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

## **Working Party No. 3 on Co-operation and Enforcement**

### **Criminalisation of cartels and bid rigging conspiracies – Note by Austria**

9 June 2020

This document reproduces a written contribution from Austria submitted for Item 1 of the 131<sup>st</sup> OECD Working Party 3 meeting on 9 June 2020.  
More documents related to this discussion can be found at  
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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## *Austria*

### 1. Sanctions for bid rigging

#### 1.1. Cartel fines

1. The main competition acts in Austria are the Cartel Act (*Kartellgesetz*), which deals with substantive competition law as well as procedural rules of the Cartel Courts (“CC”), and the Competition Act (*Wettbewerbsgesetz*), which defines the investigative tools of the Federal Competition Authority (“BWB”).<sup>1</sup> The prohibition of anticompetitive conduct, including hardcore cartels such as bid rigging, is laid down in Sec 1 et seq Cartel Act, which corresponds to Art 101 TFEU. This provision does not distinguish between bid rigging in public and private procurement.

2. In 2002, competition legislation in Austria changed significantly by moving away from a system solely based on criminal responsibility of individuals to a system mainly relying on monetary fines imposed on undertakings. The Cartel Act provides that the CC may impose fines of up to 10 per cent of the undertaking’s total turnover in the last business year for an infringement of European or Austrian competition law.<sup>2</sup> According to Sec 30 of the Cartel Act, aggravating and mitigating factors must be considered when setting the fine. Such mitigating factors include, for example, the voluntary termination of the infringement or the compensation of losses.<sup>3</sup> In the Austrian fining practice, the implementation of an earnest compliance system may be qualified as a mitigating factor only if it leads to the voluntary termination of the anti-competitive conduct.<sup>4</sup>

3. It should be noted that the CC must not impose higher fines than what the BWB has suggested to the CC. When calculating the fines, the BWB mostly relies on the EU fining guidelines. The highest fine imposed by the CC on a single undertaking amounts to EUR 30 Mio.<sup>5</sup>

4. In Austria, cartel fines are not criminal sanctions *strictu sensu* but they are considered penalties close in character to those that can be imposed under criminal law (*strafrechtsähnlicher Charakter*) as they contain both preventative and repressive elements.<sup>6</sup>

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<sup>1</sup> The BWB is not a decision-making body but an independent investigative authority similar to a public prosecutor. Final and binding decisions in competition matters are made by the specialized CC, which decide solely upon application of the BWB or the Federal Cartel Prosecutor.

<sup>2</sup> Sec 29 Cartel Act.

<sup>3</sup> Sec 30 (3) Cartel Act.

<sup>4</sup> *Harsdorf/Hölzl*, Die Bedeutung kartellrechtlicher Compliance-Programme aus Behörden- und Unternehmenssicht, ÖZK 2016, 222.

<sup>5</sup> OGH 8.10.2015, 16 Ok 2/15b, *Spar*.

<sup>6</sup> OGH 4.10.2010, 16 Ok 5/10; OGH 06.11.2007, 5 Ob 154/07v; OGH 12.09.2007, 16 Ok 4/07.

## 1.2. Criminal sanctions

5. Since 2002, the Austrian Criminal Code (*Strafgesetzbuch*) contains a provision that criminalises anticompetitive conduct in the context of tendering procedures.<sup>7</sup> This provision explicitly prohibits collusive tendering - i.e., rendering a tender or conducting negotiations based on an unlawful agreement aiming to induce the contracting entity to accept a certain tender. According to this provision, individuals may face prison up to three years. Likewise, bid rigging can be qualified as fraud under certain conditions<sup>8</sup> and offenders may be imprisoned up to ten years.<sup>9</sup>

6. However, not only individuals can be criminally liable under Austrian law for collusive tendering. Under the Austrian Law on the Responsibility of Legal Entities (*Verbandsverantwortlichkeitsgesetz*) criminal conduct such as collusive tendering committed by an employee or a “decision maker”<sup>10</sup> can be attributed to the company under several conditions, namely if the conduct was committed (1) to the benefit of the company or (2) in violation of duties addressed to the company.<sup>11</sup> In many cases, collusive tendering will be arguably beneficial for the company.

7. If it was committed by an employee, attribution to the company additionally requires that the company’s representatives did not take appropriate measures to prevent criminal activities.<sup>12</sup> Such a measure can be an adequate compliance system aiming to prevent anti-competitive practices.<sup>13</sup> Accordingly, when collusive tendering was committed by an employee, the company may avoid criminal liability if it can prove that the representatives established a genuine compliance system. Whereas when it was committed by a “decision maker”, the criminal behaviour will be directly attributed to the company.<sup>14</sup>

8. Provided that these conditions are met, the company may be held liable and fined by the criminal court. Compared to cartel fines, criminal fines are very low though, as they must not exceed EUR 850.000 in the case of collusive tendering.<sup>15</sup>

## 1.3. Consequences under public procurement law

9. Another legal consequence of collusive tendering is stipulated in the Austrian Public Procurement Act (*Bundesvergabegesetz*). It provides that contracting authorities must exclude companies from participating in the procurement procedures when there are “sufficiently plausible indications” for an adverse agreement with other companies,

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<sup>7</sup> Sec 168b Criminal Code.

<sup>8</sup> Sec 146 et seq Criminal Code.

<sup>9</sup> Sec 147 (3) Criminal Code.

<sup>10</sup> According to Sec 2 (1) Law on the Responsibility of Legal Entities “decision maker” is a broad term including heads of businesses and any persons having significant influence on decisions or who exercise control within a business.

<sup>11</sup> Sec 3 (1) Law on the Responsibility of Legal Entities.

<sup>12</sup> Sec 3 (3) Law on the Responsibility of Legal Entities.

<sup>13</sup> *Hilf/Zeder* in Höpfel/Ratz, WK<sup>2</sup> VbVG § 3 at recital 41.

<sup>14</sup> Sec 3 (2) Law on the Responsibility of Legal Entities.

<sup>15</sup> Sec 4 Law on the Responsibility of Legal Entities.

especially agreements aimed at distorting competition such as collusive tendering.<sup>16</sup> Such exclusion does not require a prior decision by the BWB.

## 2. Process for obtaining criminal sanctions

### 2.1. Coordination of enforcement activities

10. Criminal offences such as collusive tendering and fraud are not pursued by the BWB but by the public prosecution and the criminal courts according to the Code of Criminal Procedure (*Strafprozessordnung*). The BWB is obliged to report any suspicion of a criminal offence to the public prosecution but it is not involved in the sentencing process.<sup>17</sup> Likewise, according to the law, public prosecution and the police can share any data or evidence obtained in their investigations with the BWB. This includes highly sensitive data e.g. telecommunication recordings.

11. Similar to the criminal branch, the BWB is provided with a wide range of investigative tools. It has effective powers to require undertakings or associations of undertakings to provide information necessary and to disclose information that may enable the BWB to investigate putative infringements of competition law or to conduct sector inquiries. If necessary, the BWB has the power to execute such requests by compulsory enforcement.<sup>18</sup> Moreover, the BWB is able to conduct interviews and interrogations with representatives of undertakings and with any natural person who may possess information relevant for investigations.<sup>19</sup> Provided the CC has issued a warrant, the BWB can also conduct dawn raids when there are reasonable grounds for suspecting an infringement of European or Austrian competition law.<sup>20</sup>

12. It is common practice that the BWB and the public prosecution cooperate and coordinate their investigations. For instance, the BWB may call in police officers to assist in enforcing dawn raids, including physical securing of buildings or premises and electronic evidence gathering.<sup>21</sup> Moreover, the Competition Act authorizes the criminal police, the public prosecution and the courts to transmit legally obtained personal data to the BWB whenever it is necessary for its cartel investigations.<sup>22</sup> Likewise, agencies such as the public prosecution may request information and documents with regard to investigations from the BWB by means of mutual assistance.<sup>23</sup> Accordingly, evidence gathered in investigations by criminal law enforcement agencies may be used in competition cases, and vice versa. Indeed, the cooperation has benefited both branches considerably in detecting illegal conduct.

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<sup>16</sup> Sec 78 (1) Public Procurement Act.

<sup>17</sup> Sec 78 (1) Code of Criminal Procedure.

<sup>18</sup> Sec 11a Competition Act.

<sup>19</sup> Sec 11 (2) Competition Act.

<sup>20</sup> Sec 12 Competition Act.

<sup>21</sup> Sec 14 Competition Act.

<sup>22</sup> Sec 10 (1a) Competition Act.

<sup>23</sup> Art 22 Federal Constitution Act (*Bundes-Verfassungsgesetz*).

## 2.2. Prohibition of double jeopardy (*'ne bis in idem'*)

13. It follows from the situation described above, that a company may face two different sanctions for bid rigging in Austria: cartel fines imposed by the CC upon application of the BWB and criminal sanctions imposed by the criminal courts. It has been quite controversial in Austria whether bid rigging may be prosecuted under both criminal and competition law in view of the *ne bis in idem* principle. However, it must be noted that the criminal provision of collusive tendering and the prohibition of anti-competitive conduct do not aim at protecting the same legal interest, as the main purpose of the criminal provision is to protect the interest of the contracting entity.<sup>24</sup> Moreover, it is doubtful whether the criminal fine of maximum EUR 850.000 corresponds with the seriousness of an offence like collusive tendering and is as such adequate to punish it in an effective, proportionate and dissuasive manner.<sup>25</sup> For these and other reasons, the BWB follows the approach that prosecuting bid rigging under criminal and competition law does not constitute an infringement of the *'ne bis in idem'* principle.

## 3. Leniency

### 3.1. The role of leniency

14. Leniency plays a very important role in the Austrian cartel enforcement framework and tells a success story. This might be surprising for a rather small jurisdiction and Austria is quite exceptional in this regard. Unlike many other EU Member States, the scope of the Austrian Leniency programme covers the full range of prohibitions laid down in Sec 1 Cartel Act and Art 101 TFEU and is not restricted to collusive agreements between two or more competitors on the same level of the production or distribution chain.

15. The large number of leniency applications suggests its effectiveness and impact on prosecution: Since 2004, with the entry into force of the leniency program, the BWB has received 104 leniency applications. Between 2001 and 2018 the CC imposed fines amounting to EUR 202 Mio, of which more than half lead back to cases that have been initiated as a result of a leniency application.

### 3.2. Eligibility criteria

16. According to the Competition Act, an undertaking is eligible for leniency, if
1. it is the first undertaking to inform the BWB about an infringement in a way the BWB can apply for a search warrant or, if the BWB has already learned about an infringement, provides as first undertaking additional information, which enables the BWB to file an application to the CC without further investigations,
  2. it has ceased its participation in the cartel activities,
  3. it cooperates without any restrictions with the BWB and
  4. it has not forced other undertakings to participate in the cartel.<sup>26</sup>

<sup>24</sup> *Kirchbacher* in Höpfel/Ratz, WK<sup>2</sup> § 168b StGB at recital 58.

<sup>25</sup> *Schicho/Xeniadis/Gänser*, Das Prinzip *ne bis in idem* im Wettbewerbsrecht: Europäische Judikatur und österreichische Rechtslage, ZWF 2019, 229 (234).

<sup>26</sup> Sec 11b (1) Competition Act.

17. Only the first undertaking that fulfils the leniency criteria under point i.–iv. receives full immunity. Other undertakings may be eligible for reduced fine, if the conditions under point ii.–iv. are met and if they provide information that represents “significant added value”.<sup>27</sup> The concept of “significant added value” refers to the extent to which the submitted information and evidence, due to their quality and/or level of detail, enable the BWB to prove the facts of the respective case in a more conclusive way than would have been possible without the provided information.<sup>28</sup>

### 3.3. Leniency in the context of bid rigging

18. In the context of bid rigging, the dualism of enforcement by the BWB and public prosecution is also being reflected in leniency: when a company applies for leniency, it may put its employees at risk of criminal prosecution. Therefore, the leniency framework provides the possibility of a "criminal immunity" for the employees of a company that significantly contributed to the detection of a cartel infringement towards the BWB, the European Commission or a competition authority of another EU Member State.<sup>29</sup> This requires that the Federal Cartel Prosecutor<sup>30</sup> considers the criminal prosecution of the employees to be inappropriate in view of the company’s contribution to detect the cartel infringement. If so, the Federal Cartel Prosecutor must notify the public prosecution of the acceptance of a leniency application by the BWB. The public prosecution must then terminate the criminal investigation against employees that have declared to disclose all information in respect of their own acts, or which are of decisive importance for the detection of the committed offences.<sup>31</sup>

19. In this regard, the Federal Cartel Prosecutor acts as an intermediary between the BWB and the public prosecution. It is at his discretion to decide whether it would be inappropriate to expose employees of a company that has applied for leniency to criminal prosecution. For this purpose, the Federal Cartel Prosecutor and the BWB maintain a steady information exchange and the cooperation works very well. The Federal Cartel Prosecutor also has access to the case files.<sup>32</sup> The BWB informs the Federal Cartel Prosecutor of each step of the investigation relating to the leniency applicant, such as issuing the notification of the acceptance of a leniency application. Following this notification, the Federal Cartel Prosecutor starts evaluating the company’s contribution to the cartel detection.

20. Although the dualism of criminal and cartel enforcement is not without challenges, the Austrian leniency system has proven its effectiveness. For this reason, it served as a model for the ECN+ directive<sup>33</sup>, which in Art 23 regulates the interplay between

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<sup>27</sup> Sec 11b (2) Competition Act.

<sup>28</sup> See BWB’s Handbook on Leniency Programme, at recital 23, available at: [https://www.bwb.gv.at/fileadmin/user\\_upload/PDFs/Leniency\\_Handbook\\_final\\_version.pdf](https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Leniency_Handbook_final_version.pdf)

<sup>29</sup> Sec 209b Code of Criminal Procedure.

<sup>30</sup> The Federal Cartel Prosecutor and his Deputy belong to the Ministry of Justice and are supported by the registry of the Cartel Court in administrative matters. They also deal with cartels, abuse of market power and merger control.

<sup>31</sup> See BWB’s Handbook on Leniency Programme, at recital 49 et seqq, available at: [https://www.bwb.gv.at/fileadmin/user\\_upload/PDFs/Leniency\\_Handbook\\_final\\_version.pdf](https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Leniency_Handbook_final_version.pdf)

<sup>32</sup> Sec 81 (3) Cartel Act.

<sup>33</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ 2019 L 11/3.

applications for immunity from fines and sanctions on natural persons. However, one crucial difference is that Art 23 of the ECN+ directive refers to the contribution of each individual employee, whereas in the Austrian leniency system it is the company's contribution to the cartel detection, which is essential.