

The “register of competition” - Good things come to those who wait?

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The idea of a nationwide “register of corruption” which, among other things, registers white-collar crimes and respective administrative offences has haunted the German procurement law world for years. A bill (WRegG) bringing this idea to fruition was recently passed. The register must be established by 31 December 2020 and will replace the existing registers of some of the German federal states. Before awarding a contract, contracting authorities must consult the register and may exclude companies with a high degree of legal certainty on the basis that the company is listed on the register. Besides administering registrations, the German Federal Cartel Office as the responsible registration authority will also evaluate whether a registered company has implemented sufficient self-cleaning measures. In this case, the company will be removed from the register and be able to participate in public procurement procedures again. The implementation of this bill will have far-reaching impacts on procurement law practice in Germany.

What will be registered?

Only final decisions regarding offences that give rise to mandatory or discretionary grounds for exclusion pursuant to sec. 123 and 124 of the German Act against Restraints of Competition (ARC) will be registered (sec. 2 para. 1 No. 1-3 and para 2 WRegG). Practically relevant offences include bribery, fraud, tax or money laundering offences as well as bid rigging within the meaning of sec. 298 German Penal Code and antitrust offences. Financial penalties by the European Commission following antitrust offences as well as convictions in other countries are, however, not subject to the register. A different scope is currently practically impossible since the obligation to transmit final decisions naturally only applies to German authorities assigned with pursuing penal and administrative offences (sec. 4 para. 1 WRegG). The register does not cover discretionary grounds for exclusion that are not necessarily linked to a final decision regarding an offence, e.g. grounds of exclusion because of grave professional misconduct and improper contractual performance.

Who will be registered?

The register exclusively enlists companies. Due to their lack of criminal liability in Germany, only fines imposed on companies pursuant to sec. 30 of the German Code of Administrative Offences are directly relevant for the register. In determining these fines under the bill, there will be a broader attribution of liability than compared with the

existing ARC, since sec. 130 of the German Code of Administrative Offences is applicable. That rule provides for an attribution also in cases of supervisory and organisational fault. The relevant attribution of liability for convictions of the supervisory staff following sec. 3 para. 2 WRegG is equivalent to the rules under sec. 123 para. 3 ARC for cases above the EU threshold.

According to its explanatory memorandum, the bill does not provide for attribution of liability within a corporate group. However, there is only one express provision in the WRegG stating that an attribution of liability to a parent company is not possible in cases where a subsidiary committed the antitrust offences pursuant to sec. 81 para. 3 lit. a-c ARC (sec. 2 para. 2 s. 2 WRegG). However, if the acts of a convicted person are attributable to several group companies, the exclusion of the respective group companies is possible.

How are registration requirements assessed?

The bill only partially codifies the assessment of the registration requirements. In particular, it does not include express rules as to which authority may assess which registration requirement. According to the explanatory memorandum, it follows from sec. 4 para. 1, sec. 5 para. 1 WRegG that the registration authority is independently and definitively responsible for the assessment and decision of registration.

The transmitted data provided by the relevant (investigative) authorities serves as the sole basis for the assessment of the specific registration requirements. The registration authority only refrains from registering if the transmitted data is clearly wrong (sec. 4 para. 2 WRegG) or if the affected company can prove upon notification that the data is wrong (sec. 5 para. 1 WRegG). If the registration authority nevertheless registers the company, the company can appeal the decision before the Higher Regional Court of Düsseldorf (sec. 11 WRegG).

What are the consequences of being registered?

Contracting authorities and utilities that award concessions are obliged to consult the register before awarding contracts (sec. 6 para. 1 WRegG). This obligation applies to contracting authorities in case of a contract value of at least EUR 30.000. Contracting authorities and utilities that award concessions are obliged to consult the register if the contract value is above the respective EU thresholds. In the case of two-stage procedures (such as the competitive procedure with negotiation or the competitive dialogue), there is no duty but an option to consult the register during the first stage of such procedure. The same is true for contracts with a value below EUR 30,000, or – in case of utilities and concession awards – below the EU thresholds (sec. 6 para. 2 WRegG).

If Public Procurement Law does not apply because of express exemptions (e.g. in case of in-house contracts, sec. 108 ARC) or a German contracting authority being situated abroad (*Auslandsdienststelle*) there is no obligation to consult the register. Finally, there is no duty to consult the register for the same company within a two-month period.

During the legislative process, pre-qualification registries are given the possibility to contact the register, if the relevant companies agree (sec. 5 para. 2 s. 2 WRegG).

Even if there are, for example, criminal acts listed in the register, it is still the respective contracting authority's decision whether to exclude a company from the procurement procedure (sec. 6 para. 5 WRegG). Therefore, the contracting authority has the duty to evaluate at all times whether there are exceptions regarding the mandatory grounds of exclusion. Concerning discretionary grounds of exclusion, the contracting authority has to decide using its discretion. In this context, it should be noted that the facts justifying an entry could not be considered to the disadvantage of the subsequently self-cleaned company after an entry has been deleted (sec. 7 para. 2 WRegG).

When will an entry be deleted?

Companies with mandatory or discretionary grounds for exclusion may not be excluded from a procurement procedure if they have used the opportunity for self-cleaning as set out in sec. 125 ARC. According to the bill, a self-cleaned company can apply to be removed from the register at any time, sec. 8 para. 1 WRegG. Under the current regime, the company has to prove that it took separate self-cleaning measures in each procurement procedure. Upon an application for removal under the envisaged regime, the register authority has to determine comprehensively and independently whether the self-cleaning measures taken by the company comply with sec. 125 ARC. If the authority finds the measures sufficient, it will delete the entry. If the authority rejects a request, the respective company can apply for deletion again at any time.

If the entry has not been deleted due to self-cleaning, the entry will be deleted after three or five years, sec. 7 para. 1 WRegG. According to the explanatory memorandum, this is in line with the relevant time limits for exclusion in sec. 126 ARC. However, this may not always be the case as it is possible that, according to sec. 126 para 2 ARC, a company cannot be excluded whilst there is no duty to delete the entry according to sec 7 para. 1 s. 3 WRegG.

The register authority also stores any proof of self-cleaning measures a company has transmitted to it (sec. 3 para. 2 WRegG). In case the register authority has not yet decided whether to remove the entry (or if the company has not even applied for the removal of the entry) the information on self-cleaning measures will be provided to the contracting authority. The contracting authority still evaluates independently if the measures undertaken by the respective company are sufficient. This provision becomes

especially relevant in the time between application of removal by a company and the decision by the register authority.

What is the process of judicial review?

The competent court for the judicial review of decisions made by the registration authority will be the Public Procurement Senate of the Higher Regional Court of Düsseldorf (sec. 11 para. 1 s. 2 WRegG). During the legislative process, there was an extensive discussion about whether administrative courts should be better equipped. That the Public Procurement Senate is the competent court is desirable because of the expertise of the Higher Regional Court of Düsseldorf in the area of public procurement and because it ensures unified jurisprudence.

A single judge reviews the application. Only in cases of serious difficulties of a factual and legal nature or in cases of fundamental significance of the legal matter, a panel will decide (sec. 11 para 2 WRegG). On the request of a party to the proceedings, there can be a hearing (sec. 11 para 3 WRegG).

It is unknown how quickly the courts will clarify the remaining uncertainties in this bill. BLOMSTEIN will monitor and inform about any developments. If you have questions regarding the impacts on your company or sector, [Roland M. Stein](#) and [Pascal Friton](#) will be happy to answer them any time.