains from ecological benefits. Nevertheless, where a purely qualitative analysis is carried out, statistical material may also help to demonstrate cogently the substantiality criterion is fulfilled.

### 5.2.5 No elimination of competition

(94) Fifthly, the undertakings concerned must show the cooperation does not open up opportunities for competition to be eliminated in respect of a substantial proportion of the goods in question.<sup>74</sup> Irrespective of the size of the efficiency gains, there must continue to be a certain degree of **residual competition** on the market in question.<sup>75</sup>

(95) In the assessment, the restrictions of competition imposed on the undertakings concerned must be analysed and the magnitude of the existing competition examined. In particular, changes in the interactions between the undertakings concerned, the intensity of competition and the scale of the potential competition play roles in this respect.<sup>76</sup>

(96) This condition may be fulfilled provided the undertakings concerned continue to compete vigorously against one another in respect of at least one **important aspect of competition** or there is sufficient competition from undertakings not involved in the cooperation. It is then immaterial whether the cooperation is industry-wide or merely involves individual undertakings.

(97) A number of examples are given below that accord with the view taken by the European Commission on this issue:

- If the cooperation eliminates quality or assortment competition, for example, but does not restrict price competition, which is also an important parameter for competition in the economic sector in question, this (fifth) condition may nevertheless be fulfilled.

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<sup>74</sup> OHG, 21 March 2007, 16 Ok 12/06, *Haftungsverbund II*.

<sup>75</sup> Cf. Lager and Petsche in Petsche, Urllesberger and Vartian, eds., *KartG 2005*, 2nd ed. (2016), “§ 2”, paras. 28–29; European Commission, 2004/C 101/08, Communication from the Commission — Guidelines on the application of Article 81(3) of the Treaty, para. 105.

<sup>76</sup> Jones, Sufrin and Dunne Jones, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials*, 7th ed. (Oxford University Press, Oxford: 2019), p. 273.

- If competitors compete with a range of differentiated products that are all offered on the same relevant market, the elimination of competition for one or several product variants does not necessarily mean competition is eliminated on the relevant market.
  - Nor is competition between competitors eliminated if they decide not to use a particular environmentally harmful technology or non-sustainable material, product or substance in the manufacture of their products, provided they continue to compete on price or the quality of the end product.
- (98) The elimination of competition for a **limited period of time** is immaterial provided it does not have any impacts on the longer-term development of competition. The European Commission illustrates this point with the example of a cooperation between competitors that *temporarily* limits the production of one product variant containing a non-sustainable material in order to introduce a sustainable substitute onto the market with the aim of creating consumer awareness of the new product's characteristics.

# 6 Assessment in practice

## 6.1 Recommendations for the implementation of a sustainability cooperation in conformity with cartel law

- (99) When undertakings plan to enter into a sustainability cooperation, it should be assessed **independently beforehand** using these guidelines – as well as the guidelines issued by the European Commission – whether the cooperation in fact falls within the scope of cartel law; see sections 3 and 4. Should cartel law actually come to be applied, it is to be examined whether the cooperation’s arrangements are in conformity with cartel law; see section 5.
- (100) Should justified doubts remain following this self-assessment, it is good practice to contact the AFCA **in a timely fashion prior to the implementation of the cooperation**. The AFCA may subsequently deliver an **informal assessment under Sec. 2 para. 5 Austrian Competition Act**.<sup>77</sup> In this respect, it will coordinate its deliberations periodically with the second official party, the Federal Cartel Prosecutor.
- (101) The AFCA will recommend to the initiators of the cooperation with whom it is dealing (e.g. an association of undertakings) that they forward the **original version** of such an informal official assessment to **all other undertakings involved in the cooperation**.
- (102) Should the AFCA deliver an **informal assessment** under Sec. 2 para. 5 Austrian Competition Act, this assessment is exclusively valid for a given, clear, initial situation. Should circumstances change, this may make it necessary to re-evaluate the matter.
- (103) In complex cases, the communication of detailed information and analyses to the AFCA is essential for the assessment of a cooperation; see section 6.2.

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<sup>77</sup> At this point, the AFCA wishes to reiterate that such an informal assessment is in itself no more legally binding on either national or European courts or other authorities such as the Federal Cartel Prosecutor than the AFCA’s guidelines (or indeed the guidelines issued by the European Commission).

(104) Should an undertaking come to the conclusion that, contrary to previous expectations, a cooperation it has previously entered into is not or no longer undoubtedly in conformity with cartel law, because circumstances have changed for example, it may also contact the AFCA for a – possibly repeated – informal assessment under Sec. 2 para. 5 Austrian Competition Act. While the matter is being examined by the AFCA, the undertakings concerned must **suspend** the cooperation or take other appropriate measures in consultation with the AFCA. Should the AFCA come to the conclusion the cooperation is incompatible with cartel law, and should the undertakings concerned nevertheless adhere to the cooperation, the AFCA may initiate an investigation into an infringement of Sec. 1 Cartel Act and/or Art. 101 TFEU and, where applicable, submit an **application for termination of an infringement and/or application for a fine** to the Cartel Court.

## 6.2 Recommendations for the quantification of sustainability cooperations' effects

(105) **In complex cases**, it may be necessary for **undertakings to quantify and, under certain circumstances, evaluate** the positive or negative **effects** of a sustainability cooperation in order to justify it under Sec. 2 para. 1 Cartel Act. This is the case, in particular, when it is unclear how proportional the positive effects are to the negative effects, and whether the contribution to an ecologically sustainable economy is therefore substantial; see section 5.2.4.

(106) The negative effects of a sustainability cooperation, usually impacts of the **restriction of competition** such as a rise in prices, may be **quantified** with methods drawn from competition economics.<sup>78</sup>

(107) The positive effects of a sustainability cooperation, usually efficiency gains from **ecological benefits**, may be **evaluated** with methods drawn from environmental economics.<sup>79</sup> This presupposes the undertakings concerned have already cogently

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<sup>78</sup> See e.g. Davis and Garcés, *Quantitative Techniques for Competition and Antitrust Analysis* (Princeton University Press, Princeton: 2009).

<sup>79</sup> See e.g. Inderst, Sartzetakis and Xepapadeas, *Technical Report on Sustainability and Competition* (2021), [https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition\\_0.pdf](https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf);  
Inderst, "Incorporating Sustainability into an Effects-Analysis of Horizontal Agreements" (2022), <https://ec.europa.eu/competition-policy/system/files/2022->

demonstrated the level of the ecological benefit itself, a reduction of emissions by a certain amount for example.

- (108) It is usually necessary to convert efficiency gains into monetary values in order to carry out the evaluation. This is not always simple or obvious methodologically when it comes to efficiency gains from ecological benefits – as generally in the examination of qualitative efficiency gains.
- (109) Undertakings should draw up a **plausible, transparent statement** of the methods used, the assumptions made and the outcomes that result from them, and communicate this statement to the AFCA. It should include robustness checks on the results, for example with the standard deviation (lower and upper bounds) for the estimates being given, as well as the central estimate. Furthermore, it is helpful to state the extent to which efficiency gains will be attained independently of or in dependence on production output.
- (110) In some cases, the use of results from **existing studies** and simplified (back-of-the-envelope) calculations may be sufficient. In particular, independent, academic studies and data audited by accountants may be reliable sources. Should estimates from existing studies be transferred, it is to be ensured the **circumstances** of those studies are **comparable** with the circumstances in the given case (e.g. level of income, population density or level of harm to the environment), so that the **results** are also actually **transferrable**.
- (111) In other cases, it may be necessary for the undertakings concerned to present **case-specific studies**. These may involve the use of quantitative methods and consumer surveys. Meaningful statistical material usually has to be up to date, in other words have been generated in recent calendar years, be based on a representative sample and cover a period appropriate for the assessment of the sustainability cooperation.
- (112) The **methods** that are suitable **will depend to a great extent on the individual case**, among other things on the aspects of ecological sustainability that are purportedly

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03/kd0722074enn\_HBER\_sustainability.pdf;

Watson, “Measuring environmental benefits in competition cases” (2021), [https://one.oecd.org/document/DAF/COMP\(2021\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2021)14/en/pdf);

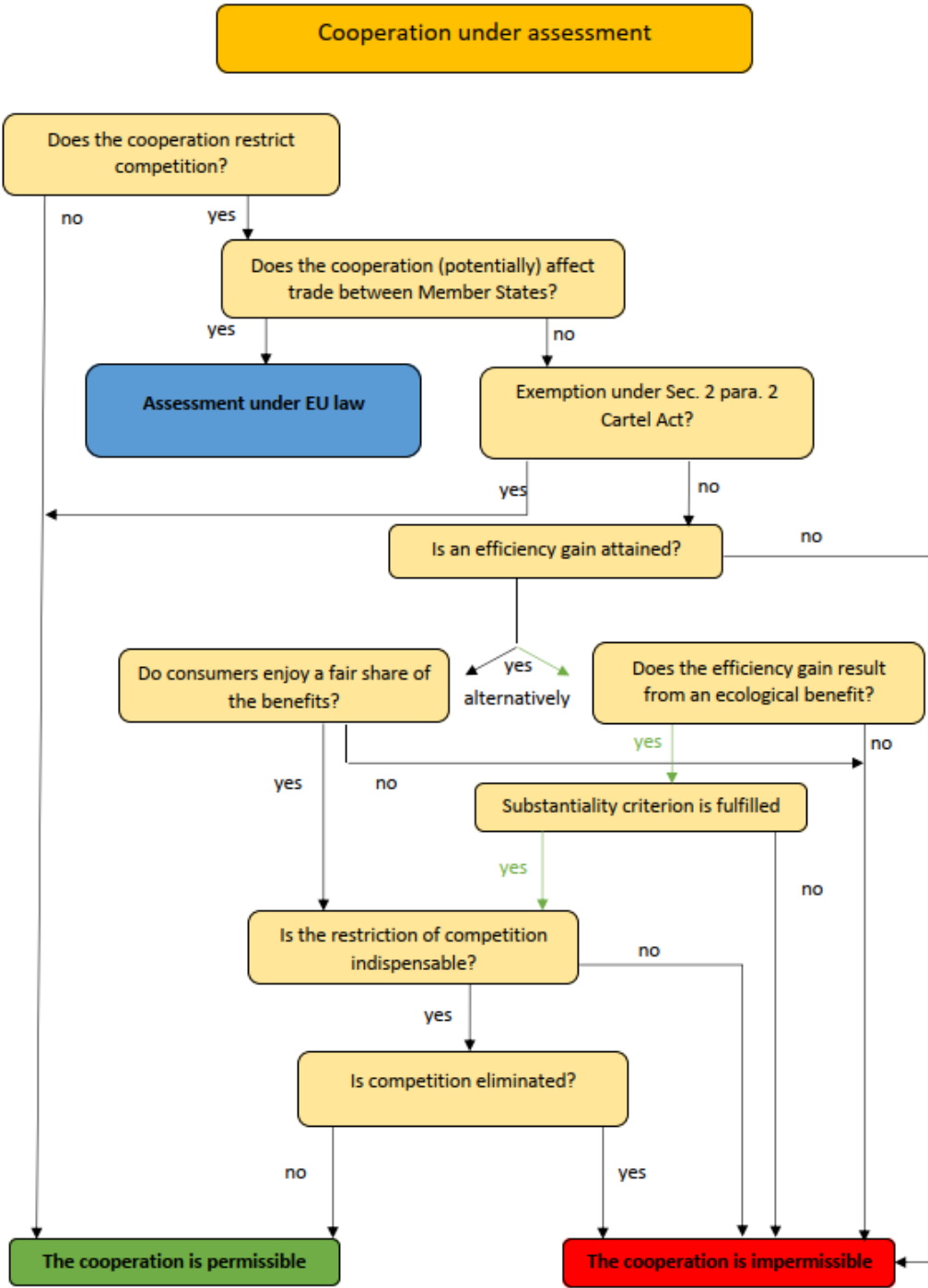
or German Environment Agency (UBA), *Methodenkonvention 3.1 zur Ermittlung von Umweltkosten* (2020), [https://www.umweltbundesamt.de/sites/default/files/medien/1410/publikationen/2020-12-21\\_methodenkonvention\\_3\\_1\\_kostensaetze.pdf](https://www.umweltbundesamt.de/sites/default/files/medien/1410/publikationen/2020-12-21_methodenkonvention_3_1_kostensaetze.pdf).



promoted, the perceptions of consumers and/or the general public, potential discrepancies between perceptions and academic findings, the availability of data and statistical measurability.

- (113) In such cases, methods are, in principle, to be used that **objectively** evaluate the ecological benefits for the general public or consumers on the market. Subjective assessments of the preferences of the general public or consumers on the market by the undertakings concerned are impermissible.
- (114) Undertakings wishing to justify an anti-competitive cooperation by reference to efficiency gains that contribute substantially to a **climate-neutral** economy are recommended to prepare a statement of the volume of CO<sub>2</sub> emissions avoided. With regard to the avoidance of emissions of other climate-damaging greenhouse gases, such as methane, it is to be recommended the figures be rendered comparable by converting them into CO<sub>2</sub> equivalent. Should the statement of the volume of emissions avoided not dispel all doubts as to the fulfilment of the substantiality criterion, there are a number of methods available to undertakings with which to (approximately) evaluate the emissions avoided in accordance with the circumstances in the individual case. The social costs of CO<sub>2</sub> emissions and the costs of avoiding them have been the subjects of diverse investigations in the literature on environmental economics. However, national and European regulatory parameters, in particular the current and foreseeable future levels of taxation on CO<sub>2</sub> and, where applicable, the capping of the volumes emitted by means of CO<sub>2</sub> certificates are also to be taken into consideration (on this issue, see para. 79).

### 6.3 Simplified flow chart of the self-assessment process



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