EUROPEAN
COMMISSION

Brussels, 14.5.2019
C(2019) 3452 final

ANNEX

ANNEX

to the

COMMISSION DECISION

laying down the guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement

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1. INTRODUCTION

1.1. Purpose of the guidelines

The general purpose of these guidelines is two-fold:

- to increase **legal certainty** for the Member States. To this end, it is important to clarify the circumstances under which breaches of applicable Union law on public procurement, or national law related to its application, can lead to financial corrections by the Commission.

- to ensure **proportionality**. To this end, it is important that the Commission considers the nature and the gravity of the irregularity[1] and the related financial implications for the budget of the Union when deciding on a financial correction.

The Commission will make **financial corrections** in order to exclude from Union financing expenditure that is in breach of applicable law (cf. Article 144 of Regulation (EU) No 1303/2013 and Article 101(8) of the Financial Regulation). The irregularity may be quantifiable with precision or not. The financial impact of an irregularity is quantified with precision if it is possible, based on an examination of the individual cases, to calculate the exact amount of expenditure wrongly declared to the Commission for reimbursement; in such cases, the financial correction must be calculated precisely. However, it is considered that in the case of irregularities in public procurement, it is not possible to quantify precisely the financial impact due to the nature of the irregularity. Therefore, in such cases, a flat rate correction is to be applied to the affected expenditure taking into account the nature and gravity of the irregularities, in accordance with the criteria set out in point 1.4.

Irregularities in the area of public procurement are analysed in accordance with the objective of protecting the financial interests of the Union and the compliance with Union law (in particular, the principles of transparency, non-discrimination, equal treatment, proportionality and legal certainty). Moreover, financial corrections can only be applied if the irregularity at stake has or could have a financial impact on the Union budget. Therefore, the types of irregularities indicated in these guidelines (or similar to those irregularities) and for which a flat-rate correction is set out in Section 2, are those considered to have a financial impact[2]. For cases where a breach of public procurement rules is only of a formal nature without any actual or potential financial impact, no financial correction is warranted[3].

The purpose of the guidelines is also to promote the consistency of the treatment of public procurement errors among the Commission services concerned, the European Court of Auditors[4] and the Member States. The Member States are responsible, in the first instance, for investigating irregularities and for implementing the financial corrections required. In this context, it is recommended to the competent authorities in the Member States to apply the criteria and financial

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1 For the purposes of the guidelines, 'irregularity' means a breach of applicable law on public procurement, which has, or would have, the effect of prejudicing the Union budget.

2 The types of irregularities described in section 2 are the most frequently detected types of irregularities. This list is not exhaustive. Other irregularities should be addressed, where possible, by analogy to the types of irregularities identified in the present guidelines.

3 Example: When the contract award notice was published later than required, or not at all.

4 Cf. the European Parliament 2010 discharge recommendation: *"The Parliament calls (...) on the Commission and the Court of Auditors to harmonise the treatment of public procurement errors in the two policy areas, Agriculture and Natural Resources and Cohesion, Energy Transport, urgently (...)"*.

correction rates set out in these guidelines when correcting irregularities detected by their own services.

The operations should be selected for funding in accordance with applicable EU and national rules, including those related to public procurement. In this context, two scenarios may occur:

a) When the tender procedure used for a public contract is in breach of public procurement rules (that would lead to a financial correction when expenditure generated by that contact is declared to the Commission) and this contract has not been signed yet, the relevant authority, taking into consideration any additional costs and time constraints, may recommend the beneficiary to launch a new tender procedure in full compliance with the mentioned rules. In case no new tender is launched, the irregularity should be corrected by applying these guidelines[5].

b) If an irregularity is detected after the contract has been signed and the operation has been approved for funding (at any stage of the operation's cycle), the irregularity should be corrected by applying these guidelines.

1.2. Scope

As specified in Article 1 of the Decision, these guidelines establish the amount of the correction to be applied in case of irregularities that constitute breaches of public procurement rules applicable to contracts[6] that generate expenditure financed by the Union budget under shared management[7].

1.2.1. Contracts subject to the Directives

These guidelines concern irregularities detected in relation to public contracts and to contracting authorities as defined in the Directives[8]. Where Article 13 of Directive 2014/24/EU applies, these guidelines are also applicable to contracts that are subsidised by contracting authorities, even when those contracts have not been awarded by contracting authorities.

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5 I.e. a flat rate ex-ante correction should be applied on any expenditure to be declared to the Commission with regard to the contract concerned.

6 For the purposes of the guidelines, the term 'contract' is used lato senso, i.e. it refers to any public procurement procedure.

7 The present guidelines do not apply to irregularities affecting expenditure under the rules on use of Simplified Cost Options.

8 The Directives are the following:
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1), as amended;
- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (repealing Directive 2004/18/EC) (OJ L 94, 28.3.2014, p. 65), as amended;
- 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 (repealing Directive 2004/17/EC); (OJ L 94, 28.3.2014, p. 243), as amended;
- Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security (OJ L 216, 20.8.2009, p. 76).

1.2.2. Contracts not subject to the Directives

In so far as the Directives do not apply[9], but the procurement falls within the scope of the Treaty and under national public procurement law, these guidelines apply provided that at least one of the following conditions is met:

(i) there is a certain cross border interest, within the meaning of point 1.2.3 and the award of such contracts does not respect the principles of transparency and non-discrimination enshrined in the Treaty;

(ii) there is a clear breach of the national public procurement law for the contracts at stake.

In addition, these guidelines are applicable also if the national rules (including contractual or grant conditions) explicitly require the beneficiaries of EU funds to comply with national public procurement rules or similar rules[10], even if those beneficiaries are not themselves a contracting authority as defined in the Directives. In that case, the irregularity is a breach to the national rules (e.g. conditions in the grant agreement refer to the Treaty principles or to national public procurement rules).

In all such cases, the required level of financial corrections should be determined by analogy with the types of irregularities identified in Section 2.

1.2.3. Existence of a certain cross border interest

For the purpose of assessing the existence of a certain cross border interest in contracts not subject to the Directives, the Commission carries the burden of proof, taking into account the jurisprudence of the European Court of Justice[11].

In this context, it is first necessary to determine whether there are factual elements that would in conjunction substantiate cross border interest, including the following: (i) the subject-matter of the contract, (ii) its estimated value, (iii) the technical requirements of the contract, (iv) the geographic location of the place of performance, (v) evidence of tenders from other Member States or expressed interest by economic operators from a different Member State.

1.3. Expenditure to which the financial corrections applies

Where the Commission detects irregularities related to non-compliance with public procurement rules, it determines the amount of the financial correction applicable in accordance with these guidelines. The amount of the financial correction is calculated on the expenditure amount declared to the Commission and related to the contract (or part of it[12]) affected by the irregularity,

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9 Including the service contracts for social and other specific services not listed in Annex XIV of Directive 2014/24/EU.

10 E.g. national or programme eligibility rules setting out obligation for beneficiaries which are not contracting authorities to follow certain simplified procurement process when concluding contracts with their suppliers.

11 See judgment C-507/03 *Commission v. Ireland*, [2007] ECR I-9777, paragraphs 32 and 34. See also cases C-412/04 Commission v. Italy [2008] ECR I-619; joined cases C-147/06 and C-148/06, SECAP SpA and Santorso Soc. V. Comune di Torino [2008] ECR I-3565.

12 The financial correction is limited to a part of the contract if such part is clearly identifiable, namely if the contract is divided into lots or when the contract is governed by a framework agreement under Article 33 of Directive 2014/24/EU. This would be the case, for example, when the technical specifications are restrictive in regard to one of the lots in a given contract as illustrated here: the contracting authority required that computers have a specific brand (without adding the compulsory mention "or equivalent") in a lot within a wider works

using the suitable flat rate correction in line with Section 2, considering the criteria mentioned in Section 1.4.

The same correction rate should be applied to any future expenditure affected by the irregularity related to the same affected contract (of part of it), before such expenditure is certified to the Commission.

Practical example:

In a case where the amount of total expenditure declared to the Commission for a works contract (concluded after the application of illegal selection criteria) is EUR 10 000 000 and where the applicable financial correction rate is 25%, the amount to be deducted from the expenditure statement to the Commission is EUR 2 500 000. Accordingly, the Union financing is reduced on the basis of the relevant co-financing rate for the priority axis under which expenditure was declared. If afterwards the national authorities intend to declare further expenditure concerning the same contract and which is affected by the same irregularity, that expenditure should be subject to the same 25% correction rate before declaring expenditure to the Commission[13]. In the end, the entire value of the payments related to the contract is corrected on the basis of the same correction rate.

1.4. Criteria to consider when deciding a proportionate rate of correction

As mentioned in point 1.1, where due to the nature of the irregularity, it is not possible to quantify precisely the financial impact but the irregularity is capable, as such, to have a budgetary impact the Commission may calculate the amount of the correction to apply by taking into account three criteria, namely the nature and gravity[14] of the irregularities and the resulting financial loss to the Funds. This implies that the financial corrections made on the basis of a scale of flat-rates listed in Section 2 of these guidelines (5%, 10%, 25% and 100%) respect the principle of proportionality. This is without prejudice to the fact that the calculation of the final amount of the correction to be applied should take account of all the characteristics of the irregularity found in relation to the elements taken into consideration for the establishment of that flat-rate[15].

Where more than one irregularity is detected in the same procurement procedure, the rates of correction are not cumulated. The most serious irregularity is taken as an indication to decide the rate of correction applicable to the contract concerned, in accordance with Section 2.

In some cases, individual irregularities related to public procurement can be of a systemic nature, resulting from a deficiency in the management and control system. In such cases, after a correction of the individual public procurement irregularities has been implemented, the Member State should take the appropriate corrective measures concerning other procurement procedures affected by the same type of irregularities. Where this is not done (i.e. where not all the expenditure affected by the deficiency has been corrected), the Commission will apply the corresponding corrective measures, including net financial corrections, in accordance with the

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contract for the construction of a hospital. In such case, the financial correction concerns only the expenditure related to the computers acquired under that contract and not to the expenditure of the whole contract.

13 The national authorities must keep the full audit trail of the financial corrections applied to the contract, including the appropriate records in the accounting system.

14 The gravity of an irregularity is assessed taking into account in particular the following factors: level of competition, transparency and equal treatment.

15 See in particular Article 144(2) of Regulation (EU) No 1303/2013 and ECJ settled case law C-406/14 (paragraphs 47 - 49) and C-408/16 (paragraph 65 and 66).

sectoral rules applicable to each Fund. The financial corrections are to be applied to the affected procurement procedures which have not already been subject to individual corrections.

1.5. Fraud

A financial correction of 100% is applied to the expenditure affected by irregularities stemming from breach of public procurement rules with an impact on the EU budget and relating to fraud, affecting the Union's financial interests or any other offence defined in Articles 3 – 5 of Directive (EU) 2017/1371[16], as established by a competent judicial body or identified by a competent EU or national authority based on evidential elements supporting the presence of fraudulent irregularities.

Fraud may be identified by specialised anti-corruption/anti-fraud EU or national administrative and criminal investigation bodies.

The auditors of the Commission and the national audit authorities[17] (unless they have specific responsibilities under national law) do not have specific competences for investigation on cases of fraud. Therefore, their reports, even if they identify a risk or indicate a likelihood of fraudulent conduct, do not *per se* determine the existence of fraud. This is without prejudice to their obligation, as confirmed by Article 15(3) of Directive (EU) 2017/1371, to "*disclose to OLAF and to other competent authorities any fact of which they become aware when carrying out their duties, which could be qualified as a criminal offence"* and without prejudice to the obligation of *"Member States … (to) ensure that national audit bodies do the same*".

[16] As established by Article 3(2)(b) of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

[17] Or certifying bodies under the European Agricultural Fund for Rural Development.

2. TYPES OF IRREGULARITIES AND CORRESPONDING RATES OF FINANCIAL CORRECTIONS

2.1. Contract notice and tender specifications

No	Type of irregularity	Applicable law[18]	Description of the irregularity	Rate of correction
1.	Lack of publication of contract notice Or unjustified direct award (i.e. unlawful negotiated procedure without prior publication of a contract notice)	Article 31 of Directive 2014/23/EU Articles 26, 32 and 49 of Directive 2014/24/EU Articles 44, 67 to 69 of Directive 2014/25/EU	The contract notice was not published in accordance with the relevant rules (e.g. publication in the *Official Journal of the European Union* ('OJ') where the Directives require this. This also applies to direct awards or negotiated procedures without prior publication of a contract notice, if criteria for using them are not fulfilled.	100%
			Same as above, except for the fact that publicity was made by other adequate means[19].	25%
2.	Artificial splitting of works/services/supplies contracts	Article 8(4) of Directive 2014/23/EU Article 5(3) of Directive 2014/24/EU Article 16(3) of Directive	A works project or proposed purchase of a certain quantity of supplies and/or services is artificially subdivided into several contracts. As a result, each contract for the part of the works/supplies/services is below the threshold of the Directives, thus preventing its publication in the OJ for the whole set of works, services or supplies at stake[20].	100% (this correction applies if the contract notice covering the works/supplies/services at stake was not published in OJ, although

[18] The mentioned case-law refers to the provisions of Directives 2004/17/EC and 2004/18/EC. However, the provided interpretation may be relevant also for the provisions of 2014 Directives.

[19] Adequate means of publicity means that the contract notice was published in a way that ensures that an undertaking located in another Member State has access to appropriate information regarding the public procurement before it is awarded, so that it would be in a position to submit a tender or express its interest to participate in obtaining that contract. In practice, this is the case when (i) the contract notice was published at national level (following the national legislation or rules in that regard) and/or (ii) the basic standards for the advertising of contracts were respected (see more details on these standards in section 2.1 of the Commission interpretative communication n° 2006/C 179/02).

[20] The same approach is applicable, mutatis mutandis, to contracts subject only to national public procurement rules and where the artificial splitting of works/supplies/services prevented its publication in accordance with these rules.

No	Type of irregularity	Applicable law[18]	Description of the irregularity	Rate of correction
		2014/25/EU C-574/10, Commission/Allemagne, T-358/08, Espagne/Commission et T-384/10, Espagne/Commission		required by the Directives)
			Same as above, except for the fact that publicity was made by other adequate means, in the same conditions as set out in point 1 above.	25%
3.	Lack of justification for not subdividing contract into lots	Article 46(1) of Directive 2014/24/EU	The contracting authority does not provide an indication of the main reasons for its decision not to subdivide into lots.	5%
4.	Non-compliance with time limits for receipt of tenders or time limits for receipt of requests to participate[21]. Or Failure to extend time limits for receipt of tenders where significant changes are made to the procurement documents	Articles 27 to 30, 47(1) and (3) and 53(1) of Directive 2014/24/EU Articles 45 to 48, 66(3) and 73(1) of Directive 2014/25/EU	The reduction of the time limits set in the Directives is more than or equal to 85% or the time limit is equal to/less than 5 days.	100%
			The reduction of the time limits set in the Directives is more than or equal to 50% (but below 85%).[22]	25%
			The reduction of the time limits set in the Directives is more than or equal to 30% (but below 50%). or The time limits were not extended where significant	10%

[21] These time limits are applicable to open procedures, restricted procedures and competitive procedure with negotiation.
Attention is also drawn to Article 47(1) of Directive 2014/24/EU: "*When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in Articles 27 to 31*".

[22] For example, considering the minimum time limit for receipt of tenders of 35 days (under Article 27 of Directive 2014/24/EU), two scenarios could occur: (1) the time limit applied by contracting authority was 10 days, which means a reduction in the time limit of 71,4% [= (35-10)/35)], thus warranting a 25% financial correction; (2) the time limit applied by contracting authority was 10 days, but minimum time limit could be 15 days (since prior information notice was published), which means a reduction in the time limit of 33% [= (15-10)/15)], thus warranting a 10% financial correction.

No	Type of irregularity	Applicable law[18]	Description of the irregularity	Rate of correction
			changes are made to the procurement documents[23].	
			The reduction of the time limits set in the Directives is less than 30%.	5%
5.	Insufficient time for potential tenderers/candidates to obtain tender documentation or Restrictions to obtain tender documentation	Article 29 and 34 of Directive 2014/23/EU Articles 22 and 53 of Directive 2014/24/EU Articles 40 and 73 of Directive 2014/25/EU	Time for economic operators (i.e. potential tenderers/candidates) to obtain tender documentation is too short (i.e. less than or equal to 50% of the time limits for receipt of tenders set in the tender documents, in line with relevant provisions), thus creating unjustified obstacles to the opening up of public procurement to competition.	10%
			Time for economic operators (i.e. potential tenderers/candidates) to obtain tender documentation is reduced but the reduction is less than 80% of the time limits for receipt of tenders, in line with relevant provisions.	5%
			Time for economic operators (i.e. potential tenderers/candidates) to obtain tender documentation is equal to or less than 5 days. or Where the contracting authority has not offered at all[24], by electronic means, unrestricted and full direct access free of charge to the procurement documents, as	25%

[23] Cf. Article 47(3)(b) of Directive 2014/24/EU.

[24] Where the electronic access was offered but the period of access has been shortened, then the above rates of 25%, 10% or 5% apply accordingly.

No	Type of irregularity	Applicable law[18]	Description of the irregularity	Rate of correction
			established by Article 53(1) of Directive 2014/24/EU, this is a serious irregularity[25].	
6.	Lack of publication of extended time limits for receipt of tenders[26] Or Failure to extend time limits for receipt of tenders	Articles 3 and 39 of Directive 2014/23/EU Articles 18 and 47 of Directive 2014/24/EU Articles 36 and 66 of Directive 2014/25/EU	The initial time limits for receipt of tenders (or receipt of requests to participate) were correct according to the applicable provisions, but were extended without appropriate publication in accordance with the relevant rules (i.e. publication in the OJEU), <u>but publicity (of the extended limits) was made by other means</u> (see conditions in point 1 above).	5%
			Same as above and <u>no publicity (of the extended time limits) was made by other means</u> (see conditions in point 1 above). or Failure to extend time limits for receipt of tenders where, for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest six days before the time limit fixed for the receipt of tenders[27].	10%
7.	Cases not justifying the use of a competitive procedure with negotiation or a competitive	Article 26(4) of Directive 2014/24/EU	Contracting authority awards a public contract by a competitive procedure with negotiation or a competitive dialogue in situations not foreseen by the Directive.	25%

[25] Except of cases where the conditions established in the quoted 2nd and 3rd paragraphs are complied with. In such cases, no correction is applied.

[26] Or extended time limits for receipt of requests to participate; these time limits are applicable to restricted procedures and negotiated procedures with publication of a contract notice.

[27] Cf. Article 47(3)(a) of Directive 2014/24/EU. In the event of an accelerated procedure as referred to in Article 27(3) and Article 28(6) of said Directive, that period shall be four days.

No	Type of irregularity	Applicable law[18]	Description of the irregularity	Rate of correction
	dialogue		Cases in which the contracting authority ensured full transparency including a justification of the use of these procedures in the procurement documents, did not limit the number of suitable candidates to submit an initial tender and equal treatment of all tenderers was ensured during the tender negotiations.	10%
8.	Non-compliance with the procedure established in the Directive for electronic and aggregated procurement[28]	Articles 33 to 39 of Directive 2014/24/EU Articles 51 to 57 of Directive 2014/25/EU	The specific procedures for electronic and aggregated procurement[29] have not been followed as established in the applicable Directive and the non-compliance could have had a deterrent effect to potential tenderers[30].	10%
			Where the non-compliance led to the award of a contract to a tender other than the one that should have been awarded, this is considered a serious irregularity[31].	25%
9.	Failure to publish in the contract notice the selection and/or award criteria (and their weighting), or conditions for performance of contracts or technical specifications.	Articles 31, 33, 34, 36, 37, 38, and 41, and Annex V (points 7.c and 9) of Directive 2014/23/EU Articles 42, 51, 53, 56 to 63, 67, and 70, Annex V part C (points 11.c and 18), and Annex VII of Directive	a) Failure to publish in the contract notice[32] the selection and/or award criteria (and their weighting).	25%
			b) Failure to publish in the contract notice[33] the conditions for performance of contracts or technical specifications. c) Neither the published contract notice nor the tender	10%

[28] Except for the cases where the irregularity is already covered by other types of irregularities set out in these guidelines.

[29] The procurement procedures concerned are: framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, centralised purchasing activities and central purchasing bodies.

[30] For example: the term of a framework agreement exceeds four years, without duly justification.

[31] If the non-compliance means that the contract notice was not published, then the rate of correction is to be determined in accordance to point 1 above.

[32] Or tender documentation if this is published together with the contract notice.

[33] Or tender documentation if this is published together with the contract notice.

No	Type of irregularity	Applicable law[18]	Description of the irregularity	Rate of correction
	Or Failure to describe in sufficient detail the award criteria and their weighting. Or Failure to communicate/publish clarifications/additional information.	2014/24/EU Article 60, 71, 73, 76 to 79, 82, and 87, Annex VIII and Annex XI, A (points . 16 and 19), B (points 15 and 16) and C (points 14 and 15) of Directive 2014/25/EU Principle of equal treatment mentioned in Article 18 of Directive 2014/24/EU Case-law: ECJ-07/2016 Dimarso, ECJ-11/2010 COM vs Ireland, ECJ-01/2008 Lianakis	specifications describe in sufficient detail the award criteria and their weighting, with the effect of unduly restricting the competition (i.e. the lack of sufficient detail could have had a deterrent effect to potential tenderers)[34]. d) The clarifications or additional information (in relation to selection/award criteria) provided by the contracting authority were not communicated to all tenderers or published.	

[34] Except if the award criteria and their weighting were clarified by the contracting authority in sufficient detail, upon request of tenderers, before the deadline for submission of tenders.

No	Type of irregularity	Applicable law[18]	Description of the irregularity	Rate of correction
10.	Use of - criteria for exclusion, selection, award or - conditions for performance of contracts or - technical specifications that are <u>discriminatory</u> on the basis of unjustified national, regional or local preferences	Articles 36, 37, 38 and 41 in relation to Article 3 of Directive 2014/23/EU Articles 42, 56 to 63, 67 and 70 in relation to Article 18(1), Annex VII of Directive 2014/24/EU Articles 60, 76 to 79, 82 and 87 in relation to Article 36(1), Annex VIII of Directive 2014/25/EU	Cases in which economic operators could have been deterred from tendering because of exclusion, selection and/or award criteria or conditions for performance of contracts that include unjustified national, regional or local preferences. This is for example the case when there is a requirement to have, at the time of submission of the tender: (i) an establishment or representative in the country or region; or (ii) tenderers' possession of experience and/or qualification in the country or region[35]; (iii) tenderers' possession of equipment in the country or region.	25%
			Same as above except for the fact that a minimum level of competition was still ensured, i.e. a number of economic operators submitted tenders that were accepted and fulfilled the selection criteria.	10%
11.	Use of - criteria for exclusion, selection, award or	Articles 36, 37, 38 and 41 in relation to Article 3 of Directive 2014/23/EU Articles 42, 56 to 63, 67 and 70 in	This refers to criteria or conditions that, despite not being discriminatory on the basis of national/regional/local preferences, still lead to restricting access for economic operators to the specific public procurement procedure, as exemplified in the	10%

[35] The definition of the selection criteria must not be discriminatory or restrictive and be linked to the subject-matter of the contract and proportionate. In any case, where a sufficiently precise description of the specific selection criterion required is not possible, the reference used in the selection criteria needs to be accompanied by the words "or equivalent", in order to ensure the opening up of competition. When these conditions are in place, no financial correction is warranted.

No	Type of irregularity	Applicable law[18]	Description of the irregularity	Rate of correction
	- conditions for performance of contracts or - technical specifications that are not discriminatory in the sense of the previous type of irregularity but still <u>restrict access</u> for economic operators	relation to Article 18(1), Annex VII of Directive 2014/24/EU Articles 60, 76 to 79, 82 and 87 in relation to Article 36(1), Annex VIII of Directive 2014/25/EU	following cases. 1) cases in which the minimum capacity levels of ability for a specific contract are related but not proportionate to the subject matter of the contract; 2) cases where, during the evaluation of tenderers/candidates, the selection criteria were used as award criteria; 3) cases where specific trademarks/brands/standards are required[36], except where such requirements relate to an ancillary part of the contract and the potential impact on the EU budget is only formal (cf. Section 1.4).	
			Cases in which restrictive criteria/conditions/specifications were applied but still a minimum level of competition was ensured, i.e. a number of economic operators submitted tenders that were accepted and fulfilled the selection criteria.	5%
			Cases in which the minimum capacity levels of ability for a specific contract are manifestly not related to the subject matter of the contract. or Cases where the exclusion, selection and/or award criteria or conditions for performance of contracts led to a situation where only one economic operator could	25%

[36] Without allowing for an equivalent trademark/brand by not using the compulsory quote "or equivalent".

No	Type of irregularity	Applicable law[18]	Description of the irregularity	Rate of correction
			submit a tender and this outcome cannot be justified by the technical specificity of the contract in question.	
12.	Insufficient or imprecise definition of the subject-matter of the contract[37]	Article 3 of Directive 2014/23/EU Article 18(1) of Directive 2014/24/EU Article 36 of Directive 2014/25/EU Cases C-340/02, *Commission/France* EU:C:2004:623 and C-299/08, *Commission/France* EU:C:2009:769 C-423/07, Commission/Espagne	The description in the contract notice and/or the tender specifications is insufficient or imprecise in a way that may not allow potential tenderers/candidates to fully determine the subject matter of the contract, causing deterrent effect potentially restricting the competition [38].	10%
13.	Unjustified limitation of sub-contracting	Articles 38(2) and 42 of Directive 2014/23/EU Articles 63(2) and 71 of Directive 2014/24/EU Article 79(3) and 88 of Directive 2014/25/EU Case C-406/14, EU:C:2016:652,	The tender documentation (e.g. technical specifications) imposes limitations on the use of subcontractors for a share of the contract fixed in abstract terms as a certain percentage of that contract, and irrespective of the possibility of verifying the capacities of potential subcontractors and without any mention of the essential character of the tasks that would be concerned.	5%

[37] Except where: (i) the Directives allow for negotiation or (ii) when the subject-matter of the contract has been clarified after publication of the contract notice, and such clarification was published in the OJ.

[38] E.g. it has been established though the complaints or notifications during the tendering that the tender specifications are insufficient for the possible bidders to determine the subject matter of the contract. However, the number of questions made by potential tenderers is not an indicator that an irregularity exists, provided the questions are adequately answered by the contracting authority, in line with Articles 47(3) and 53(2) of Directive 2014/24/EU.

No	Type of irregularity	Applicable law[18]	Description of the irregularity	Rate of correction
		Wrocław – Miasto na prawach powiatu, paragraph 34		

2.2. Selection of tenderers and evaluation of tenders

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
14.	Selection criteria (or technical specifications) were modified after opening of tenders or were incorrectly applied.	Articles 3(1) and 37 of Directive 2014/23/EU Articles 18(1) and 56(1) of Directive 2014/24/EU Article 36(1) and 76(1) of Directive 2014/25/EU	The selection criteria (or technical specifications) were modified during the selection phase or were incorrectly applied during the selection phase, resulting in acceptance of winning tenders that should not have been accepted (or rejection of tenders that should have been accepted[39]) if the published selection criteria had been followed.	25%
15.	Evaluation of tenders using award criteria that are different from the ones stated in the contract notice or tender specifications Or Evaluation using	Article 41 of Directive 2014/23/EU Articles 67 and 68 of Directive 2014/24/EU Article 82 and 83 of Directive 2014/25/EU Cases C-532/06,	The award criteria (or respective sub-criteria or weightings) stated in the contract notice or tender specifications (1) were not followed during the evaluation of tenders, or (2) additional award criteria not published[40] were used in that evaluation.	10%
			Where the two cases above-mentioned had a discriminatory effect (on the basis of unjustified national/regional/local preferences), this is a serious irregularity.	25%

[39] Unless the contracting authority can clearly demonstrate that the rejected tender would in any case not have won and that therefore the irregularity did not have any financial impact.

[40] In the terms of Article 67(5) of Directive 2014/24/EU and the related case law.

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
	additional award criteria that were not published	*Lianakis*, EU:C:2008:40, paragraphs 43-44 and C-6/15, *TNS Dimarso*, paragraphs 25-36		
16.	Insufficient audit trail for the award of the contract	Article 84 of Directive 2014/24/EU Article 100 of Directive 2014/25/EU	The relevant documentation (set out in applicable provisions of the Directives) is insufficient to justify the award of the contract, resulting in a lack of transparency.	25%
			Refusing access to the relevant documentation is a critical irregularity, since the contracting authority does not provide the evidence that the procurement procedure complied with the applicable rules.	100%
17.	Negotiation during award procedure, including modification of the winning tender during evaluation	Articles 37(6) and 59 of Directive 2014/23/EU Articles 18(1) and 56(3) of Directive 2014/24/EU Articles 36(1) and 76(4) of Directive 2014/25/EUCases C-324/14, *Partner Apelski Dariusz*, EU:C:2016:214, paragraph 69 and C-27/15, *Pippo Pizzo* EU:C:2016:404	The contracting authority allowed a tenderer/candidate to modify its tender[41] during evaluation of offers, where the modification leads to the award of the contract to that tenderer/candidate. or In the context of an open or restricted procedure, the contracting authority negotiates with any tenderer(s) during the evaluation stage, leading to a substantially modified contract in relation to the initial conditions set out in the contract notice or tender specifications. or In concessions, the contracting authority allows a tenderer/candidate to change the subject matter, award criteria and the minimum requirements during negotiations, where the modification leads to the award of the contract to that	25%

[41] Except of negotiated procedures and competitive dialogue and where the Directives allow the tenderer/candidate to submit, supplement, clarify or complete the information and documents.

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
		Joint Cases, C-21/03 et C-34/03, *Fabricom*, EU:C:2005:127	tenderer/candidate.	
18.	Irregular prior involvement of candidates/tenderers towards the contracting authority	Articles 3 and 30(2) of Directive 2014/23/EU Articles 18(1), 40 and 41 of Directive 2014/24/EU Articles 36(1) and 59 of Directive 2014/25/EU Joint Cases, C 21/03 et C 34/03, Fabricom, EU:C:2005:127	Where the prior advice of a tenderer to the contracting authority leads to a distortion of the competition or results in a violation of the principles of non-discrimination, equal treatment and transparency, in the conditions indicated in Articles 40 and 41 of Directive 2014/24/EU[42].	25%
19.	Competitive procedure with negotiation, with substantial modification of the conditions set out in the contract notice or tender specifications	Article 29(1) and (3) of Directive 2014/24/EU Article 47 of Directive 2014/25/EU	In the context of a competitive procedure with negotiation, the initial conditions of the contract were substantially altered[43], thus requiring the publication of a new tender.	25%
20.	Unjustified rejection of abnormally low tenders	Article 69 of Directive 2014/24/EU Article 84 of Directive	Tenders that appeared to be abnormally low in relation to the works/supplies/services were rejected but the contracting authority, before rejecting those tenders, did not question in writing the respective tenderers (e.g. requesting details of the constituent elements of the tender, which it considers	25%

[42] Such advice is irregular no matter whether it occurs at the moment of the drafting of the tender documentation or during the preceding project application procedure.

[43] See last line of Article 29(3) of Directive 2014/24/EU.

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
		2014/25/EU Joints Cases C-285/99 *Lombardini* and C-286/99 *Mantovani* EU:C:2001:610, paragraphs 78 to 86 and Case T-402/06, *Spain/Commission*, EU:T:2013:445, paragraph 91	relevant), or where such questioning exists but the contracting authority is not able to evidence that it has assessed the replies provided by the tenderers at stake.	
21.	Conflict of interest with impact on the outcome of the procurement procedure	Article 35 of Directive 2014/23/EU Article 24 of Directive 2014/24/EU Article 42 of Directive 2014/25/EU Case C-538/13, *eVigilo* EU:C:2015:166, paragraphs 31-47	Whenever an undisclosed or inadequately mitigated conflict of interest has been identified, according to Article 24 of the Directive 2014/24/EU (or Article 35 of Directive 2014/23/EU or Article 42 of Directive 2014/25/EU), and the tenderer concerned was successful in securing the contract(s) in question[44].	100%

[44] The conflict of interest may already occur at the stage of the project preparation, as far as the project preparation had an influence on the tender documentation/tender procedure.

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
22.	Bid-rigging[45] (established by a competition / anti-cartel office, a court or other competent body)	Article 35 of Directive 2014/23/EU Article 24 of Directive 2014/24/EU Article 42 of Directive 2014/25/EU	Case 1a: The bid-rigging tenderers operated without either the assistance of a person within the management and control system or the contracting authority and a bid-rigging company was successful in securing the contract(s) in question.	10%
			Case 1b: If only colluding companies participated in the procurement procedure, competition is seriously impeded.	25%
			Case 2: A person within the management and control system or the contracting authority participated in the bid-rigging by assisting the bid-rigging tenderers and a bid-rigging company was successful in securing the contract(s) in question. In this case, there is a conduct of fraud/conflict of interest on the part of the person within the management and control system assisting the bid-rigging companies or the contracting authority.	100%

2.3. Contract implementation

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
23.	Modifications of the contract elements set out in the contract notice or tender specifications, not in compliance with the	Article 43 of Directive 2014/23/EU Article 72 of Directive	(1) There are <u>modifications</u> to contract (including reduction in the scope of the contract) not in compliance with Article 72(1) of said Directive; However, modifications to contract elements will not be considered as an irregularity subject to a financial	25% of the initial contract and the new works/supplies/services (if any) resulting from the modifications

[45] Bid rigging happens when groups of firms conspire to raise prices or lower the quality of goods, works or services offered in public tenders. No correction is warranted where the bid-rigging tenderers operated without assistance from a person within the management and control system or the contracting authority and none of the bid-rigging companies were successful in securing the contract(s) in question.

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
	Directives	2014/24/EU Article 89 of Directive 2014/25/EU Case C-496/99P, *Succhi di Frutta* EU:C:2004:236, paragraphs 116 and 118 Case C-454/06, *Pressetext* EU:C:2008:351 Case C-340/02, *Commission v. France* EU:C:2004:623 Case C-91/08, *Wall*	correction where conditions of Article 72(2) are respected, i.e.: a) the value of the modifications is below both of the following values: (i) the thresholds set out in Article 4 of Directive 2014/24/EU[46]; and (ii) 10 % of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts, and b) the modification does not alter the overall nature of the contract or framework agreement[47]. (2) There is a substantial modification of the contract elements (such as the price, nature of the works, the completion period, the terms of payment, the materials used) if the modification renders the implemented contract materially different in character from the one initially concluded. In any event, a modification will be considered	

[46] The thresholds are revised every two years, cf. Article 6 of the Directive.

[47] The concept of "overall nature of the contract or framework agreement" is not defined by the Directives and has not yet been the subject of case-law. See also recital 109 of the Directive 2014/24/EU. In this respect, further guidance is provided by SIGMA's brief 38 on public procurement – contract modifications (available at http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-38-200117.pdf): *"Modification is permitted where it is expressly provided for in review clauses set out in the initial procurement documents. Review clauses can provide a certain degree of flexibility in the terms of the contract. Modifications to the contract cannot be permitted simply because they were mentioned in the procurement documents in advance. Review clauses in procurement documents must be clear, precise and unequivocal. Review clauses must not be drafted in broad terms with a view to covering all possible changes. A review clause that is too general is likely to breach the principle of transparency and entails the risk of unequal treatment. (…) Review clauses must specify the scope and nature of possible modifications or options as well as the conditions under which they may be used. (...)Review clauses must not alter the overall nature of the contract. (…) For example, a new contract is likely to be drawn up if the nature of the contract is modified in such a way that the delivery of different products or the provision of services of a different kind is required in comparison to those set out in the original contract. In these circumstances, a modification will not be permitted, even if the scope, nature and conditions for different products or new services have been established in advance in a clear, precise and unequivocal manner."*

No	Type of irregularity	Legal basis / reference document	Description of irregularity	Rate of correction
		AG, EU:C:2010:182	substantial where one or more of the conditions set out in Article 72(4) of the Directive 2014/24/EU is met.	
		Article 72(1)(b), last subparagraph and Article 72(c)(iii) of Directive 2014/24/EU	Any increase in price exceeding 50 % of the value of the original contract.	25% of the initial contract and 100% of related contract modifications (price increase)