National Security and Public Procurement: Which Direction Is Being Proposed?

On 8 September 2026, Advocate General Andrea Biondi delivered an Opinion in two joined cases—C-271/25 (UAB „Autovici" v VšĮ „CPO LT") and C-334/25 (UAB „Skinest Baltija" v AB „Lietuvos geležinkeliai"). Both cases arose from the Supreme Court of Lithuania, which referred questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The key question is whether the procedure for excluding suppliers from Lithuanian public procurement procedures on national security grounds is compatible with EU law. In the current geopolitical situation, when hybrid threats and the actions of hostile states are forcing a reconsideration of the interaction between security and public procurement, this question is particularly relevant—and not only for Lithuania.

Characterisation of the grounds for exclusion: a specific matter—not of the EU public procurement directives, but of the EU Treaty

This is perhaps the most important part of the AG's Opinion. The Advocate General clearly found that the Lithuanian national-security grounds for exclusion are autonomous, so-called sui generis grounds, based not on EU public procurement Directives 2014/24 and 2014/25, but directly on Article 4(2) TEU. In other words, their legal basis derives from the EU Treaties, which recognise each Member State's exclusive responsibility for its national security. The practical consequence is that the requirements of Article 57 of Directive 2014/24, such as an assessment of proportionality, "self-cleaning" measures or a limited exclusion period, apply to these provisions neither directly nor by analogy.

It is interesting that, if this Opinion were upheld by the CJEU, the Member States would have to decide how and by what means to regulate this issue, since it is obvious that, from the perspective of legislative technique, it is not appropriate to regulate this part of legal relations by legal acts regulating public procurement. In other words, this should be a matter for regulation by other laws, rather than by public procurement legislation.

However - and this is a crucial nuance - such provisions are not entirely outside the scope of EU law. Although the procurement directives do not apply to them, the Member States must nevertheless comply with the general principles of EU law: proportionality, equal treatment, non-discrimination, transparency, good administration and the right to an effective remedy under the Charter. A kind of "dual-level" model thus emerges: on the one hand, national security as a prerogative of the Member States; on the other, EU principles as a minimum standard that must be observed.

Automatic exclusion: may the contracting authority dispense with an assessment?

One of the most pressing questions is whether the contracting authority may exclude a supplier automatically, relying on information from the competent authorities, without assessing the situation itself. The AG's answer is essentially yes, but subject to conditions. EU law does not preclude provisions under which the contracting authority has no discretion whatsoever and must rely on information from the competent authorities concerning a threat to national security. The logic is simple: security assessment is a specific activity requiring special expertise and access to classified information, whereas contracting authorities generally do not have such powers.

It is interesting that the AG also points to another possibility: if a Member State decides to leave the contracting authority a certain degree of discretion, that is also permissible and would even be more consistent with the CJEU case-law developed in the Infraestruturas de Portugal case. In any event, the main condition remains the same: the competent authority must carry out an individual and concrete assessment of each case, rely on up-to-date information and give sufficient reasons for its decision.

These conclusions are a natural consequence of the AG's legal interpretation: if the public procurement directives do not apply, it does not necessarily follow that the contracting authority has discretion to determine the existence of a threat to national security. It is important to note that the lower courts in Lithuania adhered precisely to the position presented by the AG in the Opinion, and it was precisely the Supreme Court of Lithuania that called this national case-law into question.

Principle of proportionality: what restrictions apply?

In the AG's Opinion, the analysis of the principle of proportionality covers three essential aspects. First, the recency of the data: the exclusion must be based on sufficiently recent data that reflect an existing threat, rather than one that existed in the past. If the factual situation has changed, that must be taken into account. Second, the significance of the information for the specific procurement: the AG acknowledges that, in certain cases, a supplier may be excluded from all public procurement procedures, for example where links to hostile states have been established and the procurements are carried out in a particularly vulnerable sector such as railways; however, such a decision must be individually substantiated and reasoned. Third, the duration of the exclusion: a supplier may not be excluded indefinitely. The possibility of review must be ensured within a reasonable period, and the economic operator must clearly know the procedure under which it may request a reassessment of the situation.

The provisions of the Opinion sound highly progressive; however, when the AG's Opinion is considered as a whole, suppliers who find themselves in a situation involving a threat to national security will be in a difficult position if the CJEU follows the same approach. This is because, as noted, the AG takes the view that public purchasers have limited ability to challenge the findings of the responsible authorities concerning the threat posed by a particular supplier to national security. As a result, such authorities are sufficiently free to establish such a "status" for a supplier, and there are almost no means of limiting that freedom.

Duty to state reasons and judicial review

As regards the statement of reasons for decisions, the AG lays down a clear standard: the contracting authority must inform the excluded supplier of the substance of the reasons for the decision, while preserving the confidentiality of information relating to national security. It is not necessary to disclose all classified information - it is sufficient to indicate the legal basis, the fact that information was received from the competent authorities, and a general reason, such as links to foreign states. The criterion for how much information to provide concerns whether disclosure could directly and specifically harm national security, while applying only the strictly necessary limitations on the right of defence. An interesting detail is that the AG notes that the fact that certain information was publicly available does not mean that it must be disclosed during the exclusion procedure, because it must be assessed in the context of the threat to national security.

As regards judicial review, the AG's position is strict and clear: decisions on exclusion must be subject to comprehensive and effective judicial review. The court must be able to examine all the factual and legal circumstances, including classified information—confidentiality of the information cannot be invoked against the court. Even if the contracting authority itself did not have access to classified information, that does not in itself mean that the right of defence has been infringed, provided that the court was able to assess that information independently.

Must the ground for exclusion be indicated in the procurement documents?

In practice, a question that frequently arises is whether the ground for exclusion must be clearly indicated in the procurement documents in order for it to be applied. The AG's answer is: not necessarily. Under the principles of equal treatment and transparency, a contracting entity is not precluded from applying a ground for exclusion laid down in national legislation, even if it was not indicated in the procurement documents. The AG's reasoning is based on the fact that a "duly informed and ordinarily diligent" supplier cannot be unaware of generally applicable national legislation. This conclusion is the antithesis of the quintessence of the public procurement procedure. It runs counter to the fundamental principle established by the CJEU in Pizzo C-27/15 and other cases, that all tender conditions must be set out in the public procurement documents. However, as mentioned, it is important not to forget that exclusion on grounds of a national-security threat is not a public procurement procedure; accordingly, neither the aforementioned precedents nor the analogy in the case-law associated with them apply.

The “export" of a threat to national security into other procurements

One specific but highly significant practical aspect of the Skinest Baltija case is whether a Government resolution adopted in relation to one procurement may be applied to an entirely different procurement procedure. The AG’s position is essentially yes. Such an “extended" application may be justified if the procurements are similar and relate to a vulnerable sector. However, the requirements of proportionality, assessment of relevance and the right of defence must also be observed here. It is particularly important that the resolution is not “eternal”: the supplier must have the opportunity to submit new data and request a review of the situation.

This point is particularly relevant in practice. The AG’s Opinion gives rise to hope that a company which was excluded from a tender for dismantling a nuclear power plant because of a threat to national security will not be excluded from a tender for painting a school wall. However, once again, viewed as a whole, the question remains open as to the effective practical applicability of this legal reasoning, particularly in view of the fact that the contracting authority has no discretion (unless provided for by law) to assess or refute the reports of the authorities responsible for monitoring threats to national security and the assessments set out in them. In other words, there are very serious doubts as to the practical applicability of these AG conclusions if those conclusions are transposed into a CJEU judgment word-by-word.

What’s next?

This AG Opinion is one of the most significant EU-level documents directly related to Lithuanian and EU-wide public procurement practice in the context of national security. The AG essentially confirmed that the model chosen by Lithuania - to exclude suppliers from procurements on the basis of information from the competent authorities concerning a threat to national security - is compatible with EU law. This is an important signal not only for Lithuania but also for other Member States seeking legal instruments that enable them to protect their public procurements from entities connected with hostile third countries.

At the same time, the AG clearly drew the boundaries. National security is not and cannot be a blanket justification - each exclusion must be based on a specific, individual assessment and up-to-date data, and minimum guarantees of defence must be ensured for the supplier. Courts bear a special responsibility: they must carry out a comprehensive review and examine all information, including classified information, so that they can independently assess the basis for the decision. And although the legal part of the AG’s Opinion is balanced, emphasising the importance of the principles of proportionality and good administration and the duty to comply with the legal requirements associated with them, in practice this legal approach will nevertheless have several adverse consequences for market participants.

First, the Member States will, in principle, have to devote substantial attention to establishing and legally regulating the procedure related to the assessment of a national-security threat in public procurement. General rules will not suffice.

Second, a legal framework and related case-law must be established to provide for how a supplier that has been recognised as a threat to national security could effectively demonstrate that the circumstances which led to such a “negative status” have been eliminated or no longer exist. Only in this way can it be ensured that a supplier will not be excluded from the public procurement market permanently. The current AG Opinion creates only the preconditions for such a practical “rebirth of the supplier”, but they are extremely vague.

Finally, it is to be hoped that the CJEU will clarify the conditions for applying the right to judicial protection in the situations under consideration. Although the AG emphasises that this right must be exercised effectively under EU law, the Opinion seeks to “balance“ different values and, if the situation does not change as a result of such verbal legal acrobatics, everything will remain as it is - to the detriment of

suppliers - with the answer “classified” being given each time the question “what am I being accused of?” is asked.