# BEST INTERNATIONAL PRACTICES IN INVESTIGATION AND ADJUDICATION OF PUBLIC PROCUREMENT OFFENCES

## EXTRACT FROM MANUAL ON INVESTIGATION AND ADJUDICATION OF PUBLIC PROCUREMENT OFFENCES

OSCE Organization for Security and Co-operation in Europe
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## Acronyms

AGCM – Italian Competition and Market Authority (Italian: *Autorità Garante della Concorrenza e del Mercato*)

ANAC – Italian National Anti-Corruption Authority

CISA – Convention Implementing the Schengen Agreement

CJEU – Court of Justice of the European Union

CNS – National Consortium Services Cooperative Society (Italian: *Consorzio Nazionale Servizi Società Cooperativa)*

DPS – Dynamic Purchasing System

EC – European Commission

ECtHR – European Court of Human Rights

EU – European Union

GDP – Gross Domestic Product

GPA – Government Procurement Agreement

RCC – Romanian Competition Council

SMEs – Small and Medium-sized Enterprises

TFEU – Treaty on the Functioning of the European Union

VAT – Value Added Tax

WTO – World Trade Organization

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# Introduction

Public procurement represents a substantial share of EU public expenditure - accounting for between 13.6% and 16% of EU GDP annually, or around €2 trillion.[1] This underscores its critical role, not only in economic activity, but also in shaping public policy and governance across the Union. The EU's internal market relies on transparent, competitive procurement procedures to secure the best value for public money and to safeguard the rights of economic operators. Corruption and collusion undermine these objectives and cost EU economies billions of euros - an EU Commission based survey recently estimated the annual cost of corruption at €120 billion.[2]

To ensure effective deterrence and to protect fundamental rights, adjudicators must navigate a complex legal framework that combines EU directives, national laws and jurisprudence of both the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR). In doing so, they face several practical challenges: drawing the fine line between mere administrative errors and conduct amounting to a criminal offence, handling complex and highly technical procurement evidence that often requires specialized expertise, and ensuring that sanctions imposed are proportionate so as to uphold both deterrence and fairness. This chapter's aim is to provide judges and prosecutors with practical guidance on how international practice (e.g. EU procurement directives and key international case law, including ne bis in idem cases) can assist national adjudication in distinguishing administrative irregularities from criminal offences.

1 Accessible at: https://single-market-economy.ec.europa.eu/single-market/public-procurement_en.
2 Accessible at: https://www.voanews.com/a/corruption-costs-european-economy-120-billion-euros-a-year/1843739.html.

# 1. EU Public Procurement Directives

## 1.1. General principles of EU public procurement

EU public procurement rules aim to make public purchasing across Member States fair, transparent and competitive (equitable and non-discriminatory). They derive from the Treaty on the Functioning of the EU (TFEU) and the relevant EU procurement directives, and their principles mirror the WTO Government Procurement Agreement (GPA)[3]. Even where a contract falls outside a specific EU directive, contracting authorities are bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.[4] These principles are not abstract: in practice, breaches of them often form the basis for identifying corruption risks, such as favouring local or politically connected bidders or for exposing conflicts of interest in tender procedures. For adjudicators, this means that violations of Treaty principles can be a decisive factor in determining whether a procurement irregularity amounts to an administrative breach or rises to the level of a criminal offence.

Every public procurement process must adhere to fundamental principles and standards throughout all stages, from market consultation and drafting tender requirements, to contract awarding and notification. For adjudicators, it is essential to recognize that violations of these principles may not only constitute administrative irregularities - requiring corrective or supervisory measures – but, in serious cases, may also amount to criminal offences, particularly where they reveal corruption, fraud or conflicts of interest. Key principles include:

- **Free movement of goods and open competition**: Authorities must open qualifying contracts to EU-wide tendering. Requirements that favour local presence or experience – such as insisting bidders already having an office in the contracting country or carrying out their main activity in the region in question – are unlawful.
- **Equal treatment**: Bidders in comparable situations must be assessed solely on the quality and price of their tenders. Conflict of interest must be prevented and scoring should be objective, justified and documented. While unequal scoring or concealed conflicts of interest may initially appear as administrative irregularities, they can evolve into criminal liability if carried out deliberately to favour certain bidders, as such conduct may appear to be corruption, fraud or abuse of office.

3 GPA is intended to make laws, regulations, procedures and practices regarding government procurement more transparent and to prevent the protection of domestic products or suppliers or discrimination against foreign products or suppliers.
4 European Court of Justice Case C-329/98, paragraph 60. Accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61998CJ0324.

- **Non-discrimination**: Conditions in tenders based on nationality or the origin of goods are prohibited.[5] Technical specifications must not favour a particular brand or standard unless they include an "or equivalent" option.[6]
- **Transparency**: Sufficient advertising and clear documentation of procedures and decisions ensure the market is open to all potential suppliers and allow external review.[7] All clarifications and communications must be shared with every bidder. Also, evaluation procedure needs to be documented, scoring needs to be justified and tenderers need to be informed. A failure to properly document these steps not only creates evidentiary gaps that complicate later adjudication but may itself serve as a red flag in investigations, suggesting attempts to conceal favouritism or irregularities.
- **Proportionality**: Procedures and requirements must be tailored to the contract's value and subject matter; they must be appropriate and cannot be excessive (e.g. demanding annual revenues far above the contract value). The key aspects (such as participation conditions and award criteria) must be relevant and necessary to achieve the procurement's objectives.[8]
- **Mutual recognition**: Member States must accept equivalent qualifications and certificates from other EU countries; proof of membership in a local professional body cannot be required if equivalent evidence exists. A refusal to accept such equivalence may not only breach EU procurement rules but, if used deliberately to exclude foreign bidders, can amount to an abuse of the procurement process – potentially signalling discrimination, favouritism or even corruption.

By applying these principles throughout all stages of procurement – from market consultation to contract award – authorities and adjudicators ensure non-discriminatory access and the best value for public funds.

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5 Other Examples of unlawful and discriminatory selection criteria include:
Having at least 5 similar references from the public sector only, and not the private sector, unless justified and non-discriminatory;
Providing references for previous works that are significantly higher in value and scope than the contract being tendered, unless justified and non-discriminatory;
Already having qualifications/professional certificates recognised in the country of the contracting authority at the time of submission of tenders, as this would be difficult for foreign tenderers to comply with in such a short timeframe;
Complying with a particular professional standard without using the wording 'or equivalent'.
https://living-in.eu/eu-support-services/procurement-support-materials/eu-legal-framework-public-procurement

6 European Court of Justice case C-59/00, paragraph 26. Accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CO0059.

7 European court of Justice case C-329/98, paragraph 62. Accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61998CJ0324.

8 For example:
choice of tender procedure should be in direct link with the value of the contract and its subject matter;
whether or not to combine contracts or divide them into lots;
number and contents of suitability requirements, requirements relating to financial and economic strength, requirements relating to technical and professional skill selection criteria (all these conditions should be related and proportionate to the object of the procurement); E.g. Having an annual revenue of EUR 10 million even if the contract value is only EUR 1 million is a disproportionate selection criterion;
requirements for consortiums,
award criteria: choosing the most appropriate award criteria between 'lowest price', 'lowest costs on the basis of cost-effectiveness' or 'best price-performance ratio' based on the relevance and nature of the contract.
contract terms and conditions.
https://living-in.eu/eu-support-services/procurement-support-materials/eu-legal-framework-public-procurement

## 1.2. EU directives

The complete EU legal framework on public procurement is included in the following legal acts:

- Directive 2009/81/EC on public procurement in the fields of defence and security;[9]
- Directive 2014/23/EU on the award of concession contracts;[10]
- Directive 2014/24/EU on public procurement;[11]
- Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.[12]

The EU procurement directives are essential for adjudicators because they provide the legal framework,[13] define the boundary between irregularity and crime,[14] and ensure consistent, fair and proportionate remedies in procurement disputes.[15]

Abuses of the procurement rules can point to administrative or criminal behaviour, depending on several circumstances. When red flag for potential abuse is present, key aspects that adjudicators need to take into consideration are:

- Is there an objective justification? (urgency, technical exclusivity);
- Is there intentional manipulation? (splitting, false valuation, collusion);
- Is there personal gain or contractor benefit? (kickbacks, favouritism);
- Is there damage to funds or competition? (overpricing, exclusion of bidders).

The following visual decision tree can help adjudicators assessment whether a procurement red flag is merely an administrative irregularity or if it escalates into a criminal offence.

**Step 1.**

Is the red flag explained by an objective justification? (e.g. genuine urgency, technical exclusivity, timing constraints)

- YES → Likely Administrative Irregularity (but still review legality)
- NO → Go to Step 2

**Step 2.**

Is there evidence of INTENTIONALITY? (e.g. deliberate splitting, falsified values, coordinated rotation)

- NO → Administrative Breach / Possible Disciplinary Sanction
- YES → Go to Step 3

**Step 3.**

Is there PERSONAL GAIN or BENEFIT to officials or contractors? (e.g. kickbacks, favouritisms, systematic pattern of awards)

- NO → Administrative Offence or Serious Mismanagement
- YES → Go to Step 4

9 Accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009L0081.
10 Accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014L0023-20180101.
11 Accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014L0024-20180101.
12 Accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014L0025-20180101&locale=en.
13 EU procurement directives provide the legal benchmark for assessing whether contracting authorities respected fundamental principles such as transparency, equal treatment, and non-discrimination
14 EU procurement directives help adjudicators distinguish between mere administrative irregularities and serious breaches that may amount to corruption, fraud, or abuse of office.
15 By applying the directives and related CJEU case law, adjudicators ensure consistency, fairness, and proportional remedies in procurement disputes.

**Step 4.**
Did the act cause DAMAGE to public funds or competition? (e.g. inflated prices, exclusion of other bidders, waste of resources)

- NO → Grey Area → May still be Misuse of Office (depends on national law)
- YES → CRIMINAL OFFENCE

**Step 5.**
Classify the likely offence:

- o Fraud in procurement (false valuation, splitting, urgency misuse);
- o Bid-rigging / cartel (linked contractors, rotations, tailored specs);
- o Abuse of office / corruption (unlawful advantage, favouritisms);
- o Embezzlement / misuse of funds (personal enrichment);
- o Money laundering (profits recycled through contracts).

### *1.2.1. Directive 2014/24/EU on public contracts*

Directive 2014/24/EU harmonizes rules for the award of public works, supply and service contracts by public authorities. Its objectives are to foster equal treatment, non-discrimination and transparency and to promote innovation and access for small firms.[16] It harmonizes the way public authorities and utility operators award high-value contracts that are presumed to attract cross-border interest.

Breaches of the procurement rules under this Directive may lead to findings of grave professional misconduct or corruption offences when deliberate.

**Key areas and typical abuses**

a. Thresholds and splitting

Contracts above EU thresholds must follow full procedures.[17] Thus, common abuse is artificially splitting a large project into similar procurements to stay below thresholds and evade these rules. Potential offences include fraud, abuse of office and corruption.
Red flags that indicate an abuse include:

- Repeated awards just below thresholds (multiple contracts awarded to the same contractor (or linked contractors) with values narrowly below EU/national thresholds in a short time period);
- Artificial contract splitting (a larger procurement requirement is divided into several smaller contracts, each below the threshold, without objective justification);
- Linked contractors involved (contracts awarded to different companies that share ownership, management, or address, suggesting circumvention through “rotation” of awards);
- Identical timing of awards (several below-threshold contracts awarded within days/weeks for similar goods/services that could reasonably have been tendered together);

16 Accessible at: https://eur-lex.europa.eu/EN/legal-content/summary/public-procurement.html#:~:text=KEY%20POINTS

17 The directive applies to contracts above thresholds periodically adjusted by the European Commission. Current thresholds can be regularly checked at: https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/thresholds_en.
Contracts below the thresholds remain largely subject to national law, but EU principles of transparency and non-discrimination must be respected. As mentioned in the previous chapter, those principles require contracting entities to ensure non-discrimination, equal treatment, transparency and proportionality, and to allow effective competition: tenders may not include nationality-based conditions, local-presence requirements or other criteria that unfairly favour certain suppliers. These duties apply whenever a contract has potential cross-border interest, even if EU directives do not.

- Same subject matter in multiple contracts (separate contracts cover nearly identical supplies, works, or services (e.g. buying 95 chairs today, 95 tomorrow);
- Unexplained urgency claimed (authorities cite urgency or exceptions to justify direct awards below thresholds when no real emergency exists);
- Pattern across budget periods (recurrent contract splitting near year-end (to fit within budget lines) or at the start of a new budget cycle);
- Similar technical specifications across contracts (different small contracts specify almost the same technical requirements, clearly pointing to one overall procurement need);
- Rotation among a closed group of contractors (below-threshold awards systematically distributed among a small circle of firms, often linked, to keep each award under the radar);
- Suspicious value calculations (contract values appear artificially underestimated to stay under the threshold - e.g. using partial unit costs, excluding taxes, or undercounting quantities).

It should be noted that not every red flag equals a crime - some may amount to administrative irregularities. However, existence of several red flags usually is a strong indicator for criminal liability. Criminal liability typically requires intentionality, personal gain, collusion or damage to public funds/competition. The following table can be used in distinguishing whether a red flag points to administrative offence and criminal conduct.

| **Red Flag** | **Administrative Irregularity (no intent/personal gain proven)** | **When It Becomes a Criminal Offence (intent + benefit + damage)** |
|---|---|---|
| Repeated awards just below thresholds | Poor planning or lack of aggregation of needs. | Deliberate under-threshold awarding to same/ linked contractors → Fraud, Abuse of office. |
| Artificial contract splitting | Fragmentation due to decentralized budgeting or organizational error. | Intentional division to avoid open tender → Fraud in procurement, Abuse of office. |
| Linked contractors involved | Lack of due diligence in checking beneficial ownership. | Collusive arrangements or bid-rigging cartel with officials' involvement → Cartel offence, Corruption. |
| Identical timing of awards | Administrative coincidence (different departments purchasing at same time). | Coordinated award strategy to bypass thresholds → Procurement fraud, Abuse of office. |
| Same subject matter in multiple contracts | Separate needs mistakenly treated as distinct procurements. | Systematic splitting with intent to benefit contractor → Fraud, Embezzlement if funds diverted. |
| Unexplained urgency claimed | Misunderstanding of exceptions (misapplication of urgency rules). | Falsified emergency to justify direct award → Abuse of office, Fraud. |
| Pattern across budget periods | Poor financial planning; rushing at year-end. | Intentional manipulation of timing to favour specific contractors → Fraud, False accounting. |
| Similar technical specifications | Technical similarity due to common standards. | Deliberate tailoring of specs to one contractor → Bid-rigging, Abuse of office. |
| Rotation among closed group of contractors | Small local market with limited bidders. | Organized scheme of rotating contracts among linked firms → Cartel, Corruption, Money laundering. |
| Suspicious value calculations | Errors in cost estimation, exclusion of VAT by mistake. | Artificial undervaluation to remain under thresholds → Fraud, False accounting, Abuse of office. |

### b. Award criteria

Contracting authorities must award contracts based on the most economically advantageous tender, assessing price or best price-quality ratio. Authorities may divide contracts into lots and must respect environmental, social and labour law obligation[18]. Common abuse is manipulating scoring or award criteria (tailoring specifications) to favour one supplier. These types of activities may point to corruption or collusion.

Red flags include:

- Technical specifications contain overly specific requirements (number of employees, type of equipment the bidders should own, brand references instead of using functional or performance-based criteria);
- The technical parameters are unjustified (dimensions, weight or performance requirements that favour one supplier);
- Excessive or irrelevant experience requirements (demanding prior contracts of a certain high value, or in a narrowly defined sector, when such requirements are not essential for contract performance);
- Unrealistically short deadlines (setting timeframes that only an incumbent supplier or insider could meet, effectively excluding other competitors);
- Location-based restrictions (requiring that bidders have offices or production facilities in a specific city or region, without operational necessity);
- Unbalanced qualification criteria (asking for a combination of qualifications (e.g. certifications, financial turnover, number of employees) that only a pre-selected contractor possesses);
- Bundling unrelated requirements (combining different goods or services into one tender (e.g. IT software plus furniture supply) to exclude smaller or more specialized competitors);
- Subjective or vague evaluation criteria (using criteria such as “best design” or “high quality materials” without measurable standards, leaving room for favouritism);
- Customizing to incumbent contractor (drafting specifications around the technical solution of the previous supplier, preventing fair competition);
- Hidden mandatory conditions (introducing “informal” requirements (e.g. specific prior collaboration, informal certifications, or insider knowledge) that are not disclosed but enforced in evaluation).

As mentioned above, certain criteria need to be met in order one irregularity to be considered criminal offence. The following table can help in distinguishing when a red flag points to administrative irregularity and when to criminal offence.

18 Accessible at: https://eur-lex.europa.eu/EN/legal-content/summary/public-procurement.html#:~:text=KEY%20POINTS.

| Red Flag | Administrative Breach (no intent/personal gain proven) | When It Crosses into Criminal Offence (intent + benefit + damage) |
|---|---|---|
| Overly specific requirements (brand names, equipment ownership, exact no. of employees) | Breach of procurement principles (equal treatment, competition). May lead to annulment by review body. | Drafted to favour one bidder, excluding others → Abuse of office, Bid-rigging, Fraud in procurement. |
| Unjustified technical parameters (dimensions, weight, performance criteria without necessity) | Poorly prepared tender; lack of proportionality or transparency. | Deliberate tailoring of specs to pre-selected supplier → Fraud, Abuse of authority, Corruption. |
| Excessive or irrelevant experience requirements | Misinterpretation of proportionality principle. Discriminatory but not criminal if accidental. | Systematically set to match one bidder's profile → Abuse of office, Bid-rigging, possibly Corruption if linked to kickbacks. |
| Unrealistically short deadlines | Administrative irregularity if due to poor planning or urgency misinterpretation. | Deadline engineered to ensure only incumbent can deliver → Fraud, Abuse of office. |
| Location-based restrictions (must have office in region/city) | Discriminatory administrative breach of EU principles (freedom of establishment, competition). | Requirement designed to exclude outside bidders and favour local partner → Abuse of office, Fraud, possibly Cartel arrangements. |
| Unbalanced qualification criteria (financial turnover + certifications + workforce only one bidder has) | Disproportionate administrative requirement → annulment likely. | Constructed to predetermine one contractor's success → Fraud, Corruption, Abuse of office. |
| Bundling unrelated requirements (e.g. IT software + furniture) | Inefficient/anti-competitive but potentially poor tender design only. | Intentional bundling to exclude small and medium size enterprises and channel award → Fraud in procurement, Abuse of authority. |
| Subjective or vague evaluation criteria ("best design", "high quality") | Violation of transparency principle; annulment in review proceedings. | Used as tool to justify award to preferred contractor → Abuse of office, Fraudulent manipulation. |
| Customizing to incumbent contractor (tailored to last supplier's solution) | Poor market analysis; excessive reliance on prior supplier. | Clear deliberate tailoring to exclude competition → Fraud, Bid-rigging, Corruption. |
| Hidden mandatory conditions (informal requirements not in tender documentation) | Breach of transparency and predictability of procurement rules. | Intentional concealment to advantage insider → Fraud, Corruption, Abuse of office. |

### c. Exemptions and exclusions

Certain sectors and special services may follow different rules. Procurement in water, energy, transport and postal sectors is subject to Directive 2014/25/EU. Certain services (e.g. electronic communications[19], certain public service contracts[20]) are also excluded. In addition, contracts that must be awarded under procurement procedures laid down by an international agreement (e.g. projects jointly implemented by a Member State and a third country), or by an international organization or financing institution, are also excluded,[21] as well as contracts awarded by a contracting authority to another contracting authority (or association of authorities) on the basis of an exclusive right conferred by law or regulation.[22]

Common abuse in procurement offences may be misclassifying contracts to avoid competition. Misclassification is often subtle and presented as a "linguistic interpretation". Adjudicators should look for patterns of benefit – does the chosen classification systematically result in avoiding open procedures, higher thresholds or transparency rules.

Red flags include:

- Inappropriate use of "Service" vs. "Supply" classification (a contract for supplies (e.g. IT hardware) is misclassified as a "service" (e.g. IT maintenance) to justify direct award or lighter procedure)0;
- Incorrect use of "Consultancy/Intellectual Services" (routine or standardized tasks (e.g. cleaning, catering, printing) are presented as "intellectual/consultancy services" to benefit from exemptions);
- Improper labelling as "Framework Agreement" (a single contract is disguised as a "framework" to avoid open competition for subsequent awards);
- Works vs. Services misclassification (a construction or renovation contract (works) is described as "services" to apply lower thresholds or exceptions);
- Overuse of "In-House" (Teckal) exemption (contracts awarded directly under the in-house exception, but the entity does not meet control/activities criteria (e.g. mixed public-private ownership);
- Misuse of "Exclusive Rights" exception (contract claimed to fall under exclusive rights, but no valid legal monopoly or exclusivity exists);
- Splitting under different categories (similar contracts classified under different categories (e.g. some as "services," some as "supplies") to keep each below threshold or exempt);
- Public-Public cooperation exception misapplied (contract presented as "cooperation between public authorities," but in practice resembles a standard services contract with private elements);
- Misuse of defence/security exemptions (contracts categorized under defence/security exceptions (Directive 2009/81/EC), but subject matter is civilian - e.g. uniforms, IT equipment);
- Use of "Non-Prioritized Services" or old classifications (tenders labelled under outdated/non-prioritized categories (health, education, culture) to avoid full application of current rules);
- Contract value deliberately lowered via misclassification (elements of a single works contract broken down and wrongly labelled as smaller service/supply contracts to keep under thresholds).

19 Article 8 of the Directive 2014/24/EU.

20 Article 10 of the Directive 2014/24/EU. The directive excludes certain public service contracts, including: (a) acquisition or rental of land, buildings or other immovable property; (b) production, co-production or broadcasting of audiovisual or radio programme material; (c) arbitration and conciliation services; (d) specified legal services such as representation before courts or notarial services; (e) financial services relating to the issue, sale or transfer of securities and central-bank services; (f) loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments; (g) employment contracts; (h) civil-defence and emergency services provided by non-profit organisations (excluding patient transport ambulances); (i) passenger transport services by rail or metro; and (j) political campaign services for political parties during elections.

21 Article 9 of the Directive 2024/24/EU.

22 Article 11 of the Directive 2024/24/EU.

The following table can help in distinguishing when a red flag points to administrative irregularity and when to criminal offence.

| Red Flag | Administrative Breach (No intent/personal gain proven) | When It Crosses into Criminal Offence (Intent + Benefit + Damage) |
|---|---|---|
| Inappropriate use of "Service" vs. "Supply" (e.g. IT hardware misclassified as IT services) | Error in classification, lack of training in procurement categories. Annulment possible. | Deliberate misclassification to justify direct award → Fraud in procurement, Abuse of office. |
| Incorrect use of "Consultancy/ Intellectual Services" (routine tasks labelled as consultancy) | Misinterpretation of exemptions; poor drafting of terms. | Mislabelling used to channel contract to preferred company under lighter rules → Fraud, Corruption. |
| Improper labelling as "Framework Agreement" (single contract disguised as framework) | Poor understanding of framework rules. Administrative irregularity leading to annulment. | Used to avoid competition and repeatedly award to one supplier → Fraudulent manipulation, Abuse of office. |
| Works vs. Services misclassification (renovation called "services") | Genuine misunderstanding of technical definitions. | Intentional misclassification to apply lower thresholds or exemptions → Fraud, Abuse of authority. |
| Overuse of "In-House" (Teckal) exemption | Misapplication of case law criteria (control/activities). | Deliberately awarding to ineligible mixed-ownership entities → Abuse of office, Fraud, Corruption. |
| Misuse of "Exclusive Rights" exception | Misinterpretation of exclusivity rights (e.g. license wrongly believed to be monopoly). | Fabricated or knowingly false claim of exclusivity → Fraud, Abuse of authority. |
| Splitting under different categories (same procurement divided into supplies/services labels) | Administrative misjudgement in categorization. | Intentional splitting across categories to keep below thresholds → Fraud in procurement, False accounting. |
| Public-Public cooperation misapplied | Incorrect legal assessment of cooperation conditions. | Fake "cooperation" masking a private contract → Fraud, Abuse of office, possibly Corruption. |
| Misuse of defence/security exemptions | Error in applying Directive 2009/81/EC categories. | Civilian goods disguised as defence/security to evade rules → Fraud, Misuse of funds, Abuse of authority. |
| Use of outdated/non-prioritized services categories | Sloppy use of old rules (Directive pre-2014 categories). | Intentional misclassification to avoid stricter rules → Fraudulent manipulation of procurement rules. |
| Contract value lowered via misclassification (works broken into "smaller services/supplies") | Inaccurate estimation or negligent misclassification. | Artificial undervaluation with intent to avoid thresholds → Fraud, False accounting, Abuse of office. |

### d. Type of procurement procedures

Contracting authorities may choose from several procurement procedures, depending on the complexity of the purchase and the need for competition: open procedure,[23] restricted procedure,[24] competitive procedure with negotiation,[25] competitive dialogue,[26] innovation partnership[27] and negotiated procedure without prior publication[28].

The choice of procedure is one of the most manipulated stages of procurement, since contracting authorities deliberately choose (or disguise) the wrong procedure to restrict competition or favour certain bidders. Misuse can covert a lawful direct award into a offence of abuse of office, corruption, bid-rigging or favouritism.

Red flags include:

- Unjustified use of negotiated procedure without publication (procedure chosen without evidence of the strict legal grounds (e.g. extreme urgency, technical exclusivity); award made through negotiation when open/restricted procedure was required);
- Frequent reliance on direct awards (a disproportionate number of contracts awarded directly (single-source), often to the same supplier, without proper justification);
- Emergency procedures misused ("Urgency" repeatedly cited as a reason for bypassing open competition, even when needs were foreseeable);
- Improper use of restricted or accelerated procedures (acceleration invoked without real urgency, resulting in shorter deadlines that exclude new entrants; restricted procedure used where an open one would have been appropriate);
- Rotation among the same bidders (authorities always invite the same small group of bidders in negotiated/restricted procedures);
- Opaque Pre-Qualification (selection criteria for restricted procedures applied subjectively or used to eliminate competitors);

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23 Prescribed in **Article 27 of the Directive:** This is the default procedure. Any interested supplier may submit a tender, and the authority must allow at least 35 days from dispatch of the contract notice for receipt of tenders. There is no pre-selection of candidates, and no negotiation of tenders; the award is based on the published criteria.

24 Prescribed in **Article 28 of the Directive:** Any operator may request to participate, but only those pre-selected by the contracting authority may submit a tender. The minimum time-limits are 30 days for requests to participate and 30 days for tenders, with shorter deadlines possible when a prior information notice has been published. This procedure allows the authority to limit the number of candidates while still maintaining competition.

25 Prescribed in **Article 29 of the Directive:** Used where the authority's needs cannot be met without adaptation of readily available solutions or where the contract includes design or innovative solutions. Any supplier may request to participate, but selected candidates submit an initial tender that forms the basis of negotiations. The authority must state which aspects are non-negotiable (minimum requirements and award criteria) and ensure equal treatment and confidentiality during negotiations. It may choose to award the contract on the basis of the initial tenders without negotiation if this is indicated up front.

26 Prescribed in **Article 30 of the Directive:** Appropriate for particularly complex projects where the authority cannot define the technical or legal means to meet its needs. Any operator may request to participate; after pre-selection, the authority opens a dialogue with candidates to identify solutions capable of meeting its requirements. The procedure may proceed in successive stages to reduce the number of solutions. Once a suitable solution is identified, remaining participants submit final tenders, which may be clarified but not fundamentally altered. Contracts are awarded solely on the basis of the best price-quality ratio.

27 Prescribed in **Article 31 of the Directive:** Designed to develop and purchase innovative goods, services or works that are not available on the market. Any operator may request to participate; the authority sets out its needs and minimum requirements and may partner with one or more entities. The partnership consists of successive research and development phases, with remuneration paid in instalments and the option to terminate after each phase. Negotiations are permitted to refine tenders, but minimum requirements and award criteria cannot be negotiated.

28 Prescribed in Article 32 of the Directive: A non-competitive option reserved for exceptional cases, such as when no suitable tenders were received in an open or restricted procedure, when only one supplier can deliver the contract for technical or exclusive-rights reasons, or when extreme urgency caused by unforeseeable events makes standard deadlines impracticable. It may also be used for additional deliveries from the original supplier, purchases on commodity markets, or contracts following a design contest. Because there is no call for competition, authorities must justify the use of this procedure strictly.

- Unjustified use of competitive dialogue or innovation partnership (complex procedures invoked where standard open competition would suffice; used to narrow the field and favour "insider" bidders);
- Changes in procedure during procurement (procedure switched mid-process (e.g. from open to negotiated) without legal grounds);
- Artificially low number of invited bidders (only one or two firms invited in a procedure meant to involve wider competition);
- Systematic use of Exceptions/Exemptions (defence, in-house, cooperation, or exclusive-rights exceptions repeatedly misapplied to avoid open procedures);
- Repeated cancellation and relaunch tenders cancelled and relaunched multiple times until the "right" bidder wins;
- Use of non-transparent award criteria in procedure (evaluation rules altered after procedure choice to predetermine the outcome).

The following table can help in distinguishing when a red flag points to administrative irregularity and when to criminal offence.

| **Red Flag** | **Administrative Breach (No intent/personal gain proven)** | **When It Crosses into Criminal Offence (Intent + Benefit + Damage)** |
|---|---|---|
| Unjustified use of negotiated procedure without publication | Misinterpretation of legal grounds (urgency, exclusivity). Poor training/ oversight. | Procedure deliberately chosen to avoid open competition → Fraud in procurement, Abuse of office. |
| Frequent reliance on direct awards | Overuse due to lack of planning, habit, or misunderstanding of rules. | Direct awards systematically given to same supplier without justification → Corruption, Bid-rigging, Fraud. |
| Emergency procedures misused | Genuine confusion about urgency requirements. Administrative annulment. | Fake or repeated "urgency" claims to bypass competition → Fraud, Abuse of authority. |
| Improper use of restricted/ accelerated procedures | Procedural error in selecting procedure. | Acceleration/restriction used to exclude bidders intentionally → Fraudulent manipulation, Abuse of office. |
| Rotation among same bidders | Limited supplier market unintentionally leading to repetition. | Collusive rotation of contracts within small group of firms, tolerated by officials → Cartel offence, Corruption. |
| Opaque pre-qualification | Vague or poorly drafted criteria leading to inconsistent application. | Subjective use of criteria to eliminate competitors and favour insider → Fraud, Abuse of office, Corruption. |
| Unjustified use of competitive dialogue / innovation partnership | Misunderstanding of when such complex procedures are allowed. | Procedure chosen strategically to favour pre-selected bidder → Fraudulent manipulation, Abuse of office. |
| Changes in procedure mid-process | Administrative incompetence or poor planning. | Switching procedure to secure contract for certain bidder → Fraud, Abuse of authority. |

| | | |
|---|---|---|
| Artificially low number of invited bidders | Small pool of suppliers due to market limitations. | Intentional exclusion of qualified bidders to limit competition → Fraud, Bid-rigging, Abuse of office. |
| Systematic use of exceptions/exemptions | Misapplication of exceptions; poor legal analysis. | Repeated, deliberate misuse of exemptions to avoid competition → Fraud, Corruption, Abuse of office. |
| Repeated cancellation and relaunch | Procedural mistakes, changing needs, or poor planning. | Relaunches orchestrated until "favored" bidder wins → Fraud, Corruption. |
| Use of non-transparent award criteria | Vague drafting of evaluation rules, negligence in procedure. | Evaluation criteria altered/manipulated to secure award → Fraud, Abuse of office, Corruption. |

- Tools

The Directives provides for tools which allow contracting authorities to manage recurrent purchases efficiently while still applying the appropriate procurement procedure when awarding individual contracts, such as framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogue, centralized purchasing, joint procurement etc.[29]

These instruments in practice they can be misused to restrict competition or favour particular suppliers**,** sometimes even crossing into criminal offences (bid-rigging, abuse of office, fraud, corruption). Misuse often occurs not at the initial award stage, but in secondary phases (e.g. mini-competitions, catalogue updates, or call-offs), where transparency is lower and discretion higher.

For adjudicators, the key distinction is whether irregularities stem from administrative errors or inefficiency (e.g. poor planning, unclear documentation) or whether they indicate intentional restriction of competition (e.g. tailored criteria, repeated favouritism, collusive bid patterns). The latter points toward criminal offences such as corruption, bid-rigging, fraud, or abuse of office.

Red flags like systematically predetermined winners, unjustified exclusions and repeated reliance on the same suppliers should trigger closer scrutiny, as they often signal collusion or corruption rather than mere non-compliance.

29 Articles 33-39 of the Directive 2014/24/EU

| Tool | Possible Misuse | Red Flags | Potential Offences | Adjudicator's Note |
|---|---|---|---|---|
| Framework Agreements | - Excessively long duration locking out competition.<br>- Tailored entry criteria to favour few suppliers.<br>- Manipulation of mini-competitions/call-offs.<br>- Splitting into lots to benefit selected bidders. | - Few suppliers admitted despite wide market.<br>- Same contractor repeatedly wins call-offs.<br>- Vague or shifting criteria for mini-competitions. | Abuse of office; favouritism; bid-rigging; corruption in call-off stage. | Be alert if mini-competitions appear systematically predetermined – this suggests corruption or collusion, not just poor planning. |
| Dynamic Purchasing Systems (DPS) | - Overly complex/technical entry requirements.<br>- Artificially short or restrictive access windows.<br>- Opaque mini-competitions excluding newcomers.<br>- Platform design discouraging small and medium size enterprises. | - DPS formally open, but no new entrants admitted.<br>- Repeated exclusion of same suppliers.<br>- Barriers unrelated to contract subject. | Restrictive practices; unlawful discrimination; abuse of dominance (concurrency offences). | A DPS that remains "closed in practice" despite being open in law signals deliberate market manipulation, potentially criminal. |
| Electronic Auctions | - Collusion among bidders ("winner rotation").<br>- Manipulated auction parameters (low start prices).<br>- Over-focus on lowest price → abnormally low tenders.<br>- Pre-arranged compensation via later modifications. | - Unnatural bidding patterns (same winners).<br>- Extreme price drops followed by contract modifications.<br>- Frequent single-bidder outcomes. | Bid-rigging/ cartels; fraud; corruption (if auction parameters are tailored). | Abnormally regular bid patterns or later inflated contract changes often indicate cartel behavior, not just competitive dynamics. |
| Electronic Catalogues | - Restricting catalogue access to few suppliers.<br>- Specifications tailored so only one catalogue qualifies.<br>- Hidden price/specifications changes after award.<br>- Excluding categories to eliminate rivals. | - Only one supplier's catalogue accepted.<br>- Gaps between published catalogue and actual orders.<br>- Catalogue "updates" used to increase prices. | Fraud; false declarations; manipulation of competition. | If catalogue updates increase prices or limit access without new competition, this may constitute fraud, not just maladministration. |
| Centralized / Joint Procurement | - Collusive allocation of contracts through central bodies.<br>- Disguised direct awards via central purchasers.<br>- Over-reliance on one buyer reducing competition.<br>- Conflicts of interest in supplier selection. | - Repeated awards to same companies.<br>- Non-transparent criteria in centralized awards.<br>- Exclusion of capable local operators. | Cartel behaviour; conflict of interest; corruption; abuse of dominance. | Where centralized bodies show repeated patterns of favouring specific suppliers, suspicions of conflict of interest or corruption are strong. |

### *1.2.2. Directive 2014/25/EU (utilities)*

Directive 2014/25/EU applies to the procurement of works, supplies and services by entities operating in the water, energy, transport and postal services sectors. Utilities procurement is often high-value and monopolistic, making it especially vulnerable to corruption and collusion.

**Key areas and typical abuses**

- Thresholds

The directive sets thresholds that trigger the application of EU procurement rules.[30] Breaches occur when constructing authorities attempt to stay "below" the thresholds. Common breaches include artificial splitting of contracts to remain under threshold, estimating contract value at an unreasonably low level, awarding additional woks/supplies/services to the same contractor in the framework of the same contact, repeated awards to the same contractor just under the threshold within a short timeframe etc.

Red flags include[31]:

- Contracts of the same nature artificially divided (works, supplies, services) without objective justification;
- Internal estimates of contract value inconsistent with market benchmarks;
- Misuse of additional works (additional works are invoked repeatedly, suggesting poor initial planning; use of "technical reasons" to award additional works without evidence (e.g. vague claims of compatibility); additional contracts that push the total well beyond the original scope or value; extensions just below the 50% cap, repeated multiple times).

The following table can help in distinguishing when a red flag points to administrative irregularity and when to criminal offence.

| Red Flag | Administrative Breach (no intent/ personal gain proven) | When It Crosses into Criminal Offence (intent + benefit + damage) |
|---|---|---|
| Artificial division of contracts (works/supplies/services) | Poor planning; decentralized budgeting; lack of aggregation of needs. | Deliberate contract splitting to avoid thresholds → Fraud in procurement, Abuse of office. |
| Internal estimates inconsistent with market benchmarks | Negligent or outdated market research; poor cost estimation. | Intentional undervaluation to avoid procurement rules → Fraud, False accounting. |
| Misuse of additional works (extensions, vague "technical reasons," repeated 50% caps) | Weak planning leading to repeated add-ons; administrative irregularity. | Fabricated "technical reasons" or repeated circumvention to channel funds to one supplier → Fraud, Corruption, Abuse of office. |

30 The thresholds are periodically adjusted by the European Commission. Current thresholds can be regularly checked at: https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/thresholds_en.

31 The same red flags as in previous section apply.

- Award criteria

Like the general procurement directive, utilities procurement must be awarded on the basis of the most economically advantageous tender. Contracting entities identify this either by price or cost (using cost-effectiveness techniques such as life-cycle costing) or by the best price-quality ratio, which may include qualitative, environmental and social criteria. Eligible factors include quality (technical merit, aesthetics, accessibility), staff qualifications, after-sales service and delivery conditions.

Award criteria must relate to the subject matter of the contract and permit effective competition; contracting entities must indicate the relative weighting of each criterion or their order of importance. Life-cycle costing, where used, must cover acquisition, use, maintenance and end-of-life costs and may include monetized environmental externalities.

Common breaches include overly vague or subjective evaluation criteria, criteria designed to favour a specific bidder (e.g. unnecessary technical capacity), post-publication changes in award criteria or their weighting, excessive emphasis on "soft" criteria (e.g. company profile), etc.

Red flags include:

- Scoring system that lack transparency or justification;
- "Tailored" criteria that match a specific supplier's profile (e.g. requiring past projects or identical scope);
- Criteria irrelevant to the subject matter of the contract;
- Large discrepancies between evaluators' scoring of the same offer.

The following table can help in distinguishing when a red flag points to administrative irregularity and when to criminal offence.

| **Red Flag** | **Administrative Breach (no intent/ personal gain proven)** | **When It Crosses into Criminal Offence (intent + benefit + damage)** |
|---|---|---|
| Scoring system lacking transparency/ justification | Sloppy evaluation rules; failure to document rationale. | Hidden or manipulated scoring to predetermine outcome → Fraud, Corruption, Abuse of office. |
| "Tailored" criteria matching specific supplier's profile | Poorly designed requirements not linked to subject matter. | Criteria intentionally drafted to fit a pre-selected bidder → Fraudulent manipulation, Bid-rigging, Abuse of office. |
| Irrelevant criteria (not linked to contract subject) | Breach of proportionality/ transparency principles; annulment. | Criteria inserted to exclude competitors or favour one firm → Fraud, Abuse of authority. |
| Large discrepancies between evaluators' scores | Inconsistent training or unclear guidance to evaluators. | Coordinated scoring manipulation to ensure chosen bidder wins → Fraud, Abuse of office, Corruption. |

- Exemptions and exclusions

The directive does not apply to certain contracts.[32] These procedures are often abused by invoking "technical reasons" without real competition barriers, using urgency as justification when it is self-created (e.g. the procurement could have been planned), claiming exclusive rights where multiple suppliers exist etc.

Red flags include:

- Frequent reliance on negotiated procedure without publication due to technical reason;
- Use of urgency grounds when delays were foreseeable;
- Weak or no evidence of exclusivity or technical impossibility;
- In-house awards to entities that also compete on the open market.

The following table can help in distinguishing when a red flag points to administrative irregularity and when to criminal offence.

| Red Flag | Administrative Breach (no intent/personal gain proven) | When It Crosses into Criminal Offence (intent + benefit + damage) |
|---|---|---|
| Frequent reliance on negotiated procedure without publication ("technical reasons") | Misinterpretation of technical exclusivity rules. | False or unsubstantiated exclusivity invoked to avoid open competition → Fraud, Abuse of office. |
| Use of urgency when delays were foreseeable | Poor planning; inadequate procurement scheduling. | Falsified urgency claims to bypass competition → Fraud, Corruption, Abuse of authority. |
| Weak/no evidence of exclusivity or technical impossibility | Administrative error in verifying market conditions. | Knowing misrepresentation of exclusivity to justify direct award → Fraudulent manipulation. |
| In-house awards to entities that also compete on market | Misunderstanding of Teckal criteria; poor legal analysis. | Deliberately misused in-house exception to favor controlled entity → Fraud, Corruption. |

32 Key exclusions include:
**Resale or lease contracts:** contracts awarded for resale or lease to third parties where the contracting entity has no special or exclusive right to sell or lease;
**Contracts unrelated to covered activities or performed outside the EU:** contracts awarded for purposes other than the pursuit of water, energy, transport or postal activities, or for such activities in a third country;
**Contracts governed by international rules:** contracts the entity must award under procurement procedures established by international agreements or financed entirely by international organisations;
**Specific service contracts:** acquisition or rental of land or buildings, arbitration and conciliation services, certain legal services, financial services relating to securities, loans, employment contracts, passenger transport by rail or metro, certain civil-protection services and broadcasting time. Service contracts awarded on the basis of an exclusive right enjoyed by a contracting authority are also excluded;
**Utilities' own purchases:** contracts for the purchase of water-by-water entities and for the purchase of energy or fuels by energy entities;
**Defence and security procurement:** contracts covered by Directive 2009/81/EC and contracts whose disclosure would compromise essential security interests are excluded.

- Types of procurement procedures

Directive 2014/25/EU offers several procedures, similar in structure to those in the public-sector directive but tailored to utilities, offering flexibility to the contracting authorities.[33] This flexibility is often misused and the procedures are misapplied or distorted. Common breaches that can lead to abuse of office and point to corruption, and collusion include choosing procedures that limit competition without valid justification, incomplete or non-transparent publication of tender notices, allowing irregular bids to continue in the process while excluding compliant ones, negotiations used to alter essential conditions after tender submission etc.

From the type of procedures, the open procedure is least prone to abuse, followed by the restricted/complex procedures that hold medium risk (abuse here lies in tailoring criteria or overusing exemptions) to the negotiated procedure without publication that is most prone to abuse. Thus, negotiated procedure without prior publication should be an exception, not a rule.

Red flags include:

- Frequent use of negotiated procedure in non-complex cases;
- Bid deadlines that are unreasonably short;
- Tender specifications or clarifications published late or selectively shared;
- Contracts significantly amended after award (scope, price, duration)

The following table can help in distinguishing when a red flag points to administrative irregularity and when to criminal offence.

| Red Flag | Administrative Breach (no intent/personal gain proven) | When It Crosses into Criminal Offence (intent + benefit + damage) |
|---|---|---|
| Frequent use of negotiated procedure in non-complex cases | Misjudgement of procedure choice; poor familiarity with rules. | Negotiated procedure strategically chosen to limit competition → Fraud, Abuse of office. |
| Bid deadlines unreasonably short | Administrative error in planning timelines. | Timelines deliberately shortened to exclude outsiders, benefit insiders → Fraud, Abuse of office. |
| Tender specs/clarifications published late or selectively shared | Negligent handling of tender communications. | Withholding info to give advantage to certain bidders → Fraud, Abuse of office, Corruption. |
| Contracts significantly amended after award (scope, price, duration) | Poor initial planning; legitimate but excessive reliance on modification clauses. | Major amendments used to alter contract unlawfully → Fraud, Abuse of office, Corruption. |

33 **Open procedure (**any interested operator may submit a tender; there is no pre-selection or negotiation); **Restricted procedure (**any operator may request to participate, but only those invited by the contracting entity may submit a tender); N**egotiated procedure with prior call for competition (**a call for competition is published; interested operators request to participate and, after selection, submit initial tenders that form the basis for negotiations. Minimum requirements and award criteria must remain fixed, and equal treatment and confidentiality apply during negotiations.); **Competitive dialogue** (used for complex contracts where the entity cannot define the technical or financial means to meet its needs. After selecting candidates, the entity engages in a dialogue to identify suitable solutions and invites final tenders based on the solution(s) developed); **Innovation partnership (**employed when the required product, service or works is not available on the market. The partnership combines research and development phases and subsequent purchase; it may involve one or several partners and is structured in successive stages with the possibility to terminate after each stage); N**egotiated procedure without prior call for competition (**permitted only in specific circumstances, such as when no suitable tenders were received in an open or restricted procedure, when only one operator can deliver the contract (e.g. for technical or exclusive-rights reasons) or in cases of extreme urgency not attributable to the contracting entity. It may also be used for additional deliveries from the original supplier, purchases on commodity markets, contracts following a design contest or repeat works/services) (Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance. https://eur-lex.europa.eu/eli/dir/2014/25/oj/eng)

- Tools

The directive also recognizes framework agreements, dynamic purchasing systems, electronic auctions and electronic catalogues[34] and allows centralized or joint procurement by utilities.[35] These instruments are promoted to save costs and streamline procurement, but in practice they can be misused.[36]

### *1.2.3. Directive 2014/23/EU on concession contracts*

Directive 2014/23/EU regulates concession contracts in which an authority entrusts a company with the provision and operation of works or services and transfers the operational risk.

- Material and monetary scope[37]

The Directive 2014/23/EU applies to the award of public works and services concessions by contracting authorities and contracting entities when the estimated concession value meets the threshold established by European Commission. The estimated value equals the total turnover expected to be generated by the concessionaire over the contract duration and must include the value of any options, extension periods, user payments, financial advantages granted by the authority, and the value of any supplies or services made available to the concessionaire.

Contracting authorities must not split concessions to avoid the threshold. If the combined value of lots meets or exceeds the threshold, each lot must be awarded in accordance with the Directive. Inflating or underestimating concession values or artificial splitting are common fraud schemes that may cross into criminal conduct.

- Award criteria[38]

Concessions must be awarded on the basis of objective criteria that comply with the Directive's principles (equal treatment, non-discrimination and transparency) and are linked to the subject-matter of the concession. These criteria must ensure effective competition and identify the overall economic advantage for the contracting authority or entity. Acceptable factors can include price, cost, and qualitative considerations such as environmental, social or innovation-related aspects, provided they do not confer unrestricted discretion. The criteria must be accompanied by requirements that allow verification of tenders and must be listed in descending order of importance.

- Exemptions and exclusions[39]

The Directive sets detailed rules on exclusions – when the Directive will not be applicable.[40]

34 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance, Articles 51-54. Accessible at: https://eur-lex.europa.eu/eli/dir/2014/25/oj/eng.

35 Ibid, Articles 55-57.

36 Type of abuses, red flags and adjudicators' notes are explained in section 1.2.1, subsection Tools.

37 Directive 2014/23/EU, Article 8.

38 Directive 2014/23/EU Directive 2014/23/EU, Article 41.

39 Ibid, Articles 10-17.

40 Concessions awarded on the basis of an exclusive right; concessions for air-transport services or public passenger transport services; concessions mandated by international agreements or subject to international procurement rules, and those governed by the defence and security Directive 2009/81/EC or requiring protection of essential security interests; certain services; concessions awarded to affiliated undertakings or joint ventures under certain conditions etc.

- Type of procurement procedures[41]

The Directive does not prescribe separate open or restricted procedures. Instead, it sets a general concession award procedure. Contracting authorities must publish a concession notice to invite competition (a prior information notice may be used to reduce time-limits). The concession notice or invitation must describe the concession's subject-matter, the conditions of participation and the award criteria. Authorities may limit the number of candidates to an appropriate level, provided the selection is done on the basis of objective criteria to ensure genuine competition.

Negotiations with candidates and tenderers are allowed, albeit negotiated procedures and concessions in general are particularly prone to abuse. The contracting authority may adjust the procedure and hold negotiations, but it cannot change the subject-matter of the concession, the award criteria or the minimum requirements during negotiations. The authority must communicate any modifications to all participants, keep records of each stage and ensure transparency and equal treatment.

Simplified rules apply to concessions for social and other specific services listed in Annex IV: these contracts only need to comply with the provisions on publication of a concession notice and award notice.

- Red flags and notes for adjudicators

Concessions can be manipulated to evade rules or disguise corruption and fraud. Red flags include:

✓ Manipulation of estimated value
  - Concession value systematically underestimated to fall below the EU threshold;
  - Artificial exclusion of elements that must be included (e.g. options, extensions, user fees, supplies provided by the authority);
  - Use of optimistic demand forecasts or unrealistic financial assumptions to keep value below thresholds;
  - Inflated costs or exaggerated revenue streams that benefit one operator disproportionately;

✓ Artificial splitting of concessions
  - Large concession divided into several smaller contracts just below the threshold;
  - Award of "lots" to the same operator or linked operators, avoiding aggregation rules;
  - Sudden proliferation of small concessions with identical scope, timing, or location;

✓ Duration and extension abuses
  - Concession duration set excessively long, beyond what is objectively needed, locking out competition;
  - Repeated "extensions" or renegotiations that cumulatively change the original scope or value;
  - Extension clauses activated without justification (e.g. "technical reasons" without evidence);

✓ Irregular awarding practices
  - Direct awards justified by urgency, technical exclusivity, or "unique competence," without proper documentation;
  - Concessions tailored to a single operator through specific technical, financial, or experience criteria;
  - Unusual or opaque financial advantages provided by the authority (grants, guarantees, or revenue-sharing skewed in favour of the concessionaire);

✓ Risk allocation red flags
  - Risks that should remain with the concessionaire (demand risk, operational risk) shifted back to the public authority without justification;

41 Directive 2014/23/EU Directive 2014/23/EU, Article 37.

- Concessions where the public sector guarantees minimum revenue, eliminating genuine risk transfer;
- Hidden clauses that allow concessionaire to terminate with compensation if revenues fall short;

✓ Operational and monitoring concerns
- Lack of transparent monitoring of concessionaire's revenue streams (tickets, tolls, fees);
- Reporting obligations absent or weak, making it easy to conceal real turnover;
- Authority fails to enforce penalties or claw back clauses when concessionaire underperforms.

✓ Collusion and conflict of interest
- Same individuals advising on concession design later linked to the winning bidder;
- Concessionaire with privileged access to internal data or demand forecasts;
- Family, political, or business ties between decision-makers and the operator.

For adjudicators, the key challenge is to distinguish between errors or weak planning (administrative breaches) and deliberate manipulation (criminal offences):
- Administrative breaches typically involve poor estimation methods, weak documentation or insufficient monitoring of concessionaires;
- Criminal conduct arises when value calculations are deliberately falsified, concessions are artificially split, or exemptions are invoked to hide collusion, corruption or favouritism.

Checklist for adjudicators:
1. Was the estimated value calculated transparently, including all required elements (options, extensions, user fees)?
2. Were concessions split artificially or awarded repeatedly to linked operators?
3. Were extensions/renegotiations proportionate and properly justified?
4. Did the authority maintain oversight of concessionaire's revenues and enforce penalties?
5. Is there evidence of conflicts of interest, collusion, or personal benefit in awarding or monitoring the concession?

The following table can help adjudicators in distinguishing between administrative breach and criminal offence.

| Red Flag Area | Administrative Breach | Possible Criminal Offence |
|---|---|---|
| Manipulation of estimated value | Miscalculation or omission of some concession elements (e.g. options, user fees) due to negligence or poor methodology. | Deliberately underestimating concession value to avoid thresholds; falsifying demand/revenue forecasts; excluding obligatory cost elements with intent to mislead. |
| Artificial splitting of concessions | Poor planning leading to fragmented concessions or failure to aggregate lots properly. | Intentional splitting of concessions into smaller lots to evade thresholds; awarding multiple lots to linked operators to disguise a single high-value concession. |
| Duration and extension abuses | Extensions applied without strong justification but within allowable flexibility; excessive duration set due to lack of market research. | Systematic use of unjustified renegotiations/ extensions to benefit a single operator; granting long duration concessions in exchange for undue advantage (e.g. kickbacks). |
| Irregular awarding practices | Over-reliance on urgency/ technical grounds with weak documentation; poorly drafted concession criteria. | Fraudulent invocation of urgency/exclusivity; criteria deliberately tailored to favour one operator; direct award linked to corruption, favouritism, or collusion. |

| | | |
|---|---|---|
| Risk allocation abuses | Risk allocation vaguely defined; excessive guarantees provided by the authority due to weak negotiation. | Concession structured to eliminate all risk for operator (e.g. guaranteed revenue regardless of performance) with intent to conceal undue benefit or misappropriation of public funds. |
| Operational and monitoring failures | Weak monitoring mechanisms; insufficient reporting obligations leading to lack of oversight. | Concealing real turnover; fraudulent reporting by concessionaire with collusion of authority; deliberate failure to enforce penalties for personal gain. |
| Collusion and conflict of interest | Lack of transparency in managing potential conflicts of interest; failure to document recusals. | Award influenced by undisclosed ties (family, political, business); insider leaks of demand forecasts/data; collusion or bribery between concessionaire and officials. |

### *1.2.4. Directive 2009/81/EC on defence and security*

Defiance and security procurement involves national security interests that justify specific rules. Directive 2009/81/EC opens the defence market while allowing Member States to apply Article 346 TFEU to exempt contracts necessary to protect essential security interests. The Directive applies to military equipment, works and services and to sensitive purchases involving classified information. It emphasizes that exemptions must be justified case by case and introduces review procedures enabling tenderers to challenge decisions. Adjudicators should recognize that procurement in defence may legitimately restrict transparency to protect national security.

For adjudicators, the challenge is to draw the line between legitimate security needs and misuse of exemptions.

1. Legitimate Security Needs (Lawful Exemptions)

Legitimate security needs usually are the existence of classified information,[42] urgency,[43] exclusivity/technical reasons,[44] interoperability needs[45] and treaty/international obligations.[46] Indicators of legitimacy are clear documentation of risk to security, independent technical justification, proportionality of exemption, and temporal limits (short-term until regular procurement possible).

2. Misuse of Exemptions (Red Flags of Corruption/Favouritism)

- Overbroad classification: Declaring ordinary supplies (uniforms, catering, IT services) as “classified” to avoid tender. Also, classification of tender documents in order to avoid transparency in procurement is a red flag;
- Manufactured urgency: Invoking urgency where delays were foreseeable (e.g. late planning of routine defence needs);
- Artificial exclusivity: Claiming only one supplier can provide goods without market testing or evidence;
- Excessive contract duration: Long-term monopoly created under the guise of security, excluding future competition;

42 Restriction is justified if disclosure would compromise national security or operational effectiveness (e.g. procurement of encrypted communication systems, weapons platforms).
43 Genuinely unforeseeable crisis requiring immediate response (e.g. sudden armed conflict, terrorist attack).
44 Only one supplier is capable of delivering a critical system (e.g. highly specialised defence equipment with no market substitute).
45 When systems must be compatible with existing defence infrastructure (e.g. NATO standards).
46 Procurement required under international defence agreements.

- Political/Business ties: Contract systematically awarded to companies linked to political elites or former officials;
- Lack of post-crisis review: No reversion to open competition once urgent/exceptional conditions passes.

Indicators of misuse include vague references to "national interest" without detail, repeated use of exemptions for the same supplier, inflated costs, poor or absent audit trail.

In adjudicating, the following aspects need to be taken into account:

- Was the exemption objectively necessary (linked to real security risk)?
- Was it proportionate (narrowly tailored, limited in duration)?
- Is there documented justification (risk assessment, technical analysis, legal opinion)?
- Were there alternative suppliers/solutions reasonably available?
- Did the exemption benefit one operator repeatedly without market testing?

The table below provides example on how adjudicators can decide over a red flag.

| Red Flag | Administrative Breach | Possible Criminal Offence |
|---|---|---|
| Overbroad classification of information | Overly cautious classification of ordinary supplies (e.g. uniforms, catering) as "confidential" due to risk aversion. | Deliberate misuse of classification to shield contracts from competition, benefiting a favoured supplier or concealing corruption. |
| Manufactured urgency | Weak justification for urgency based on poor planning or foreseeable delays in procurement of equipment. | False invocation of urgency to bypass open tender; evidence that urgency was fabricated to favour a specific company. |
| Artificial exclusivity / Technical reasons | Insufficient market research before declaring only one supplier can provide goods or services. | False claims of exclusivity, collusion with a supplier to create appearance of uniqueness, or suppressing alternative bids. |
| Excessive duration of contract | Contracts set longer than necessary due to poor assessment of operational needs. | Intentionally granting unjustified long-term monopolies to secure benefits for a particular operator (kickbacks, political ties). |
| Interoperability and compatibility claims | Overly broad interpretation of interoperability needs, applied without detailed justification. | Misuse of interoperability argument to exclude competition and ensure award to pre-selected supplier. |
| Political/business ties | Weak handling of conflict-of-interest declarations or transparency gaps in award decisions. | Direct conflict of interest, contracts awarded to firms connected to political elites, military officials, or through bribery. |
| Lack of post-crisis review | Failure to return to competitive procedures after urgent conditions pass, due to administrative inertia. | Intentional prolongation of exemption conditions, repeatedly renewing contracts under "emergency" status without justification. |

## 1.3. Competition law and procurement

Competition law and public procurement intersect most sharply where anti-competitive practices distort tendering procedures. Bid-rigging, price-fixing or market-sharing agreements between bidders are not only cartel offences under EU and national competition law, they also constitute procurement offences that undermine the principles of open and fair competition.

Recognizing this overlap, the EU procurement directives empower contracting authorities to exclude economic operators that have engaged, among other aspects, in serious competition-law violations. For adjudicators, this raises the question of how to assess evidence of collusion or cartel behaviour. In practice, exclusion is often based on final decisions by national or EU competition authorities, which provide strong probative value. However, adjudicators may also be confronted with procurement cases where no prior competition authority ruling exists. In both situations, they must carefully weigh the available evidence (e.g. bid patterns, communication records, unusual market behaviour) while ensuring due process, and may need to distinguish between an administrative finding sufficient for exclusion and a higher evidentiary threshold required in criminal proceedings.

The Directive 2014/24/EU distinguishes between mandatory and optional grounds for exclusion.

- Mandatory exclusions:[47] Contracting authorities must exclude bidders that have been convicted by final judgment of participation in a criminal organization, corruption, fraud, terrorist offences, money-laundering, financing of terrorism, or human-trafficking. They must also exclude a bidder that is in serious breach of its obligations to pay taxes or social security contributions;
- Optional exclusions:[48] Authorities may exclude bidders that are bankrupt or insolvent, guilty of grave professional misconduct, have engaged in collusive agreements to distort competition, are affected by a conflict of interest that cannot be remedied, have distorted competition through prior involvement in preparing the procurement, have shown significant or persistent deficiencies in performing earlier contracts, or have misrepresented information or attempted to unduly influence the procedure.

Article 57 also allows Member States to derogate from mandatory exclusions for overriding public-interest reasons and recognizes a self-cleaning mechanism: an excluded bidder can demonstrate remedial measures (compensation, cooperation with authorities, compliance reforms) to regain eligibility. Member States must set maximum exclusion periods – five years for mandatory grounds and three years for optional grounds. For adjudicators, it is important to recognize that self-cleaning claims require careful scrutiny: remedial measures may be genuine (e.g. independent compliance monitoring, structural reforms, proactive cooperation with authorities), but they may also be merely cosmetic (symbolic policies, superficial training, minimal compensation) intended to circumvent exclusion rules without addressing underlying misconduct.

Other articles in the directive reinforce exclusion: Article 24 requires contracting authorities to identify and prevent conflicts of interest, which can lead to exclusion, and Article 41 addresses distortion of competition due to prior involvement in preparing the procurement.

Directive 2014/25/EU (the utilities directive) allows utilities to exclude bidders, but it does not reproduce the grounds itself; instead, it cross-references the exclusion provisions of Directive 2014/24/EU. The substantive grounds – criminal convictions, non-payment of taxes, insolvency, grave professional misconduct, collusion, conflicts of interest, etc. – are therefore the same as those in Article 57 of Directive 2014/24/EU, but their

47 Article 57 paragraphs 1 and 2 of the Directive 2014/24/EU
48 Article 57 paragraph 4 of the Directive 2014/24/EU.

application in the utilities sector is more flexible: utilities may choose whether or not to apply the optional grounds unless national law requires them to do so.[49] This flexibility, while offering utilities discretion, may also increase the risk of inconsistent application across cases or operators. Selective enforcement or manipulation of exclusion grounds could create space for favouritism or shield certain bidders from scrutiny. Adjudicators should therefore be alert to whether discretion has been exercised consistently, proportionately, and with transparent reasoning.

At the enforcement level, competition authorities and procurement bodies often cooperate, but the dual application of administrative or criminal sanctions raises issues such as proportionality and ne bis in idem, which have been addressed by both the Court of Justice and the European Court of Human Rights in their jurisprudence.[50]

49 Article 80 of the Directive 2014/25/EU.
50 Relevant case law can be found in sections 2 and 3 of this chapter.

# 2. Court of Justice of the European Union Case Law on Procurement Offences (CJEU)

The CJEU provides authoritative interpretations of EU directives and general principles. While the CJEU does not adjudicate criminal liability, its judgments guide national courts and enforcement agencies on exclusion from tenders, professional misconduct and self-cleaning. Thus, CJEU contains case law that can help in interpretation of the EU Directives on public procurement, among others on interpreting the ne bis in idem principle under Article 50 of the TFEU illustrating how these principles are applied. This case law is not specifically on public procurement but it's relevant since it elaborates the circumstances under which the national authorities can conduct dual proceedings (criminal and administrative) in public procurement cases.

## 2.1. CJEU case law on public procurement directives (selected examples)

- **Case C-66/22 (Infraestruturas de Portugal SA and Futrifer Indústrias Ferroviárias SA v Toscca – Equipamentos em Madeira Lda)**[51]

Factual background

Case C-66/22 originated in Portugal and concerned a dispute over a public procurement procedure run by Infraestruturas de Portugal, the national rail-infrastructure manager. In 2019 the authority awarded a contract for wooden railway dowels to Futrifer Indústrias Ferroviárias SA. A rival bidder, Toscca – Equipamentos em Madeira Lda, challenged the award on the basis that Futrifer had previously been fined by the Portuguese Competition Authority for taking part in a cartel and, in Toscca's view, should have been excluded from the tender.

Legal questions

The Portuguese Supreme Administrative Court asked the Court of Justice to interpret EU procurement law and the following questions were central:

- Does Article 57(4)(d) of Directive 2014/24/EU give the contracting authority exclusive discretion to decide whether to exclude a bidder for anti-competitive conduct?

51 https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CJ0066

- Can national law substitute the contracting authority's decision with a general prohibition on tendering imposed by the national competition authority as an ancillary penalty for a cartel fine?
- When assessing whether a bidder remains reliable despite a competition law breach, must the contracting authority undertake a broader suitability review in line with the EU Charter's right to good administration?
- Is it compatible with EU law that, under Portuguese rules, exclusion for a competition-law breach unrelated to the specific tender depends on the competition authority's ancillary penalty and that authority assesses the bidder's "self-cleaning" measures?
- Is a national rule limiting exclusion to cases where anti-competitive acts are evidenced within the particular tendering procedure consistent with Article 57(4)(d) of Directive 2014/24/EU?

Key findings of the Court

1. Obligation to transpose optional exclusion grounds.
   The Court clarified that Member States must transpose the optional exclusion grounds into their national procurement rules. While national law may decide whether contracting authorities are required or merely allowed to apply those grounds, the State cannot omit them entirely. Otherwise, contracting authorities would be deprived of the ability to exclude unreliable operators, contrary to the directive's purpose. For utilities contracts, Member States must at least make it possible for contracting entities to include those grounds in their exclusion criteria.
2. Scope of the exclusion for anticompetitive conduct.
   The optional ground concerning operators that enter into agreements aimed at distorting competition (Article 57(4)(d)) precludes national legislation that limits exclusion to particular situations or only allows exclusion when the anticompetitive conduct occurred in the same procurement procedure. Contracting authorities must be free to exclude tenderers at any stage when there is significant evidence of anticompetitive conduct, whether in the current or past procedures.
3. Authority to decide and impact of competition-authority decisions.
   National law cannot confer sole authority to the national competition authority to exclude tenderers for competition breaches. A competition authority's decision may provide important evidence, but the contracting authority must itself assess the operator's reliability and cannot be bound by the absence of such a decision. Moreover, Member States cannot narrow the scope of this exclusion ground; contracting authorities must retain discretion.
4. Obligation to state reasons.
   To comply with the principle of sound administration, contracting authorities must provide reasons when they exclude a tenderer on the basis of anticompetitive conduct or when they decide not to exclude a tenderer despite evidence of such conduct. This duty allows other participants to understand and, if necessary, challenge the decision.

Implications

The judgment strengthens the role of contracting authorities in safeguarding competition and integrity in public procurement. *Member States cannot avoid transposing optional exclusion grounds or delegate exclusion decisions solely to competition authorities.* Contracting authorities must actively assess evidence of anticompetitive behaviour and act proportionately, ensuring transparency and accountability by stating reasons for their decisions.

- **Case C-178/16 – Impresa di Costruzioni Ing. E. Mantovani SpA and Guerrato SpA v Provincia autonoma di Bolzano and others (20 December 2017)[52]**

Factual background

The Province of Bolzano (Italy) launched an EU-wide tender in July 2013 for financing, designing and building a new prison. Mantovani SpA, acting as lead contractor of a temporary consortium, submitted a request to participate. In December 2013 the firm declared that its former chairman and managing director (Mr B.), who had ceased his duties in March 2013, had not been convicted. Shortly afterwards, press reports revealed that Mr B. had negotiated a plea bargain for a false-invoicing scheme and would receive a prison sentence. The contracting authority sought clarification and obtained the criminal record, which showed that the conviction became final on 29 March 2014. Mantovani argued that the conviction had become final only after its declaration and that it had fully dissociated itself from Mr B.'s conduct by removing him from management and taking legal action against him. The authority nonetheless consulted the Italian anti-corruption authority (ANAC) and, on 27 February 2015, excluded Mantovani for failing to declare the conviction and for not providing timely evidence of dissociation. National courts upheld the exclusion, and the Consiglio di Stato referred questions to the Court of Justice.

Legal questions

The main issue was whether Directive 2004/18/EC[53] and general EU principles (equal treatment, proportionality, legal certainty and transparency) precluded national rules that:

- Require tenderers to declare criminal convictions of former directors who left the company up to one year before the contract notice;
  and
- Allow exclusion of a tenderer for failing to declare a conviction that is not yet final or for failing to prove "full and effective dissociation" from the convicted director's conduct.

Key findings of the Court

1. Member-State discretion for optional grounds
   Article 45(2) of Directive 2004/18 lists optional exclusion grounds and leaves it to Member States to lay down implementing conditions. Member States may therefore decide to impute to a company the wrongful conduct of its directors and to consider the professional ethics of those representatives when assessing the tenderer's reliability.
2. Considering directors' conduct is not an extension of EU grounds
   The Court held that taking account of a director's conviction as part of the optional ground under Article 45(2)(c) does not expand the scope of that ground but is a legitimate implementation of tier. The fact that the conduct occurred before the tenderer applied does not preclude exclusion.
3. Proportionality and opportunity to prove dissociation
   Member States may require an undertaking to prove it has fully dissociated itself from the convicted director; the tenderer must be allowed to submit evidence, and the contracting authority must assess that evidence and provide reasons. Only if dissociation is not convincingly demonstrated may the authority exclude the tenderer. Requiring a declaration of convictions occurring within a year before the tender notice was not disproportionate, particularly because national law allowed the company to prove it had effectively dissociated from the director.

52 https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62016CC0178
53 The Directive 2012/24/EU repealed and replaced the Directive 2014/18/EC

4. Application to other exclusion grounds
   If the conviction is not yet final, the authority may rely on Article 45(2)(d) (grave professional misconduct) and exclude the tenderer on the basis of "any means" of proof. Failure to disclose the conviction may also constitute misrepresentation under Article 45(2)(g).
5. Equal treatment
   A company whose director committed an offence affecting its professional conduct is not in a situation comparable to one whose director has not; applying stricter scrutiny to such a company therefore does not breach equal-treatment principles.

Implications

The Court concluded that Directive 2004/18, in particular Article 45(2)(c), (d) and (g), together with the principles of equal treatment and proportionality, does not preclude national legislation that:

- obliges tenderers to declare criminal convictions of directors who ceased to perform their duties within one year of the contract notice and allows contracting authorities to consider such convictions – even if not yet final – when assessing the tenderer's reliability;
  and
- permits contracting authorities to exclude a tenderer that fails to declare a non-final conviction or fails to prove that it has fully and effectively dissociated itself from the convicted director's activities

The judgment thus confirms that Member States may adopt rigorous rules to ensure the integrity of tenderers. However, exclusion on the basis of past misconduct is permissible only where proportionality is respected and companies are given a genuine opportunity to demonstrate reform – such as effective dissociation from the wrongful conduct, organizational changes, or compliance improvements.

- ***Case C-124/17 — Vossloh Laeis GmbH v Stadtwerke München GmbH (24 October 2018)***[54]

Factual background

Vossloh Laeis, a rail-switch manufacturer in Germany, had participated in a cartel and been fined by the German competition authority. When it later bid for a public contract in the utilities sector, the contracting entity (Stadtwerke München) sought to exclude it because of the prior anti-competitive conduct. German law permitted exclusion unless the bidder could demonstrate "self-cleaning" – i.e., that it had taken measures to regain reliability.

Legal questions

The Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria, Germany) has raised with the Court of Justice two issues which the Court has not previously addressed:

1. Whether national rules could require an operator that has been fined for a competition law infringement to cooperate not only with the competition authority but also with the contracting authority to clarify all relevant facts and demonstrate its reliability;
   and
2. When the maximum period of exclusion begins to run for operators penalized for agreements aimed at distorting competition, in the event that that period has not been set by final judgment and must run from 'the date of the relevant event'.

54 https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62017CC0124

Key Findings of the Court

1. Cooperation with the contracting authority
   The Court held that Article 80 of the Utilities Directive (2014/25/EU) read with Article 57(6) of the Public Procurement Directive (2014/24/EU) does not preclude national rules requiring an economic operator "to clarify the facts and circumstances relating to the criminal offence or the misconduct committed" by cooperating with both the investigating authority and the contracting authority, as long as the cooperation is confined to measures strictly necessary to assess whether the operator has regained its reliability. In particular, contracting authorities may ask a bidder that has breached competition law to provide the competition authority's decision, even if that could facilitate civil claims, and may insist on evidence that the bidder has paid or undertaken to pay compensation for the damage caused. Such requirements ensure that the self-cleaning measures are effective.
2. Starting point of the exclusion period
   Under Article 57(7) of Directive 2014/24/EU, when an economic operator has engaged in conduct covered by the exclusion ground for anti-competitive agreements in Article 57(4)(d) and has been sanctioned by a competent authority, the maximum exclusion period is calculated from the date of that authority's decision. Thus, the exclusion period does not begin when the misconduct itself ceased but when the formal decision imposing a penalty is adopted.

Implications

The judgment clarifies that contracting authorities in the utilities sector may require tenderers previously penalized for competition law breaches to actively cooperate in demonstrating their reliability, including providing decisions and evidence of compensation. It also clarifies that the clock for the maximum exclusion period starts running from the date of the penalty decision.

- **Practical takeaways for adjudicators**

CJEU case law underscores that contracting authorities are not passive actors: they must actively safeguard the integrity of procurement. [55] Key takeaways from the CJEU case law are the following:

1. Discretion and reasoning
   - ✓ Exclusion grounds must be available in national law;
   - ✓ Contracting authorities can exercise discretion – but it must always be reasoned and reviewable;
   - ✓ Evidence from competition/criminal authorities is strong but not binding (adjudicators must make sure that evidence from competition authorities is weighed but not treated as binding);
2. Evidence of misconduct
   - ✓ Collusion, grave misconduct, false declarations are valid exclusion grounds;
   - ✓ Exclusion decisions must be explained transparently so bidders can understand and, if necessary, challenge them;
   - ✓ Adjudicators check if the authority's decision based on reliable evidence and explained transparently?

55 Checklist for adjudicators in reviewing exclusion decisions:
Legal Basis – Has the exclusion ground (e.g. collusion, grave misconduct, false declaration) been properly transposed into national law and applied consistently?
Evidence – Is the exclusion based on reliable evidence (e.g. competition authority decision, criminal conviction) and has the contracting authority itself assessed reliability rather than deferring automatically?
Self-Cleaning – Was the tenderer given a fair chance to demonstrate remedial measures (e.g. organisational reforms, compensation, compliance monitoring)?
Proportionality – Is the exclusion proportionate to the misconduct, or does it amount to an automatic sanction without considering the bidder's reform efforts?
Reasoned Decision – Has the contracting authority clearly explained its reasoning, so that the decision is transparent, reviewable, and consistent with due process?

3. Dissociation from misconduct
   - ✓ Misconduct of former directors can justify exclusion;
   - ✓ Key check: whether dissociation from misconduct has been seriously assessed – did the company fully and effectively dissociate (management changes, legal action against wrongdoers)?
4. Self-cleaning measures
   - ✓ Companies must be given a chance to show reform;
   - ✓ Adjudicators verify if measures genuine (compliance reforms, compensation, cooperation with regulators) or merely cosmetic (paper policies, token training)?
5. Proportionality and due process
   - ✓ Exclusion cannot be automatic;
   - ✓ Sanctions must be proportionate to misconduct. The adjudicators should check whether exclusion is applied proportionately rather than automatically;
   - ✓ Adjudicators should demand evidence of reform – such as compensation, compliance programmes, and cooperation with regulators and explain why these measures do self-cleaning are or are not sufficient;
   - ✓ Tenderers must have a right to be heard and to appeal.

## 2.2. CJEU case law on ne bis in idem principle

The ne bis in idem principle is included in many national, European and international legal instruments. Within the European Union's area of freedom, security and justice, the main legal sources of the principle are Articles 54 to 58 of the Convention Implementing the Schengen Agreement and Article 50 of the Charter of Fundamental Rights of the European Union.[56] In general, the ne bis in idem principle prohibits duplication of proceedings and penalties of a criminal nature for the same acts and against the same person, either within the same Member State or in several Member States if the person has exercised their right to freedom of movement. Moreover, the ne bis in idem principle is also prescribed in Article 4 of Protocol 7 to the ECHR.

Despite the differences in wording and scope of the ne bis in idem principle in various legal provisions, it is clear that the CJEU has striven in its case-law for a uniform approach vis-a -vis the ne bis in idem principle.[57]

### *2.2.1. Requirements for application of the ne bis in idem principle*

According to the applicable legal framework, in light of the interpretation given by the CJEU, several requirements should be satisfied for a situation to be considered a bis in idem:

56 Case law by the Court of Justice of the European Union on the principle of ne bis in idem in criminal matters, April 2020, Eurojust

57 Case law by the Court of Justice of the European Union on the principle of ne bis in idem in criminal matters, April 2020, Eurojust, pg.7 There are obvious differences between Article 50 of the Charter and Article 4P7 ECHR, in particular that Article 50 of the Charter applies both within the same Member State and in a cross-border context, while **Article 4 of Protocol 7 to the ECHR** can only apply within the same State. Nevertheless, the CJEU has underlined that even though the ECHR does not constitute a legal instrument formally incorporated into EU law, the guaranteed right of the Charter has the same meaning and the same scope as the corresponding right in the ECHR (Åkerberg Fransson, M.) and that it is necessary to ensure that the interpretation of Article 50 of the Charter does not disregard the level of protection guaranteed by the ECHR in so far as Article 50 of the Charter contains a right corresponding to that provided for in Article 4P7 ECHR (Orsi and Baldetti, Menci, Garlsson Real Estate SA).

- The ‘criminal nature’ requirement, concerning the two sets of proceedings

The CJEU held that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts, a combination of administrative penalties and criminal penalties, provided that the administrative penalty is not criminal in nature.[58] This ‘criminal nature’ requirement is thus particularly relevant in the context of duplication of criminal and punitive administrative sanctions imposed for the same facts at the end of different proceedings.

In this respect, the CJEU clarified that three criteria, which are alternative and not cumulative, are relevant for determining whether an administrative sanction is criminal in nature: (1) the legal classification of the offence under national law, (2) the intrinsic nature of the offence and (3) the degree of severity of the penalty.[59]

When identifying the criteria for determining the criminal nature of a penalty, the CJEU aligned itself with the ‘Engel criteria’ developed by the EctHR.[60]

- The ‘same person’ requirement, concerning the defendant

The application of the ne bis in idem principle presupposes in the first place that the same person is subject of the penalties or criminal proceedings at issue. The CJEU delt with the question of the same person requirement and this was with regard to relation between natural person and legal person, concluding that the requirement is not met when a tax penalty is imposed on a company with legal personality but the criminal proceedings are brought against a natural person – even if the natural person was the legal representative of the company subject to the tax penalty.[61]

- The ‘idem’ requirement, concerning the same facts;

According to the CJEU the ‘same acts’ is to be understood as the identity of the material acts in the sense of ‘a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter’. Following this approach, the EctHR’s case-law also developed towards a factual (and not legal) notion of idem.[62]

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58 Case of the CJEU C-617/10. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62010CJ0617

59 Relevant case law includes the following cases: Case C-617/10, Åkerberg Fransson, Judgment of 26 February 2013, Case C-524/15, Menci, Judgment of 20 March 2018, Case C-524/15, Menci, Judgment of 20 March 2018, Case C-524/15, Menci, Judgment of 20 March 2018

60 See section 3.2 of this chapter

61 Joined Cases C-217/15 and C-350/15, Orsi and Baldetti, Judgment of 5 April 2017. The CJEU stated that article 50 of the Charter must be interpreted as not precluding national legislation that permits criminal proceedings to be brought for non-payment of VAT, after the imposition of a definitive tax penalty with respect to the same act or omission, where the penalty was imposed on a company with legal personality but the criminal proceedings were brought against a natural person.

62 Relevant case law: Case C-436/04, Van Esbroeck, Judgment of 9 March 2006 – the CJEU stated that “The relevant criterion is the identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected. Punishable acts of exporting and importing the same narcotic drugs are in principle to be regarded as ‘the same acts’. The definitive assessment is left to the competent national courts.”; Case C-150/05, Van Straaten, Judgment of 28 September 2006; Case C-467/04, Gasparini, Judgment of 28 September 2006; Case C-288/05, Kretzinger, Judgment of 18 July 2007; Case C-524/15, Menci, Judgment of 20 March 2018; Case C-537/16, Case C-367/05, Kraaijenbrink, Judgment of 18 July 2007 where the CJEU refers to the definition of ‘same acts’ developed in Van Esbroeck (paragraphs 26–28) and adds that the material acts must make up an inseparable whole (paragraph 28). The CJEU then explains that the mere fact that the alleged perpetrator acted with the same criminal intention does not suffice (paragraph 29). In other words, a subjective link between acts which gave rise to criminal proceedings in two States is insufficient; an objective link between the sums of money in the two proceedings must be established (paragraphs 30 and 31) and Case C-537/16, Garlsson Real Estate and others, Judgment of 20 March 2018 – the CJEU underlined that the classification of the facts under national law and the legal interest protected are not relevant and that the fact that the criminal offence requires an additional constituent subjective element in relation to the administrative penalty is irrelevant.

- The 'bis' requirement, concerning the existence of a final decision.

The CJEU has held that two elements are necessary in order for a decision to count as finally disposing of the case against a person for the purposes of ne bis in idem.

First, it is necessary for the decision at stake to definitively bar further prosecution at the national level. The CJEU has also clarified that the possibility under national law of reopening the criminal investigation if new facts/evidence become available does not preclude the initial decision from being regarded as a 'final' decision.

Second, it is necessary that the decision at stake be given after a determination has been made as to the merits of the case. The CJEU held that this requires a detailed investigation to have been undertaken. At the same time, the CJEU held that an acquittal or a decision of non-lieu (e.g. a finding that there were no grounds to refer the case to a trial court because of insufficient evidence) also satisfies this requirement.[63]

### *2.2.2. Limitations of the ne bis in idem principle*

In one of its rulings[64] the CJEU has admitted that the principle of ne bis in idem guaranteed by Article 50 of the Charter may be subject to limitations on the basis of the horizontal clause provided under Article 52(1) of the Charter.

According to this provision, limitations to the rights guaranteed by the Charter may be justified where they: (1) are provided for by law, (2) respect the essence of those rights and (3) respect the principle of proportionality, i.e. are necessary and genuinely meet other objectives of general interest[65] recognized by the EU or the need to protect the rights and freedoms of others.
So far, the CJEU has assessed two different limitations to the ne bis in idem principle under Article 52 of the Charter: the 'enforcement condition' under Article 54 CISA and the duplication of criminal proceedings and administrative proceedings of a criminal nature against the same person for the same facts. The letter one is extremely relevant from a point of view of adjudicating procurement offences.

The CJEU has held that the duplication of criminal proceedings and penalties and administrative proceedings and penalties of a criminal nature for the same act (the 'double-track enforcement system') constitutes a limitation to the ne bis in idem principle that may be justified under Article 52(1) of the Charter provided that certain conditions are satisfied.[66]

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63 To date, the CJEU has accepted as 'a decision that has been finally disposed of' an out-of-court settlement with the public prosecutor (Joined Cases C-187/01 and C-385/01, Gözütok and Brügge, Judgment of 11 February 2003), a court acquittal based on lack of evidence (Case C-150/05, Van Straaten, Judgment of 28 September 2006), a court acquittal arising due to the prosecution of the offence being time-barred (Case C-467/04, Gasparini, Judgment of 28 September 2006) and a decision of non-lieu (Case C-398/12, M., Judgment of 5 June 2014). On the other hand, the CJEU rejected the application of Article 54 of the CISA in cases where a judicial authority had closed proceedings without any assessment of the unlawful conduct with which the defendant had been charged (Case C-469/03, Miraglia, Judgment of 10 March 2005), cases where a police authority, following the expiry of the limitation period and an examination of the merits of the case, had submitted an order to suspend the criminal proceedings (Case C-491/07, Turanský, Judgment of 22 December 2008), cases where a decision by the public prosecutor to terminate the criminal proceedings against a person was adopted without a detailed investigation having been undertaken (Case C-486/14, Kossowski, Judgment of 29 June 2016), and cases where the public prosecutor closed criminal investigations against unknown persons and the person involved was only interviewed as a witness (Case C-268/17, AY, Judgment of 25 July 2018).

64 Case C-129/14 PPU, Spasic, Judgment of 27 May 2014

65 In the procurement context, such "objectives of general interest" may include safeguarding the integrity and transparency of the tender process, ensuring fair competition between bidders, or protecting the proper use of EU and national public funds.

66 Relevant case law: Case C-524/15, Menci, Judgment of 20 March 2018, Case C-537/16, Garlsson Real Estate and others, Judgment of 20 March 2018 and Joined Cases C-596/16 and C-597/16, Di Puma and Zecca, Judgment of 20 March 2018.

In its decisions the CJEU stated that article 50 of the Charter does not preclude national legislation whereby criminal proceedings may be brought against a person, even though that person has already been made subject to a final administrative penalty of a criminal nature in relation to the same acts, on condition that:

1. The legislation pursues an objective of general interest that justifies such a duplication of proceedings and penalties, it being necessary for those proceedings and penalties to pursue additional objectives;
2. It contains rules ensuring coordination which limits the additional disadvantage resulting from the legislation to only what is strictly necessary, and
3. It provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.

In order duplication of proceedings and penalties to be justified under Article 52(1) of the Charter such duplication of criminal proceedings and penalties must meet the following conditions[67]:

- It must be provided for by law;
- It must respect the essential content of ne bis in idem;
- It must meet an objective of general interest, in so far as the two sets of criminal proceedings and penalties pursue complementary aims relating to different aspects of the same unlawful conduct;
- It must comply with the principle of proportionality, which, in the absence of harmonization of EU law on the matter, is not called into question by the mere fact that a Member State chose to provide for a duplication of proceedings;
- Provide for clear and precise rules as to when an act can be subject to duplication of proceedings;
- Contain rules ensuring coordination that limits the disadvantage resulting from such duplication to what is strictly necessary;[68]
- Ensure that the severity of all of the penalties imposed does not exceed the seriousness of the offence, in accordance with the principle of proportionality of penalties under Article 49(3) of the Charter;[69]
- Even where the legislation at issue appears to comply with the requirements set out above in principle, its practical application must also ensure that the resulting actual disadvantage for the person concerned is not excessive in relation to the seriousness of the offence, which is for the referring court to assess, taking into consideration all the circumstances in the main proceedings.

In addition, the CJEU[70] held that Member States may, when transposing Article 14(1) of Directive 2003/6/EC, provide for parallel criminal and administrative penalties for insider dealing, provided they respect Article 50 of the Charter. While a second set of administrative proceedings constitutes a restriction on the ne-bis-in-idem right, that restriction can be justified under Article 52(1) of the Charter if the measures pursue complementary objectives – such as safeguarding market integrity – and remain proportionate. However, bringing an administrative-fine procedure after a definitive criminal acquittal which found the alleged acts unproven goes beyond what is necessary and violates Article 50; the only exceptions are where the criminal case is reopened due to new evidence or a fundamental procedural defect.

67 Case C-524/15, Menci, Judgment of 20 March 2018.

68 In paragraphs 53 and 54 of this case the CJEU explains that in this case, the national legislation contains rules ensuring coordination: it limits criminal penalties to offences which are particularly serious, and the penalties provided (imprisonment) are sufficiently serious to justify the need to initiate independent criminal proceedings.

69 In paragraph 55 and 56 the CJET states that in this case, the national legislation prevents the enforcement of the administrative penalties after the criminal conviction, along with qualifying the voluntary payment of the tax debt as a mitigating factor for the determination of the criminal sanction.

70 Joined Cases C-596/16 and C-597/16, Di Puma and Zecca, Judgment of 20 March 2018 paragraphs 42-45.

- **Practical takeaways**

In procurement-related offences, the *ne bis in idem* principle often comes into play where operators face parallel tracks of liability: administrative exclusion, fines from competition or procurement authorities, and criminal prosecution for corruption, fraud, or bid-rigging. For adjudicators, the key challenge is to determine whether the administrative sanction is punitive in nature (thus "criminal" under the Engel criteria) and whether subsequent criminal proceedings would duplicate punishment for the same facts.

Judges should carefully distinguish between preventive measures (e.g. temporary exclusion to safeguard integrity) and punitive sanctions (e.g. fines, long-term debarment), and assess whether the latter overlap with criminal liability. Difficulties may arise where exclusion decisions are based on suspicions while criminal trials are still pending, or where different authorities pursue overlapping sanctions without effective coordination. In such cases, adjudicators must ensure that duplications are justified by complementary aims (e.g. protecting EU funds, safeguarding competition v.s punishing corruption) and remain proportionate, with the overall severity of penalties not exceeding the seriousness of the offence.

In practice, adjudicators can run through this flow to test whether a case involves legitimate complementary enforcement or unlawful duplication:

Step 1: Identify the sanction
→ Is the procurement measure preventive (temporary exclusion, integrity safeguard) or punitive (fine, long-term debarment)?
- Preventive → generally outside ne bis in idem.
- Punitive → proceed to Step 2.

Step 2: Same person?
→ Are both sanctions/proceedings targeting the same legal or natural person?
- If no (e.g. company vs. director) → ne bis in idem not triggered.
- If yes → proceed to Step 3.

Step 3: Same facts?
→ Do both proceedings concern the same material acts (time, place, conduct)?
- If no → ne bis in idem not triggered.
- If yes → proceed to Step 4.

Step 4: Finality of first decision
→ Has one proceeding already reached a final decision (res judicata)?
- If no → parallel proceedings may continue if coordinated.
- If yes → proceed to Step 5.

Step 5: Coordination & Proportionality
→ Are sanctions complementary and coordinated (e.g. competition fine + procurement exclusion to protect tender integrity)?
→ Is the overall severity proportionate to the misconduct?
- If yes → duplication may be justified
- If no → risk of unlawful double punishment (ne bis in idem breach).

# 3. European Court of Human Rights Case Law

The ECtHR adjudicates alleged violations of the European Convention on Human Rights (ECHR). Its jurisprudence applies to procurement in two respects: protection of property and fair trial rights when contractual sanctions are imposed, and the ne bis in idem principle where parallel administrative and criminal proceedings occur.

## 3.1. Protection of property and proportionality

- ***Case Kuban v. Turkey, judgement 24 November 2020*** [71]

Facts of the case and domestic proceedings

The applicant, Mr. Kuban, was a contractor in a public procurement contract with a public body in Turkey. He was later accused of criminal activity tied to the execution of that contract. Consequently, the procurement contract was annulled, and his performance guarantee forfeited on the grounds of an indictment.

The Turkish authorities terminated the contract and seized the security deposit, citing the criminal charges, even though the indictment had not led to conviction at that stage.

Findings of ECtHR

Mr. Kuban brought his case before the ECtHR, arguing violations of his right to property under Article 1 of Protocol No. 1 to the Convention, as well as his right to a fair hearing (Article 6).

- Article 1, Protocol No. 1 (Right to property):
  The Court held that the seizure of the performance guarantee – based on a criminal indictment rather than a final conviction – constituted an interference with Mr Kuban's right to property. The Court examined whether the interference had a legitimate public interest and was proportionate to the aim pursued. After acknowledging that public authorities may exclude bidders suspected of criminal conduct, the Court found that Turkey exceeded its margin of appreciation, as the forfeiture occurred before conviction, based on allegations only. This was deemed disproportionate and in violation of Article 1, Protocol No. 1. For adjudicators, the key point is to differentiate between precautionary measures

71 https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-206194%22]}

grounded in suspicion and sanctions or exclusions that require proven liability: suspicion may justify temporary safeguards, but permanent or punitive measures must rest on established responsibility.

- Article 6 (Right to a fair trial):
  The Court concluded that the forfeiture of Mr. Kuban's guarantee was effectively imposed without a proper judicial review and before any determination of guilt. This deprived him of access to court and the ability to contest the seizure under fair proceedings. Consequently, there was also a violation of Article 6 § 1 in conjunction with Article 1, Protocol No. 1.

This case demonstrates that even where procurement law permits exclusion, contractual sanctions must be proportionate and follow due process. In addition, it also illustrates the risk of disproportionate pre-emptive sanctions in procurement (e.g. forfeiture before conviction).

- ***Case UAB Profarma and UAB Bona Diagnosis v. Lithuania, judgement from 7 January 2025***

Facts of the case and domestic proceedings

The applicants, two private companies, had concluded contracts with the Lithuanian authorities during the COVID-19 pandemic for the supply of rapid tests.[72] Due to alleged irregularities in the procurement process and accusations of bad faith, national courts annulled the contracts and ordered the applicants to return part of the payments received.[73] The applicants challenged these measures as violations of their property rights.

Findings of ECtHR

- Interference and legal bases

In this case the Lithuanian Government acknowledged that requiring the companies to return money constituted an interference with their property rights, which the ECtHR confirmed. The Court also confirmed that this is a case where the first rule of Article 1 of Protocol No. 1 to the ECHR, which guarantees peaceful enjoyment of possessions applies.

In the concreate case the Court found that the contracts were annulled for violating imperative legal norms (e.g. transparency, rational use of public funds) and good morals under domestic civil law. Furthermore, the Court agreed the annulments were "provided by law", including statutes and case-law.

Although not explicitly codified, the case-law of Lithuania's Supreme Court allowed for restitution in monetary terms when physical return was impossible. The Court found this practice foreseeable and lawful.

- Legitimate aim of the interference

According to the EctHR, the interference of the national authorities in this case pursued a legitimate public aim: preventing collusive practices and protecting public funds during a health emergency.

72 During the COVID-19 emergency, Lithuania conducted a procurement for rapid antigen tests. The National Public Health Surveillance Laboratory, supervised by the Ministry of Health, awarded the contract to UAB Profarma, which committed to deliver 510,000 tests. Profarma sourced the tests from UAB Bona Diagnosis for a lower price and fulfilled its contractual obligations.

73 The Lithuanian Prosecutor General then initiated civil court proceedings seeking to annul the procurement and sale contracts, and to recover the difference between what the State paid and the market value, alleging procedural flaws, a lack of transparency, and artificially inflated prices that suggested collusion. The domestic first-instance court found the procurement process to be flawed (failure to assess all bids), fined the purchasing laboratory but did not punish the private companies (ruled that no evidence showed wrongdoing on their part). The Appeal court overturned that verdict, holding that the companies had acted irresponsibly and deceptively - Profarma misrepresented its capacity and pricing, and the Bona contract appeared abusive given the young company's lack of experience. It, thus ordered the companies to reimburse the State: Profarma ~€145,200 and Bona ~€3,997,400, respectively, corresponding to the difference between the sum paid by the State for the rapid antigen tests and the market price of such tests at the material time, which was determined by the Court of Appeal.

- Proportionality Analysis

The Court reiterated that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measures applied by the State. In each case involving an alleged violation of Article 1 of Protocol No. 1 to the Convention the Court must, therefore, ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden.

Having in mind that goal of the public procurement procedures and the better position of the national authorities to appreciate what is in the public interest, the Court emphasized a wide margin of appreciation for States in public procurement and economic policy. Furthermore, the Court has held on multiple occasions that the authorities should not be prevented from correcting their mistakes, even those resulting from their own negligence, because holding otherwise would be contrary to the doctrine of unjust enrichment. Nonetheless, the correction of such mistakes should not lead to a situation where the individual concerned is required to bear an excessive burden.

Despite arguments that the burden was shifted entirely to the companies while authorities escaped sanctions, the Court held that:

- The bad faith of the companies justified the annulment and partial restitution;
- The context of a public health emergency warranted flexibility in enforcement;
- The decisions did not impose a disproportionate burden on the applicants.

Thus, the Court held no violation of Article 1 of Protocol No.1 of the ECHR, affirming that Member States have a wide margin of appreciation to enforce procurement transparency and hold private actors accountable – even if state entities also played a role in the flawed process. In short, the ECtHR upheld that contract annulment and partial repayment due to procurement irregularities and supplier bad faith were lawful, legitimate, and proportionate. Even in emergencies, suppliers must act transparently and reasonably, and cannot expect to profit excessively at the expense of the public interest. This judgment underlines that profiteering in emergencies can attract severe financial sanctions without violating property rights.

## 3.2. Ne bis in idem (double jeopardy) jurisprudence

### *3.2.1. General overview*

The importance of the ECtHR case law from a perspective of adjudication of public procurement offences is in clarifying as well the possibility for a person to be found accountable in dual proceedings and establishing the criteria that need to be met in order the person's human rights to be respected.

Article 4 of Protocol No. 7 to the European Convention on Human Rights protects the *ne bis in idem* principle, meaning that no one may be prosecuted or punished in criminal proceedings for an offence for which they have already been finally acquitted or convicted. This safeguard has been affirmed in the Court's case-law.[74] The prohibition on repetitive prosecution or punishment is central to the protection offered by this provision.

74 See *Marguš v. Croatia* [GC], 2014, paragraph 114; *Sergey Zolotukhin v. Russia* [GC], 2009, paragraph 58; *Nikitin v. Russia*, 2004, paragraph 35; *Kadusic v. Switzerland*, 2018, paragraph 82

The Article comprises three paragraphs. The first sets out the essential components of the *ne bis in idem* test:[75]

1. Criminal nature – Whether both proceedings are criminal in nature?
2. Same offence – Whether the conduct prosecuted is the same in both sets of proceedings?
3. Duplication of proceedings – Whether there is a repetition of prosecution or punishment?

The third component – duplication – requires examination of three sub-questions:

a. Whether a second set of proceedings was initiated?
b. Whether the first proceedings concluded with a *final* decision?
c. Whether the exception under paragraph 2 of Article 4 applies?

In A and B v. Norway (2016) the Grand Chamber clarified that parallel administrative and criminal proceedings may be compatible with ne bis in idem when they pursue complementary purposes and are linked by a "sufficiently close temporal and material connection". This "integrated system" approach allows, for example, a competition authority to fine a company for cartel conduct and a contracting authority to exclude the same company from procurement if the proceedings are coordinated and proportionate. Adjudicators must therefore assess whether administrative sanctions and criminal penalties are part of such an integrated system and whether cumulative punishment is proportionate.

In addition, short overview of the main aspects relevant for proper adjudication in line with the ECtHR case law concerning respect of the ne bis in idem principle will be given.

- **Criminal or Penal Nature of Proceedings**

When determining whether both sets of proceedings are "criminal" (or "penal") in nature for the purposes of Article 4 paragraph 1 of Protocol No. 7, the Court has clarified that national legal classification alone is not decisive. Relying solely on domestic law would give Contracting States too much discretion and could undermine the Convention's objectives.[76]

The term "criminal proceedings" in Article 4 of Protocol No. 7 is interpreted in line with the principles developed for the terms "criminal charge" (Article 6) and "penalty" (Article 7) of the Convention.[77] The Court has adopted three criteria (known as Engel criteria[78]) to decide if a "criminal charge" exists:

1. Legal classification of the offence under national law.
2. Nature of the offence.
3. Severity of the potential penalty.

The second and third criteria are alternative, though they may be combined if neither alone lead to a clear answer.[79]

In the procurement context, this means that certain sanctions formally labelled as "administrative" may nonetheless be considered "criminal" in nature – for example, administrative fines of a punitive character, or exclusion measures that have a severe and lasting impact on a company's ability to participate in public tenders.

75 Case law of the ECtHR *Mihalache v. Romania* [GC], 2019, paragraph 49
76 Case law of the ECtHR *Sergey Zolotukhin v. Russia* [GC], 2009, paragraph 52
77 Case law of the ECtHR *Sergey Zolotukhin*, paragraph 52; *Timofeyev and Postupkin v. Russia*, 2021, paragraph 86
78 Case law of the ECtHR *Engel and Others v. the Netherlands*, 1976
79 Case law of the ECtHR: *Jussila v. Finland* [GC], 2006, paragraphs 30-31; *Mihalache v. Romania* [GC], 2019, paragraph 54; *Matijašić v. Croatia* (dec.), 2021, paragraph 23

If either set of proceedings is not considered "criminal" or "penal" under the Court's assessment, a complaint under Article 4 of Protocol No. 7 will generally be deemed inadmissible as *ratione materiae* incompatible with the Convention.[80] Where the Court has previously found that proceedings did not involve a "criminal charge" under Article 6, it will usually conclude that Article 4 of Protocol No. 7 is also inapplicable.[81]

- **Whether the Proceedings Concerned the "Same Offence" (Idem)**

The principle of ne bis in idem bars prosecution or trial for the same offence. In Sergey Zolotukhin v. Russia [GC], 2009, the Court reviewed earlier approaches:

- Focusing on the identity of facts regardless of legal characterization (same conduct, idem factum – Gradinger v. Austria, 1995, paragraph 55);
- Looking at the legal classification, allowing the same facts to constitute different offences (concours idéal d'infractions – Oliveira v. Switzerland, 1998, paragraphs 25-29);
- Assessing whether the offences shared essential elements (Franz Fischer v. Austria, 2001).

The Court ultimately held that Article 4 of Protocol No. 7 prohibits prosecuting or trying someone for a second offence if it arises from facts that are identical or substantially the same as those underlying the first offence.[82]

Determining Whether Facts Are Identical or Substantially the Same

The starting point is to compare the statements of fact in both sets of proceedings.[83] It is irrelevant which parts of the new charges are upheld or dismissed, as the protection applies to the risk of being tried again, not only to a second conviction or acquittal.

The Court focuses on concrete factual circumstances involving the same person, closely connected in time and place, whose existence must be proven to secure a conviction or even to open proceedings.[84]

- **Whether there was a duplication of proceedings (bis)**

Article 4 of Protocol No. 7 prohibits a second set of criminal proceedings when the first has been concluded by a final decision. This protection covers not only the right not to be punished twice but also the right not to be prosecuted or tried again – even if the earlier proceedings ended without a conviction.[85]

The Court has held that consecutive proceedings are prohibited when the first was already final before the second began. However, this does not extend to concurrent proceedings (litis pendens). For example, if two proceedings run in parallel and the second is dropped after the first becomes final, there is no violation.[86] By contrast, if both proceed without discontinuation, it constitutes prohibited duplication.[87] Thus, adjudicators need to determine if procurement sanctions operate as follow-up measures to criminal liability or if they form part of a separate, concurrent system.

However, the Court has recognized exceptions where different sanctions – such as criminal penalties and administrative measures like license withdrawal – are imposed by separate authorities in separate proceedings,

80 Case law of the ECtHR: *Paksas v. Lithuania* [GC], 2011, paragraph 69; *Seražin v. Croatia* (dec.), 2018, paragraphs 91-92
81 Case law of the ECtHR: *Paksas v. Lithuania*, paragraph 68; *Timofeyev and Postupkin*, paragraphs 86-87
82 Case law of the ECtHR: Zolotukhin, paragraphs 79-82; A and B v. Norway [GC], 2016, paragraph 108
83 Case law of the ECtHR: Zolotukhin v. Russia, paragraph 83
84 Ibid, paragraphs 84 - 84
85 Ibid, paragraphs 110-111
86 Case law of the ECtHR: Zigarella v. Italy (dec.), 2002
87 Case law of the ECtHR: Tomasović v. Croatia, 2011, paragraphs 29–32; Muslija v. Bosnia and Herzegovina, 2014, paragraphs 36–37; Nykänen v. Finland, 2014, paragraphs 47–54; Glantz v. Finland, 2014, paragraphs 57–64

provided there is a sufficiently close link in both substance and time between them.[88] In such situations, the measures are viewed as part of an integrated response by the state authorities, not a prohibited repetition.

This principle was developed further in A and B v. Norway [GC], 2016, where the Court examined combined criminal and administrative proceedings for incorrect tax declarations. It held that States must convincingly show that such dual proceedings are "sufficiently closely connected in substance and in time". Factors include:

- Complementary purposes – The proceedings should address different aspects of the misconduct, not just in theory but in practice;
- Foreseeability – Dual proceedings should be a predictable consequence of the same conduct;
- Evidence handling – Authorities should coordinate to avoid duplicating evidence gathering and assessment;
- Penalty adjustment – Sanctions in the second proceedings should take account of penalties already imposed, ensuring the overall burden remains proportionate.[89]

The Court also noted that the more an administrative proceeding resembles a criminal one – particularly in its punitive and stigmatizing nature – the more critical it becomes to assess whether its purposes genuinely differ from those of criminal proceedings.[90]

The Court further elaborated that even if there is a strong connection in substance, there must also be a sufficiently close connection in time.[91] The proceedings need not run fully in parallel; they may proceed sequentially if justified by efficiency or justice considerations. However, delays must not be excessive or cause disproportionate prejudice.[92]

- **Whether there was a "final decision"**

The ne bis in idem protection applies only after a person has been finally acquitted or convicted. In order to consider that the criteria "final decision" is met under the jurisprudence of the ECtHR, two aspects appear as relevant: whether the decisions involved acquittal or a conviction and whether the decisions was final.

Thus, the decision must not only be final in the procedural sense but must also involve a determination of the individual's criminal responsibility – either an acquittal or a conviction.[93] When determining "acquittal or conviction", the Court looks at the actual content and effects of the decision, not merely its form. Judicial involvement is not essential; what matters is whether the competent authority, empowered by law, assessed the evidence and ruled on the accused's guilt or innocence.[94]

- If the authority gathered and examined evidence, evaluated the accused's role, and issued a reasoned decision (including the imposition of a penalty with punitive/deterrent aims), this amounts to a "conviction".[95]

88 Case law of the ECtHR: Nilsson v. Sweden (dec.), 2005; Maszni v. Romania, 2006, paragraphs 68–70
89 Case law of the ECtHR: A and B v. Norway [GC], 2016, paragraphs 130-132
90 Ibid, paragraph 133
91 Ibid, paragraph 134
92 In Nodet v. France, 2019, paragraph 53, the Court found no sufficient connection in substance or time between administrative and criminal proceedings for market manipulation, as they pursued the same purpose, collected evidence separately, and were not closely coordinated – leading to disproportionate prejudice. In Mihalache v. Romania [GC], 2019, paragraph 84, the Court held that two sets of proceedings (before a prosecutor and a court) for the same offence were not integrated into a coherent whole: they pursued the same aim, were based on the same evidence, imposed uncoordinated penalties, and ran consecutively rather than in parallel. In such cases, the Court must assess whether the first decision was a "final" acquittal or conviction, and if so, whether setting it aside was a permissible reopening under Article 4 of Protocol No. 7 (paragraphs 85–86).
93 Case law of the ECtHR: Mihalache v. Romania [GC], 2019, paragraphs 88–89
94 Ibid, paragraph 97
95 Ibid, paragraphs 98-101

- By contrast, decisions ending proceedings on purely procedural grounds, such as statutory limitation, without examining guilt or innocence, are neither acquittals nor convictions.[96]

A decision is "final" when it has acquired res judicata status – meaning it is irrevocable because no ordinary remedies are available, or the time-limit to use them has expired.[97] The existence of extraordinary remedies, such as reopening or time-limit extensions, does not affect finality.[98]

The Court has found that certain prosecutor decisions not to prosecute are not "final" under domestic law and thus Article 4 does not apply.[99] Similarly, terminations due to amnesties for grave human rights violations – such as war crimes – fall outside Article 4 because such amnesties conflict with State obligations under Articles 2 and 3.[100]

In assessing finality, the Court takes domestic law as the starting point but requires compliance with the principle of legal certainty. The Court emphasizes that for the principle of legal certainty to be satisfied, a principle which is inherent in the right not to be tried or punished twice for the same offence, a remedy must operate in a manner bringing clarity to the point in time when a decision becomes final. An "ordinary" remedy thus, must have clear scope, defined time-limits, and balanced access for both parties. Remedies allowing indefinite review at a party's discretion do not count as ordinary and therefore do not affect finality.[101]

**Procurement-specific implications**

In procurement settings, difficult questions arise when exclusion decisions rely on criminal proceedings that ended without prosecution or with procedural closure. For example, if authorities decide not to prosecute a suspected collusion case, can that decision be treated as "final" for purposes of exclusion? Similarly, if new evidence emerges in a bid-rigging investigation and the case is reopened, does the earlier dismissal still prevent exclusion on ne bis in idem grounds? Judges must balance the contracting authority's duty to safeguard integrity against the principle of legal certainty. In practice adjudicators should:

- ✓ Check the nature of closure: Only acquittals or convictions after liability has been assessed qualify as "final decisions" for ne bis in idem purposes. Procedural terminations (e.g. expired status of limitation, non-prosecution) do not;
- ✓ Look for res judicata: A decision must be irrevocable (ordinary remedies exhausted or expired) to trigger protection. Convictions under appeal or re-opened cases are not yet final;
- ✓ Distinguish suspicion vs. liability: Exclusion based on allegations or procedural closure is permissible if framed as preventive integrity measures, but punitive sanctions require proven liability;
- ✓ Avoid duplicative punishment: Where a conviction or acquittal is final, additional punitive measures (e.g. fines, debarment for the same facts) may breach ne bis in idem. Only proportionate preventive safeguards remain possible.

The following decision tree can help adjudicators in determining is there a "final" decision under ne bis in idem principle.

Step 1. Was the case resolved with a determination of liability?

- Yes → Go to Step 2.
- No → (e.g. non-prosecution, limitation, amnesty) → Not a final decision → ne bis in idem not triggered.

96 Case law of the ECtHR: Smoković v. Croatia (dec.), 2019, paragraphs 43–45
97 Case law of the ECtHR: Sergey Zolotukhin v. Russia, paragraph 107
98 Case law of the ECtHR: Mihalache v. Romania [GC], 2019, paragraph 108
99 Case law of the ECtHR: Sundqvist v. Finland (dec.), 2005
100 Case law of the ECtHR: Marguš v. Croatia [GC], 2014, paragraphs 122–141
101 Case law of the ECtHR: Mihalache v. Romania [GC], 2019, paragraphs 115-125

Step 2. What was the outcome?

- Acquittal or Conviction → Go to Step 3.
- Procedural closure without ruling on guilt → Not a final decision → ne bis in idem not triggered.

Step 3. Is the decision final under domestic law (res judicata)?

- Yes → (appeals exhausted or deadlines expired) → Final decision → ne bis in idem protection applies.
- No → (appeal pending, case reopened) → Not final → ne bis in idem not yet triggered.

Step 4. Procurement implications

- If final acquittal/conviction → Additional punitive sanctions (e.g. fines, debarment for the same facts) risk ne bis in idem breach. Only preventive integrity measures allowed.
- If not final → Authorities may proceed with exclusion or sanctions, but must respect proportionality and coordination with ongoing proceedings.

**Exceptions under Article 4 § 2 of Protocol No. 7**

Article 4 § 2 of Protocol No. 7 limits the otherwise strict principle of legal certainty in criminal law. While legal certainty is fundamental, it is not absolute. In criminal matters, it must be viewed in light of this provision, which explicitly allows States to reopen a case when new facts emerge or when a serious procedural defect is discovered in the earlier proceedings.[102] However, such reopening must remain exceptional: it cannot be used to re-litigate cases merely because an authority disagrees with the outcome. To comply with the ne bis in idem guarantee, reopening must be objectively justified, clearly grounded in law, and strictly limited to situations where genuinely new evidence or fundamental defects undermine the fairness or reliability of the original proceedings.

The Court makes a clear distinction between:

- A second prosecution or trial, prohibited by Article 4 paragraph 1 of the Protocol No.7; and
- The resumption of a trial in exceptional circumstances, which Article 4 paragraph 2 expressly permits.

Accordingly, a person may be prosecuted again on the same charges, in line with domestic law, if the case is reopened because of newly discovered evidence or the identification of a fundamental procedural flaw in the initial proceedings.

In W.A. v. Switzerland (2021), concerning preventive detention ordered after reopening proceedings due to mental health concerns and the risk of re-offending, the Court clarified that a reopening under Article 4 paragraph 2 typically means annulling the original judgment and re-determining the charges in a fresh decision. If the reopening does not introduce new elements that affect the nature of the offence or the person's guilt, and no new determination of the charges takes place, it cannot be considered a reopening within the meaning of this provision. In such situations, imposing a new punishment for the same offence breaches Article 4 of Protocol No. 7.[103]

In Mihalache v. Romania [GC], 2019,[104] the Court explained that "new" or "newly discovered" facts and the discovery of a "fundamental defect" are alternative grounds, not cumulative ones.
"Newly discovered" facts are those that existed during the original trial but remained unknown to the judge until afterwards. "New" facts are those that arise only after the trial. Both concepts also cover new evidence relating to previously existing facts.

102 Case law of the ECtHR: Mihalache v. Romania [GC], 2019, paragraph 129
103 Case law of the ECtHR: W.A. v. Switzerland (2021), paragraph 71-72
104 Case law of the ECtHR: Mihalache v. Romania [GC], 2019, paragraphs 131-133

A “fundamental defect” means a serious procedural violation that undermines the integrity of the original proceedings, such as when the accused was acquitted or punished for a less serious offence than applicable by law. A simple re-evaluation of the evidence by prosecutors or higher courts does not qualify. However, when reopening could work in the accused’s favour – for example, after a conviction – Article 4 does not prevent it. In such cases, the defect analysis focuses on whether the accused’s defence rights were violated, affecting the fairness of the trial.

In all cases, the grounds for reopening must be capable of affecting the outcome of the case, either in favour of or against the accused.

Applying these principles in one case the Court rejected the Government’s claim that harmonizing prosecutorial practice was an exceptional circumstance justifying reopening.[105] It also ruled that merely reassessing the facts under the applicable law is not a “fundamental defect”.[106]

### *3.2.2 Request no. P16-2023-002 for an advisory opinion by Estonia, decision 19 February 2024*

The Estonian prosecuting authorities-initiated proceedings against a mayor for suspected embezzlement and wilful breach of public procurement rules. The district prosecutor later terminated the procurement-related proceedings, citing no grounds for prosecution, and gave no reasons as permitted by law; the municipality, as the alleged victim, did not request an explanation. The embezzlement proceedings continued, and a senior prosecutor later revoked the termination of the procurement case, stating it had been unjustified. The court committed the defendant for trial on both charges, rejecting his claim that the procurement offence proceedings breached the ne bis in idem principle, and ultimately convicted him on both counts. On appeal, the partial termination was found to be a fundamental defect allowing reopening, and the conviction for the procurement offence was upheld. The defendant further appealed to the Supreme Court, arguing the revocation lacked justification and no new evidence was obtained, but the prosecution maintained there was no ne bis in idem violation. The Supreme Court then sought guidance from the European Court of Human Rights on whether such termination under Estonian law constitutes an acquittal or a simple discontinuance under Article 4 of Protocol No. 7.

The ECtHR assessed whether the Estonian Supreme Court’s request met the requirements for an advisory opinion under Protocol No. 16. It found that most conditions were satisfied but focused on whether the request raised a “question of principle” under Article 1 paragraph 1. Reviewing its case-law, the Court noted that it had consistently held that a public prosecutor’s discontinuance of criminal proceedings – without imposing a penalty – does not amount to either a conviction or an acquittal for the purposes of Article 4 of Protocol No. 7, and thus that provision is inapplicable. This position had been reaffirmed in multiple decisions of the Court,[107] with the only exception being cases where the discontinuance also entailed a punitive sanction. Since the present case involved an ordinary discontinuance with no novel or complex circumstances, the Court concluded the matter was covered by well-established case-law and did not require further clarification. It therefore decided not to accept the request for examination by the Grand Chamber.

105 Case law of the ECtHR: Mihalache v. Romania [GC], 2019, paragraphs 134-138
106 Case law of the ECtHR: Stăvilă v. Romania, 2022, paragraphs 88-102
107 Case law of the ECtHR: Mihalache v. Romania [GC], 2019, Smirnova and Smirnova v. Russia 2002, Harutyunyan v. Armenia, 2006 and Marguš v. Croatia [GC], 2014

# 4. Distinction between Administrative Contraventions and Criminal Offences in National Doctrine

EU Member States differ in how they classify procurement irregularities. In many jurisdictions, minor breaches result in administrative sanctions (e.g. fines, debarment), while serious conduct may constitute a criminal offence.

## 4.1. Spain

Among EU member states, Spain has developed one of the most refined national doctrines for adjudicating public procurement offences, particularly in drawing the line between administrative irregularities and criminal conduct. Spanish jurisprudence, especially in relation to the offence of *prevaricación*, requires clear proof of intentional, arbitrary, and manifestly unjust action before classifying a breach as criminal, ensuring that minor procedural errors remain within the administrative sphere. This approach provides a structured, well-reasoned framework that balances the need for accountability with the principle of minimal criminal intervention.

Under Article 404 of the Spanish Penal Code, administrative prevarication criminalizes a public authority or official who deliberately issues an arbitrary resolution knowing it is unlawful, punishable by special disqualification for nine to fifteen years. The Spanish Supreme Court clarifies that not every irregularity constitutes prevarication; the decision must be "evident, patent, flagrant and clamorous", showing arbitrariness and causing an unfair result.[108] Administrative irregularities – such as procedural omissions or regulatory breaches – can often be challenged through non-criminal avenues, like contentious-administrative litigation, and need not escalate to criminal sanctions.

To qualify as criminal prevarication, judicial doctrine and jurisprudence in Spain affirm that the following conditions must be met:

108 https://www.antifraucv.es/en/the-fine-line-between-administrative-irregularity-and-crime-in-public-procurement-2/

a. The resolution must be issued by a public authority or official in their administrative role;
b. It must be objectively illegal - meaning contrary to law (the resolution openly violates a legal provision);
c. The illegality must be glaring and hard to justify by any reasonable legal argument (the illegality is so gross that it cannot be explained by misinterpretation);
d. The decision must cause material injustice;
e. The action must demonstrate intentional abuse of power – an arbitrary act intended to enforce a particular will, rather than adherence to law or procedure.[109]

Importantly, it's the combination of intent**,** flagrant illegality**,** and resulting harm that distinguishes criminal prevarication from mere administrative error. The Supreme Court emphasizes that criminal law should intervene only when a serious offence is present, not in routine administrative irregularities. This is to prevent the over-criminalization of administrative acts, reserving criminal proceedings for cases involving intentional wrongdoing that undermines public trust.

However, Spanish jurisprudence demonstrates that some procurement irregularities have been criminalized:

- Creating a second phase of works to avoid competition (Supreme Court judgment 302/2018). Officials were convicted of prevarication and bribery for splitting a works contract, circumventing competition, and manipulating the procedure;[110]
- Direct sale of public property without auction. Officials were convicted for directly selling property to favoured individuals and obtaining commissions;[111]
- Splitting contracts to avoid open procedures. Cases show convictions even for low-value procurement where contracts were unlawfully split and controls circumvent;[112] Commentators argue that some convictions represent an expansion of criminal law into areas better handled administratively.

The distinction can be clearly seen in this tabular comparison:

| Aspect | Administrative Irregularity | Criminal Prevarication |
|---|---|---|
| **Nature** | Procedural or regulatory breach | Deliberate, arbitrary, and unjust decision |
| **Intent** | Often unintentional or negligent | Explicit intention to act against legal norms |
| **Legal Consequences** | Contested in administrative courts (e.g. nullity) | Criminal prosecution, possible disqualification |
| **Required Threshold** | Lower – errors, omissions, procedural faults | High – egregious, obvious illegality and abuse of power |

This structured approach can serve as a model for adjudicators in other jurisdictions when making similar distinctions.

For adjudicators, the Spanish experience highlights the need to distinguish between irregularities that warrant administrative sanctions (e.g. nullity of contract, fines) and conduct that constitutes criminal prevarication, requiring proof of intentional arbitrariness and serious illegality. This distinction is fundamental

109 Ibid.
110 Accessible at: https://www.antifraucv.es/en/the-fine-line-between-administrative-irregularity-and-crime-in-public-procurement-2/.
111 Ibid.
112 Ibid.

to preserving the integrity of public procurement. By clearly separating minor administrative mistakes from criminal intent, the legal system protects public officials from undue prosecution while ensuring that genuinely harmful conduct is punished.

## 4.2. Romania[113]

Romania has adopted a hybrid model for dealing with public procurement offences. It uses administrative enforcement to punish and deter systemic market manipulation (bid rigging, collusion, competition law breaches), while reserving criminal law for cases involving coercion, corruption, or deliberate exclusionary tactics. This distinction allows adjudicators to channel most irregularities through competition law while escalating only the gravest breaches into the criminal sphere.

- Administrative / Competition Law Breaches (Non-Criminal)

Romania treats most procurement irregularities that distort competition – but lack direct evidence of corruption or coercion – as administrative infringements. The Romanian legislation prohibits collusive bidding, market-sharing, and coordinated pricing in tenders. Bid rigging falls under this regime of anticompetitive practices or agreements having as their object or effect the restriction, prevention or distortion of competition. Sanctions (fines) apply regardless of whether the tender produced damage; the focus is on protecting competition in the market itself. [114]

Beyond fines, procurement consequences are immediate. Contracts awarded through collusion are declared null and void, ensuring that public funds are not committed to tainted agreements. Entities found guilty risk debarment from public tenders for up to three years. However, Romania follows the EU's self-cleaning principle: companies can avoid exclusion if they cooperate with investigations, dismiss responsible individuals, implement compliance programs, and compensate for damages. This makes the administrative track both punitive and rehabilitative, combining deterrence with incentives for reform.
The enforcement process is specialized.[115] Investigations are led by the Romanian Competition Council (RCC), which can open proceedings ex officio, based on complaints, or from referrals by contracting authorities. Evidence gathering often mirrors criminal tools (dawn raids, document seizures), but the process remains administrative. Contracting authorities may rely on RCC findings during tender evaluation, with the principle of proportionality guiding exclusions. Thus, in Romania, administrative remedies dominate where competition law violations occur without clear criminal intent, keeping the boundary at the level of concerted but not coercive misconduct.

- Criminal Offences

Romanian law criminalizes procurement misconduct where there is intentional distortion of competition through coercion, bribery, or collusion with corrupt intent. The Criminal Code penalizes acts such as excluding competitors by threats, manipulating tender outcomes through bribery, or coordinating offers in a fraudulent manner. Penalties range from one to five years' imprisonment, or significant fines for legal entities, signaling that criminal liability attaches to conduct undermining both market fairness and public integrity.[116]

113 The findings in this section are referred at https://cms.law/en/int/expert-guides/cms-expert-guide-right-bidding-vs-bid-rigging/romania

114 Sanctions are severe in monetary terms. The Romanian Competition Council (RCC) may impose fines of up to 10% of an undertaking's global turnover.

115 Romanian **Competition Law no. 21/1996** (Art. 26–36)

116 Romanian criminal code no. 289/2009 (Art. 206, 207, 246, 289-294)

Criminal liability also extends under the Competition Law itself: individuals in decision-making roles – such as directors, managers, or authorized representatives – who knowingly engage in bid rigging or other anticompetitive agreements may face six months to five years' imprisonment, along with disqualification from holding managerial roles. This reflects Romania's recognition that administrative fines, while large, may not suffice to deter intentional misconduct that undermines public trust. In practice, prosecutors pursue cases where collusion overlaps with corruption, coercion, or fraud, ensuring that only the most serious conduct escalates into criminal proceedings.

A distinctive feature of Romania's dual system is that criminal and administrative tracks can run in parallel. While the RCC investigates the market conduct, the National Anticorruption Directorate (DNA) and criminal prosecutors focus on corruption or coercion elements.[117] This parallelism creates a layered approach: administrative sanctions ensure swift deterrence, while criminal prosecutions target integrity-related misconduct. Thus, the line is drawn between mere anticompetitive coordination (administrative) and intentional fraudulent or corrupt manipulation (criminal).

## 4.3. Italy

- Institutional and Legal Framework

In adjudicating public procurement offences Italy has developed multilayered system. The Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato – AGCM)[118] is the principal administrative body responsible for supervising public procurement transparency and integrity. Its competences include investigating suspected infringements, conducting dawn raids and inspections, requesting documents and information, and imposing significant administrative fines on undertakings that engage in anticompetitive conduct such as bid rigging, cartels, or abuse of dominance. Importantly, AGCM's findings are binding in establishing the existence of an infringement, which can then serve as the basis for follow-on damages actions before civil courts. This creates a layered enforcement model where administrative and judicial proceedings interact.[119]

Alongside administrative enforcement, procurement-related criminal offences are dispersed across the Italian Penal Code (Codice Penale) and specific anti-corruption statutes.

They include the disturbed freedom of auctions (Art. 353) and disturbed freedom of the procedure for choosing the contractor (Art. 353-bis), which criminalizes collusion and manipulation in tenders, as well as corruption offences (Arts. 318–322-bis), abuse of office (Art. 323), and aggravated fraud against public funds (Art. 640-bis).[120]

Furthermore, Legislative Decree 231/2001 extends liability to companies themselves, allowing debarment and corporate sanctions.[121] Key institutions involved in the criminal investigations are Guarda di Finanza, the prosecution offices, the courts and the EPPO (on EU level).

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117 Different organisations within the Public Prosecutor's Office are responsible for criminal prosecution in cases where the RCC enforces the Competition Law administratively.
https://globalcompetitionreview.com/insight/enforcer-hub/2023/organization-profile/romania-competition-council?utm

118 Established in 2014 by merging the former procurement watchdog (AVCP) and the anti-corruption commission

119 https://www.mondaq.com/italy/antitrustcompetition-law/890386/cartels-comparative-guide?utm

120 https://legislationline.org/sites/default/files/2023-09/criminal%20code%20of%20Italy.pdf

121 https://www.vfc.com/responsibility/governance/ethics-compliance/italian-legislative-decree-no-23101

- Practical Examples

Italian experience offers several practical examples of relevance to adjudicators concerning procurement offences. Though not all include criminal and administrative response, the case law offers guidelines that can assist practitioners in adjudicating public procurement offences.

*Telecom Italia Case*[122]

Between 2009 and 2011, TIM leveraged its dominant position over internet infrastructure to impose unfair conditions on alternative operators, making it nearly impossible for them to compete. The AGCM investigated and fined TIM for abuse of dominance under Article 102 TFEU. This administrative decision was not only punitive but also served as privileged evidence in subsequent civil litigation, where harmed competitors pursued damages.

The Italian Supreme Court (Cassazione, 30 October 2024, n. 1923) upheld a damages award to KPNQwest (later Comm 3000), confirming that the AGCM's decision could establish the infringement but that the claimant still had to prove the causal link and the extent of damages. A court-appointed expert constructed a counterfactual market scenario, using the UK telecom sector as a benchmark, to assess the losses. The Cassazione accepted this probabilistic method, underlining that damages in competition or procurement contexts often require reliance on economic presumptions and comparative analysis, rather than direct proof.

For adjudicators of procurement offences, the Telecom Italia case demonstrates two practical points. First, administrative authority decisions are powerful tools: they anchor the factual finding of infringement but do not replace the need for judicial assessment of harm. Second, courts must be prepared to use economic expertise and comparative reasoning to quantify damage in complex markets. This model mirrors procurement cases more broadly, where contracting irregularities or collusion may first be sanctioned administratively, and later give rise to civil or even criminal liability, depending on intent and severity.

*FS Group (Trenitalia / RFI) – Abuse of Dominant Position in Regional Rail Services*[123]

In April 2025, the Italian Council of State[124] upheld a decision of the Competition Authority (AGCM) finding that the FS Group (including RFI, the rail infrastructure manager, and Trenitalia, the main operator of passenger services) had abused its dominant position. The abuse consisted of a coordinated exclusionary strategy: using the vertically integrated structure of the group, FS influenced the Veneto Region to directly award regional rail contracts to Trenitalia until 2032, bypassing the tender procedure that had originally been planned.

The Council of State stressed that the companies exploited their dual role – control of the rail network and service provision – to secure long-term exclusivity and foreclose potential competitors. While AGCM imposed only a symbolic fine of €1,000 (given the infrastructural investments and efficiency gains for consumers), the court confirmed that the practice still qualified as an abuse of dominance under Article 102 TFEU. The ruling underlines that exclusionary conduct need not show actual effects; it is sufficient that it is capable of restricting competition on the merits.

For adjudicators in procurement cases, the Trenitalia decision shows how courts may treat strategic behaviour that undermines tendering obligations: even if public authorities benefit in the short term (e.g. through lower costs or infrastructure improvements), practices that evade open competition and foreclose rivals can still

122 https://www.concurrences.com/pdf_version.api/objet/article-125758.pdf
123 Accessible at: https://www.concurrences.com/pdf_version.api/objet/article-128539.pdf.
124 Italy's **supreme administrative court**

be sanctioned as abuse. The symbolic fine highlights judicial flexibility in weighing efficiency gains against illegality, but the precedent affirms that procurement must remain open and competitive unless strict legal exceptions apply.

*Case of award of facility maintenance services*[125]

In May 2022, Italy's Council of State delivered a landmark ruling on a facility-management cartel case, where several cleaning companies were fined for collusion by the AGCM under Article 101 TFEU. The cartel was revealed after CNS, one of the bidders, withdrew and submitted a leniency application, prompting an AGCM investigation. Evidence – including email exchanges and wiretaps obtained during a parallel criminal proceeding – formed the foundation for the AGCM's administrative findings.
On appeal, the Council of State upheld the AGCM's decision, affirming that evidence lawfully acquired in criminal investigations can be used in antitrust proceedings, so long as the companies' rights of defence were respected and the authority scrutinized the evidence itself. The court also clarified evidentiary standards: if AGCM indicates abnormal behaviour suggesting collusion, it is then up to the companies to provide a credible alternative explanation. Furthermore, the ruling allowed for proportional reductions in fines, confirming that the AGCM may adjust the severity factor based on market impact – even when the conduct itself is serious.[126]

The facility-management case shows that adjudicators must be prepared to handle interplay between administrative and criminal enforcement. Evidence gathered in criminal proceedings, such as wiretaps, may legitimately support administrative findings, provided that due process rights are safeguarded. This broadens the evidentiary base for assessing collusion in procurement cases, while ensuring procedural fairness. The decision also highlights that once abnormal tender behaviour is indicated, the burden shifts to companies to present plausible explanations -underscoring the proactive role adjudicators play in testing the credibility of defences. Finally, proportionality remains crucial: even where collusion is proven, sanctions should be calibrated to reflect the actual impact on competition, balancing deterrence with fairness.

- Memorandum of understanding

In Italy formal memorandums of understanding between the administrative authorities entitled to adjudicate public procurement offences and public prosecution offices are being concluded.

The memorandum of understanding between the Italian Competition Authority (AGCM) and the Milan Public Prosecutor's Office establishes a strengthened framework for cooperation in tackling corruption and safeguarding market integrity. It sets out procedures for the mutual exchange of information and documents arising from administrative and criminal investigations, ensuring that evidence of potential criminal conduct identified by the Authority is swiftly shared with prosecutors, and that prosecutors provide the Authority with relevant materials to support its enforcement work. Notably, it also regulates the use of AGCM's new inspection powers, requiring prior prosecutorial authorization when inspections extend to private premises such as homes or vehicles.[127]

125 Accessible at : https://www.clearyantitrustwatch.com/2022/05/council-of-state-judgments-on-bid-rigging-in-a-tender-procedure-for-the-award-of-facility-maintenance-services/.
126 Accessible at: https://www.twobirds.com/en/insights/2022/italy/italian-council-of-state-partially-dismisses-bid-rigging-fines?utm.
127 Accessible at: https://en.agcm.it/en/media/press-releases/2025/1/The-Italian-Competition-Authority-renews-its-memorandum-of-understanding-with-the-Public-Prosecutors-Office-of-Milan.

## 4.4. Cross-Cutting lessons from international practice

Taken together, the experiences of Spain, Romania, and Italy illustrate that the adjudication of procurement offences requires a careful balance between deterrence, proportionality and fairness. Thus, the key takeaways are the following:

- **Proportionality and minimal criminal intervention**: Not all irregularities are crimes. Criminal proceedings should be reserved for serious misconduct that undermines public trust and market integrity, ensuring proportionality and preventing the over-criminalization of administrative mistakes. Thus, criminal law should remain a last resort, designed for flagrant, intentional misconduct;
- **Parallel enforcement requires coordination**: Procurement offences often generate parallel enforcement tracks. Administrative competition findings, criminal prosecutions, and civil damages can coexist, but courts must guard against *ne bis in idem*. Courts must coordinate sanctions to ensure they are effective but not duplicative, balancing the need for deterrence with respect for fundamental rights. Memorandums for understanding/cooperation can ease the coordination;
- **Evidentiary flexibility**: Procurement cases frequently involve complex evidence since procurement offences require reliance on economic presumptions, expert analysis, or evidence from parallel tracks (e.g. wiretaps, leniency). Evidence gathered in the scope of criminal proceedings can be used in the administrative proceedings, provided that due process rights are safeguarded;
- **Institutional interplay matters**: Procurement enforcement must be viewed as a multi-actor ecosystem, where findings by one authority can inform another. Recognizing this interplay creates obligation for institutional cooperation and allows for more coherent, effective adjudication that strengthens accountability without duplicating sanctions, creating a layered, complementary enforcement model.

Having in mind this takeaway, the adjudicators should always asses:

- **Nature of the irregularity**

The first task for an adjudicator is to determine whether the misconduct is essentially a procedural irregularity (e.g. missing paperwork, late publication of tender notices, minor breaches of procurement rules) or whether it involves intentional corruption or collusion (e.g. bid rigging, contract splitting to favor a specific supplier, bribery of officials). This distinction is fundamental: procedural mistakes, even if negligent, generally fall within the administrative track, while intentional acts designed to distort competition or secure undue advantage may escalate into the criminal sphere;

- **Appropriate enforcement track**

Once the nature of the irregularity is clear, the adjudicator should map the case onto the correct track:

  - Administrative: For routine breaches of procurement rules, transparency requirements, or competition distortions without intent (e.g. collusive bidding sanctioned by the competition authority with fines and debarment);
  - Civil: For cases where private harm must be repaired (e.g. damages actions following an administrative body decision, where injured competitors seek compensation);
  - Criminal: For conduct involving intent, corruption, coercion, or fraud (e.g. bribery, bid manipulation, threats to exclude competitors), where public trust and market fairness are at stake;

- **Proportional sanction**

Adjudicators must also ensure that sanctions are proportionate to the gravity of the offence. A minor procedural error should not result in severe penalties that stigmatize officials unnecessarily, while deliberate corruption should not be met with mere administrative fines. Proportionality requires weighing intent, harm caused, and systemic risk;

- **Accountability and legal certainty**

Finally, adjudicators must balance two values:

  - Accountability: ensuring that irregularities are investigated, sanctioned, and corrected, so public procurement remains transparent and competitive;
  - Legal Certainty: safeguarding officials and companies from arbitrary or excessive punishment, maintaining predictable boundaries between administrative breaches and criminal offences.

# 5. Guidance for Adjudicators

## 5.1. Assessing the nature of the offence

Adjudicators should consider the following factors when determining whether a procurement irregularity constitutes an administrative contravention or a criminal offence:

- Legal qualification
  Determine whether the conduct falls under a criminal offence defined by national law (e.g. bribery, prevarication, bid rigging) or is merely an administrative breach of procurement procedures.
  *Practical examples:*
    - Administrative contravention: A contracting authority fails to publish the tender notice within the required deadline, but no evidence of intent or benefit.
    - Administrative contravention: Minor errors in tender evaluation scoring (e.g. miscalculated points) without deliberate manipulation.
    - Criminal offence: Two bidders secretly agree to submit cover bids to predetermine the winner (bid-rigging cartel).
    - Criminal offence: A procurement officer accepts money from a supplier in exchange for tailoring specifications to exclude competitors (bribery).
    - Criminal offence: A company submits falsified certificates of prior experience to unlawfully qualify for participation (fraud/forgery).
- Intent and seriousness
  Examine evidence of intentional wrongdoing or collusion. Criminal liability generally requires intentional, flagrant violations, while negligence or minor non-compliance may be sanctioned administratively. Thus, evidence of collusion, bribes or forged documents usually trigger criminal liability, while unintentional mistakes are rectified administratively.
- Impact on competition and public interest
  Evaluate whether the misconduct significantly distorted competition, resulted in unjust enrichment or jeopardized public resources. Serious harm justifies criminal prosecution.
- Proportionality
  Ensure that sanctions - whether administrative or criminal - are proportionate to the gravity of the offence and respect rights such as property and fair trial.

## 5.2. Coordination with criminal proceedings and ne bis in idem

When administrative bodies (e.g. anti-corruption agencies, procurement authorities) impose sanctions concurrently with criminal investigations, they must abide by the ne bis in idem principle. This entails:

- Close connection
  Administrative and criminal proceedings must pursue complementary aims and be closely linked in time and substance.[128]
- Avoiding double punishment
  Authorities should coordinate to prevent multiple sanctions with the same purpose for the same conduct. For example, a corporation fined for bid rigging by a competition authority should not face a separate administrative fine from the procurement authority unless the sanctions pursue distinct legitimate aims. When administrative authorities impose sanctions such as debarment or restitution while criminal proceedings are pending or ongoing, they must ensure a close temporal and material connection with criminal proceedings and avoid imposing sanctions amounting to criminal punishment twice.
- Due process
  Parties must have the opportunity to defend themselves in both proceedings. Decisions to exclude or debar should be reasoned and subject to appeal. Authorities should coordinate with criminal prosecutors and respect the right to a fair trial. Proportionality remains crucial: sanctions (e.g. exclusion, confiscation of deposits or profits) must pursue legitimate aims and be the least restrictive measures necessary.

For example, in a bid-rigging case, the competition authority may impose a fine on the companies involved for anti-competitive conduct, while the public prosecutor pursues charges of fraud or collusion against the individuals responsible. In such circumstances, the procurement authority may still decide to exclude the companies from future tenders, but this exclusion should be coordinated with the competition fine and the criminal proceedings. The exclusion must serve a distinct legitimate aim (e.g. safeguarding the integrity of procurement processes) and not amount to a second punitive sanction for the same conduct. It would be essential for the administrative and criminal procedures to be coordinated, proportionate and peruse different legitimate goals. Similarly, in a bribery case, if criminal courts impose imprisonment and confiscation, the procurement authority may complement this with exclusion from tenders to protect public contracting, provided the measures are proportionate and clearly justified as addressing different objectives.

## 5.3. Self-cleaning and cooperation

EU directives allow companies guilty of misconduct to avoid exclusion if they implement self-cleaning measures. In this light adjudicator should evaluate whether the company has:

- Compensated damage to affected parties;
- Clarified facts and cooperated with investigation authorities and contracting entities;
- Adopted effective compliance measures to prevent future misconduct.

Failure to update declarations (e.g. failure to disclose a director's conviction) can itself constitute grave professional misconduct justifying exclusion, as held by CJEU.

128 More on this in section 3.2

# 5. Conclusion

Adjudicating public procurement offences requires an integrated understanding of EU directives, national criminal and administrative law, and the jurisprudence of both the CJEU and ECtHR. EU directives establish the legal framework for procurement and provide for exclusion of bidders involved in corruption or cartel behaviour. CJEU case law clarifies the scope of exclusions and self-cleaning, while ECtHR jurisprudence safeguards fundamental rights, including property rights and the ne bis in idem principle. National doctrines, exemplified by Spain, Romania and Italy, show how Member States draw the line between administrative contraventions and criminal offences based on seriousness, intent and impact on competition. The diversity of EU member states' approaches means that adjudicators must remain attentive to domestic legal thresholds while ensuring that their decisions remain consistent with overarching EU principles of proportionality, fairness, and effective protection of competition and integrity. Future developments, such as the EU's proposed anti-corruption directive, may harmonize definitions and enforcement across the Union, further informing adjudicators in their vital role of safeguarding the integrity of public procurement.

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