



Exclusion System Summary

Germany

I. Government-Wide Legal and Institutional Framework:

Government-Wide Exclusion Framework? Yes.

- Exclusion decisions are made on a contract-by-contract basis as governed by national legislation or centralized regulations. Exclusions apply only to the procurement at issue.

Governing Policy:

- Part 4, Arts. 123-126 of the [Act against Restraints of Competition](#) (the "Act"), which transposes Art. 57 of Directive 2014/24/EU of the European Parliament.

Primary Legal Foundation:

- Administrative/Regulatory Law.

Decision-Maker: Individual Contracting Officers; Not Functionally Independent from Senior Procurement Officials.

- Individual contracting authorities make exclusion decisions within each procurement procedure (contract-by-contract exclusion).

Qualification:

- None stated in the legal framework (although public officials in general must be thoroughly qualified).

Independence:

- Not functionally independent from senior procurement officials.

II. Functioning and Enforcement of the Government-Wide Exclusion System:

General Provisions:

Type of Procedures: Administrative.

Decision Deadline: No stated deadline for decision-maker to make a final determination.

Provisional Exclusions: None.

Initial Procurement Decision: Grounds for exclusion are reviewed by the contracting authority as part of the procurement decision on a contract-by-contract basis.

- Decision-maker can make an exclusion decision without a prior referral.
- Non-governmental parties can submit complaints and/or evidence to the decision-maker.
 - Contracting authorities may take third-party complaints into account, but there is no formal system for third parties to submit complaints.
 - Suppliers also have a formal mechanism to challenge a contracting authority's decision to not exclude a competitor from a procurement process.

Notice Requirements & Opportunity to be Heard: Yes & Yes.

Notice:

- Suppliers receive notice when:
 - An investigation into the underlying grounds is commenced.
 - The decision-maker decides that grounds exist.
- Notice must contain the grounds for exclusion.
- Decision-maker must make reasoning available to the supplier (not to the public).

Opportunity to be Heard:

- To challenge its exclusion, a supplier must first submit a written complaint to the contracting authority within ten calendar days. If not resolved, the supplier may then file an application with the relevant public procurement tribunal and may:
 - Obtain the evidentiary record.
 - Make a written submission to the decision-maker.
 - Request an in-person hearing with the decision-maker.
 - Call witnesses to an in-person hearing to testify on the supplier's behalf.
- The opportunity to be heard derives from the right to a fair trial guaranteed by the German constitution.

Appellate Review of Exclusion Decisions: Yes.

Nature and Forum of Review: Administrative and Judicial.

- Judicial process is used after the exhaustion of the administrative process.
 - As noted above, suppliers can seek review before an administrative body known as the public procurement tribunal, which exists at both the federal and regional levels.
- Decisions of the public procurement tribunal can be appealed to the Higher Regional Court.

Means Available to the Supplier: As part of appellate review, suppliers may:

- Obtain the evidentiary record.
- Make a written submission to the appellate body.
- Request an in-person hearing with the appellate body.
- Call witnesses to an in-person hearing to testify on the supplier's behalf.

Duration of Appeal Process: One to six months.

Legal Representation:

- A supplier **may** be represented by counsel. If challenge is successful, the contracting authority may be required to pay the supplier's legal fees.
- A supplier **must** be represented by counsel in any appeal to the Higher Regional Court.

Subsequent Modification of Exclusion Decision: Yes ("Self-Cleaning").

- Except through a written complaint to the contracting authority and any subsequent appeal, a supplier is **not** entitled to seek a modification of any decision to exclude it from a procurement process after it goes into effect.
- A supplier **may**, however, include evidence of "self-cleaning" with any subsequent bids submitted to a contracting authority.

III. Substantive Grounds for Government-Wide Exclusion:

Automatic Exclusion: Yes.

Based on a supplier's conviction by final judgement for the following:

- Corruption;
- Fraud (directed against the budget of the European Union);
- Money laundering;
- Social harms (human trafficking);
- Terrorist offenses or offenses linked to terrorism.

Based on a judicial or administrative decision that the supplier engaged in:

- Tax-related offenses (including failure to pay taxes or social security).

Discretionary Exclusion: Yes.

Based on a finding by the decision-maker that the supplier engaged in the following:

- Fraud (directed against the contracting authority);
- Collusion and/or infringing competition;
- Coercion or intimidation;
- Obstruction of an investigation;
- Theft or embezzlement;
- Labor-related offenses;
- Social harms (environmental offenses);
- Commercial regulatory violations;
- Poor performance, non-performance, and/or failure to perform on public contracts;
- Grave professional misconduct;
- Conflict of interest;
- Unduly influencing contracting authority;
- Undue advantage by obtaining confidential information.

Decision-maker may not exclude the supplier when there are:

- Remedial measures (“self-cleaning”);
- Settlement agreement.

Exclusion based on Bankruptcy and Cross-Debarment: Discretionary & Discretionary.

Bankruptcy: Bankruptcy and insolvency are express discretionary grounds.

Cross-Debarment: No automatic cross-debarment. However, an exclusion by another organization can be considered in any discretionary exclusion decision.

IV. Scope and Effect of Government-Wide Exclusion:

Types of Excluded Suppliers:

- Individuals and Corporations.

Scope of Exclusion:

Extension to Other Agencies and Organizations:

- Exclusions do **not** prohibit the supplier from contracting with other federal agencies (exclusion decisions are contract-by-contract). However, the same facts could constitute an exclusion ground in every subsequent tender process.
- Exclusions do **not** automatically extend to subnational governments.
- No known countries or international organizations that automatically recognize and apply exclusions from Germany.

Effect on Ongoing Contracts:

- Ongoing contracts are **not** automatically cancelled.
- Subsequent modifications to ongoing contracts are **not** affected by a supplier’s exclusion.

Effect on Subcontracting:

- Excluded suppliers **can** technically serve as subcontractors, but contracting authorities may have chosen in contract documents to evaluate, or may sometimes be required by the law to evaluate, whether any potential exclusion grounds apply to a bidder’s proposed subcontractors. If any grounds exist, the contracting authority can ask or sometimes must ask to replace the subcontractor.

Effect on Excluded Individuals:

- Excluded individuals **may** be employed by a corporate supplier in a role that is not directly related to the supplier’s ongoing contracts.
- Exclusion **may** extend to companies controlled by the excluded individual.
- *Note:* While convictions of individuals may be imputed to companies in which the individual held a management or supervisory position at the time of the offense, there is some dispute as to whether convictions for previous activity are imputable to the individual’s present employer.

Tailoring Exclusion:

- No option to tailor the exclusion to certain divisions, operating units, or business lines within a corporate supplier.

Effect on Affiliates:

Corporate Affiliates:

- Exclusion does **not** extend to affiliated companies (controlling, controlled, under common control) or affiliated individuals.

Extension to Affiliated Individuals:

- Exclusion of a corporate supplier **may** extend to individuals that own or control the supplier, executive officers and managers.
- Affiliated individuals **must** be given an opportunity to contest the action.

Duration of Exclusions:

Duration Specified in Legal Framework:

- Exclusions must be based only on grounds that occurred in the previous three or five years.

Duration Depends on Applicable Exclusion Ground? Yes.

- Five years maximum for automatic grounds (from the date of final conviction).
- Three years maximum for discretionary grounds (from the ground's occurrence).

Discretion to Deviate?

- No, the decision-maker does not have discretion to consider any grounds that fall outside the above time limitations as a basis for exclusion.

Exceptions/Waivers to Exclusions:

- Yes. A contract may still be awarded to an excluded supplier if it is imperative for compelling reasons of the public interest (this exception has rarely – if ever – been invoked).

Other Sanctions:

- The contracting authority may terminate any public contract after finding that an automatic exclusion ground against the supplier existed at the time of the contract's award, which should have resulted in the supplier's exclusion from the procurement.

V. Government-Wide Transparency and Exclusion List:

Official List of Excluded Suppliers? Not Yet (In Process).

- The federal government has adopted legislation that introduces a nationwide Register of Competition (the "Register") due to be implemented in the near future. As of the writing of this summary, the Register has not been implemented.
- The Register will not be publicly available.
- The Register will be restricted to certain exclusion grounds only and will not apply to decisions taken by authorities or courts outside Germany.

Procurement Checks? Yes. Procuring entities will be required to check the Register, once implemented.

Reporting on Exclusions:

Number of Exclusions: Figures unknown.

Regular Reporting: No requirement for regular reporting on exclusions.

Other Transparency Mechanisms: None.

VI. Limited Scope Exclusion Systems:

Entity-Wide (e.g., Single-Agency) Exclusion? Yes. Each agency is free to establish its own standards on exclusion, which may include a provision for agency-wide exclusion.

Contract-By-Contract (e.g., Single-Tender) Exclusion? Yes. See above.

Subnational Exclusions:

- Exclusion mechanisms exist at the Provincial/State and Municipal/Local levels (same exclusion rules apply to the federal government and subnational bodies).
- Exclusion decisions of one subnational body are not automatically recognized, but they can be considered by other subnational bodies as part of their own decisions.