

Good things come to those who wait? – The German Federal Ministry of Economics and Energy submits a draft bill for a so-called “register of competition”

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The idea of a nationwide “register of corruption” has haunted the German procurement law world for years. Now the German Federal Ministry of Economics and Energy has got serious: On 20 February 2017 the ministry presented a draft bill (WRegG-E) for a law to establish a so-called “register of competition” (*Wettbewerbsregister*). According to this draft bill, the register is to be established in 2019. Different economic crimes and administrative offences may be registered. Besides administering registrations, the responsible register authority is also tasked with evaluating whether a company has implemented sufficient self-cleaning measures and is therefore able to be delisted and to participate in public procurement procedures again. Contracting authorities must consult the register (even if the relevant EU threshold is not met) before awarding a contract and are allowed to exclude companies on the basis that the company is listed on the register with a higher legal certainty. The implementation of this draft bill would have far-reaching impacts on procurement law practice in Germany.

What will be registered?

Only final decisions regarding offences that give rise to compulsory or facultative grounds for exclusion pursuant to sec. 123 and 124 of the German Act against Restraints of Competition (ARC), sec. 2 para. 1 and 2 WRegG-E will be registered. Practically relevant offences include bribery, 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 due to antitrust offences as well as convictions in other countries are 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 WRegG-E. The register does not cover non-compulsory grounds for exclusion that are not compulsively linked to a final decision regarding an offence, e.g. grounds of exclusion because of grave professional misconducts and contractual improper performances.

Who will be registered?

Only companies may be entered into the register. Due to their lack of penal responsibility in Germany, only financial penalties imposed on companies are directly relevant for the register. However, conviction of a company employee can also lead to an entry into the register. This applies not only to a conviction of supervisory staff but also to all other employees if there is improper supervision or organisational fault pursuant to sec. 130 of the German Administrative Offences Act, sec. 2 para. 3 no. 2 WRegG-E. The imputation (*Zurechnung*) of liability to companies on the basis of their employee's actions goes beyond the scope of the ARC. However according to its explanatory memorandum the draft bill does not provide for imputations within a cooperate group. Nevertheless, according to the wording of the regulation, imputation is possible at least in cases of a natural persons being a member of supervisory bodies of several companies within a cooperate group at the same time. These and other complicated questions arising in the context of imputation have to be determined primarily by the authorities responsible for pursuing penal and administrative offences (cf. sec. 4 para. 1 in conjunction with sec. 3 para. 1 no. 7 WRegG-E).

What are the consequences of being registered?

The draft bill places an obligation on the contracting authorities, utilities and grantors of concessions to consult the register before awarding contracts. This obligation applies to procurement procedures with a value of at least EUR 30.000 and not only if the relevant EU threshold is met, sec. 6 para. 1 WRegG-E. However the duty to evaluate whether a company has to be excluded from the procurement procedure still lies with the respective contracting authority, sec. 6 para. 4 WRegG-E. Therefore, at all times it is its duty to evaluate whether there are exceptions regarding the compulsory grounds of exclusion. Concerning non-compulsory grounds of exclusion, the contracting authority must decide using its discretion. In this context, it has to be noted that the facts justifying an entry cannot be considered to the disadvantage of the subsequently self-cleaned company after an entry has been deleted, sec. 7 para. 2 WRegG-E.

When will an entry be deleted?

Companies with compulsory or facultative 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 draft bill, a self-cleaned company can apply to be removed from the register at any time, sec. 8 para. 8 WRegG-E. Under the current regime the sufficiency of the self-cleaning measures has to be proven in each procurement procedure separately. Upon an application for removal from a company under the envisaged regime the register authority has to comprehensively and independently determine whether self-cleaning measures by a 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 anytime

again. If an entry has not been deleted due to self-cleaning measures it is deleted after three or five years, sec. 7 para. 1 WRegG-E.

The register authority also stores any proof of self-cleaning measures a company has transmitted to them, sec. 3 para. 2 WRegG-E. In case the register authority has not decided in favour of removing the company from the list or has not yet decided with regard to an application or if an application for deletion has not been filed at all, any contracting authority that consults the register with regard to that company will receive these documents with the excerpt of the entry. The contracting authority will then still have to evaluate independently if the measures undertaken by the respective company have been sufficient. This provision becomes especially relevant in the time between application by a company and the decision by the register authority.

Lastly, companies that have been wrongly entered into the register can object to their entry on the basis that the entry is incorrect. If their statement is conclusive (*schlüssig*), the register authority enters a restriction note (*Sperrvermerk*) into the register, sec. 5 para. 2 WRegG-E. If a restriction note has been entered any contracting authority that requests information about the respective company will not receive any other information about the entry than that there is a restriction note. This provision will be particularly relevant when dealing with the complex question of imputation.

What is the process of judicial review?

Regarding the judicial review of decisions by the register authority, sec. 10 WRegG-E only stipulates that the competent court is the administrative court. This means that three different courts would have competence to regularly hear matters of German procurement law. In cases of judicial review of self-cleaning measures, this could lead to the situation where a civil court and an administrative court are dealing with the same matter at the same time.

The extent to which the first draft of the bill will be subject to changes in the legislative process is unknown. BLOMSTEIN will monitor and inform about any developments. If you have questions regarding the potential impacts on your company or sector, [Roland M. Stein](#) and [Pascal Friton](#) will be happy to answer your questions any time.