

Competition Law and Sustainability

DCED 2024 Annual Meeting

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Ban on Cartels



Article 101

(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

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

Ban on Cartels



§ 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.

(2) Pursuant to para. 1, it shall particularly be prohibited to:

1. directly or indirectly fix purchase and selling prices or any other trading conditions;
2. limit or control production, markets, technical development or investments;
3. share markets or sources of supply;
4. apply dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage;
5. make the conclusion of contracts subject to acceptance by the other contract parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Any agreements and decisions prohibited pursuant to para. 1 shall be automatically void.

(4) Any recommendations to maintain certain prices, price limits, calculation guidelines, trade margins and discounts which aim at or result in the restriction of competition shall be equivalent to a cartel under para. 1 (“recommendation cartels”). This shall not apply to recommendations which explicitly state to be non-binding and which are not or shall not be enforced by exerting economic or social pressure.

Legal Basis (Sustainability Exemption)

§ 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.

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.

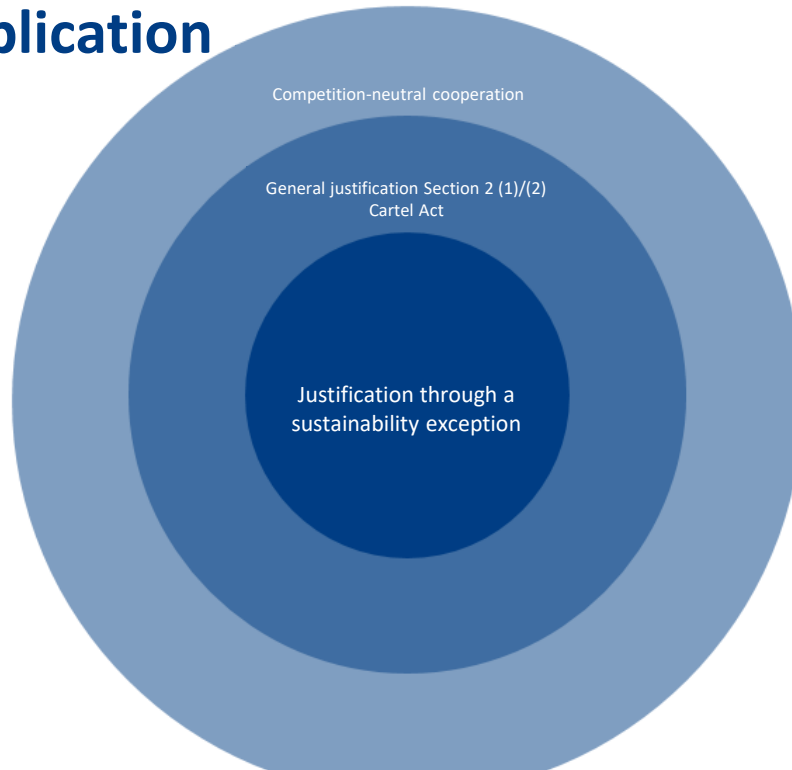
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Sustainability Guidelines

- Scope of application
- Procedure for sustainability cooperations
- Practical examples
- Recommendations



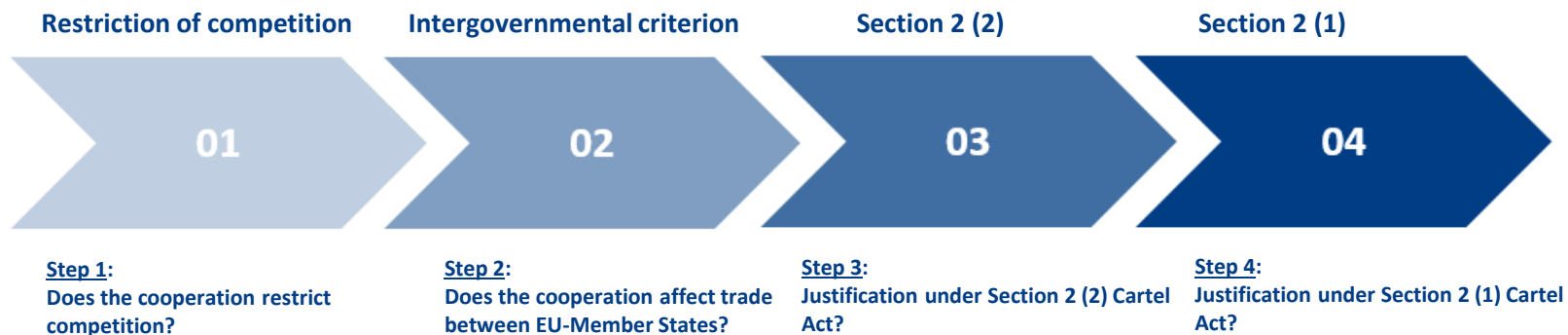
Scope of application



NB: Justification under EU law
if intergovernmental criterion
is met

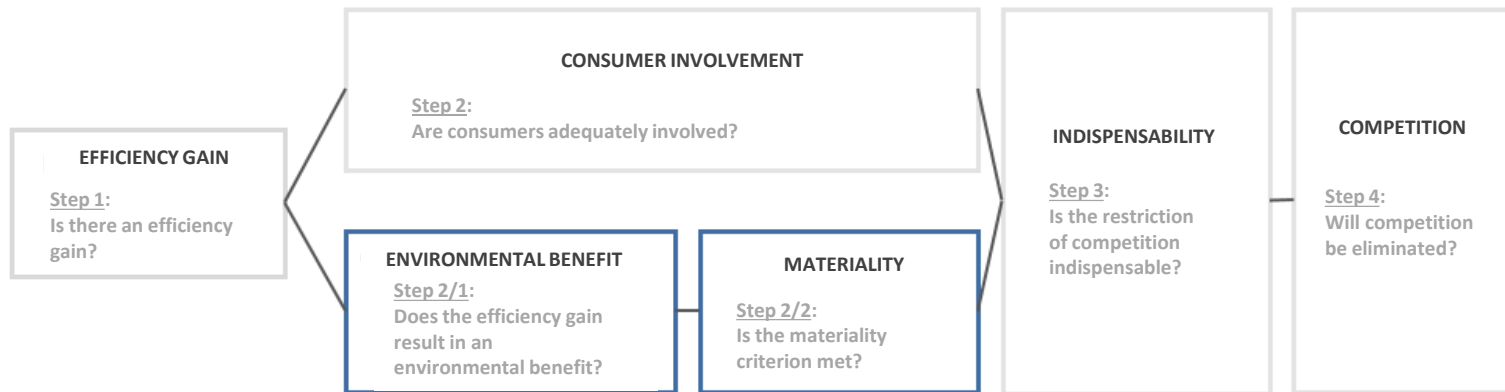
Procedure I

Simplified visualisation for self-assessment



Procedure II

Justification under Section 2 (1) Cartel Act



Practical examples

- Explanatory notes:
 - Use of exhaust or waste water filters in production (improving the production of goods)
 - Joint distribution to reduce transport costs (improving the distribution of goods)
 - Producing cars that emit less CO₂ (promoting technical progress)
- Other competition authorities, e.g.
 - GER: Raw milk price increase - animal welfare initiative
 - NL: Energy sector - wind power and price agreements to reduce CO₂ emissions

Recommendations

- In case of reasonable doubt in the self-assessment: AFCA may provide guidance
- Practical experience so far
 - Ongoing requests, likely to increase in the future
 - Publication of the Sustainability Guidelines is an important step in providing transparency and legal certainty regarding the AFCA's interpretation of the new provision
 - Living document: practical experience to be incorporated into future versions

Brochure "Competition Law and Compliance"

- 1st edition published in October 2016
- AFCA together with Austrian Chamber of Commerce
- Ratio:
 - Helping companies raise awareness, identify and mitigate antitrust risks
- Publication of the 2nd edition in June 2023

Updated brochure

- Additions on *inter alia*
 - Unfair business practices
 - Sustainability
 - Pre-notification procedures
 - Whistleblower protection



Thank you for your attention!

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Austrian Federal Competition Authority