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

**Director Disqualification and Bidder Exclusion – Note by Germany**

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This document reproduces a written contribution from Germany submitted for Item 4 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

More documents related to this discussion can be found at  
[www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm](http://www.oecd.org/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement.htm)

Mr Antonio CAPOBIANCO  
[Email: Antonio.CAPOBIANCO@oecd.org]

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## Germany

1. This contribution provides a brief outline of the legal background to bidder exclusion in relation to competition law infringements (1), describes the application and scope of this sanction (2), explains the role of the German Competition Register for Public Procurement in this context (3) and sums up the key aspects in a conclusion (4).

### 1. Legal framework

2. The German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen, hereinafter "GWB"*)<sup>1</sup> sets out compulsory grounds (Section 123 GWB) and facultative grounds (Section 124 GWB) for excluding bidders from public procurement procedures. Bidder exclusion in relation to competition law infringements belongs to the latter group.

3. According to Section 124(1) GWB contracting authorities may exclude bidders that have entered into agreements with other undertakings or engaged in concerted practices which have as their object or effect, the prevention, restriction or distortion of competition.

4. Director disqualification is not an instrument that can be used to sanction competition law violations. However, personnel consequences can play a role with regard to self-cleaning measures taken by undertakings (see recitals 10 et seq.).

### 2. Application and scope

5. Pursuant to Section 124(1) GWB a contracting authority, taking the principle of proportionality into account, may at any point in the procurement procedure exclude an undertaking from participating in the procurement procedure if it has sufficient indications that the undertaking has concluded agreements with other undertakings or engaged in concerted practices which have as their object or effect, the prevention, restriction or distortion of competition.

6. The body responsible for applying this sanction is the contracting authority. Bidder exclusion is not automatically applied. The assessment as to whether or not grounds for exclusion exist is carried out at the contracting authority's discretion on a case-by-case basis.

7. Bidder exclusion requires the contracting authority to have sufficient indications that the respective undertaking has concluded anti-competitive agreements with other undertakings or engaged in concerted practices. Sufficient indications exist, for instance, if a decision imposing a fine has been rendered by the Bundeskartellamt. An administrative decision which merely finds agreements to be restrictive without imposing a fine is also likely to be a sufficient reason for exclusion under Section 124(1) no 4 GWB. In addition, decisions by the competition authorities of the *Länder*, the European Commission or, if applicable, corresponding court findings may also be considered sufficient to establish grounds for exclusion.<sup>2</sup>

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<sup>1</sup> An English version is available at: [https://www.gesetze-im-internet.de/englisch\\_gwb/](https://www.gesetze-im-internet.de/englisch_gwb/).

<sup>2</sup> European Court of Justice, decision of 24 October 2018, C-124/17.

## 2.1. Self-cleaning measures<sup>3</sup>

8. Section 125 GWB sets out that contracting authorities may not exclude an undertaking from a procurement procedure despite the fact that there are grounds for exclusion if all of the following three requirements<sup>4</sup> have been satisfied:

9. First, the undertaking has paid or undertaken to pay compensation for any damage caused by the criminal offence or misconduct.

10. Second, the undertaking has comprehensively clarified the facts and circumstances associated with the criminal offence or misconduct and the damage caused in this regard by actively collaborating with the investigating authorities and the contracting authority.

11. Third, the undertaking has taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

12. When assessing whether the requirement of taking personnel measures has been satisfied, the need to clarify the facts of the misconduct has to be taken into account. Such measures may include replacing the management.<sup>5</sup> If the undertaking states that it has refrained from carrying out personnel measures in order to clarify the facts of the offence, it has to demonstrate the appropriateness of its decision. Specific details are to be submitted about each individual person concerned.

13. The self-cleaning measures taken by the undertakings have to be evaluated by the contracting authorities, taking into account the gravity and particular circumstances of the criminal offence or misconduct. If the contracting authority considers the self-cleaning measures by the undertaking to be insufficient, it has to provide the undertaking with justification for its decision. However, the newly established Competition Register at the Bundeskartellamt opens up the possibility for undertakings to have their self-cleaning measures checked by a central body (see recitals 27 et seqq.).<sup>6</sup>

## 2.2. Allowable period for exclusion

14. Where an undertaking for which a ground for exclusion exists under Section 124 GWB has taken no or insufficient self-cleaning measures under Section 125 GWB, it may be excluded from participation in procurement procedures for up to three years following the event at issue.<sup>7</sup>

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<sup>3</sup> Parts of this paper are based on the article “The New German Competition Register for Public Procurement: Improvements for Public Contracting Entities and for Companies That Seek Self-Cleaning” by Kai Hooghoff and Till Wiesner published in *European Procurement & Public Private Partnership Law Review (EPPPL)* 2/2022.

<sup>4</sup> See also Article 57(6) of Directive 2014/24/EU.

<sup>5</sup> Federal Public Procurement Tribunal, decision of 12 June 2015, VK2-31/05.

<sup>6</sup> More information with regard to self-cleaning is available at: [https://www.bundeskartellamt.de/DE/Wettbewerbsregister/Selbstreinigung/Downloads/Downloads\\_node.html](https://www.bundeskartellamt.de/DE/Wettbewerbsregister/Selbstreinigung/Downloads/Downloads_node.html).

<sup>7</sup> See Section 126 GWB.

### 2.3. Legal protection

15. Legal protection against the contracting authority's decision is provided in a two-stage review procedure. At the first stage bidders who feel unlawfully excluded have the possibility to submit an application to have the award procedure in question reviewed by the public procurement tribunals. The public procurement tribunals of the Federal Government are responsible for reviewing the award of public contracts that fall within the scope of responsibility of the Federal Government<sup>8</sup>; those of the *Länder* are responsible for reviewing the awards falling within their scope of responsibility. At the second stage legal protection is provided by higher regional courts.

### 3. Competition Register for Public Procurement

16. Making an informed decision when assessing whether grounds for exclusion exist and assessing self-cleaning requirements in each individual case can be challenging for a single contracting authority.

17. Until 2021 a central access point to information on possible grounds for excluding an undertaking had not been available in Germany. Consequently, contracting entities did not have access to sufficient information so that it was difficult for them to assess whether grounds to exclude a potential contractor from the procurement procedure existed.<sup>9</sup> Contracting authorities had to rely on information provided by the bidders themselves in addition to less extensive information from other registers, which often varied considerably depending on the region.

18. Contracting authorities are also entrusted with the assessment of an undertaking's self-cleaning measures as part of the relevant procurement procedure. The German legislator estimates that there are up to 30,000 contracting authorities in Germany alone which have to apply public procurement law.<sup>10</sup> Accordingly, the experiences in applying the self-cleaning instrument and the resources available for such an assessment are likely to be very heterogeneous in the individual case.

19. In 2021 the Competition Register for Public Procurement (*hereinafter "Competition Register"*) was put into operation at the Bundeskartellamt based on the Act on the Establishment and Operation of a Register for the Protection of Competition for Public Contracts and Concessions (*Wettbewerbsregistergesetz, hereinafter "WRegG"*).<sup>11</sup> The register aims at preserving the integrity of tenders by ensuring that public contracts

<sup>8</sup> The public procurement tribunals of the Federal Government are located at the Bundeskartellamt.

<sup>9</sup> Explanatory memorandum, Bundestag printed paper 18/12051, pp. 16, 17. See also key parameters on the reform of German public procurement law, decision of the Federal Cabinet of 7 January 2015, available (in German) at <https://www.bmwk.de/Redaktion/DE/Downloads/E/eckpunkte-zur-reform-des-vergaberechts.html>.

<sup>10</sup> See explanatory memorandum, Bundestag printed paper 18/12051, p. 22.

<sup>11</sup> An English version is available at: [https://www.gesetze-im-internet.de/englisch\\_wregg/index.html](https://www.gesetze-im-internet.de/englisch_wregg/index.html). The details regarding the register's operation are set out in the Competition Register Regulation (*Wettbewerbsregisterverordnung – WRegV*) available (in German) at <https://www.gesetze-im-internet.de/wregv/index.html#BJNR080900021BJNE000500000>. For a first comparative assessment of the Competition Register see Friton and Wolters, 'The German Register of Competition and Its International Context' (2018) 2 EPPPL, pp. 119 ff.

and concessions are awarded only to those undertakings which have not committed any serious offences and have acted fairly in competition.<sup>12</sup>

20. The WRegG's key aspects regarding self-cleaning and the offences which are to be entered in the register are based on the provisions on compulsory and facultative grounds for exclusion from procurement procedures provided under German procurement law and thus indirectly also on the provisions of the European public procurement directives.<sup>13</sup>

21. Due to the Competition Register contracting authorities have better access to information on whether grounds to exclude a bidder exist. The register also provides the additional option of centralised self-cleaning.

### 3.1. Informed decision

22. The Competition Register centrally and electronically provides public contracting entities with comprehensive information on possible grounds for excluding an undertaking from a specific award procedure for having engaged in economic misconduct. This helps contracting authorities to make an informed decision when assessing whether grounds for exclusion pursuant to Section 123 and Section 124 GWB exist.

23. The register serves as a central access point to such information. Public prosecuting authorities and authorities imposing administrative fines are obliged to communicate certain decisions imposing sanctions on undertakings to the registry authority. Public contracting entities, in turn, are obliged to consult the Competition Register in procurement procedures on whether there are any entries in the register relating to the bidder whose bid is to be accepted.

24. The WRegG provides for an exhaustive catalogue of sanctioning decisions which are to be entered in the register. The offences which are to be entered in the register include *inter alia* collusive tendering pursuant to Section 298 of the German Criminal Code (*Strafgesetzbuch, hereinafter StGB*) and fining decisions rendered by competition authorities due to violations of competition law, such as price or quota cartels. In general, the period after which an entry is deleted from the Competition Register is three years from the day on which the decision became final.<sup>14</sup> Entries regarding fining decisions issued by a competition authority pursuant to Section 2(2) WRegG are deleted at the latest after the expiry of three years from the day on which the decision was issued.

25. Public contracting entities within the meaning of Section 99 GWB are obliged to consult the Competition Register in procurement procedures involving an estimated order value excluding value-added tax of 30,000 euros or more on whether there are any entries in the register relating to the bidder whose bid is to be accepted. Sector contracting entities pursuant to Section 100(1) no 1 GWB and concession grantors pursuant to Section 101(1) no 1 and no 2 GWB are obliged to consult the register in the event the threshold values set out in Section 106 GWB are reached. Below these threshold values the register can be consulted on a voluntary basis. It is also possible to consult the register for information on candidates in competitive procedures.

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<sup>12</sup> Explanatory memorandum to the Act on the Establishment and Operation of a Register for the Protection of Competition for Public Contracts and Concessions, Bundestag printed paper 18/12051, p. 1, available (in German) at <https://dserver.bundestag.de/btd/18/120/1812051.pdf> .

<sup>13</sup> Article 57 and Recitals 100 and 101 of Directive 2014/24/EU (exclusion grounds) and Recital 102 (self-cleaning).

<sup>14</sup> Section 7(1) sentence 1 WRegG.

26. The register is consulted for information only on the bidder whose bid is to be accepted, i.e. the evaluation of the bids must have been carried out and concluded. If the bidder in question is a bidding syndicate, the register must be consulted with regard to all members of the bidding syndicate.

27. Pursuant to Section 6(5) sentence 1 WRegG the contracting authority decides on its own responsibility whether or not to exclude an undertaking from the procurement procedure based on the relevant provisions under public procurement law. In the explanatory memorandum, the legislator emphasises that an entry in the Competition Register does not automatically result in an undertaking's exclusion from the procurement procedure.<sup>15</sup>

### 3.2. Centralised self-cleaning

28. The Competition Register also opens up the possibility for undertakings to have their self-cleaning measures checked by a central body. Undertakings entered in the Competition Register can submit an application to the registry authority for the premature deletion of the entry due to self-cleaning.<sup>16</sup>

29. If the Bundeskartellamt deems the requirements for self-cleaning to have been fulfilled, the undertaking's entry is deleted prematurely from the register. This decision is binding on all contracting authorities in Germany, meaning the undertaking in question may then no longer be excluded from procurement procedures in view of the misconduct underlying the entry.<sup>17</sup>

30. However, the rejection of a self-cleaning application by the registry authority has no binding effect on contracting authorities.<sup>18</sup> It is thus still possible for an undertaking to demonstrate to contracting authorities in future procurement procedures that it has successfully implemented self-cleaning measures. The relevant contracting authority is still free to independently assess the undertaking's submissions in this regard and may deem them sufficient.<sup>19</sup> Public contracting entities will, however, learn of the fact that the registry authority has rejected an undertaking's self-cleaning application since this information is to be noted in the registry. The contracting entity may ask the registry authority to transmit the (negative) decision regarding the application for deletion as well as other documents for its assessment.<sup>20</sup>

### 3.3. Guidelines and Practical Guide

31. Since the registry authority's practice is of particular significance the Bundeskartellamt is obliged to issue guidelines regarding the application of the self-

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<sup>15</sup> Explanatory memorandum, Bundestag printed paper 18/12051, p. 31.

<sup>16</sup> See Section 8 WRegG.

<sup>17</sup> See Section 7(2) sentence 1 WRegG.

<sup>18</sup> See Section 7(2) sentence 2 WRegG.

<sup>19</sup> As the registry authority, the Bundeskartellamt does not maintain a "whitelist" of undertakings which have been assessed (different view held by Yukings/Kania, Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement, 19-2 UrT, 47 (2019), available at <https://ssrn.com/abstract=3422499>).

<sup>20</sup> See Section 8(4) sentences 4 and 5 WRegG.

cleaning provisions.<sup>21</sup> The Bundeskartellamt fulfilled this obligation by adopting corresponding Guidelines in November 2021. The authority also published a Practical Guide on filing an application for premature deletion from the register due to self-cleaning.<sup>22</sup> While these documents directly address only the proceeding before the registry authority to delete an entry, the details regarding the content of the requirements for self-cleaning included in these documents may, however, indirectly also help with the general practice of applying these provisions under procurement law.

#### 4. Conclusion

32. The provisions regarding bidder exclusion protect the integrity of the procurement process and ensure that public contracts and concessions are awarded only to those undertakings which have not committed any serious offences and have acted fairly in competition.

33. With its function to provide contracting authorities with information in public procurement procedures, the Competition Register helps to strengthen compliance measures in companies and the prevention of economic crime. By making it possible for undertakings to achieve self-cleaning by a national central body, the Competition Register also offers undertakings a useful new possibility to dispense with past mistakes and thus continue to participate in public procurement procedures.

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<sup>21</sup> See Section 8(5) WRegG.

<sup>22</sup> See the information provided under “self-cleaning” at [https://www.bundeskartellamt.de/DE/Wettbewerbsregister/Selbstreinigung/Downloads/Downloads\\_node.html](https://www.bundeskartellamt.de/DE/Wettbewerbsregister/Selbstreinigung/Downloads/Downloads_node.html).