

Germany introduces federal Competition Register for public procurement

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The Competition Register Act (see English text here) establishes a federal and centralized register of information enabling contracting authorities to assess whether a company must or can be excluded from a tender procedure in Germany for having committed economic offences.

The Competition Register is hosted by the Federal Cartel Office (BKartA). The BKartA – which is also the competent authority for imposing cartel fines in Germany – has now started operating the Competition Register by providing access to contracting authorities in Germany.

What kind of offences or misconduct will be registered in the Competition Register?

Final decisions regarding certain offences by company representatives or leaders that, pursuant to sec. 123 and 124 of the German Act against Restraints of Competition (ARC), provide contracting authorities with a reason for a mandatory or facultative exclusion of a bidder from a public procurement procedure will be registered in the Competition Register.

The offences listed include:

- giving or offering benefits and bribes to officials (section 333 and 334 German Criminal Code) or members of parliament (section 108e German Criminal Code), including in certain cases to foreign and international public officials and members of legislative bodies (section 335a German Criminal Code, article 2 section 2 of the Act on Combating International Bribery);
- money laundering and concealment of illegally acquired assets (section 261 German Criminal Code); and
- bid rigging (section 298 German Criminal Code).

Final decisions regarding violations of the Act on Combating Clandestine Employment or the Act on Minimum Wages will be registered in case a fine of more than € 2,500 or a prison sentence of more than three months has been imposed.

It is noteworthy that the setting of an administrative fine of at least € 50,000 for certain cartel-related offences such as a concerted practice or an abuse of a dominant position will lead to an entry even if there is not yet a final decision.

The register authority will give the company the opportunity to comment on the offence or the misconduct before an entry in the competition register is made. The company hereby can prevent an entry that is based on wrong facts.

What are the consequences of a registration in the competition register?

Entries in the register may lead to debarment from public procurement award procedures. The Competition Register Act requires contracting authorities in such procedures for a contract with a value of at least € 30,000 to check if the bidder with the economically advantageous tender is registered in the competition register. In procurement procedures with a prior invitation to tender (e.g. restricted procedure, negotiated procedure with notice, competitive dialogue), the contracting authority may choose to check whether a company is registered before sending the invitation to tender to the company. In case a company is registered, it remains within the competence of the contracting authority to decide on the exclusion from a tender procedure.

For how long will the entries remain in the Competition Register?

Criminal offences will be deleted five years after the final decision has been issued. Other offences such as e.g. cartel-related entries are deleted three years after the decision regarding the fine has been issued.

What can companies do to have their entry removed from the Competition Register earlier?

Companies can apply to the register authority for an earlier removal from the Competition Register. When doing so, the company must prove that it has performed sufficient self-cleaning measures pursuant to section 125 GWB. The rules on self-cleaning require that the company:

1. has paid or agreed to pay in respect of any damage caused by the offence or misconduct;
2. has fully cooperated with the investigating authorities and the contracting authorities in order to clarify the facts and circumstances relating to the offence or misconduct and the damage which has been caused in a comprehensive manner; and
3. has taken concrete technical, organizational and personnel measures that are appropriate to prevent further offences or misconduct.

The register authority may request the company to provide expert opinions on the sufficiency of its self-cleaning measures. A decision of the register authority to remove an entry from the Competition Register is binding for contracting authorities in the way that the underlying offence or misconduct may no longer be the basis for an exclusion of the company.

Is there a possibility for judicial review of an entry?

Any decision of the register authority is subject to judicial review.

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