



## Promoting Social Considerations into Public Procurement Procedures for Social Economy Enterprises

Matrix explaining how social considerations have been embedded in the German law transposing Directive 24/2014/EU



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**Article 18.2 of the Directive ► § 128 of Gesetz gegen Wettbewerbsbeschränkungen (GWB)**

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>§ 128 Contract Performance</p> <p>(1) In performing the public contract, undertakings must comply with all legal obligations applicable to them, in particular the obligation to pay taxes, charges and social security contributions, to comply with occupational health and safety rules and to grant employees at least those minimum working conditions, including the minimum wage, mandated for the respective performance under the Minimum Wage Act [Mindestlohngesetz], under a collective agreement declared to be universally applicable under the Collective Agreements Act [Tarifvertragsgesetz] with the effects of the Posted Workers Act, or under an ordinance issued under § 7, § 7a or § 11 of the Posted Workers Act or under § 3a of the Personnel Leasing Act [Arbeitnehmerüberlassungsgesetz].</p> <p>(2) Public contracting authorities may, in addition, set special conditions for the performance of a contract (contract performance conditions), provided that they are related to the subject matter of the contract in accordance with § 127(3). The contract performance conditions must arise from the contract notice or the procurement documents. They may in particular include economic, innovation-related, environmental, social or employment-related considerations or the protection of information confidentiality.</p>	<p>Part of the binding law. After its publication it is binding. Below the threshold, the Unterschwellenvergabeordnung (UVgO) has been introduced. It transforms and adapts the Directive's provision for national procurement-procedure. Thus, many regulations to transform the Directive themselves are transformed and modified for application below the threshold. The equivalent for § 36 VgV is § 26, the equivalent for § 60 VgV is § 44 UVgO. The UVgO itself is not by itself a binding legal provision but must be implemented. This can happen either by an ordinance of the Minister of Finance (e.g. in Federal law) or by a reference in the Public Procurement Law of a federal country. By now the Federal law as well as most of the federal countries have adopted the UVgO. It does not contain a direct parallel to Article 18 (2) but itself refers to § 128 (1) GWB.</p>	<p>The provision regulating the execution of the contract obliges EOs to observe all relevant legal provisions while executing the contract. In that context Section 1 highlights the following specific obligations:</p> <ul style="list-style-type: none"> <li>- to pay taxes, other fees and contributions to social security.</li> <li>- to observe labour law obligations concerning health and safety regulations at work, as well as the obligation to grant at least the minimum level of working conditions as stated in the Minimum-Wage-Act or such tariff-agreements that fulfill the demands of the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.</li> </ul> <p>Other than in the Directive paragraph 128 (1) does not explicitly cite:</p> <ul style="list-style-type: none"> <li>- environmental provisions. These are however included as the ruling refers to "all relevant legal provisions".</li> <li>- the ILO-norms: insofar the GWB assumes that these are covered by the blanket regulation.</li> </ul> <p>The general obligation to observe relevant rules is followed up especially in</p> <ul style="list-style-type: none"> <li>- the regulations for exclusion from the procurement-process in §§ 123 and 124 GWB</li> <li>- the regulation to cancel a contract in § 133 GWB due to major disruptions in the performance of the contract (reason for exclusion according to § 123 GWB).</li> </ul>	<p>Paragraph 128 (1) contains a blanket reference to all relevant provisions that cover the execution of the contract and includes, apart from the specifically cited subjects, regulations for the special field of work for which the contract has been tendered. As far as Paragraph 128 (1) special aspects this reference especially covers:</p> <ul style="list-style-type: none"> <li>- the Umsatzsteuergesetz (VAT Act) as well as the Körperschaftsteuergesetz (Corporate Income Tax Act);</li> <li>- the obligations under the Sozialgesetzbuch (Social Security Statute Book): Books III, V, VI, VII regulate the different branches of social insurance; Book IV regulates the procedure of raising the contributions and the employers' obligations within this procedure.</li> <li>- a verbatim quotation of the legislation to transform the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. These encompass the : <ul style="list-style-type: none"> <li>o Mindestlohngesetz</li> <li>o Tarifvertragsgesetz</li> <li>o Arbeitnehmer-Entsendegesetz, the Arbeitnehmerüberlassungsgesetz and such ordinances that have been instituted in order to grant a tariff agreement binding relevance beyond the initial parties.</li> </ul> </li> </ul>
<p><b>Open questions</b></p>	<ul style="list-style-type: none"> <li>- While the Directive specifies the obligation of compliance for the specific fields of environmental, social and labour law, German law introduces a general obligation to comply with all relevant provisions that concern the execution of the contract. On the other hand,</li> </ul>		

	<p>however, the regulation itself does not provide the CAs with adequate competences of their own to ensure EO compliance but insofar depends on other clauses like the above-mentioned to be put into effect.</p> <p>As the Directive however has itself provided the possibility of exclusion from the procedure as well as termination of contract (Articles 53 and 73 of the Directive) there remains the problem that CAs lack the competence to adopt further adequate measures to ensure the performance of contracts in compliance with relevant obligations.</p> <p>This leaves the question of whether CAs may adopt “adequate measures” apart from those in §§ 123, 124 or 133 to effect the compliance with relevant rules. That might be advisable, especially in the sense of more flexibility: the correction of minor disturbances in the contract-performance does not always require the termination of a contract with an otherwise competent EO.</p> <ul style="list-style-type: none"> <li>- § 128 has not specifically cited the provisions in Annex X to the Directive: as far as EOs are EU-based that poses no problem as these provisions have been transformed into the labour law within the EU.. However, that may become problematic if the goods to be procured have been manufactures outside the EU and if the manufacturing country has not transformed these provisions. In that case the CAs have no possibility to ensure the observation of these rules.</li> <li>- Regarding the labour law provisions: § 128 (1) has been formed in close reference to the EuGH’s jurisdiction Ruffert (C 346/06), Bundesdruckerei (C 549/13) and RegioPost (C 115/14). Further provisions can be made by the federal countries that mostly have their own legislation for their own procurement, especially fixing a special minimum wage to be observed during public contracts (usually above the minimum-wage fixed by the Mindestlohngesetz). While the Mindestlohngesetz allows for payment of and agreement on higher wages, there is an ongoing discussion whether such an opening is in accordance with the Directive 2014/24/EU.</li> </ul>
<p><b>Example of application from the national level (where applicable)</b></p>	<p>As § 128 is a general blanket clause, it comes into action if during the procedure reference is being made to the EO’s compliance with the relevant law. While §§ 123, 124 and 133 GWB already and explicitly provide such a reference to further relevant regulations, an explicit reference to § 128 (1) GWB in law texts or a contract ensures the effective control of whether the relevant regulations are being observed.</p> <p>E.g.</p> <p>§ 36 Vergabeverordnung (VgV) subcontracts: § 128 (1) is valid for subcontractors at all levels</p> <p>§ 60 VgV abnormally low tenders: an abnormally low tender can indicate the nonobservance of paying the relevant taxes, fees, social insurance contributions or wages.</p>

**Article 20 of the Directive ► § 118 of Gesetz gegen Wettbewerbsbeschränkungen (GWB)**

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Public Contracts Reserved for Certain Contractors</p> <p>(1) Public contracting authorities may reserve the right to participate in public procurement procedures to workshops for persons with disabilities and undertakings whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such public contracts to be performed in the context of sheltered employment programmes.</p> <p>(2) It is required that at least 30% of the employees of those workshops or undertakings are disabled or disadvantaged workers.</p>	<p>Part of the binding law. After its publication it is binding. Below the threshold, the Unterschwellenvergabeordnung (UVgO) has been introduced. It transforms and adapts the Directive's provision for national procurement-procedure. Thus, many regulations to transform the Directive themselves are transformed and modified for application below the threshold. The UVgO itself is not by itself a binding legal provision but must be implemented.</p> <p>This can happen either by an ordinance of the Minister of Finance (e.g. in Federal law) or by a reference in the Public Procurement Law of a federal country. By now the Federal law as well as most of the federal countries have adopted the UVgO.</p> <p>It does not contain a direct parallel to § 118 but itself refers to it in § 1 (3) UVgO.</p>	<p>§ 118 transforms Article 20 (1) almost verbatim into German tender law.</p> <p>Section (1) provides the possibility for a reserved contract:</p> <ul style="list-style-type: none"> <li>- on behalf of sheltered workshops</li> <li>- on behalf of "economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons"</li> <li>- under the condition, that the contract is performed in the context of sheltered employment programmes.</li> </ul> <p>Whether the CA avails itself of this possibility and excludes all other EOs from the procurement process however is left to its discretion.</p> <p>Section (2) transforms the condition that the EOs have to employ at least 30 % of people with a handicap or a social disadvantage. However, this condition is stated only for the sheltered workshop and the Inclusion-enterprise. In contrast to the Directive it does not extend to sheltered employment programmes.</p> <p>§ 118 has not transformed the obligation of a specific quote of § 118 in the call for competition (stated in Article 120 (2)).</p> <p>Independent of that however a reservation according to this clause must be announced by the CA in the call for competition to provide sufficient transparency.</p>	<p>§ 118 (1) provides no definition of the privileged EOs.</p> <p>However, Book IX of the Social Statute Book defines, in §§ 215 and 219, sheltered workshops as well as "inclusion enterprises".</p> <p>Programmes in the context of sheltered employment programmes are regulated in Book II of the Social Statute Book, § 16e.</p> <p>§ 224 of Book IX includes a regulation that gives precedence and a special advantage to sheltered workshops in competition with normal EOs (see below).</p>
<p><b>Open questions</b></p>	<ul style="list-style-type: none"> <li>- The lack of a formal definition, especially of economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, raises the question of what kind of disadvantages can be alleviated by these EOs. There are differing opinions on how to define these disadvantages (e.g. any social disadvantage is sufficient; the disadvantage must be manifest for at least six months. Considering the restriction of competition and the exclusion of the other EOs from these tenders, the reservation can only apply to EOs covered by a definition, that has been decided upon by parliament; the latter opinion restricts the beneficiary EOs on enterprises and programmes that comply with §§ 215, 219 SGB IX (men and women with handicaps).</li> <li>- § 224 SGB IX allows to give precedence and a special advantage to sheltered workshops that compete for tenders with normal EOs. This clause is not derived from the Directive and raises the question of whether besides the possibility to reserve the contract for the EOs named in § 118 another restriction may be imposed on the competition of normal EOs with sheltered workshops. The question has not yet been decided by jurisdiction.</li> <li>- Extension of the 30 %-Rule on sheltered employment programmes: § 118 (1) has not included these programmes in the 30 % provision. Carried out like that this, it would extend the possibility for such a reservation far beyond what the Directive intended. Here a more restrictive interpretation seems necessary, to ensure that conformity of § 118 (1) with the Directive is possible and necessary.</li> </ul>		
<p><b>Example of application from the national level (where applicable)</b></p>	<p>Examples of reserved contracts can be found, especially when CAs procure services or products from the said EOs.</p>		

**Article 40 of the Directive ► § 28 Vergabeverordnung (VgV, Procurement Ordinance )**

Text of the article	What the article means	What the provision allows	What the provision doesn't allow
<p>(1) Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.</p> <p>(2) The implementation of a procurement process with the sole purpose of market exploration or of cost or price determination is not permitted.</p>	<p>The VgV is based on the authorisation granted to the government in § 131 GWB (Gesetz gegen Wettbewerbsbeschränkungen). It needed the additional approval by both chambers of parliament (the Bundestag as well as the Bundesrat, the representation of the federal countries).</p> <p>As an Government ordinance it does not share the legal rank of a parliamentary law but it is directly applicable and needs no further implementing.</p> <p>While the GWB contains regulations that transpond the common principles of all three Directives 2014/23/EC, 2014/24/EC and 2014/25/EC and outlines the procedures, more specific rules for awarding contracts and concessions have been provided in ordinances dedicated to the specifics of procurement (VgV), concessions (KonzVgV) and the procurement by entities operating in the water, energy, transport and postal services sectors (SektVO).</p> <p>Therefore, the transposition of the Directive into German law includes regulations within the GWB as well as the VgV.</p>	<p>Paragraph 1 contains a verbatim translation of Article 40 Paragraph 1 of the ordinance.</p> <p>There are however differences in Paragraph 2: German law does not take over the positive description of a legal market consultation from Article 40 Paragraph 2 but takes up a regulation from earlier German Procurement Law (VOL/A § 2 (3)) that excludes certain methods of preliminary market analysis. Paragraph 2 specifically forbids to launch an abusive procurement-competition for the sole purpose</p> <ul style="list-style-type: none"> <li>• of researching the market,</li> <li>• the costs and</li> <li>• the prize</li> </ul> <p>of the goods to be procured.</p> <p>Examples and limits of legal methods are included in the interpretation of Paragraph (1).</p>	<p>The definition of market research interacts with the regulation for the involvement of candidates or tenderers prior to the actual procurement-process, according to § 7 VgV</p>
<p><b>Open questions</b></p>	<p>Examples and limits of legal consultation methods described in Article 40 Paragraph (2) have been extensively explored by German jurisdiction. Examples for unlawful proceedings are:</p> <ul style="list-style-type: none"> <li>- Failure to follow the market consultations with a prompt procurement procedure.</li> <li>- Failure to describe the required good in a neutral way: a market-consultation has to be undertaken before the description of the procured goods/services can be limited to certain specifics to which only the product/concept of one single that exclude other competitors.</li> <li>- Alternative demands: Launching a procurement-procedure for a differentiate set of goods even though the CA knows in advance that its demand will encompass only a selection of these.</li> <li>- Double procurements for the identical goods: shortly before finishing the first procurement-process the CA launches another process for identical goods that takes into account the results of the first process.</li> </ul>		
<p><b>Example of application from the national level (where applicable)</b></p>	<p>A market-consultation should be conducted</p> <ul style="list-style-type: none"> <li>- if the required goods or services are unusual or if the CA orders them for the first time.</li> <li>- to learn how the market for a required good or services works, what kind EOs are to be expected (e.g. mainly SME or other EO),</li> <li>- to get to know the uses of the market in question in order to identify a suitable form of procedure (if e.g. the market indicates a tendency to define the contracted goods during negotiations)</li> </ul>		

**Article 42 of the Directive ► § 121 (2) of Gesetz gegen Wettbewerbsbeschränkungen, § 31 of Vergabeverordnung (VgV), 7a (1) EU of the Vergabe- und Vertragsordnung für Bauleistungen**

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>§ 121 (2) GWB                      (2) For all procurement which is intended for use by natural persons, the accessibility criteria for persons with disabilities or the design for all users shall be taken into account when preparing the tender specifications, except in properly justified cases.</p> <p>§ 31 (2) – (5) VgV                      (2) The tender specifications must describe the details of the subject matter of the contract :</p> <ol style="list-style-type: none"> <li>1. terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;</li> <li>2. by reference to technical specifications technical specifications defined in Appendix 1 and, in order of preference,                             <ol style="list-style-type: none"> <li>a. to national standards transposing European standards,</li> <li>b. European Technical Assessments,</li> <li>c. common technical specifications,</li> <li>d. international standards and other technical reference systems established by the European standardisation bodies or</li> <li>e. in case there are no such standards or specifications , national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies;</li> </ol> </li> </ol> <p>(3) as a combination of No. 1 and 2.</p> <p>Any reference to a specification under No. 2 lit. a to e shall be accompanied by the words ‘or equivalent’;</p> <p>(3) The specifications can include aspects of quality and innovation as well as social or ecological aspects. They may also refer to the specific process or method of production or provision of the requested works or to another stage of its life cycle the subject-matter of the contract including the production and supply chain, even where such factors do not form part of their material substance provided that they are linked to the subject matter of the contract and proportionate to its value and its objectives.</p> <p>(4) The tender specification can further prescribe whether intellectual property rights shall be transferred or whether rights of use of the intellectual property shall be transferred on the contracting authority.</p> <p>(5) Where mandatory accessibility requirements as laid down in § 121 (2) of the Act against</p>	<p>The GWB is a parliamentary law. After its publication it is binding without any further transposition.</p> <p>Below the threshold the Unterschwellenvergabeordnung (UVgO) has been introduced. It transposes and adapts the Directive’s provision for national procurement procedure. Thus many regulations to transpose the Directive themselves are transposed and modified for application below the threshold. The equivalent for § 36 VgV is § 26, the equivalent for § 60 VgV is § 44 UVgO. The UVgO is not by itself a binding legal provision but must be implemented.</p> <p>This can happen either by an ordinance of the Minister of Finance (e.g. in Federal law) or by a reference in the Public Procurement Law of a federal country.</p> <p>By now the Federal law as well as most of the federal countries have adopted the UVgO.</p> <p>Verbatim transposition of Article 42.1.</p>	<p>Transposes Art. 41 (2) Subparagraph 4.</p> <p>Paragraph (2):                      Clause 1 secures the accessibility of technical specifications secured by its regulation in the procurement documentation and by reference to Appendix 1 to the VgV.</p> <p>Paragraph 2 No. 2 transposes Article 42 (3) and (6) allowing the requirements of the contract as</p> <p>No. 1 specifications addressing the performance or functional requirements (transposing Article 42 (6))</p> <p>No. 2 technical specifications (transposing Article 42 (3)), a combination of No. 1 and 2.</p> <p>Clause 2 transposes Article 42 (4) Clause 2.</p> <p><b>Paragraph 3:</b> transposes Article 42 (1) Sub-paragraph 2 verbatim.</p>	

<p>Restraints of Competition are adopted by a legal act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.</p>			
<p>§ 7a (1) EU VOB/A § 7a (1) EU VOB/A</p> <ol style="list-style-type: none"> <li>1. The technical specifications (according to Appendix TS No. 1) for the subject matter shall be equally accessible to all economic operators.</li> <li>2. Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.</li> <li>3. The technical specifications may also specify whether the transfer of intellectual property rights will be required.</li> <li>4. For all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.</li> <li>5. Where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.</li> </ol>		<p><b>Paragraph 4</b> transposes Article 42 (1) Sub-paragraph (3) verbatim.</p> <p><b>Paragraph 5</b> transposes Article 42 (1) Subparagraph 4 as far as it concerns mandatory accessibility requirements adopted by a legal act of the Union.</p>	
<p><b>Open questions</b></p>	<p>The cited regulations open the competition for the diversity of different technical possibilities available on the EU-internal market.</p>		
<p><b>Example of application from the national level (where applicable)</b></p>	<p>- “Design for all” as a technical specification for integrative barrier-free building that considers the needs of all visitors.</p>		

**Article 43 of the Directive ► § 34 Vergabeverordnung (VgV)**

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>(1) As a means of proof that supplies or services correspond to certain characteristics required in the service description the contracting authority may demand the submission of labels that fulfil the conditions stated in paragraphs 2 to 5.</p> <p>(2) The label shall fulfil all the following conditions:</p> <ol style="list-style-type: none"> <li>1. All the label requirements are appropriate to define characteristics of the performance and are linked to the subject-matter of the contract according to § 31 paragraph 3.</li> <li>2. The label requirements are based on objectively verifiable and non-discriminatory criteria.</li> <li>3. The label is established in an open and transparent procedure in which all interested parties may participate.</li> <li>4. The label is accessible to all interested parties.</li> <li>5. The label requirements were set by a third party over which the economic operator, who applies for the label, cannot exercise a decisive influence.</li> </ol> <p>(3) In case the performance does not have to meet all of the label requirements, the contracting authority shall indicate which label requirements are referred to.</p> <p>(4) Contracting authorities shall accept other labels that provide equivalent label requirements.</p> <p>(5) Where, for reasons that are not attributable to that economic operator, an economic operator had demonstrably no possibility of obtaining the specific label indicated by the contracting authority or an equivalent label within the relevant time limits, the contracting authority shall accept other appropriate means of proof, provided that the economic operator concerned proves that the performance fulfils the requirements of the specific label or the specific requirements indicated by the contracting authority.</p>	<p>The VgV is based on the authorisation granted to the government in § 131 GWB (Gesetz gegen Wettbewerbsbeschränkungen). It needed the additional approval by both chambers of parliament (the Bundestag as well as the Bundesrat, the representation of the federal countries). As a Government ordinance it does not share the legal rank of a parliamentary law but it is directly applicable and needs no further implementing. While the GWB contains regulations that transpose the common principles of all three Directives (2014/23/EC, 2014/24/EC and 2014/25/EC) and outlines the procedures, more specific rules for awarding contracts and concessions have been provided in ordinances dedicated to the specifics of procurement (VgV), concessions (KonzVgV) and the procurement by entities operating in the water, energy, transport and postal services sectors (SektVO). Therefore, the transposition of the Directive into German law includes regulations within the GWB as well as the VgV.</p>	<p>§ 34 transforms Article 43 (1) of the Directive with few differences directly into German law and opens this generally for the use and reference of labels. Before the reform, such a reference was possible only for ecological labels.</p> <p><b>Paragraph 1</b> introduces the possibility to demand that a label that confirms that the tendered work, service etc. corresponds to the required characteristics</p> <p><b>Paragraph 2</b> states the conditions for a valid label taking over the provisions as stated in the Directive.</p> <p><b>Paragraph 3</b> transforms the provision for the selective choice of requirements.</p> <p><b>Paragraph 4</b> transforms the provision for the acceptance of alternative equivalent labels.</p> <p><b>Paragraph 5</b> transforms the admittance of tenders for which the EO could not get neither the required nor an equivalent label. § 34 VgV has not transformed Article 43 (2), that provides the possibility to adopt parts of an otherwise insufficient label as technical specifications that are linked in a sufficient way to the subject matter of the contract and are appropriate to define characteristics of this subject matter.</p>	<p>§ 34 interacts with:</p> <ul style="list-style-type: none"> <li>- § 33 VgV that transforms Article 44 of the Directive. While the distinction between those two instruments is much clearer in the Directive, §§ 33 and 34 VgV are less clearly differentiated.</li> <li>- § 31 VgV that regulates the description of the demanded good/services.</li> </ul>
<p><b>Open questions</b></p>	<ul style="list-style-type: none"> <li>- Lack of a sufficient description of the required goods/services: these must be described so comprehensively that any EO can understand all the requirements without further knowledge of the demands put forward by the label. The reference to a label cannot replace this comprehensive description.</li> <li>- Demands on the equivalence of labels: especially If the EO refers to a label used in its own state of origin, the EO has to prove its equivalence. Jurisdiction will have to outline the demands on this proof; in order to keep this provision workable these demands must not be too high.</li> </ul>		

**Example of application from the national level (where applicable)**

Procurement of goods:

- for the ecological sustainability of electronic, office and household goods: Blue Angel label (<https://www.blauer-engel.de/de>)
- for fair-trade: Fairtrade Germany (<https://www.fairtrade-deutschland.de>), GEPA (<https://www.gepa.de/home.html>) based on ecological, economic and social standards.

Procurement of Services:

- Stiftung Warentest.

**Article 46 of the Directive ► § 97 (4) Gesetz gegen Wettbewerbsbeschränkungen (GWB) and § 30 Vergabeverordnung (VgV)**

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>§ 97 (4) GWB The interests of small and medium-sized undertakings shall primarily be taken into account in public procurement procedures. Contracts shall be divided into individual lots (partial lots) and awarded separately according to the type or area of specialisation (trade-specific lots). Several partial or trade-specific lots may be awarded collectively if this is required for economic or technical reasons. If an undertaking that is not a public contracting authority or sector contracting entity is entrusted with the realisation or execution of a public assignment, it shall be obliged by the public contracting authority or sector contracting entity, so far as it subcontracts to third parties, to proceed according to sentences 1 to 3.</p> <p>§ 30 VgV (1) Without prejudice to § 97 (4) of the Act against Restraints of Competition the contracting authority may decide whether tenders may be submitted only for one lot, for several lots or for all lots. They may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer. (2) Contracting authorities shall state the provisions according to paragraph 1 in the contract notice or in the invitation to confirm interest. They shall indicate in the procurement documents the objective and non-discriminatory criteria they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number. 3. Where more than one lot may be awarded to the same tenderer, contracting authorities may</p>	<p>The GWB is a parliamentary law. After its publication it is binding without any further transposition.</p> <p>Below the threshold, the Unterschwellenvergabeordnung (UVgO) has been introduced. It transposes and adapts the Directive's provision for national procurement-procedure. Thus, many regulations to transpose the Directive are themselves transposed and modified for application below the threshold. The equivalent for § 36 VgV is § 26, the equivalent for § 60 VgV is § 44 UVgO. The UVgO is not by itself a binding legal provision but must be implemented.</p> <p>This can happen either by an ordinance of the Minister of Finance (e.g. in Federal law) or by a reference in the Public Procurement Law of a federal country.</p> <p>By now the Federal law as well as most of the federal countries have adopted the UVgO.</p> <p>It does not contain a direct parallel to Article 18 (2) but itself refers to § 128 (1) GWB.</p> <p>The VgV is based on the authorisation granted to the government in § 131 GWB (Gesetz gegen Wettbewerbsbeschränkungen). It needs additional approval by both chambers of parliament (the Bundestag as well as the Bundesrat, the representation of the federal countries).</p> <p>As a Government ordinance it does not share the legal rank of a parliamentary law but it is directly applicable and needs no further implementing.</p> <p>While the GWB contains regulations that transpose the common principles of all three Directives (2014/23/EC, 2014/24/EC and</p>	<p>German law provides regulations for the division of a contract into lots both in the parliamentary law (GWB) and the ordinance (VgV).</p> <p>Whereas § 97 (4) GWB outlines the principles and the purpose of the division (support for SMEs), § 30 VgV transposes the detailed provisions of the Directive under the condition that the principles of § 97 (4) are observed. In accordance with Article 46 (4), § 97 (4) contains an obligation to divide the contract into lots. This division can either segregate the area in which the contract is to be performed into regional lots; or alternatively, it is possible to divide the lots according to different aspects of the contract that allows SMEs to tender for these single aspects. The award of multiple lots to a single EO is possible if economic or technical reasons demand such a concentration of lots; the possibility of an exception is provided by Article 46 (1).</p> <p>§ 97 (4) further ensures that an EO that acts as a general contractor and employs subcontractors is itself obliged to form lots.</p> <p>§ 30 VgV transposes Article 46 almost verbatim.</p> <p><b>Paragraph 1</b> transposes Article 46 (2) and (3) of the Directive concerning the limitation of lots to be awarded to a single EO. Further, it limits the number of lots to be awarded to a single EO.</p> <p><b>Paragraph 2</b> obliges the CA to indicate its intentions according to the limitation of lots in the announcement of the procurement or in the call for competition or the expression of interest. Furthermore, it transposes the obligation in Article 46 (2) Subparagraph 2 and obliges the CA to name the objective and non-discriminatory</p>	

<p>award contracts combining several or all lots, if they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.</p>	<p>2014/25/EC) and outlines the procedures, more specific rules for awarding contracts and concessions have been provided in ordinances dedicated to the specifics of procurement (VgV), concessions (KonzVgV) and the procurement by entities operating in the water, energy, transport and postal services sectors (SektVO).</p> <p>Therefore, the transposition of the Directive into German law includes regulations within the GWB as well as the VgV.</p>	<p>criteria by which they select the lots to be awarded to a EO that has won more than the limited number of lots.</p> <p><b>Paragraph 3</b> takes up the possibility provided by Article 46 (3) and allows the CA to award contracts for several or all possible lots to one single EO, provided the CA indicates this in the contract notice or in the invitation to confirm interest. This indication has to state which lots or groups of lots can be combined.</p>	
<p><b>Open questions</b></p>	<p>- § 30 (1) Sentence 1 leaves it to the discretion of the CA whether it awards the contract for one, several or all lots. This may be misleading because while the CA may choose one of these variants it has to settle on one of them and indicate its decision. The decision against a division into lots must remain an exception and requires a reasoned decision in the procurement documents.</p>		
<p><b>Example of application from the national level (where applicable)</b></p>	<p>As indicated above, § 97 (4) transposes Article 46 as a mandatory obligation and demands special reasons for awarding several or all lots to a single EO.</p> <p>The limitation of lots awarded can be a useful tool when contracting social services: it is one of the aims of the Social Statute Book to secure a variety of social service providers and service concepts. Dividing contracts for social services within a municipality into different regional lots and limiting the number of lots that can be awarded to a single EO can be a way to maintain the necessary variety of providers and allow the target groups of the contracted services a choice between the possible EOs.</p>		

**Article 56 of the Directive ► §§ 122, 124 Gesetz gegen Wettbewerbsbeschränkungen, §§ 42 und 56 Vergabeverordnung (VgV)**

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p><b>§ 122 Eligibility</b></p> <p>1. Public contracts shall be awarded to skilled, efficient (eligible) undertakings that have not been excluded under §§ 123 or 124.</p> <p><b>§ 124 Facultative Grounds for Exclusion</b></p> <p>Taking the principle of proportionality into account, public contracting authorities may at any point in the procurement procedure exclude an undertaking from participating in the procurement procedure if</p> <ol style="list-style-type: none"> <li>the undertaking has demonstrably breached applicable environmental, social or labour obligations in carrying out public contracts;</li> <li>the undertaking is insolvent, an insolvency proceeding or a comparable proceeding over the assets of the undertaking has been filed or opened, the opening of such a proceeding has been denied for lack of assets, the undertaking is in liquidation proceedings or has ceased to do business;</li> <li>the undertaking has demonstrably committed grave professional misconduct which renders its integrity questionable; § 123(3) shall apply mutatis mutandis;</li> <li>the public contracting authority has sufficient indications that the undertaking has concluded agreements with other undertakings which have as their object or effect, the prevention, restriction or distortion of competition;</li> <li>a conflict of interest exists in the execution of the procurement procedure which could compromise the impartiality and independence of a person working for the public contracting authority in the executing of the procurement procedure and which cannot be effectively remedied by other, less intrusive measures;</li> <li>a distortion of competition results from the prior involvement of the undertaking in the preparation of the procurement procedure, and such distortion of competition cannot be remedied by other, less intrusive</li> </ol>	<p>The GWB is a parliamentary law. After its publication it is binding without any further transposition.</p> <p>Below the threshold the Unterschwellenvergabeordnung (UVgO) has been introduced. It transposes and adapts the Directive's provision for national procurement procedure. Thus many regulations to transpose the Directive themselves are transposed and modified for application below the threshold. The equivalent for § 36 VgV is § 26, the equivalent for § 60 VgV is § 44 UVgO. The UVgO is not by itself a binding legal provision but must be implemented.</p> <p>This can happen either by an ordinance of the Minister of Finance (e.g. in Federal law) or by a reference in the Public Procurement Law of a federal country.</p> <p>By now the Federal law as well as most of the federal countries have adopted the UVgO.</p> <p>It does not contain a direct parallel to Article 18 (2) but itself refers to § 128 (1) GWB.</p>	<p>Transposes Article 56 (1)</p> <p>§ 122 sets the principle of who is eligible for being awarded a tender. Paragraph 2 defines and restricts the different aspects of suitability.</p> <p>§ 122 Paragraph 2 transposes Article 58.</p> <p>Transposes Article 56 (1) Subparagraph 2:</p> <p>One of the reasons for a non-compulsory exclusion is the demonstrable violation of such obligations as referred to in § 128 (1) GWB.</p> <p>Transposes Article 56 (2) Subparagraph 1 verbatim. Subparagraph 2 is not transposed.</p> <p><b>Paragraph 1:</b> transposes Article 56 (1).</p> <p><b>Paragraph 2:</b> Clause 1 transposes Article 56 Paragraph 3.</p> <p>§ 56 differentiates information regarding <b>the EO's enterprise</b> which may not only be submitted, supplemented, clarified and corrected, <b>that refer to the tendered offer</b> which may only be supplemented or completed.</p> <p>Clause 2: if a PA decides to deny the possibility to submit missing or incomplete information etc. it has to declare this in the contract notice or the tender documents.</p>	<p>Interacts with the regulations, relevant under § 128 GWB (which transposes § 18 (2), for a detailed citation see the Article 18 (2) Matrix); of most importance:</p> <ul style="list-style-type: none"> <li>Umsatzsteuergesetz (VAT Act),</li> <li>Körperschaftsteuergesetz (Corporate income tax law);</li> <li>Sozialgesetzbuch (Social Security Statute Book): Book III, V, VI, VII</li> <li>Legislation to transpose Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.             <ul style="list-style-type: none"> <li>Mindestlohngesetz (Minimum Wages Law)</li> <li>Tarifvertragsgesetz (Tariff-Agreement-Law)</li> <li>Arbeitnehmer-Entsendegesetz, the Arbeitnehmerüberlassungsgesetz (Laws concerning the posting of workers) and such ordinances that have been instituted in order to grant a tariff-agreement binding relevant beyond the initial parties.</li> </ul> </li> </ul>

<p>measures;</p> <p>7. the undertaking has produced significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract or concession contract which led to an early termination, damages or other comparable sanctions;</p> <p>8. the undertaking has committed a serious misrepresentation or withheld information or is not able to submit the required evidence with respect to the grounds for exclusion or the selection criteria; or</p> <p>9. the undertaking</p> <ol style="list-style-type: none"> <li>a. has undertaken to unduly influence the decision-making process of the public contracting authority;</li> <li>b. has undertaken to obtain confidential information that may confer upon it undue advantages in the procurement procedure; or</li> <li>c. has negligently or intentionally provided misleading information that may have a material influence on the decision of the public contracting authority concerning the award decision, or has undertaken to provide such information.</li> </ol> <p>(2) § 21 of the Posted Workers Act [<i>Arbeitnehmer-Entsendegesetz</i>], § 98c of the Residence Act [<i>Aufenthaltsgesetz</i>], § 19 of the Minimum Wage Act [<i>Mindestlohngesetz</i>] and § 21 of the Control of Unreported Employment Act [<i>Schwarzarbeitsbekämpfungsgesetz</i>] shall remain unaffected.</p>			
<p>§ 42 VgV Selection of eligible competing economic operators; exclusion of competitors</p> <p>3. In open procedures, contracting authorities may decide to examine tenders before verifying the fulfilment of the eligibility criteria.</p> <p>§ 56 VgV Additional requests for documents</p> <ol style="list-style-type: none"> <li>(1) Expressions of interest, requests to participate and tenders shall be examined as to their completeness and technical correctness; in addition t that tenders shall be examined as to their mathematical accuracy.</li> <li>(2) Provided that such requests are made in full compliance with the principles of equal treatment and transparency the contracting authority may request candidate or tenderer to supplement, complete or correct information</li> </ol>	<p>The VgV is based on the authorisation granted to the government in § 131 GWB (Gesetz gegen Wettbewerbsbeschränkungen). It needed the additional approval of both chambers of parliament (the Bundestag as well as the Bundesrat, the representation of the federal states).</p> <p>As a Government ordinance it does not share the legal rank of a parliamentary law but it is directly applicable and needs no further</p>	<p><b>Paragraph 3:</b> excludes from the rule according to Paragraph 2 such information that is relevant to the economic assessment based on the award criteria.</p> <p>A sub-exception states that irrelevant elements of the prize-calculation do not change the result of the calculation submitted by the EO or the ranking of the assessment or the competition-result.</p> <p><b>Paragraph 4:</b> transposes Article 56 (3) which requests an appropriate time limit for the delivery of the</p>	

<p>concerning the enterprise, especially self-declarations, information, certificates or other verifications or to correct or supplement or complete documentation concerning the performance. The contracting authority is authorised to indicate in the contract notice or the procurement documents, that it will not request additional documentation.</p> <p>(3) No additional documentation may be requested regarding to the performance that concern the economical assessment based on the award criteria. This does not apply to information concerning the price, if this concerns only irrelevant single items that do not change the over-all-prize or change the ranking of the assessment and the competition.</p> <p>(4) The candidate or tenderer shall supply the information within an appropriate time limit set by the contracting authority that can be calculated according to the calendar.</p> <p>(5) The decision for an additional request and its result shall be documented.</p>	<p>implementing.</p> <p>While the GWB contains regulations that transpose the common principles of all three Directives (2014/23/EC, 2014/24/EC and 2014/25/EC) and outlines the procedures, more specific rules for awarding contracts and concessions have been provided in ordinances dedicated to the specifics of procurement (VgV), concessions (KonzVgV) and the procurement by entities operating in the water, energy, transport and postal services sectors (SektVO).</p> <p>Therefore, the transposition of the Directive into German law includes regulations within the GWB as well as the VgV.</p>	<p>requested information.</p> <p>Paragraph 5: the PA has to document</p> <p>-its decision to proceed according to § 56 VgV the result of its proceeding.</p>	
<p><b>Open questions</b></p>	<p>§ 56 VgV introduces a new regulation of an issue that has been much discussed by national jurisdiction. It is expected that the new clauses will settle the uncertainties based on the former regulation, which restricted the possibilities of amending the tender to submitting missing declarations and documents providing evidence. So in contrast to the present regulation, submitted tenders could not be corrected but only complemented by additional documents or information.</p>		
<p><b>Example of application from the national level (where applicable)</b></p>	<p>Request for missing information in order to allow a competing EO to remain in the competition if that is needed to maintain a choice between diversified and differentiated tenders.</p>		

**Article 57 of the Directive ► §§ 123 and 124 of Gesetz gegen Wettbewerbsbeschränkungen**

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>§ 123 Compulsory Grounds for Exclusion</p> <p>(1) Public contracting authorities shall exclude an undertaking from participation at any point in the procurement procedure when they are aware that a person whose conduct is imputable to the undertaking in accordance with paragraph 3 has been convicted by final judgement or a final administrative fine has been issued against the undertaking under § 30 of the German Administrative Offences Act [<i>Gesetz über Ordnungswidrigkeiten</i>] for a criminal offence under:</p> <ol style="list-style-type: none"> <li>1. § 129 of the German Criminal Code [<i>Strafgesetzbuch</i>] (forming criminal organisations), § 129a of the German Criminal Code (forming terrorist organisations) or § 129b of the German Criminal Code (criminal and terrorist organisations abroad);</li> <li>2. § 89c of the German Criminal Code (terrorism financing) or for participation in such a crime or for the provision or collection of financial resources with knowledge that such financial resources will be used or intended to be used, wholly or in part, to commit a crime under § 89a(2) no. 2 of the German Criminal Code;</li> <li>3. § 261 of the German Criminal Code (money laundering; hiding unlawfully obtained financial benefits);</li> <li>4. § 263 of the German Criminal Code (fraud), provided that the criminal offence is directed against the budget of the European Union or against budgets administered by the European Union or on its behalf;</li> <li>5. § 264 of the German Criminal Code (subsidy fraud), provided that the criminal offence is directed against the budget of the European</li> </ol>	<p>The GWB is a parliamentary law. After its publication it is binding without any further transposition.</p> <p>Below the threshold the Unterschwellenvergabeordnung (UVgO) has been introduced. It transposes and adapts the Directive's provision for national procurement procedure. Thus many regulations to transpose the Directive themselves are transposed and modified for application below the threshold. The equivalent for § 36 VgV is § 26, the equivalent for § 60 VgV is § 44 UVgO. The UVgO itself is not by itself a binding legal provision but must be implemented.</p> <p>This can happen either by an ordinance of the Minister of Finance (e.g. in Federal law) or by a reference in the Public Procurement Law of a federal country.</p> <p>By now the Federal law as well as most of the federal countries have adopted the UVgO.</p> <p>It does not contain a direct parallel to Article 18 (2) but itself refers to § 128 (1) GWB.</p>	<p>In reference to the gravity of a prolonged exclusion from the participation in competition for contracts, German Procurement Law transposes Article 57 in the parliamentary law.</p> <p>In order to allow a better transparency of the regulation, German Law differentiates the content of Article 57 in §§ 123 – 126.</p> <p>The transposition of reasons for compulsory exclusion refers to the relevant clauses in the Penal Code that are themselves transposed into the clauses cited in Paragraph 1.</p> <p><b>Paragraph 1:</b> transposes Article 57 Paragraphs 1 and 5 Subparagraph 1, which states that an exclusion is possible at any time of the procedure. The catalogue in Article 57 (1) is transposed as following:</p> <ul style="list-style-type: none"> <li>• No. 1 transposes Lit. a</li> <li>• No. 2 transposes Lit. d and e</li> <li>• No. 3 transposes Lit. d</li> <li>• No. 4 transposes Lit. c</li> <li>• No. 5 transposes Lit. c</li> <li>• No. 6 transposes Lit. b</li> <li>• No. 7 transposes Lit. b</li> <li>• No. 8 transposes Lit. b</li> <li>• No. 9 transposes Lit. b</li> <li>• No. 10 transposes Lit. f.</li> </ul>	<p>Interaction of § 123 with</p> <ul style="list-style-type: none"> <li>• the German Penal Code: § 123 refers to offences which are cited in the Penal Code;</li> <li>• the regulations that constitute the rules violated by the offences cited under the Penal Code; many of the regulations cited in § 123 Paragraph 1 are offences against good governance duties. Therefore § 123 Paragraph 1 indirectly interacts with these duties as well.</li> <li>• Wettbewerbsregistergesetz (Competition Register Act).</li> </ul>

<p>Union or against budgets administered by the European Union or on its behalf;</p> <ol style="list-style-type: none"> <li>6. § 299 of the German Criminal Code (taking and giving bribes in commercial practice);</li> <li>7. § 108e of the German Criminal Code (bribing delegates);</li> <li>8. §§ 333 and 334 of the German Criminal Code (granting an undue advantage and bribery), each also in conjunction with § 335a of the German Criminal Code (foreign and international officials);</li> <li>9. Article 2 § 2 of the German Act on Combating International Bribery [<i>Gesetz zur Bekämpfung internationaler Bestechung</i>] (Bribery of Foreign Public Officials In International Business Transactions) or</li> <li>10. §§ 232 and 233 of the German Criminal Code (human trafficking) or § 233a of the German Criminal Code (assisting in human trafficking).</li> </ol> <p>(2) A conviction or the issuance of an administrative fine under the comparable provisions of other countries are the equivalent of a conviction or the issuance of an administrative fine within the meaning of paragraph 1.</p> <p>(3) The conduct of a person convicted by final judgement shall be imputable to an undertaking if that person has acted as the responsible person for the management of the undertaking; this also includes supervision of management or the exercise in another manner of control in a managerial position.</p> <p>(4) Public contracting authorities shall at any point in the procurement procedure exclude an undertaking from participating in the procurement procedure if</p> <ol style="list-style-type: none"> <li>1. the undertaking has not fulfilled its obligations relating to the payment of taxes, charges or social security contributions and this has been established by a judicial or administrative decision having final and binding effect or</li> </ol>		<p><b>Paragraph 2:</b> states that corresponding convictions in other States can ensue in an exclusion from competition in Germany as well.</p> <p><b>Paragraph 3:</b> transposes Article 57 Paragraph 1 Subparagraph 2.</p> <p><b>Paragraph 4:</b> transposes Article 57 Paragraph 2.</p> <p>Clause 1 No. 1 transposes Subsection 1.</p> <p>Clause 1 No. 2 transposes Paragraph 2 Subsection 2.</p> <p>Clause 2 transposes Paragraph 2 Subsection 3.</p> <p><b>Paragraph 5:</b> transposes Article 57 Paragraph 3;</p> <p>Clause 1 allows a dispensation from the application of § 123 (1), if there are compelling reasons of public interest</p> <p>Clause 2 allows a dispensation from the application of § 123 (4.1): not only if there are compelling reasons of public interest but also if an exclusion is obviously disproportional.</p> <p>Clause 3 contains a cross reference to § 125 (duration of the exclusion, see below).</p>	
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<p>2. the public contracting authorities can prove the breach of an obligation under no. 1 in another suitable manner.</p> <p>Sentence 1 shall not apply if the undertaking has fulfilled its obligations by making the payment or committing to pay the taxes, charges and social security contributions, including interest, fines for late payment and penalties.</p> <p>(5) An exclusion under paragraph 1 may be disregarded if this is imperative for compelling reasons of the public interest. An exclusion under paragraph 4 sentence 1 may be disregarded if this is imperative for compelling reasons of the public interest or if an exclusion would be obviously disproportionate.</p>			
<p>§ 124 Facultative Grounds for Exclusion</p> <p>(1) Taking the principle of proportionality into account, public contracting authorities may at any point in the procurement procedure exclude an undertaking from participating in the procurement procedure if</p> <ol style="list-style-type: none"> <li>1. the undertaking has demonstrably breached applicable environmental, social or labour obligations <i>in</i> carrying out public contracts;</li> <li>2. the undertaking is insolvent, an insolvency proceeding or a comparable proceeding over the assets of the undertaking has been filed or opened, the opening of such a proceeding has been denied for lack of assets, the undertaking is in liquidation proceedings or has ceased to do business;</li> <li>3. the undertaking has demonstrably committed grave professional misconduct which renders its integrity questionable; § 123(3) shall apply <i>mutatis mutandis</i>;</li> <li>4. the public contracting authority has sufficient indications that the undertaking has concluded agreements with other undertakings which have as their object or effect, the prevention,</li> </ol>		<p><b>Paragraph 1:</b> transposes Article 57 Paragraph 4 and 5 Subparagraph 2, which states that such an exclusion is possible at any time during the procedure, and lists the cases of a non-compulsory exclusion.</p> <p>The catalogue in Paragraph 4 is transposed as following:</p> <ul style="list-style-type: none"> <li>• No. 1 transposes Lit. a</li> <li>• No. 2 transposes Lit. b</li> <li>• No. 3 transposes Lit. c</li> <li>• No. 4 transposes Lit. d</li> <li>• No. 5 transposes Lit. e</li> <li>• No. 6 transposes Lit. f</li> <li>• No. 7 transposes Lit. g</li> <li>• No. 8 transposes Lit. h</li> <li>• No. 9 transposes Lit. i.</li> </ul>	<p>Interaction with</p> <ul style="list-style-type: none"> <li>• the regulations, relevant under § 128 GWB (which transposes § 18 (2), for a detailed citation see the Article 18 (2) Matrix); of most importance : <ul style="list-style-type: none"> <li>• Umsatzsteuergesetz (VAT Act),</li> <li>• Körperschaftssteuergesetz (Corporate income tax law);</li> <li>• Sozialgesetzbuch (Social Security Statute Book): Book III, V, VI, VII</li> <li>• Legislation to transpose the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. <ul style="list-style-type: none"> <li>○ Mindestlohngesetz (Minimum Wages Law)</li> <li>○ Tarifvertragsgesetz (Tariff-Agreement-Law)</li> <li>○ Arbeitnehmer-Entsendegesetz, the Arbeitnehmerüberlassungsgesetz (Laws concerning the posting of workers) and such ordinances that have been instituted in order to grant a</li> </ul> </li> </ul> </li> </ul>

<p>restriction or distortion of competition;</p> <ol style="list-style-type: none"> <li>5. a conflict of interest exists in the execution of the procurement procedure which could compromise the impartiality and independence of a person working for the public contracting authority in the executing of the procurement procedure and which cannot be effectively remedied by other, less intrusive measures;</li> <li>6. a distortion of competition results from the prior involvement of the undertaking in the preparation of the procurement procedure, and such distortion of competition cannot be remedied by other, less intrusive measures;</li> <li>7. the undertaking has produced significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract or concession contract which led to an early termination, damages or other comparable sanctions;</li> <li>8. the undertaking has committed a serious misrepresentation or withheld information or is not able to submit the required evidence with respect to the grounds for exclusion or the selection criteria; or</li> <li>9. the undertaking <ol style="list-style-type: none"> <li>a. has undertaken to unduly influence the decision-making process of the public contracting authority;</li> <li>b. has undertaken to obtain confidential information that may confer upon it undue advantages in the procurement procedure; or</li> <li>c. has negligently or intentionally provided misleading information that may have a material influence on the decision of the public contracting authority concerning the award decision, or has undertaken to provide such information.</li> </ol> </li> </ol> <p>(2) § 21 of the Posted Workers Act [<i>Arbeitnehmer-</i></p>		<p><b>Paragraph 2:</b> contains a cross-reference that clarifies that the exclusion based on § 124 (1) does not preclude sanctions based on special labour-law provisions that allow to exclude employers from tenders if they violate the regulations of these laws.</p>	<p>tariff-agreement binding relevance beyond the initial parties.</p> <ul style="list-style-type: none"> <li>• Insolvency Law (Insolvenzordnung)</li> <li>• Antitrust-Law</li> <li>• § 5 Vergabeverordnung (protection of confidential information)</li> <li>• § 6 Vergabeverordnung (Conflict of interest)</li> <li>• § 7 Vergabeverordnung (Inclusion of EO in the preparation of the tender)</li> <li>• Civil Law Codex: regulation for the performance of contracts</li> <li>• Wettbewerbsregistergesetz (Competition Register Act).</li> </ul> <p>Further interaction based on Paragraph 2 with</p> <p>§ 21 des Arbeitnehmer-Entsendegesetzes (Law concerning the posting of workers)</p> <p>§ 98c des Aufenthaltsgesetzes (Residence Act),</p> <p>§ 19 des Mindestlohngesetzes (Minimum Wages Law)</p> <p>§ 21 des Schwarzarbeitsbekämpfungsgesetzes (Act to Combat Clandestine Employment).</p>
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<p><i>Entsendegesetz</i>], § 98c of the Residence Act [Aufenthaltsgesetz], § 19 of the Minimum Wage Act [<i>Mindestlohnengesetz</i>] and § 21 of the Control of Unreported Employment Act [<i>Schwarzarbeitsbekämpfungsgesetz</i>] shall remain unaffected.</p>			
<p><b>§ 125 Self-cleansing</b></p> <p>(1) Public contracting authorities shall not exclude an undertaking for which a ground for exclusion exists under § 123 or § 124 from participation in the procurement procedure where the undertaking has proven that it</p> <ol style="list-style-type: none"> <li>1. has paid or undertaken to pay compensation for any damage caused by the criminal offence or misconduct;</li> <li>2. has comprehensively clarified the facts and circumstances associated with the criminal offence or misconduct and the damage caused thereby by actively collaborating with the investigating authorities and the public contracting authority; and</li> <li>3. has taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.</li> </ol> <p>§ 123(4) sentence 2 shall remain unaffected.</p> <p>(2) The self-cleansing measures taken by the undertakings shall be evaluated by the public contracting authorities, taking into account the gravity and particular circumstances of the criminal offence or misconduct. If the public contracting authorities consider the self-cleansing measures by the undertaking to be insufficient, they shall provide the undertaking with justification for the decision.</p>		<p>Transposes Article 57 Paragraph 6 <b>Paragraph 1:</b> transposes Subparagraph 1 and 2, stating the possibility and the demands for a substantial self-cleansing.</p> <p>No. 1 – 3 transpose Subparagraph 2 and the verifiable steps to be taken if an EO has to provide proof.</p> <p>The cross-reference to § 123 (4.2) states that the measurements stated in Article 57 Paragraph (4.2) preclude the exclusion in itself.</p> <p><b>Paragraph 2:</b> transposes Paragraph 6 Subparagraphs 1 and 3.</p>	<p>Interacts with the Wettbewerbsregistergesetz (Competition Register Act; concerning the registration of EOs who have been excluded from the tender).</p>
<p><b>§ 126 Allowable Period for Exclusions</b></p> <p>Where an undertaking for which a ground for exclusion exists has taken no sufficient self-cleansing measures under § 125,</p>		<p>Transposes Article 57 Paragraph 7.</p>	

<ol style="list-style-type: none"> <li>1. if a ground for exclusion exists under § 123, it may be excluded from participation in procurement procedures for up to five years from the day of the final conviction;</li> <li>2. if a ground for exclusion exists under § 124, it may be excluded from participation in procurement procedures for up to three years following the event at issue.</li> </ol>			
<b>Possible elements of legal uncertainty (better if already dealt with in national courts)</b>	<ul style="list-style-type: none"> <li>- Other than § 123, § 124 demands a discretionary decision on how the PA reacts on verified relevant occurrences that may justify an exclusion. The decision must be based on a prognosis whether the EO can be expected to reliably and diligently perform the service undertaken in accordance with the relevant law. The decision must as well consider whether an exclusion is proportionate in relation to the prior offence.</li> <li>- § 124: whereas the compulsory exclusion according to § 123 is based on the final conviction the exclusion according to § 124 is based on other facts that verify the offence. It remains to be settled what demands the courts will make on these verifications.</li> </ul>		
<b>Example of application from the national level (where applicable)</b>	<ul style="list-style-type: none"> <li>- The application and practical relevance of §§ 123 and 124 GWB depends on the establishment of the Competition-Register: this register is a database that lists convictions of EOs for relevant crimes as well as such offences as hitherto have been documented in another public register. In the future, both documentations will be gathered in the Competition Register (more colloquially called the Corruption Register).</li> </ul>		

**Article 67 of the Directive ► §§ 127 of Gesetz gegen Wettbewerbsbeschränkungen and 58 Vergabeverordnung VgV**

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>§ 127 Contract Award</p> <p>(1) The contract shall be awarded to the most economically advantageous tender. The basis for this is an evaluation by the public contracting authority concerning whether and to what extent the tender meets the specified award criteria. The most economically advantageous tender is determined according to the best price-quality ratio. Apart from the price or costs, to determine this, qualitative, environmental or social aspects may also be taken into account.</p> <p>(2) Binding rules on pricing shall be observed in determining the most economically advantageous tender.</p> <p>(3) The award criteria must be related to the subject matter of the contract. This relationship shall also be assumed when an award criterion refers to processes relating to the production, provision or disposal of the performance, to trading with the performance or to another stage in the life cycle of the performance, even when such factors do not affect material qualities of the subject matter of the contract.</p> <p>(4) The award criteria must be specified and defined in a manner that ensures the possibility of effective competition, that the contract cannot be awarded arbitrarily and that it is possible to conduct an effective review on whether and to what extent the tenders meet the award criteria. If public contracting authorities allow variant tenders, they shall define the award criteria in such a way as to apply both to main tenders and variant tenders.</p> <p>(5) The award criteria and their weighting must be specified in the contract notice or the procurement documents.</p>		<p><b>Paragraph 1:</b> transposes Article 67 (1) and (2) Underparagraph 1 Clause 1 and 2 and Underparagraph 3: the best cost-performance-ratio is the mandatory base for the assessment of the performance-audit.</p> <p>Further aspects for the audit can be qualitative, ecological or social aspects. Article 67 (2) 3</p> <p><b>Paragraph 2:</b> transposes the reference in Article 67 (1) to national laws, regulations or administrative provisions concerning the price of certain supplies and states that these must be included in the determination of the best cost-performance ratio.</p> <p><b>Paragraph 3:</b> transposes Article 67 (2.1) and (3).</p> <p><b>Paragraph 4:</b>            Clause 1 transposes Article 67 (4).            Clause 2 provides for award-criteria in cases when the PA admits variant solutions. In those cases, the award-criteria must be chosen to be applicable to the tendered offers as well as the variant solutions.</p> <p><b>Paragraph 5:</b> transposes Article 67 (5).</p>	<p>Interaction with national laws, regulations or administrative provisions concerning the price of certain supplies: these include</p> <ul style="list-style-type: none"> <li>• the Verordnung PR Nr 30/53 über die Preise bei öffentlichen Aufträgen (Ordinance concerning prices for public contracts)</li> <li>• Legal regulations for the remuneration of certain professions (e.g. architects, advocates etc.)</li> <li>• mandatory minimum-wages.</li> </ul>

<p>§ 58 Contract award and award criteria</p> <p>(1) In accordance with Paragraph 127 of the Act against Restraints of Competition the contract shall be awarded to the most economically advantageous tender.</p> <p>(2) The most economically advantageous tender shall be identified on the basis of the best price – performance-relation. Apart from price or costs the criteria may include qualitative, environmental and/or social aspects, especially</p> <ol style="list-style-type: none"> <li>1. quality, including technical merit, aesthetic and functional characteristics, accessibility especially for disabled persons, design for all users, social, environmental and innovative characteristics and trading and its conditions;</li> <li>2. organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or</li> <li>3. after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion</li> </ol> <p>The contracting authority may also set a fixed price or cost, so that the most economically advantageous tender shall be determined on the basis of quality, ecological or social criteria only.</p> <p>(3) The contracting authority shall specify, in the contract notice or the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. Those weightings may be expressed by providing for a range with an appropriate maximum spread. Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.</p> <p>(4) The verification of whether and in which degree the tendered service complies with the award criteria, is rendered in accordance with paragraphs 33 and 34.</p> <p>(5) At least two representatives of the Contracting authority should be involved in the award decision.</p>		<p><b>Paragraph 1:</b> takes up the principle expressed in Article 67 (1).</p> <p><b>Paragraph 2:</b> transposes Article 67 (2) Underparagraph 1, admitting other criteria besides the price or the costs.</p> <p>Transposes Article 67 (2) Underparagraph 1 Lit. a.</p> <p>Transposes Article 67 (2) Underparagraph 1 Lit. b.</p> <p>Transposes Article 67 (2) Underparagraph 1 Lit. c: adding the availability of the tendered service as a possible criterion.</p> <p>Clause 2 transposes Article 67 (2) Underparagraph 2.</p> <p><b>Paragraph 3:</b> is a direct and almost verbatim transposition of Article 67 (5).</p> <p><b>Paragraph 4:</b> refers to §§ 33 and 34 VgV for the requirements for the proof of the criteria-fulfilment; these regulations transpose Articles 44 and 43 of the Directive.</p> <p><b>Paragraph 5:</b> demands a dual-control-procedure for the award-decision.</p>	
<p><b>Possible elements of legal uncertainty (better if already</b></p>	<ul style="list-style-type: none"> <li>• § 58 Paragraph 2 No. 2 defines “organisation, qualification and experience of staff assigned to performing the contract” as a possible award criterion. Here difficulties may arise to avoid the forbidden double consideration of criteria as a criterion concerning the aptitude of</li> </ul>		

<p><b>dealt with in national courts)</b></p>	<p>the EO to perform the contract and award criterion.</p> <ul style="list-style-type: none"> <li>• Especially with so called soft criteria it can be advisable to demand and assess performance concepts: that however poses problems for the relative weighting of the different tenders. In 2016 and 2017 a highly controversial jurisdiction has searched for a viable way to ensure both legal certainty and a leeway for the EOs in which they can describe their concepts. The question was, whether PAs can rate these concepts by school grades and how closely they have to define the expectations a tender has to fulfil to receive a certain grading. While the earlier decision demanded the publication of the details and the possibility for the EO to foresee the grading for its own concept, based on the EuGH Dimarso-ruling a later decision dropped these requirements again. <ul style="list-style-type: none"> <li>○ Oberlandesgericht Düsseldorf, 08.03.2017, VII-Verg 39/16</li> <li>○ EuGH Dimarso, 14.07.2016 C-6/15</li> <li>○ Oberlandesgericht Düsseldorf, 08.03.2017 – VII-Verg 39/16.</li> </ul> </li> </ul>
<p><b>Example of application from the national level (where applicable)</b></p>	<p>The admission of qualitative, ecological and/or social criteria is an important aspect of sustainable and strategic procurements. Examples of the consideration of</p> <ul style="list-style-type: none"> <li>• <b>Qualitative aspects:</b> are important especially for the procurement of social services as they allow to weigh soft skills; the professional integration of migrants in social services can be both a social as well as a qualitative aspect, as these employees may have special cultural sensitiveness or competences and language skills that add greatly in building a relationship with the target groups of certain services.</li> <li>• <b>Social aspects:</b> the employment of handicapped, formerly unemployed or disadvantaged persons in the performance of contracts (unless it is a reserved contract).</li> <li>• <b>Ecological aspects:</b> special regard to the sustainability of the tendered goods or services.</li> </ul>

**Article 69 of the Directive ► §§ 60 Vergabeverordnung (VgV)**

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>(1) Where the price or the costs of a tender appears to be abnormally low in relation to the required performance contracting authorities shall require clarification from the economic operators.</p> <p>(2) The contracting authority shall assess the information provided by consulting the tenderer. and consider the submitted documents. The assessment may in particular relate to:</p> <ol style="list-style-type: none"> <li>1. the economics of the manufacturing process of the supply or of the services provided;</li> <li>2. the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services;</li> <li>3. the originality of the work, supplies or services proposed by the tenderer</li> <li>4. compliance with obligations referred to in § 128 (1) of the Act against Restraints of Competition, especially with the provisions of ecological, social or labour law relevant for the economic operator</li> <li>5. the possibility of the tenderer obtaining State aid.</li> </ol> <p>3. Where after the assessment according to paragraphs 1 and 2 the contracting authority is unable to satisfactorily clarify the the low level of price or costs proposed, the contracting authority may decline to award the contract for this tender. Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in paragraph 2 clause 2 No. 4.</p> <p>4. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the contracting authority shall reject the tender where the latter is unable to prove within a time limit that the aid in question was legally awarded. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof</p>	<p>The VgV is based on the authorisation granted to the government in § 131 GWB (Gesetz gegen Wettbewerbsbeschränkungen). It needs additional approval by both chambers of parliament (the Bundestag as well as the Bundesrat, the representation of the federal countries).</p> <p>As a Government ordinance it does not share the legal rank of a parliamentary law but it is directly applicable and needs no further implementing.</p> <p>While the GWB contains regulations that transpose the common principles of all three Directives (2014/23/EC, 2014/24/EC and 2014/25/EC) and outlines the procedures, more specific rules for awarding contracts and concessions have been provided in ordinances dedicated to the specifics of procurement (VgV), concessions (KonzVgV) and the procurement by entities operating in the water, energy, transport and postal services sectors (SektVO).</p> <p>Therefore, the transposition of the Directive into German law includes regulations within the GWB as well as the VgV.</p>	<p><b>Paragraph 1</b> transposes Article 69 (1) verbatim and obliges the CA to demand an explanation of the EOs if the price or the costs proposed in the tender in relation to the tendered services is abnormally low.</p> <p><b>Paragraph 2</b> obliges the CA to examine the composition of the tender and to take into consideration the information transferred by the EO; the focus-points of these explanations listed in Paragraph 2 No. 1 – 4 and 6 transposed in the Directive verbatim.</p> <p>No. 1 economics of the manufacturing process of the contracted goods or of the performance of the service.</p> <p>No. 2 the technical solution chosen or the exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;</p> <p>No. 3 the originality of the tendered work, supplies or service proposed by the EO.</p> <p>No. 4 compliance with obligations referred to in § 128 (1) GWB, especially economical, social and labour law obligations.</p> <p>No. 5 the possibility of the EO obtaining State Aid.</p> <p>The list does not contain a reference to Article 71 (Subcontractors)</p> <p><b>Paragraph 3</b> transposes Article 69 Paragraph 3; it leaves it to the CA's discretion to reject the tender if the assessment according to Paragraphs 1 and 2 has yielded no satisfactory explanation for the low price or cost; Directive § 60 VgV does not state that such a rejection is only permitted in the case of unsatisfactory explanation. The CA is obliged to reject the tender if it has established that the abnormally is caused by noncompliance with the obligations</p>	<ul style="list-style-type: none"> <li>- § 128 (1) GWB.</li> <li>- § 9 VgV.</li> <li>- Rules on State Aid and Grants.</li> </ul>

		<p>under Paragraph 2 Sentence 2 No. 4.  <b>Paragraph 4</b> transposes Article 69 Paragraph 4: it contains the obligation to reject the tender if the abnormally low tender is due to State Aid and the tenderer is unable to prove within a given time that the State Aid is in accordance with the relevant legal provisions. Paragraph 4 obliges the CA to inform the Commission of this rejection of a tender.  § 60 contains no transposition of Article 69 Paragraph 5.</p>	
<p><b>Open questions</b></p>	<ul style="list-style-type: none"> <li>- Criteria for abnormality”: As in the Directive, § 60 VgV leaves it to the CA’s discretion whether the price or costs is abnormally low and whether further assessment into the calculation is mandatory. However, jurisdiction has established certain guidelines; a difference of 20 % or more to the next acceptable higher tender is deemed unusually low.</li> <li>- Formalities of the demanded explanation and the assessment: in contrast to the earlier Directive 2004/18/EC, the Directive (24/2014/EU) does not demand a certain form. § 9 Paragraph 2 VgV however demands a written correspondence and the EO’s response must accordingly come in written form to admit the assessment.</li> <li>- State Aid as reason for an abnormally low tender: this should include all possible forms of State Aid, i.e. apart from direct money transfer, the awarding of advantageous credits, debt relief and other forms. It may be yet uncertain what requirements the demanded proof for the compliance of the State Aid with relevant regulations has to meet and how long the time for its delivery must be set.</li> <li>- Abnormally high tenders: it is not clear whether they can be included into the assessment provided by § 60 or whether they must be processed without further scrutiny, or can be eliminated in the next step of the procedure. The wording of § 60 VgV is specific. An assessment could lead to the exclusion of an otherwise eligible tender at an unnecessary early step and reduce the competition. An inclusion into the procedure of § 60 VgV would demand specific criteria for their assessment. If they are not excluded and proceeded to the award decision they would compete with the other eligible tenders and might influence a median-based rating.</li> </ul>		
<p><b>Example of application from the national level (where applicable)</b></p>	<ul style="list-style-type: none"> <li>- The assessment of abnormally low tenders may prove to become a major opportunity and occasion to control the compliance with the relevant economic, social or labour law regulations. As such it may effectively secure the long-term observation of these regulations by tenderers interested in participation in procurement.</li> </ul>		

**Article 70 of the Directive ► § 128 Abs. 2 Gesetz gegen Wettbewerbsbeschränkungen (GWB)**

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Contract performance (2) Public contracting authorities may, in addition, set special conditions for the performance of a contract (contract performance conditions), provided that they are related to the subject matter of the contract in accordance with § 127(3). The contract performance conditions must arise from the contract notice or the procurement documents. They may in particular include economic, innovation-related, environmental, social or employment-related considerations or the protection of information confidentiality.</p>	<p>The GWB is a parliamentary law. After its publication it is binding without any further transposition. Below the threshold, the Unterschwellenvergabeordnung (UVgO) has been introduced. It transforms and adapts the Directive's provision for national procurement-procedure. Thus, many regulations to transform the Directive themselves are transformed and modified for application below the threshold. The equivalent for § 36 VgV is § 26, the equivalent for § 60 VgV is § 44 UVgO. The UVgO is not by itself a binding legal provision but must be implemented. This can happen either by an ordinance of the Minister of Finance (e.g. in Federal law) or by a reference in the Public Procurement Law of a federal country. By now the Federal law as well as most of the federal countries have adopted the UVgO. It does not contain a direct parallel to Article 18 (2) but itself refers to § 128 (1) GWB.</p>	<p>§128 (2) transposes Article 70 almost verbatim into German tender law. Beyond the relevant rules referred to in § 128 (1) (see Matrix Article 18 (2)) it allows CAs to introduce further special conditions into the contract that concern the performance of a contract. These conditions must be:</p> <ul style="list-style-type: none"> <li>• linked to the subject matter of the contract within the meaning of § 127(3) GWB.</li> <li>• indicated in the call for competition or in the procurement documents.</li> </ul> <p>Possible conditions may include economic, innovation-related, environmental, social or employment-related considerations.</p>	<p>§ 128 (1) GWB: this section refers to conditions and relevant rules laid down by the law. §§ 305 ff Bürgerliches Gesetzbuch (Civil Law Code): provides standards for the control of conditions used in contracts that are set up unilaterally by one contracting party. TFEU Articles 34 and 59.</p>
<p><b>Open questions</b></p>	<ul style="list-style-type: none"> <li>- Extent of the applicability of special conditions during the life-cycles of the contracted goods: in accordance with Recital 97 these conditions may refer to any step within the life-cycles. This concerns even such goods that have been manufactured before the contract notice has been published.</li> <li>- Extent of control: the ECJ has formulated standards for the effective control of the fulfilment of award-criteria (C-513/99 Concordia). It is not yet decided whether these are applicable for the conditions according to § 128 (2) GWB. As the observance of these conditions cannot be controlled at the time of the awarding decision there may be a good reason for allowing a different standard in the context of § 128 (2).</li> </ul>		
<p><b>Example of application from the national level (where applicable)</b></p>	<p>The introduction of special contract conditions can be useful:</p> <ul style="list-style-type: none"> <li>- to ascertain special social standards for the performance of the contract: e.g. the inclusion of certain disadvantaged persons (handicapped, persons on employment-training etc.)</li> <li>- to ascertain fair-trade or ecological standards for labels.</li> </ul> <p>These clauses may be useful when it is difficult to grade a performance during fulfillment: in contrast to award criteria the observance of a condition cannot be rated by degrees; the statement is reduced to stating whether or not the condition is being fulfilled.</p>		

## Article 71 of the Directive ► §36 Vergabeverordnung (VgV)

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>(1) In the contract notice or the procurement documents the contracting authority may ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and as far as this is reasonable to name the proposed subcontractors. Prior to the award of the contract the contracting authority may require the shortlisted economic operators to name the subcontractors and to prove that they can dispose of the required means of the said subcontractors. If a candidate or tenderer intends to subcontract parts of a contract to a third party and concerning his his capacity of performance in accordance with Article 45 and 46 refers to the capacities of this third party, Article 47 is to be applied as well.</p> <p>(2) Paragraphs 1 shall be without prejudice to the question of the main contractor's liability to the contracting authority.</p> <p>(3) In the case of services to be provided at a facility under the direct oversight of the contracting authority, the contracting authority shall require in the terms of contract that the main contractor indicates to the contracting authority at the latest when the performance of the contract commences the name, contact details and legal representatives of its subcontractors and that he notifies the contracting authority of any changes to this information occurring during the course of the contract performance. Contracting authorities may impose the reporting obligation according to phrase 1 as well as a term of contract for other services or for supply contracts. Equally the reporting obligation may be extended to suppliers involved in service contracts as well as further down the subcontracting chain.</p> <p>(4) § 128 (1) of the Act against Restraints of Competition applies to subcontractors on all levels of the subcontracting chain.</p>	<p>The VgV is based on the authorisation granted to the government in § 131 GWB (Gesetz gegen Wettbewerbsbeschränkungen). It needs the additional approval by both chambers of parliament (the Bundestag as well as the Bundesrat, the representation of the federal countries). As a Government ordinance it does not share the legal rank of a parliamentary law but it is directly applicable and needs no further implementing.</p> <p>While the GWB contains regulations that transpose the common principles of all three Directives (2014/23/EC, 2014/24/EC and 2014/25/EC) and outlines the procedures, more specific rules for awarding contracts and concessions have been provided in ordinances dedicated to the specifics of procurement (VgV), concessions (KonzVgV) and the procurement by entities operating in the water, energy, transport and postal services sectors (SektVO).</p> <p>Therefore, the transposition of the Directive into German law includes regulations within the GWB as well as the VgV.</p>	<p><b>Paragraph 1</b> transposes Article 71 Paragraph 2. It allows the CAs to ask the EOs in the contract notice or the procurement documents to state those parts of the contracts they intend to share with a subcontractor; as far as it is reasonable, they can be asked as well to name the selected subcontractors. It further allows the CA to ask the shortlisted tenderers to name their subcontractors and to prove that they can command the necessary resources from these subcontractors. § 47 VgV is to be applied, if a tenderer employs a subcontractor to cover the demands concerning his economic and financial standing as well as his technical ability (defined in §§ 45 and 46 VgV). Subcontractors who are employed to cover these aspects of standing and ability must be named when the tenderer proves his eligibility for the contract.</p> <p><b>Paragraph 2</b> transposes Article 71 (2). The employment of a subcontractor does not prejudice the main contractor's liability.</p> <p><b>Paragraph 3</b> transposes Article 71 (5). It applies to contracts that are to be performed at a facility under the direct oversight of the CA. In this case the CA has to demand in the contractual conditions that the contractor has to indicate to the CA the name, the contact details and the legal representative, involved in such works or services. This information must be given after the award of the contract, at the latest when the performance of the contract commences. Equally, the contractor has to notify the CA of any changes on the level of subcontractors that may occur during the course of the contract. This obligation may be extended to providers involved in servicing contracts as well as further levels within the chain of subcontractors.</p> <p><b>Paragraph 4</b> states that the obligation to observe all relevant regulations for the performance of a contract</p>	<ul style="list-style-type: none"> <li>• § 45 Definition of economic and financial standing.</li> <li>• § 46 Definition of technical and professional ability.</li> <li>• § 47 VgV: involvement of a subcontractor who covers such aspects of eligibility as stated in §§ 45 and 46, and which the main contractor cannot secure in his own person.</li> <li>• § 128 (1) GWB.</li> </ul>

<p>(5) Prior to awarding the contract the contracting authority shall verify whether there are reasons to exclude the subcontractor. In the event of compulsory exclusion grounds the contracting authority shall demand the replacement of the subcontractor. In the event of facultative exclusion grounds the contracting authority may demand the replacement. The contracting authority may set the applicant or the tenderer time line to effect the replacement.</p>		<p>is binding for subcontractors on all levels of contract-sharing.  <b>Paragraph 5</b> states that before awarding the contract, the CA controls whether there are reasons for the exclusion of subcontractors. If the reason for exclusion is compulsory the CA has to demand an exchange of subcontractor. If the reason is facultative the CA may demand an exchange. The CA may set a time limit for such an exchange.</p>	
<p><b>Open questions</b></p>	<ul style="list-style-type: none"> <li>- The indication of subcontractors at an early stage of the procurement process can cause trouble for the main contractor who may still need to identify eligible subcontractors. Besides, if the market for the service to be contracted from the subcontractor is very small, there may arise undue restrictions on the competition for the subject matter of the tendered contract, because only those EOs can participate in the competition who manage to secure one of the few specialised subcontractors.</li> </ul>		
<p><b>Example of application from the national level (where applicable)</b></p>	<ul style="list-style-type: none"> <li>- The employment of a subcontractor enables SMEs to take part in a competition and to be awarded contracts. A sub-contract may be easier to construct than a joint tender with all the ensuing questions of legal partnership between the tenderers.</li> <li>- Subcontracting can enable an EO to tender even if it: <ul style="list-style-type: none"> <li>- either does not cover all of the demanded aspects of eligibility: lack of suitable facilities for training courses for unemployed; qualification to teach certain subjects;</li> <li>- or while covering all the demanded aspects of eligibility requests, e.g. a delivery of computers in order to conduct computer-courses, or the lease of a minivan transport course participants between their homes and the facility where the contracted service is to be performed.</li> </ul> </li> </ul>		

**Article 74 of the Directive ► § 64 Vergabeverordnung (VgV)**

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>Public contracts for social and other special services according to § 130 (1) of the Act against Restraints of Competition shall be awarded according to the provisions of this ordinance and with regard to the peculiarities of the specific service in accordance with this section.</p>	<p>The VgV is based on the authorisation granted to the government within the GWB § 113, and needs the approval of the Federal Chamber of the German Parliament (Bundesrat). As a Government ordinance it does not share the legal rank of a law passed by parliament but it is directly applicable and binding law that needs no further implementing.</p> <p>While the GWB contains regulations that transform the common principles of all three Directives (2014/23/EC, 2014/24/EC and 2014/25/EC) and outlines the procedures, more specific rules for awarding contracts and concessions have been provided in ordinances dedicated to the specifics of procurement (VgV), concessions (KonzVgV) and the procurement by entities operating in the water, energy, transport and postal services sectors (SektVO). Therefore, the transposition of the Directive into German law includes regulations within the GWB as well as the VgV.</p>	<p>Contracts for social and other specific services according to § 130 GWB shall be awarded:</p> <ul style="list-style-type: none"> <li>- in accordance with the VgV</li> <li>- and the special provisions of the §§ 64, 65, 66 under consideration for the special aspects of the contracted service.</li> </ul>	<ul style="list-style-type: none"> <li>- § 130 GWB.</li> <li>- § 65, 66 VgV.</li> </ul>
<p><b>Open questions</b></p>	<ul style="list-style-type: none"> <li>- It is not yet clear how far the consideration for the contracted services will extend.</li> <li>- The practical relevance of this general clause will depend to a large extent on the willingness of CAs to adopt the provisions of tender law to the demands of the social services tendered. Only if this happens will the judiciary have a chance to shape with its jurisdiction the meaning of the general clause.</li> </ul>		
<p><b>Example of application from the national level (where applicable)</b></p>	<ul style="list-style-type: none"> <li>- Apart from the special modifications of general tender law in § 65 an application of the general clause may be made: <ul style="list-style-type: none"> <li>- decision on how to define the lots for a contract: dividing the region of a district or town in regional lots and limiting the number of lots to be awarded to a single tenderer to secure a selection among different providers with different service concepts.</li> </ul> </li> </ul>		

**Article 75 of the Directive ► § 66 Vergabeverordnung (VgV)**

Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
<p>(1) Contracting authorities shall make known their intention to award a public contract for social or other specific services by means of a contract notice. § 17 paragraph 5 remains unaffected.</p> <p>(2) A contract notice is not necessary, where the contracting authority continuously publishes a prior information notice, provided that the prior information notice shall</p> <ol style="list-style-type: none"> <li>1. refer specifically to the types of services that will be the subject of the contracts to be awarded.</li> <li>2. indicate that the contracts will be awarded without further publication and</li> <li>3. invite interested economic operators to express their interest (expression of interest).</li> </ol> <p>(3) Contracting authorities that have awarded a public contract for social and other specific services shall make known the results of the procurement procedure. They may group such notices on a quarterly basis. In that case, they shall send the grouped notices within 30 days of the end of each quarter.</p> <p>(4) For the notices according to paragraphs 1 till 3 contracting authorities shall use the forms according to appendix XVIII of the implementing regulation (EU) 2015/1986. The publication of the notice shall happen in accordance with § 40.</p>	<p>The VgV is based on the authorisation granted to the government in § 131 GWB (Gesetz gegen Wettbewerbsbeschränkungen). It needed the additional approval by both chambers of parliament (the Bundestag as well as the Bundesrat, the representation of the federal countries). As a Government ordinance it does not share the legal rank of a parliamentary law but it is directly applicable and needs no further implementing.</p> <p>While the GWB contains regulations that transposes the common principles of all three Directives (2014/23/EC, 2014/24/EC and 2014/25/EC) and outlines the procedures, more specific rules for awarding contracts and concessions have been provided in ordinances dedicated to the specifics of procurement (VgV), concessions (KonzVgV) and the procurement by entities operating in the water, energy, transport and postal services sectors (SektVO). Therefore, the transposition of the Directive into German law includes regulations within the GWB as well as the VgV.</p>	<p><b>Paragraph 1</b> transposes Article 75 (1). The CA is required to make known their intention to award a contract for social and other specific services by means of a contract notice. No publication is taking place in accordance with § 17 (5) VgV in the case of a negotiated procedure without prior publication which can be used in conformity with § 14 (4) VgV.</p> <p><b>Paragraph 2</b> transposes Article 75 (1) S. 1 lit a and b, detailing the conditions for a prior information notice as an alternative to the contract notice. The requirements take over the parallel requirements from Article 75 of the Directive:</p> <ul style="list-style-type: none"> <li>- continuous publication in reference specifically to the types of services that will be the subject of the contracts to be awarded</li> <li>- the indicated formation that the contracts will be awarded without further publication</li> <li>- the invitation of interested EOs to express their interest</li> </ul> <p><b>Paragraph 3</b> transposes Article 75 (2) of the Directive. After awarding a public contract for social and other specific services the CA makes the results of the procurement procedure known by means of a contract award notice, which may be grouped on a quarterly basis. In that case, the grouped notices have to be sent within 30 days of the end of each quarter.</p> <p><b>Paragraph 4</b> contains a reference to</p> <ul style="list-style-type: none"> <li>- the Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement</li> <li>- § 40 VgV (regulation for the publication of notices).</li> </ul>	<p>§ 14 (4) conditions for a negotiated procedure without prior publication. § 17 (5) VgV: exemption of the negotiated procedure without prior publication from the compulsive contract notice. § 40 VgV on the publication of notices. § 53 VgV form for the expression of interest.</p>
<b>Open questions</b>			
<b>Example of application from the national level (where applicable)</b>			

<b>Article 77 of the Directive ► Not transposed</b>			
<b>Text of the article</b>	<b>National implementing provisions (if relevant)</b>	<b>What the article means</b>	<b>Interaction with other national laws</b>
		This provision is based on a specific British type of EO that does not exist in this form and has no parallel in Germany. A transposition was therefore neither necessary nor practicable.	-
<b>Open questions</b>	-		
<b>Example of application from the national level (where applicable)</b>			