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## **Act on the establishment and operation of a register for the protection of competition for public contracts and concessions**

### **(Competition Register Act – Wettbewerbsregistergesetz, WRegG)**

Competition Register Act of 18 July 2017 (Federal Law Gazette I p. 2739) as amended by  
Article 10 of the Act of 18 January 2021 (Federal Law Gazette I p. 2)

#### **Section 1**

##### **Establishment of the Competition Register for public procurement**

- (1) A register for the protection of competition for public contracts and concessions (Competition Register) shall be established and maintained at the Federal Cartel Office (*Bundeskartellamt*) (registry authority).
- (2) The Competition Register shall provide contracting authorities within the meaning of Section 98 of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*) with information on grounds for exclusion as set out in Sections 123 and 124 of the German Competition Act.
- (3) The Competition Register shall be maintained in the form of an electronic database.

#### **Section 2**

##### **Conditions leading to an entry in the Competition Register**

- (1) The following information shall be entered in the Competition Register:
  1. Final convictions and penalty orders issued by criminal courts due to one of the following criminal offences:
    - a) criminal offences listed in Section 123(1) of the German Competition Act,
    - b) fraud pursuant to Section 263 of the German Criminal Code (*StGB*) and subsidy fraud pursuant to Section 264 of the German Criminal Code, provided that the criminal offence affects public budgets,
    - c) withholding and misappropriating wages and salaries pursuant to Section 266a of the German Criminal Code,
    - d) tax evasion pursuant to Section 370 of the German Fiscal Code (*AO*), or
    - e) collusive tendering pursuant to Section 298 of the German Criminal Code;

2. Final convictions and penalty orders issued by criminal courts as well as final fining decisions issued due to one of the following criminal or administrative offences if the penalty incurred is imprisonment for a term exceeding three months or a criminal fine exceeding 90 daily rates or a minimum administrative fine of two thousand five hundred euros:

- a) pursuant to Section 8(1) no. 2, Sections 10 to 11 of the German Act to Combat Undeclared Work and Unlawful Employment (*SchwarzARbG*) of 23 July 2004 (Federal Law Gazette I p. 1842), last amended by Article 1 of the Act of 6 March 2017 (Federal Law Gazette I p. 399),
- b) pursuant to Section 404(1) and (2) no. 3 of the German Social Code, Book III (*SGB III*) – promotion of employment – (Article 1 of the Act of 24 March 1997, Federal Law Gazette I pp. 594, 595), last amended by Article 6(8) of the Act of 23 May 2017 (Federal Law Gazette I p. 1228),
- c) pursuant to Sections 15, 15a, 16(1) nos. 1, 1c, 1d, 1f and 2 of the German Temporary Employment Act (*AÜG*) in the version promulgated on 3 February 1995 (Federal Law Gazette I p. 158), last amended by Article 1 of the Act of 21 February 2017 (Federal Law Gazette I p. 258),
- d) pursuant to Section 21(1) and (2) of the German Minimum Wage Act (*MiLoG*) of 11 August 2014 (Federal Law Gazette I p. 1348), last amended by Article 6(39) of the Act of 13 April 2017 (Federal Law Gazette I p. 872), or
- e) pursuant to Section 23(1) and (2) of the German Law on the Posting of Workers (*AEntG*) of 20 April 2009 (Federal Law Gazette I p. 799), last amended by Article 6(40) of the Act of 13 April 2017 (Federal Law Gazette I p. 872), or

3. Final fining decisions issued pursuant to Section 30 of the German Administrative Offences Act (*OWiG*), also in conjunction with Section 130 of the German Administrative Offences Act, due to criminal offences as set out under no. 1 or criminal and administrative offences as set out under no. 2.

(2) In addition, fining decisions issued due to administrative offences pursuant to Section 81(1) no. 1, (2) no. 1 in conjunction with Section 1 of the German Competition Act shall be entered in the Competition Register if a minimum fine of fifty thousand euros has been imposed. Fining decisions issued pursuant to Section 81a(1) to (3) a to c of the German Competition Act shall not be entered.

(3) Decisions issued by criminal courts and fining decisions pursuant to subsection (1) nos. 1 and 2 and decisions against a natural person pursuant to subsection (2) shall be entered in the Competition Register only if the conduct of the natural person can be attributed to an undertaking. This is the case if the natural person has acted as the person responsible for managing the undertaking, which also covers supervision of the conduct of business or other exercise of controlling powers in a managerial position.

(4) An undertaking within the meaning of this Act is any natural or legal person or group of such persons offering the supply of goods, the execution of construction works or the provision of other services to the market. If a legal person or an association of persons constituting an undertaking ceases to exist after the entry has been included in the Competition Register, the entry shall remain unaffected.

### **Section 3**

#### **Content of the entry in the Competition Register**

(1) The registry authority shall store the following data transmitted by an authority required to communicate information pursuant to Section 4 in an electronic database:

1. the name of the authority communicating the data,

2. the date of the decision that is to be entered and the date on which such decision became final,
  3. the file number assigned by the authority communicating the data,
  4. with respect to the undertaking concerned,
    - a) the company name,
    - b) the legal form,
    - c) the surnames and first names of the undertaking's legal representatives,
    - d) with regard to partnerships, the surnames and first names of the managing partners,
    - e) the postal address of the undertaking,
    - f) with respect to domestic undertakings, the registration court and the register number of the commercial register, register of cooperatives, register of associations, partnership register or in the case of comparable official registers the register number and the body maintaining the register, if available,
    - g) with respect to foreign undertakings, instead of the information specified under f, a number comparable to a register number and the body maintaining the register, if available, and
    - h) if available, the VAT number,
  5. with respect to the natural person against whom the decision that is to be entered in the Competition Register was issued or who is named in the fining notice pursuant to Section 30 of the German Administrative Offences Act,
    - a) the surname, birth name and first name of the natural person,
    - b) the date, place and country of birth of the natural person,
    - c) the postal address of the natural person concerned and
    - d) the circumstances establishing the attribution of the misconduct to an undertaking pursuant to Section 2 (3) sentence 2 and
  6. the criminal or administrative offence, including the penalty imposed, leading to the entry in the Competition Register.
- (2) If an undertaking informs the registry authority after it has been entered in the Competition Register that it can prove the implementation of self-cleaning measures within the meaning of Section 123(4) sentence 2 or Section 125 of the German Competition Act, the registry authority shall store the transmitted data in the Competition Register.
- (3) The data stored in the Competition Register and the registry authority's case files are confidential.

#### **Section 4 Communications**

- (1) The prosecuting authorities and the authorities competent for the prosecution of administrative offences shall in the event of decisions pursuant to Section 2(1) and (2) communicate the data specified in Section 3(1) to the registry authority without delay. Section 30 of the German Fiscal Code does not preclude the communication of decisions pursuant to Section 2(1) no. 1d and pursuant to Section 2(1) no. 3 in conjunction with subsection (1) no. 1d.

(2) The registry authority shall check the data transmitted and refrain from making an entry if the data are manifestly incorrect. If after making an entry the data turn out to be incorrect, the registry authority shall rectify or delete the relevant data of its own motion. Section 8(3) shall apply accordingly.

(3) If the prosecuting authorities or the authorities competent for the prosecution of administrative offences become aware of circumstances conflicting with the continued storage of the transmitted data in the Competition Register, these authorities shall notify the registry authority without delay.

### **Section 5**

#### **Opportunity to comment prior to an entry in the Competition Register; right to information**

(1) Before including an entry in the Competition Register, the registry authority shall inform the undertaking concerned in text form of the content of the intended entry and shall give such undertaking the opportunity to comment within two weeks following the receipt of such information. If the undertaking concerned proves that the data transmitted are incorrect, the registry authority shall refrain from making an entry or rectify the incorrect data. The registry authority may extend the period for submitting comments. Section 8(3) shall apply accordingly.

(2) Upon application, the registry authority shall provide undertakings or natural persons information on the content of the Competition Register relating to such undertakings or persons. Notwithstanding the rights to information granted under data protection law, a new application pursuant to sentence 1 may be filed by the same undertaking or the same natural person only after the period of one year, unless a legitimate interest exists. With the consent of the relevant undertaking, the registry authority shall upon application provide information on the content of the Competition Register relating to the undertaking to a body that maintains an official list satisfying the requirements provided for in Article 64 of Directive 2014/24/EU.

(3) The application pursuant to subsection (2) sentence 1 may be filed in writing, bearing an officially or publicly certified signature. Applicants shall prove their identity and, when acting as a legal representative, also their power of representation. The application made on behalf of an applying undertaking may be filed exclusively by a legal representative. In filing the application, the applicant may not be represented by an authorised agent.

(4) The application pursuant to subsection (2) sentence 1 may also be filed electronically. In this case, electronic identification shall be required.

(5) The provision of information pursuant to subsection (2) sentence 1 by the registry authority shall be subject to fees.

(6) Undertakings entered in the Competition Register or undertakings affected by a planned entry may request that an authorised lawyer be granted unrestricted access to the files for the purpose of enforcing or defending their legal interests relating to the entry.

(7) Subsections (3) and (4) shall apply accordingly to the provision of information pursuant to Article 15 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

### **Section 6**

#### **Contracting authorities' obligation to consult the register; decision on the exclusion from the procurement procedure**

(1) A public contracting authority pursuant to Section 99 of the German Competition Act is obligated to consult the Competition Register prior to awarding a contract in a public procurement procedure involving an estimated order value, excluding value-added tax, of EUR 30,000 or more on whether there are any entries in the Competition Register relating to the bidder to whom the public contracting authority intends to award the contract. In the event the threshold values set out in Section 106 of the German Competition Act are reached, a sector contracting entity pursuant to Section 100(1) no. 1 of the German

Competition Act or a concession grantor pursuant to Section 101(1) nos. 1 and 2 of the German Competition Act is obligated to consult the Competition Register prior to awarding a contract on whether there are any entries in the Competition Register relating to the bidder to whom they intend to award the contract. By way of derogation from sentences 1 and 2, the obligation to consult the register does not apply in cases with regard to which public procurement law provides for any exemptions from the applicability of public procurement law. By way of derogation from sentences 1 and 2, German agencies abroad are not required to consult the Competition Register. The contracting authority may refrain from consulting the register again if this authority has already received the information contained in the Competition Register relating to the relevant undertaking within the last two months. Contracting authorities are not entitled to demand that bidders or candidates submit information as provided for under Section 5(2) sentence 1.

(2) In addition, contracting authorities pursuant to subsection (1) may consult the Competition Register

1. in the context of awarding public contracts and concessions with an estimated order or contract value below the value thresholds set out in subsection (1) on whether there are entries in the Competition Register relating to the bidder to whom the contracting authority intends to award the contract or the concession, and

2. in the context of a restricted procedure (competitive tender) on whether there are entries in the Competition Register relating to the candidates the contracting authority intends to invite to submit tenders.

(3) The registry authority shall provide the contracting authority consulting the Competition Register with the stored data relating to the undertaking specified in the search form. If an undertaking has not been entered in the Competition Register, the registry authority shall communicate this to the contracting authority.

(4) The information retrieved from the Competition Register may be brought to the attention of only those members of staff who are responsible for accepting information or processing the procurement procedure.

(5) The contracting authority shall on its own responsibility and in accordance with the provisions under procurement law decide on the exclusion of an undertaking from participating in the procurement procedure. Section 7(2) shall remain unaffected.

(6) Contracting authorities may request prosecuting authorities or authorities competent for the prosecution of administrative offences to provide additional information if the contracting authorities consider such information necessary for the award decision. The prosecuting authorities and the authorities competent for the prosecution of administrative offences may transmit the information upon request of the contracting authority.

(7) The data transmitted pursuant to subsections (3) and (6) and pursuant to Section 8(4) sentence 5 are confidential and may be used by the contracting authority for award decisions only. The data are to be deleted after the expiry of the legally required storage periods.

## **Section 7**

### **Deletion of entry from the Competition Register after expiry of period for deletion; legal effect of deletion**

(1) Entries regarding criminal offences pursuant to Section 2(1) no. 1 a, c and d shall be deleted at the latest after the expiry of five years from the day on which the decision became final. Entries regarding fining decisions pursuant to Section 2(2) shall be deleted at the latest after the expiry of three years from the day on which the fining decision was issued. Apart from that, entries shall be deleted at the latest after the expiry of three years from the day on which the decision became incontestable. In the event there are several entries due to the same misconduct, all entries concerning an undertaking shall be deleted if the deletion requirements are met with regard to one entry and the periods for deletion are the same; in the event of differing periods for deletion, the longer period shall be decisive. The provisions of Section 4(2) sentence 2 and Section 8(1) sentence 3 shall remain unaffected.

(2) If an entry in the competition register has been deleted pursuant to subsection (1) or Section 8, the criminal or administrative offence which led to the entry may no longer be used in procurement procedures to the disadvantage of the undertaking concerned. The contracting authority is not bound by the registry authority's rejection of a request for the deletion of an entry pursuant to Section 8(1).

### **Section 8**

#### **Premature deletion of entry from the Competition Register due to self-cleaning; fees and expenses**

(1) If an undertaking has been entered in the Competition Register, it may submit an application to the registry authority for the deletion of the entry from the Competition Register prior to the expiry of the period for deletion set out in Section 7(1) due to self-cleaning. The application is admissible if the undertaking demonstrates a legitimate interest in the premature deletion in a satisfactory way. The entry is to be deleted if the undertaking has proven to the registry authority that for the purposes of the procurement procedure it has implemented self-cleaning measures in accordance with Section 123(4) sentence 2 of the German Competition Act in the case of Section 2(1) no. 1 c and d, and in accordance with Section 125 of the German Competition Act in all other cases.

(2) After the application has been filed, the registry authority shall examine the facts of its own motion. In doing so, it may limit itself to the facts presented by the applicant or to facts of which it can be reasonably expected to be aware. The applicant may be required

1. to submit the decision issued by the criminal court or the fining decision,
2. to provide expert opinions or other documents suitable for evaluating the self-cleaning measures.

Sections 57 and 59 to 59b of the German Competition Act shall apply accordingly.

(3) In preparation for the decision regarding the application, the registry authority may request the prosecuting authority that has communicated the data or the authority competent for the prosecution of administrative offences to transmit information which according to the assessment of the registry authority may be necessary for the evaluation of the application. The requested authority shall provide such information.

(4) The registry authority shall evaluate the self-cleaning measures adopted by the undertaking, taking into account the gravity and special circumstances of the criminal offence or misconduct. If the authority considers the self-cleaning measures adopted by the undertaking to be insufficient, it shall request additional information from the undertaking or reject the application. If the registry authority rejects the application, it shall justify its decision to the undertaking. The decision regarding the application for premature deletion of an entry is to be noted in the Competition Register. The registry authority shall transmit the decision regarding the application for deletion and other documents to the contracting authority upon its request.

(5) The registry authority shall adopt guidelines regarding the application of (1) to (4).

(6) In order to cover the administrative costs incurred by the registry authority, applications for the premature deletion of entries from the Competition Register due to self-cleaning are subject to fees and the reimbursement of expenses. Section 62 of the German Competition Act and any statutory instruments based on this section shall be applied accordingly; the charging framework is determined based on Section 62(2) sentence 2 no. 2 of the German Competition Act.

### **Section 9**

#### **Electronic data transmission**

(1) Any communication between the registry authority and the prosecuting authorities, the authorities competent for the prosecution of administrative offences, the contracting authorities, the undertakings and the bodies maintaining an official list that meets the

requirements provided for in Article 64 of Directive 2014/24/EU shall generally take place in electronic form.

(2) Data may be transmitted to contracting authorities by way of an automated on-demand process that enables the transfer of personal data. The processing of personal data shall be subject to general data protection regulations, unless this Act or the statutory instrument based on this Act contains specific provisions.

### **Section 10** **Authorisation to issue statutory instruments**

The Federal Government shall with the consent of the Federal Council (*Bundesrat*) issue a statutory instrument to regulate the following:

1. the technical and organisational requirements for
  - a) storing data in the Competition Register,
  - b) transmitting data to the registry authority or to contracting authorities, including the automated data retrieval process, and
  - c) communicating with undertakings and natural persons, in each case including provisions on identification and authentication, as well as with bodies maintaining an official list that meets the requirements provided for in Article 64 of Directive 2014/24/EU,
2. the necessary data protection requirements for electronic communication with the registry authority,
3. the content and scope of the data pursuant to Section 3(1) and the communication pursuant to Section 6(3),
4. a standard form to be used by undertakings for the communication pursuant to Section 3 (2),
5. requirements regarding the content of the communication pursuant to Section 4, including a standard form to be used by the bodies obligated to communicate data, and the details of the entry procedure,
6. more detailed provisions concerning the additional information that may be requested pursuant to Section 6(6) sentence 1,
7. requirements relating to suitable expert opinions and documents to be submitted by the applicant pursuant to Section 8(2) sentence 3 no. 2 and especially also to the registry authority's approval of systems of independent bodies based on which suitable precautionary measures taken in order to prevent future misconduct can be proven for the purposes of the procurement procedure and
8. the fee rate and the collection of fees from the debtor in the context of providing information pursuant to Section 5(2) sentence 1 and the reimbursement of expenses.

### **Section 11** **Recourse to legal action**

(1) Complaints shall be admissible against decisions of the registry authority. Section 63(1) nos. 1 and 2, Sections 64, 69, 70(1) and (2), Sections 71 to 73(1) sentence 2, Section 73(2) sentence 1 in conjunction with Section 54(2) nos. 1 and 2, Section 73(3) and (4) sentence 1 first half of the sentence and sentence 2, Sections 74, 75(1) to (3), Section 76(1) sentences 1 and 2, Section 76(2) and (4) to (6) and Section 171(3) of the German Competition Act shall apply accordingly, unless otherwise stipulated.

(2) The appellate court shall rule by one of its members as a single judge. The single judge shall transfer the proceeding to the appellate court to decide in the composition required by the stipulations of the German Courts Constitution Act (GVG) if:

1. the case shows particular factual or legal difficulties, or
2. the legal matter has fundamental significance.

Any re-transfer to the single judge is ruled out.

(3) The decision on the complaint may be delivered without an oral hearing, unless one of the parties to the proceedings requests that an oral hearing be held. Section 65(2) of the German Competition Act shall apply accordingly.

## **Section 12**

### **Rules of application; promulgation of statutory instruments**

(1) The Federal Ministry for Economic Affairs and Energy shall

1. determine when the requirements for electronic data transfer pursuant to Section 9(1) have been met and
2. publish this determination pursuant to no. 1 in the Federal Gazette.

(2) Sections 2 and 4 shall be applicable after the month following the day of publication pursuant to subsection (1) no. 2; this day shall be communicated by the Federal Ministry for Economic Affairs and Energy without delay in the Federal Gazette. Section 5(2) and Section (6) shall be applicable six months after the day specified in sentence 1; in deviation from this, the registry authority may offer a contracting authority, upon its request, the possibility to consult the register pursuant to Section 6(1) and (2) as early as from the day specified in sentence 1. Until the application of the provisions specified in sentence 2 becomes mandatory, the Länder regulations regarding the establishment and operation of a register corresponding to the one provided for in Section 1 shall continue to apply.

(3) Statutory instruments pursuant to this Act may in deviation from Section 2(1) of the German Promulgation and Announcement Act (*VkBkmG*) be promulgated in the Federal Gazette.