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Competition and Corruption in Public Procurement – Note by Austria

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1. Introduction

1. Public procurement represents one of the most tangible uses of public funds. Its primary purpose is to ensure the provision of goods, construction projects, and services that directly benefit the broader population. Public procurement thus constitutes a substantial share of Austria's economic activity and plays a pivotal role in the allocation of public resources. The total amount spent by the federal government, the federal states and municipalities on the procurement of goods and services is approximately EUR 67 billion, corresponding to around 18% of Austria's GDP and 28,6% of public expenditure. Given this scale, the integrity and efficiency of procurement processes are of central importance for both economic performance and public trust.

2. Public contracting authorities must comply with the provisions of public procurement law when conducting procurement procedures. The central objective of this legal framework is to uphold the core principles of transparency, non-discrimination, equal treatment, and proportionality, thereby fostering open and performance-based competition. It also aims to ensure that public funds are used efficiently, economically and prudently. However, the proper functioning of these mechanisms fundamentally depends on the absence of unlawful practices. When competition is distorted, this can result in significant economic harm.

3. Unlawful practices in public procurement frequently take the form of collusion among bidders, in particular, bid-rigging arrangements, where firms coordinate their behaviour to manipulate tender outcomes. The societal implications of such practices are considerable. Cartels in procurement processes lead to a reduction of bidding competition and ultimately to inflated prices, reduced efficiency, and a misallocation of resources.

4. Beyond their economic impact, such conduct is prohibited under both competition law and criminal law in Austria and is subject to a range of sanctions. In aggravated cases such as those involving fraud it may result in custodial sentences. Furthermore, corruption risks may also arise through illicit cooperation between public officials and private firms. Given the substantial contract values and revenue volumes involved, public procurement has repeatedly been identified as one of the areas particularly susceptible to corruption. In Austrian enforcement practice, these two phenomena are frequently interlinked. Bid-rigging investigations have revealed parallel corruption elements. The concurrent applicability of competition law provisions on bid rigging and criminal law provisions on corruption creates both enforcement challenges and opportunities for inter-institutional coordination, as this paper illustrates.

5. Against this background, this paper will in a first part outline the Austrian legal framework of competition and corruption in public procurement from a procurement law, competition law and criminal law perspective. It will discuss the role of leniency systems for the detection of offences and possibilities for cooperation between public authorities in investigations. Lastly, the importance of advocacy measures is highlighted.

2. Public Procurement Law Considerations

6. Competition is both the foundation and a goal of the Public Procurement Act. § 20 (1) sets forth the criteria for determining whether the conduct of parties involved in a procurement procedure is appropriate or improper. It stipulates that public procurement must be conducted under conditions of free and fair competition, in accordance with the principles of equal treatment of all bidders, non-discrimination, proportionality and transparency. Free and fair competition is defined as competition that operates without undue restrictions and takes place without bribery, price-fixing, or the exploitation of unjustified competitive advantages. Non-compliance with procurement rules by bidders may result in their exclusion from the specific procurement procedure (§ 141 Public Procurement Act), as well as their exclusion from participation in future procedures (§ 78 Public Procurement Act). Contracting authorities must exclude companies from participating in the procurement procedures when there are "sufficiently plausible indications" that anticompetitive conduct has occurred. § 148(2) Public Procurement Act further establishes the option to revoke the procurement procedure if the contracting authority suspects price-fixing. This is because the award must be granted to authorised, capable, and suitable contractors at reasonable prices. A prior decision by the AFCA is not necessary for exclusion.

7. Furthermore, §26 (1) of the Public Procurement Act stipulates that contracting authorities must avoid conflicts of interest and resulting distortions of competition. According to the law, such conflicts exist when employees of the contracting authority "*who are involved in the conduct of the procurement procedure or who can influence the outcome of the procedure have, directly or indirectly, a financial, economic, or other personal interest that could impair their impartiality and independence in the context of the procurement procedure*." Public contracting authorities are required to take appropriate measures to effectively prevent, detect, and resolve conflicts of interest and to ensure equal treatment of all contractors. On the bidder side, a conflict of interest may also arise through the use of subcontractors. If a conflict of interest cannot be prevented or resolved by other, less severe measures, bidders must be excluded from the procurement procedure (§ 78(1)(7) Public Procurement Act).

3. Competition Law Implications

8. Anti-competitive agreements in procurement processes lead to a distortion of competition and qualify as an infringement of competition law. Common forms include price-fixing, restrictions on production and sales, and market-sharing agreements.

9. Austrian law imposes a ban on cartels under §1 of the Cartel Act. Following the logic of Art. 101 TFEU, it prohibits 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 (i.e. cartels)*.

10. Although §2 Cartel Act provides certain grounds for exemptions for the prosecution of cartels, bid-rigging practices constitute a hardcore cartel and may therefore not be covered by these grounds. In such cases, the intent to restrict competition is presumed, meaning that the focus of the proceedings is typically on establishing the existence of the agreement itself, rather than proving negative market effects or harm to competition.

11. The 2002 amendment to cartel law brought about significant changes to competition law in Austria. On the one hand, it established the Federal Competition Authority as an independent investigative body in competition matters and on the other

hand, it introduced a modernised system of fines targeting the liability of undertakings and associations of undertakings.

12. Thus, according to §29 of the Cartel Act, if the Cartel Court finds that a competition law infringement has occurred, it may impose fines of up to 10% of the undertaking's total turnover of the last business year. § 30 (1) and (2) of the Cartel Act sets out aggravating factors when establishing a fine such as the gravity of the violation, the duration and enrichment due to the infringement, the degree of responsibility and the economic capacity of the undertaking. Subparagraph (3) moreover provides certain mitigating factors, including the voluntary termination of the infringement, cooperation throughout the investigation process or the compensation of losses.

4. Criminal Law Implications

13. The 2002 amendment to the Austrian Cartel Act also had an impact on criminal law provisions related to cartel prohibitions. Until the 2002 reform, §129 of the Cartel Act referred to the offence of "cartel abuse" in the context of bid-rigging conduct in public procurement procedures. Although a provision within the Cartel Act, it imposed criminal liability for natural persons. In 2002, the Austrian legislator "decriminalised" the Cartel Act, limiting liability for administrative fines imposed for anti-competitive agreements in procurement procedures under the Cartel Act solely to undertakings. However, in the same vein, a provision in the Austrian Criminal Code was introduced, intended to impose criminal liability for collusive tendering which is prohibited under competition law (§168b of the Criminal Code).

14. Under §168b of the Criminal Code, a prison sentence of up to three years may be imposed on anyone who submits a request to participate, submits a tender, or conducts negotiations in a procurement procedure based on an unlawful agreement aimed at inducing the contracting authority to accept a specific offer. The wording of the provision does not distinguish between public and private contracting authorities and it was recently confirmed that private contracting authorities are included within its scope of application (OGH 21.11.2023, 11 Os 112/23i).

15. The specific feature of this offence is that liability only arises where the conduct is based on an unlawful agreement within the meaning of competition law. The criterion of illegality is thus primarily determined by competition law (in accordance with §1 Cartel Act). Furthermore, the application of §168b of the Criminal Code does not require any actual or potential financial loss. It was introduced for cases in which prohibited collusion has taken place but where the full elements of fraud are not met. However, in certain cases, bid-rigging may be prosecuted as fraud under §146 of the Criminal Code, which, however, requires actual damage to the contracting party. Fraud is punishable by imprisonment for up to six months or an individually calculated fine. In cases where the criminal behaviour is considered to be serious fraud and a loss of over EUR 300,000 is incurred, this can result in a prison sentence of up to 10 years.

16. If corruption was involved in the collusion, other legal provisions under Austrian Criminal Law may apply. While the Austrian Criminal Code does not provide for a legal definition of the term "corruption", the Code allocates a whole section to "criminal breaches of official duty, corruption, and related criminal offences". This section encompasses a wide range of criminal offences, such as abuse of public office (§ 302 Criminal Code), accepting bribes (§ 304 Criminal Code) or offering bribes (§ 307 Criminal Code), and accepting or offering improper benefits for oneself or for third parties (§ 305 & §307a Criminal Code). The primary actors in this context are individuals performing public

functions, such as civil servants or other public officials, as defined in § 74(1) of the Criminal Code. In addition, corruption-related offences within the public administration in Austria are also subject to sanctions under applicable public service law. In practice, corruption and collusion in procurement may arise in parallel. For instance, where a public official is involved in facilitating collusive arrangements in a procurement procedure, provisions on abuse of public office (§302 Criminal Code) or bribery (§304, §307 Criminal Code) may apply alongside competition law sanctions under §168b of the Criminal Code. In such cases close coordination between the AFCA, the Public Prosecutor's Office for Economic Affairs and Corruption (WKStA), and the Federal Bureau of Anti-Corruption (BAK) is required.

5. Ne bis in idem

17. Companies may, under certain circumstances, also be subject to criminal sanctions for infringements of § 168b of the Criminal Code. Under the Corporate Criminal Liability Act, a legal entity is responsible for offences committed by decision-makers or employees if (1) the offence was committed for the entity's benefit or (2) the offence resulted in a breach of the entity's obligations. The liability of a legal entity for an offence and the criminal liability of decision-makers or employees for the same offence do not exclude one another.

18. This criminal liability of undertakings gives rise to the question of double jeopardy in the context of competition law and criminal law. In Austria, the application of the ne bis in idem principle has been widely discussed, for example in cases of bid rigging.

19. The AFCA has consistently taken the view that § 168b of the Criminal Code and § 29 of the Cartel Act constitute complementary legal responses to socially harmful conduct that protect different legal interests.

20. In 2024, the Austrian Supreme Court acting as Supreme Cartel Court confirmed this view in two decisions (May 2024, Opinion Research Cartel, 16 Ok 5/23f, and October 2024, Joinery Cartel, 16 Ok 6/23b). In both cases, the Cartel Court had previously rejected AFCA's applications on the grounds that, due to prior finalised criminal proceedings, the same conduct would be sanctioned twice. In resolving the question around possible double jeopardy, the Supreme Cartel Court held that as a limiting criterion, the parallel legal responses must not impose an excessive burden on the concerned person. Moreover, both proceedings must be foreseeable and duplication in the collection and assessment of evidence must be avoided.

6. Detection and investigation of collusion in public procurement

21. The confidential nature of such arrangements makes the detection of unlawful collusion in procurement procedures particularly challenging. Anonymous whistleblowers and leniency applicants who report misconduct therefore play a crucial role in supporting effective investigative efforts.

6.1. The role of Leniency

22. Both Austrian competition law and criminal law provide for the possibility of being exempted from legal sanctions following the involvement in collusive bidding.

23. Pursuant to § 11b of the Competition Act, the AFCA may, provided that an undertaking cooperates in uncovering a cartel, opt for requesting a reduction of the fine or refrain from seeking the imposition of a fine before the Cartel Court. The following general conditions under § 11b (1) 1, 2 and 4) of the Competition Act apply:

- The requesting undertaking terminates its participation in the (alleged) infringement.
- The undertaking cooperates truthfully, fully and expeditiously with the AFCA throughout the duration of the preliminary proceedings. This includes submitting all evidence of the suspected infringement in their possession and not publicly disclosing the ongoing cooperation with AFCA.
- The requesting undertaking has not coerced other undertakings to participate in the infringement.

24. In addition to these general requirements, eligibility criteria under § 11b (1) 3 lit a and b of the Competition Act apply to the immunity of fines:

- If the undertaking is the first to submit information and evidence to the AFCA which upon suspicion of a competition violation, enable the immediate application for a dawn raid pursuant to § 12 (1) of the Competition Act.
- If the AFCA already has sufficient information and evidence to file a request for a dawn raid, the undertaking must be the first to submit additional information and evidence that will enable the AFCA to directly file a substantiated application for the imposition of fines before the Cartel Court pursuant to § 36 (1a) of the Competition Act.

25. Generally, immunity of fines can only be granted to the first undertaking applying for leniency. Accordingly, full exemption from fines can no longer be justified for cases where the AFCA already has sufficient information and evidence to prove the infringement in proceedings before the Cartel Court. Nevertheless, in such cases where an undertaking provides information and evidence with *significant added value* compared to the information and evidence already in AFCA's possession, reduced fines may be applicable.

26. Upon receipt of the request to leniency status, the AFCA ultimately notifies the Federal Cartel Prosecutor who is the second official party in competition law proceedings before the Cartel Court. This notification is particularly important in cases where competition law infringements have possible criminal law implications, particularly in view of immunity of criminal sanctions (§ 209b of the Code of Criminal Procedure).

27. § 209b of the Code of Criminal Procedure contains complementary provisions to § 11b of the Competition Act which also allow natural persons to be exempted from punishment due to their cooperation with the law enforcement authorities. A special procedure has hereby been established for those criminal offences committed through violations of competition law. This includes bid-rigging in public procurement (§168b Criminal Code), fraud offences (§146 et seq. Criminal Code), as well as inadmissible bidding agreements in compulsory auction proceedings (§292c Criminal Code).

28. The application of §209b of the Code of Criminal Procedure requires that:

29. The AFCA grants leniency to an undertaking in the course of an investigation, resulting either in the immunity from fines or a reduction of fines; and

30. Given the significance of the undertaking's contribution to uncovering a cartel infringement, it would be disproportionate to prosecute employees for such criminal offences.

31. § 209b of the Code of Criminal Procedure thereby closes an important gap by ensuring that employees do not face criminal consequences precisely because of their cooperation with the AFCA, as this could otherwise undermine incentives to participate in the leniency programme. The assessment of the weight of such cooperation is carried out by the Federal Cartel Prosecutor. Furthermore, § 209b of the Code of Criminal Procedure can only be invoked by those employees of an undertaking who have actively cooperated in the investigation of the competition infringement under the leniency programme.

32. The Federal Cartel Prosecutor subsequently notifies the WKStA if he thinks it would be disproportionate to prosecute employees who participated in such infringement on behalf of the undertaking. The employees in question must then disclose all relevant information to the Public Prosecutor. This is followed by the provisional suspension of the investigation, subject to possible future prosecution.

33. After such a notification by the Federal Cartel Prosecutor, the Public Prosecutor shall close the preliminary proceedings against those employees who have disclosed to the Public Prosecutor and the Court all their knowledge of their own acts and other facts relevant to the clarification of the offences committed by the infringement, subject to possible future prosecution.

6.2. Inter-institutional cooperation among public sector bodies

34. The AFCA regularly cooperates with other authorities pursuant to § 10(1) of the Competition Act for the purpose of gathering information. In practice, particularly close and reciprocal cooperation exists with the WKStA, especially in connection with infringements of § 1 Cartel Act (cartel prohibition) and § 168b Austrian Criminal Code (anti-competitive agreements in procurement procedures). The two authorities are required to mutually inform each other where there is suspicion of cartel-related collusion. The exchange of documents needed in investigations takes place on the basis of the constitutionally mandated duty of administrative assistance (Article 22 Federal Constitutional Law) and AFCA's obligation to report under § 78 of the Code of Criminal Procedure.

35. Information received from other public institutions has also triggered the initiation of investigations by AFCA in the past. For example, investigations into the construction cartel pursued by the AFCA originated from findings by a tax fraud investigation unit, which notified both the WKStA and the AFCA of suspicions of offences. The case subsequently involved parallel competition law and criminal proceedings, with the AFCA investigating the bid-rigging arrangements under §1 of the Cartel Act while the WKStA pursued criminal charges including under §168b of the Criminal Code. The detection pathway illustrates how inter-institutional information flows can support the detection of anticompetitive conduct in procurement.

7. Importance of advocacy measures

36. The AFCA has implemented numerous preventive measures in recent years. These take the form of cooperation with public authorities, compliance training in municipalities and cities, and the provision of training materials for contracting authorities.

37. In 2024, a joint initiative was launched between the AFCA and several Regional Courts of Audit. It is addressed to contracting authorities and is intended to raise awareness of how to detect and prevent bid-rigging. The initiative highlights typical characteristics

and potential warning signs and provides guidance on how to design tender documents to reduce the likelihood of collusion.

38. In the context of anti-corruption efforts, the AFCA emphasises that there should be no involvement or coordination on the part of contracting authorities with potential contractors, and that no preferential treatment should be given to established bidders. The design of procurement procedures should promote genuine competition among bidders. These objectives can be achieved, for example, through appropriate compliance and anti-corruption measures.

39. As part of the "Compliance Compass for Municipalities" project, the AFCA, together with the BAK, offers practical compliance training for municipalities.

8. Conclusion

40. Public procurement plays a central role in economic activity and in the allocation of public resources, however where competition is distorted through bid rigging or corrupt practices, consequences involve higher costs, reduced efficiency, and diminished trust in public institutions. The outlined legal framework, which encompasses procurement, competition and criminal law, therefore seeks not only to sanction misconduct but also to safeguard fair competition and the integrity of public spending. At the same time advocacy and preventive measures are essential to reduce risks at an early stage. This improves awareness, strengthens tender design, and enables the detection of suspicious patterns. Close cooperation between competition authorities, procurement bodies, and other stakeholders is key to identifying risks and responding effectively.