

Practice Name:

Competition Register

Country:
Germany

Practice category:

- Systems and tools



Contact:

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Fraud risk(s) countered

- Avoidance or manipulation of public procurement procedures
- Others

Context and objective(s)

The Act on the establishment and operation of a register for the protection of competition for public contracts and concessions, entered into force on 29 July 2017.

Due to the lack of a common database which gathers all relevant information, it has been difficult for contracting authorities to verify whether a company has committed any past offences that would justify an exclusion from public procurement procedures under EU and German procurement law. Individual German federal states, albeit not all of them, have separate “corruption registers” for that purpose. Contracting authorities must often rely on the information provided by the applicants themselves.

This creates the risk that companies who may need to be excluded from public procurement procedures continue to be awarded contracts because contracting authorities cannot check a consolidated register. Authorities might fail to identify a hit in one of the numerous existing registers or rely on information from the very applicants whose behaviour they must assess.

The new Competition Register for Public Procurement is a national, common database that will provide public contracting authorities, sector contracting entities and concession grantors with information to assess whether a company must or can be excluded from an award procedure for having committed relevant offences. This shall help prevent economic crime and ensure fair competition relating to public procurement awards.

The new register is currently being established by a special unit at the Federal Cartel Office, which acts as the “registry authority”.

Description of the practice

The legal basis for the register including the transmission and consulting obligations has been laid down in the Competition Register Act of 2017. Further technical and organisational requirements will be stipulated in a separate ordinance to be adopted by the German Federal Government (with the approval of the German Bundesrat).

The Bundeskartellamt (Federal Cartel Office) is currently setting up the register expected to be provisionally operational by the end of 2020. A special unit within the Federal Cartel Office was formed which shall employ 30 FTEs. A budget of approximately EUR 3.8 million was granted for the implementation of the register and maintenance costs are estimated at about EUR 2.3 million per year.

The Competition Register will be operated electronically. Communication with the register will be, in general, subject to prior registration with the Federal Cartel Office and require the SAFE registration system, which is also used for judiciary procedures. After registering, the contracting authorities can access the information in the register; the register will not be open to the public.

The register will contain information about final convictions, penalty orders and fines related to mostly economic offences (enumerated in detail), including but not limited to:

- Corruption and Bribery,
- Human trafficking,
- Formation of criminal or terrorist organisations,
- Terrorist financing,
- Fraud relating to public budgets (including the budget of the EU),
- Subsidy fraud,
- Anti-competitive agreements (including collusive tendering),
- Forced labour and exploitation of labour,
- Violations of Minimum Wage Act and Act to Combat Undeclared Work and Unlawful Employment,
- Money laundering, and
- Tax evasion.

Law enforcement agencies, customs agencies and competition authorities will be required by law to electronically report information about breaches, rulings, penalties and fines to the registry authority.

Companies which are to be added to the register will be informed in writing and have two weeks to object if the information forwarded was not correct and if they can provide the necessary evidence. The registry authority assesses the provided evidence and, if applicable, corrects the information or withdraws, i.e. eliminates the entry. Companies can appeal decisions of the registry authority at the court in charge of such appeals (the Higher Regional Court Duesseldorf).

Public contracting authorities will be obligated to consult the register for contracts with an estimated value of EUR 30.000 and above. Sector contracting entities and concession grantors must consult the register for contracts with an estimated value equal or above the EU thresholds (EUR 428.000 (goods and services) / EUR 5.350.000 (works) for sector contracting entities; EUR 5.350.000 for concession grantors). Contracting authorities who fail to consult the register might be confronted with legal consequences for the violation of public procurement law. In addition, contracting entities can consult the register on a voluntary basis for projects below the mandatory thresholds.

An entry in the register does not automatically lead to the exclusion from any public procurement procedures. Rather, public contracting authorities must decide for themselves, in accordance with the relevant procurement law provisions, on the exclusion of the company.

After a period of 3 or 5 years (depending on the grounds for the entry), a company will be deleted from the register.

Companies can request an early deletion from the register in accordance with the rules of self-cleaning under EU and German procurement law (i.e. if they provided compensation for any damage caused by their misconduct, collaborated with the investigating authorities and implemented appropriate compliance measures to avoid further misconduct in the future).

If the registry authority has granted the request for early deletion from the register, public contracting authorities are no longer allowed to exclude a company based on the grounds which led to the entry in the register. However, if the Federal Cartel Office does not deem the self-cleaning measures sufficient, contracting authorities are still entitled to assess the steps taken by the company for self-cleaning for themselves, and therefore take into consideration the company (and therefore its bids for current procurements), within the boundaries of public procurements laws.

The registry authority will publish guidance on self-cleaning procedures that grant an early deletion.

Unique features

The register will be a single source of nationwide information for contracting authorities. It involves the timely, electronic provision of information by prosecuting bodies, customs agencies and competition authorities to ensure that all the necessary information on convictions and administrative fines is available to contracting entities.

Outcomes and results

Considering that the register is not yet operational, there are no concrete outcomes as of today.

However, the Competition Register is intended to make an important contribution to the fight against corruption and other economic crime and misconduct by providing information to determine whether an economic operator is affected by grounds for exclusion. Previously convicted or fined companies may thus be consistently excluded from receiving awards.

It is also expected that the register will have preventive effects and will further deter companies from performing illegal conduct because of the severe possible consequences, the exclusion from an award procedure.

Key success factors

Notifying relevant breaches to the register and its consultation by contracting authorities will be mandatory according to German law. The corresponding legal text clearly defines the scope, set up and objectives of the register and the tasks of the registry authority.

The electronic allows timely communication and review of the relevant information.

The unit responsible for the setup combines expertise from different relevant areas, e.g. legal, economic and IT staff and holds regular exchanges with both the reporting bodies and the authorities that will have to use the register, in order to ensure the register's compliant and user-friendly implementation.

Challenges encountered & lessons learned

The setup of a federal register is a complex IT project that involves the cooperation of numerous agencies.

Due to the federal organisation of the German state, the involved agencies are at national, regional (Länder) or town level, and they follow different procedures and use different systems. Different needs and prerequisites need to be aligned.

Finally, the register must be compliant with GDPR, and ensure data and IT security, which adds another layer of complexity.

Potential for the transferability

The implementation of a national, electronic register to be used for public procurement procedures is not unique to Germany and is already mentioned as an option in the corresponding EU Directive 2014/24/EU on public procurement (recital 85).

Other countries might be able to add a competition register to an already existing electronic platform for public procurement. If a new setup is needed, a responsible public agency must be chosen or newly formed in order to manage the register.

The structure and cooperation with various reporting agencies and consulting authorities must be organised according to the national setup. Countries which do not have a federal organisation, as Germany does, might have fewer stakeholders to manage.