

Levelling the Playing Field

How do you level the playing field, specify correctly and assess tenders objectively when the incumbent has a favourable position or built in advantage?

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03 June 2026



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Introduction

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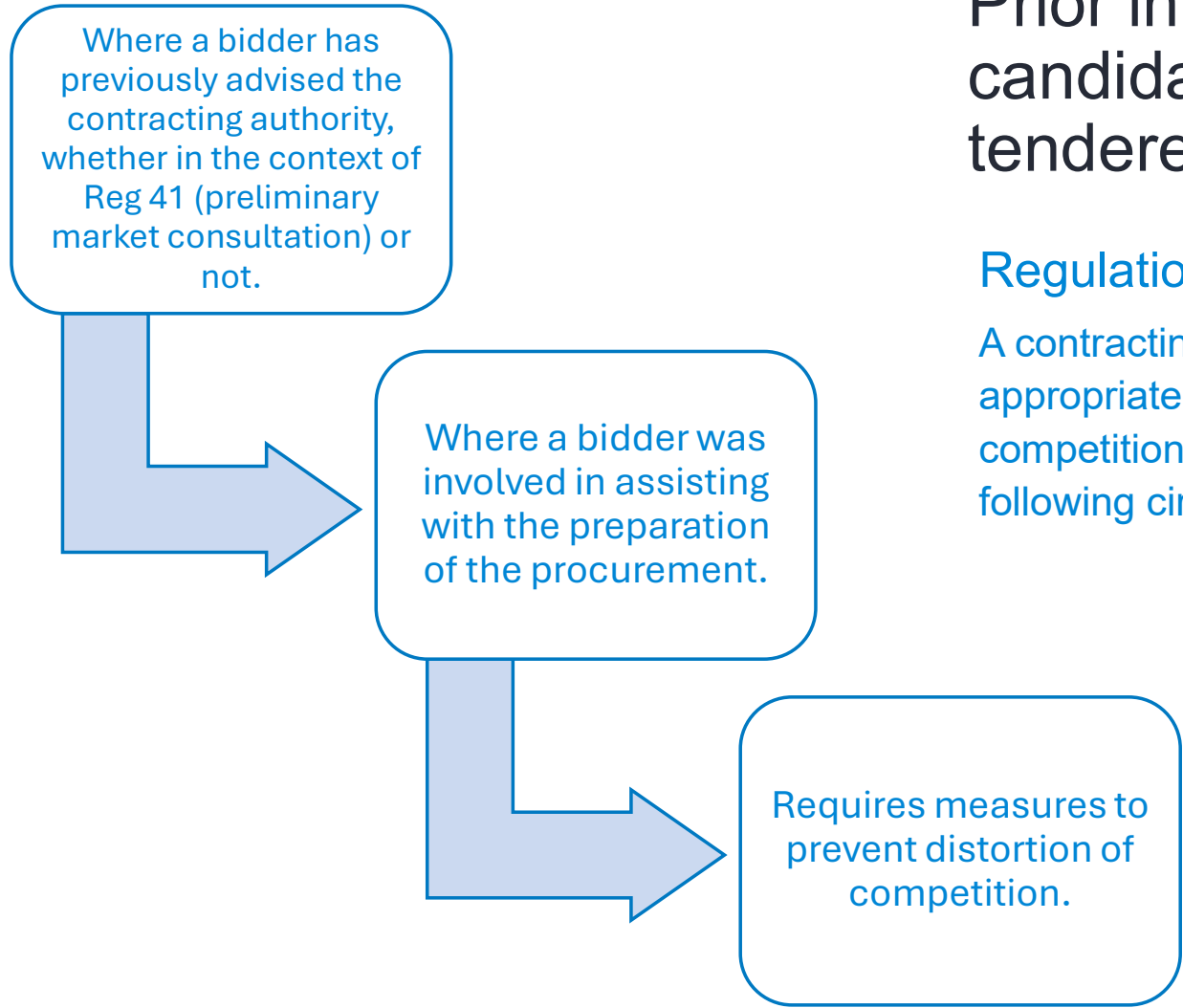
Core Legislation

Legal framework in Scotland

- Public Contracts (Scotland) Regulations 2015
- Procurement Reform (Scotland) Act 2014
- Procurement (Scotland) Regulations 2016

- Procurement Act 2023





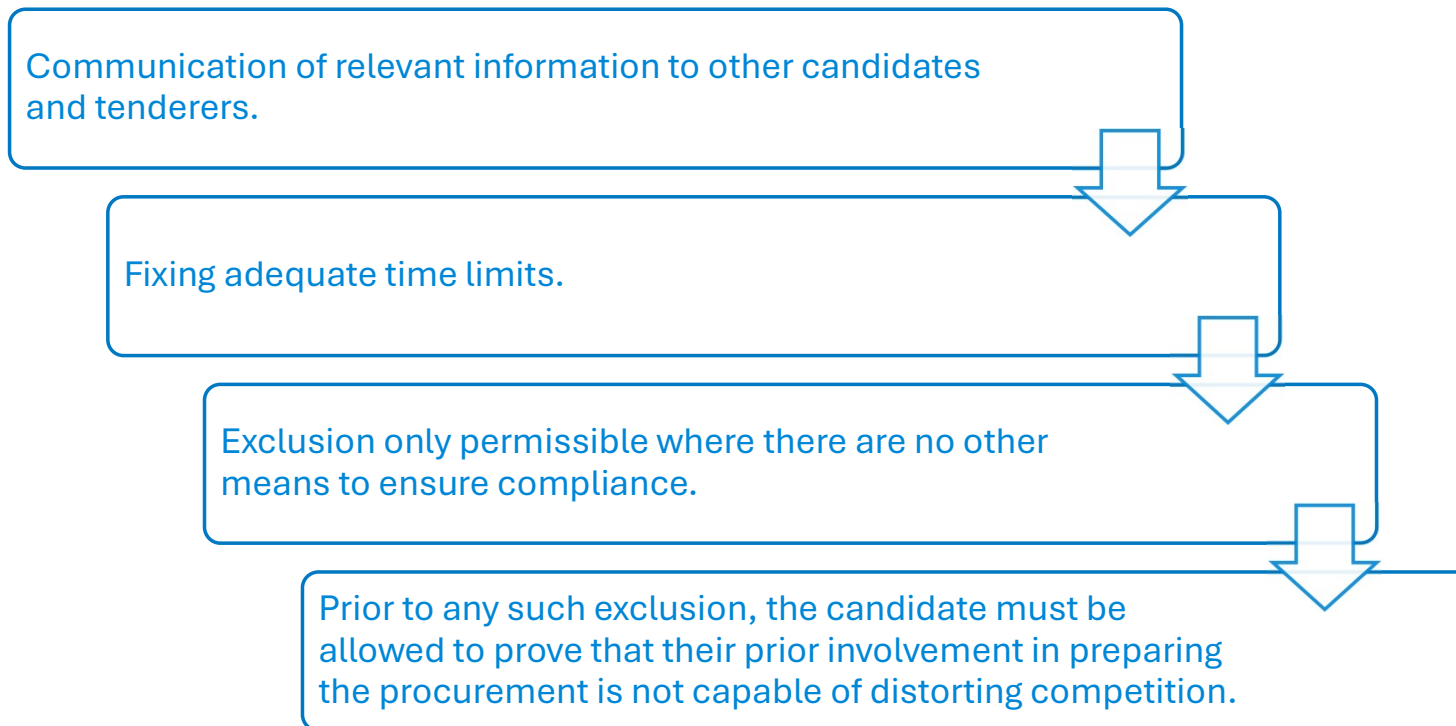
Prior involvement of candidates or tenderers

Regulation 42 (2015 Regs)

A contracting authority must take appropriate measures to ensure that competition is not distorted when the following circumstances apply.

Prior involvement of candidates or tenderers

'Appropriate measures' under Reg 42



Provision for exclusion of operators where distortion of competition may arise:

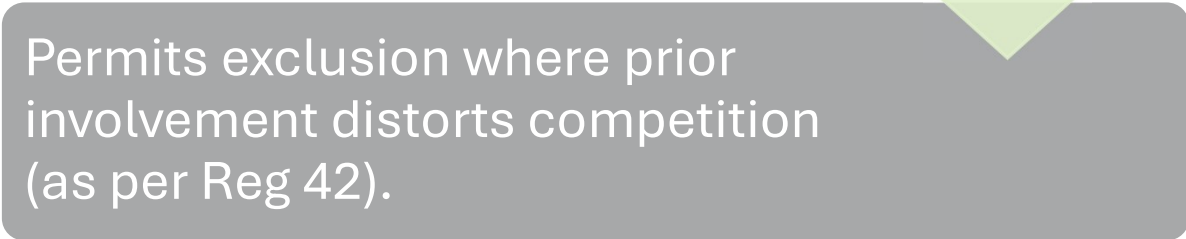
Regulation 58(8)(f) of the 2015 Regs.



Regulation 9(5)(f) of the 2016 Regs.

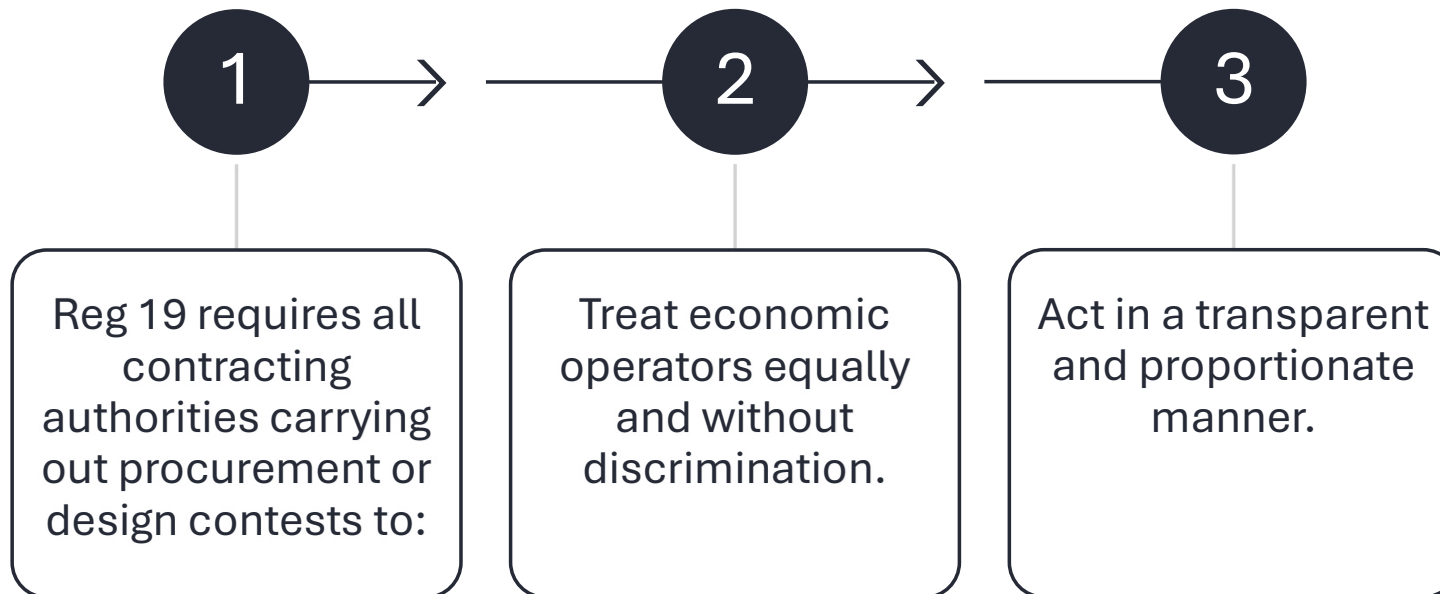


Permits exclusion where prior involvement distorts competition (as per Reg 42).



Principles of procurement

Regulation 19 (2015 Regs)



The Procurement Act 2023



Covered Procurement (Section 12)



Section 12(2) “a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment”



Section 12(3) where different treatment is justified “the authority must take all reasonable steps to ensure it does not put the supplier at an unfair advantage or disadvantage”

The Procurement Act 2023

Preliminary Market Engagement (Section 16)

“In carrying out preliminary market engagement, a contracting authority must take steps to ensure that:
(a) suppliers participating in the preliminary market engagement are not put at an unfair advantage, and
(b) competition in relation to the award of the public contract is not otherwise distorted.” (Section 16(3))

If the supplier has an unfair advantage and the advantage cannot be avoided then the contracting authority must treat the supplier as an excluded supplier and exclude them (Sections 16(4) and 16(5))



Principle of equal treatment

Fabricom SA v Belgium State [2008]

(Joined Cases C-21/03 and C-34/03)

“the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition.”

Fabricom SA v Belgium State [2008]

The contracting authority must meet its obligations to ensure transparency and equal treatment between bidders:

“... the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified.”

Fabricom SA v Belgium State [2008]

While the equal treatment principle does not preclude a contracting authority from taking into account the market advantages enjoyed by one candidate above another:

In *Fabricom*, it was recognised that to inflict a rule enforcing the automatic exclusion of a candidate (based on their carrying out of preparatory work) without permitting that candidate to demonstrate that their involvement would not distort competition, would be **disproportionate**.

The court held that such a rule would go “beyond what is necessary to attain the objective of equal treatment of all tenderers.” (para 34).



Neutralising advantage

Proof IT SIA v EIGE [2018]

(Case T-10/17)

The General Court of the European Union considered an action brought by Proof IT SIA (**Proof IT**), an undertaking operating in the information technology sector.

Proof IT asked the court to annul the decision of the European Institute for Gender Equality (**EIGE**) rejecting a tender (in respect of a procurement for website and intranet services) submitted by Proof and awarding the contract to another (successful) tenderer.

Proof IT alleged that:

1. The contract award criteria were imprecise;
2. The evaluation process lacked transparency;
3. EIGE committed manifest errors of assessment in evaluation of the applicant's tender, the correction of which would lead to a different tender result; and
4. EIGE breached the principle of equal treatment by interpreting the award criteria in a manner which benefitted the successful tenderer (through knowledge it had previously acquired in a separate contract with EIGE).

Proof IT SIA v EIGE [2018]

Background (call for tenders)

EIGE's call for tenders specified that the contract was to be awarded to the most “*economically advantageous offer*” based on a pre-formulated *quality / price ratio*.

The call for tender was accompanied by specifications setting out award criteria and their weighting.

At Proof IT's request, following the rejection of its tender, EIGE provided information concerning the evaluation and score of the tender submitted by the successful tenderer.

Proof IT objected to the evaluation of its tender, with EIGE responding that its decision would not be altered and that the methodology described in the tender specifications had been followed.

Proof IT SIA v EIGE [2018]

Alleged breach of equal treatment

In deciding whether the successful tenderer's inherent de facto advantage led to a breach of the principle of equal treatment, the Court pointed out that:

“... the alleged advantage of the successful tenderer, on the assumption that it is proven, is not the consequence of any conduct on the part of the contracting authority.”

Proof IT SIA v EIGE [2018]

Alleged breach of equal treatment (ctd)

“Unless such a contractor were automatically excluded from any new call for tenders or, indeed, were forbidden from having part of the contract subcontracted to it, it is in fact **inevitable** that an advantage will be conferred upon an existing contractor or the tenderer connected to that party by virtue of a subcontract, since that is inherent in any situation in which a contracting authority decides to initiate a tendering procedure for the award of a contract which has been performed, up to that point, by a single contractor.”

Proof IT SIA v EIGE [2018]

No breach of equal treatment:



“Not apparent from EIGE's evaluation report that the successful tenderer received [more] points because of its knowledge acquired in the course of performing the preceding contract”




“The successful tenderer's points award (20/20) could be explained **only** by the fact that it gave **better answers** (i.e. was more economically advantageous) and illustrated a "deep understanding of the objectives of the framework contract.”

Proof IT SIA v EIGE [2018]


Neutralising *inherent de facto advantage*

The Court recognised that to completely nullify a candidate's *inherent de facto advantage*, the contracting authority (EIGE) would have had to exclude the successful tenderer from the process entirely.

The case cited previous EU case law (*Evropaïki Dynamiki v Commission*) which recognised that:



“... even the exceptional knowledge acquired by a tenderer as a result of work directly connected with the preparation of the tendering procedure in question by the contracting authority itself [**cannot**] lead to it automatically being excluded from that procedure.”



It is established in EU law therefore that the principle that tenderers should be treated equally **does not** “place any obligation upon the contracting authority to neutralise absolutely all the advantages enjoyed by a tenderer where the existing contractor is a subcontractor of that party.”



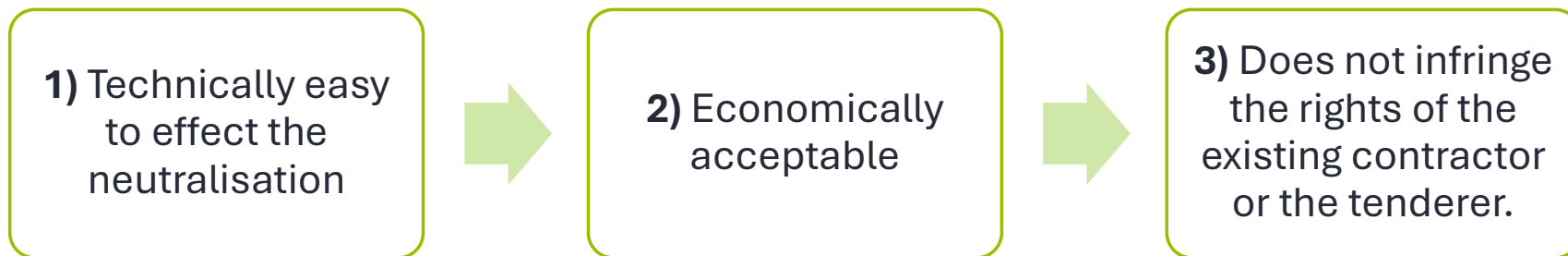
Neutralisation: the 3-fold test

Evropaiki Dynamiki v Commission [2008]

(Case T-345/03)

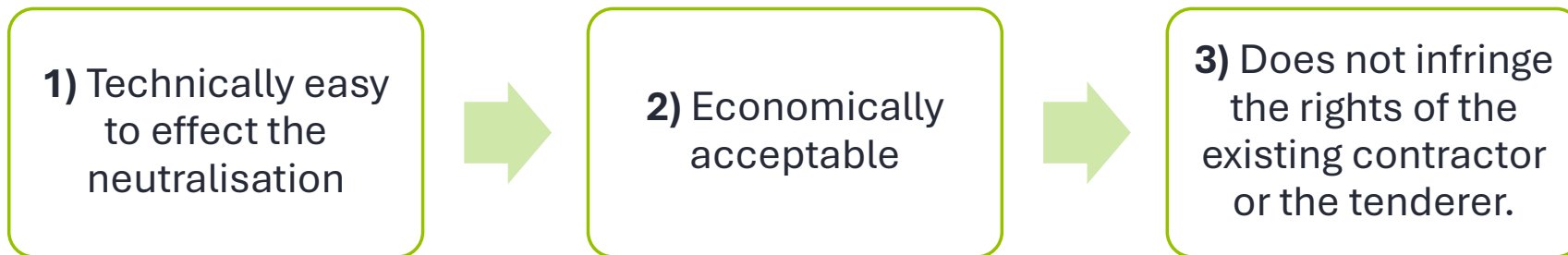
As determined in the case of *Evropaiki Dynamiki*, under EU law –

... in order to protect as far as possible the principle of equal treatment as between tenderers and to avoid consequences that are contrary to the interests of the service of the contracting institution, the potential advantages of the existing contractor or a tenderer connected to that party by virtue of a subcontract **must none the less be neutralised**, but only to the extent that it is:



Evropaïki Dynamiki v Commission [2008]

Applying differential treatment



Where a contracting authority therefore applies differential treatment in a manner consistent with points (1), (2) and (3), **this will be permissible** in order to nullify an incumbent operator's advantage.

Evropaiki Dynamiki v Commission [2008]

Application in the current case

The Court considered a general call for tenders made by the Commission of the European Communities (**Commission**), relating to the development and provision of a new version of services in support of the Community Research and Development Information Service (**CORDIS**).

- CORDIS being an informatics tool which enables framework programmes for European research to be implemented.

It was found that the incumbent contractor was in a position from (and before) the beginning of the tender procedure, in having full knowledge of crucial information contained on CORDIS, which was relevant to the tender.

- This contrasted with the availability of the same information to contesting tenderers, who were only given access to this gradually, during the tender procedure.

Evropaïki Dynamiki v Commission [2008]

Application in the current case (ctd)

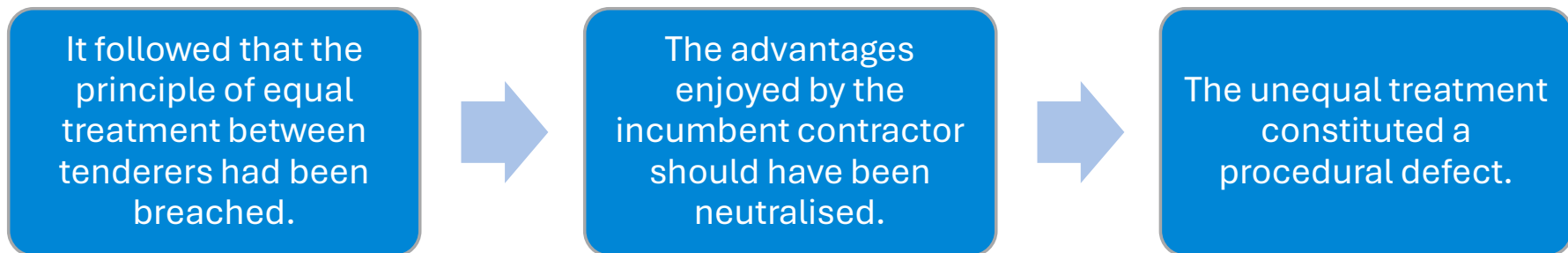
The Court found that because the Commission had the full extent of the relevant information at its disposal from the commencement of the tendering procedure, it could have:

- 1 Easily made the information available to all tenderers in the form of an annex to the tendering specifications.
- 2 Easily informed the prospective tenderers without incurring additional costs.
- 3 Shared this information with third parties without infringing the rights of any party (e.g. intellectual property rights) – this was expressly acknowledged by the Commission.

at para 159.

Evropaïki Dynamiki v Commission [2008]

Unequal treatment had therefore occurred:



Bromcom Computers plc v United Learning Trust, United Church Schools Trust [2022]

EWHC 3262 (TCC)

Heard by the Technology and Construction Court of England and Wales, the case concerned the award of a £2m contract from United Learning Trust (**ULT**) for the supply of a cloud-based management information system (**MIS**) for 57 schools.

Background

- Bromcom Computers plc (**Bromcom**) were unsuccessful in their tender, with the contract awarded to Arbor Education Partners Limited (**Arbor**).
- Arbor had already provided an MIS to 15 of ULT's schools (which was outside the scope of the procurement).
- Bromcom, in challenging the outcome of the procurement, made various allegations alleging multiple breaches of the regulations in relation to the scores awarded during the evaluation process.

Bromcom Computers plc v United Learning Trust, United Church Schools Trust [2022]

Neutralising incumbent advantage

As an incumbent supplier to ULT (contracting authority), Bromcom argued that ULT should have taken steps to ensure that the inherent advantage enjoyed by Arbor as a result of its position, was neutralised.

The Court acknowledged the precedent set by *Evropaiki Dynamiki* which recognises that while there is no absolute obligation which exists to neutralise all advantages enjoyed by incumbents - it shall be necessary to neutralise advantages where:

- 1) It is technically easy to do so;
- 2) It is economically acceptable
- 3) Neutralisation does not infringe the rights of the existing contractor or said tenderer.

Bromcom Computers plc v United Learning Trust, United Church Schools Trust [2022]

Addition of £4,405 cost applied to Bromcom's tender

- The Court addressed an issue in relation the contracting authority (ULT) adding **£4,405** to Bromcom's total costs, to cover the transfer of data from its own MAT Vision Solution to the contracting authority's own data warehouse.
- This cost was not charged to Arbor (as incumbent) because the relevant interface had already been set up in respect of Arbor's existing work for the 15 other schools. No further cost would be incurred as a result of adding an additional 57 schools to this existing interface.
- Separately, Arbor had also included a **rebate** on their price offered in respect of the tender, which was based on their charges levied for the 15 schools not relevant to the tender contract.

Bromcom Computers plc v United Learning Trust, United Church Schools Trust [2022]

Addition of £4,405 cost applied to Bromcom's tender

While the Court decided that there was manifest error and/or unfairness in ULT (as contracting authority) adding a further £4,405 to Bromcom's cost model – separately, it was acknowledged that "**this cost would have plainly been a case for neutralisation**", as well.

The judge noted that, in the circumstances:

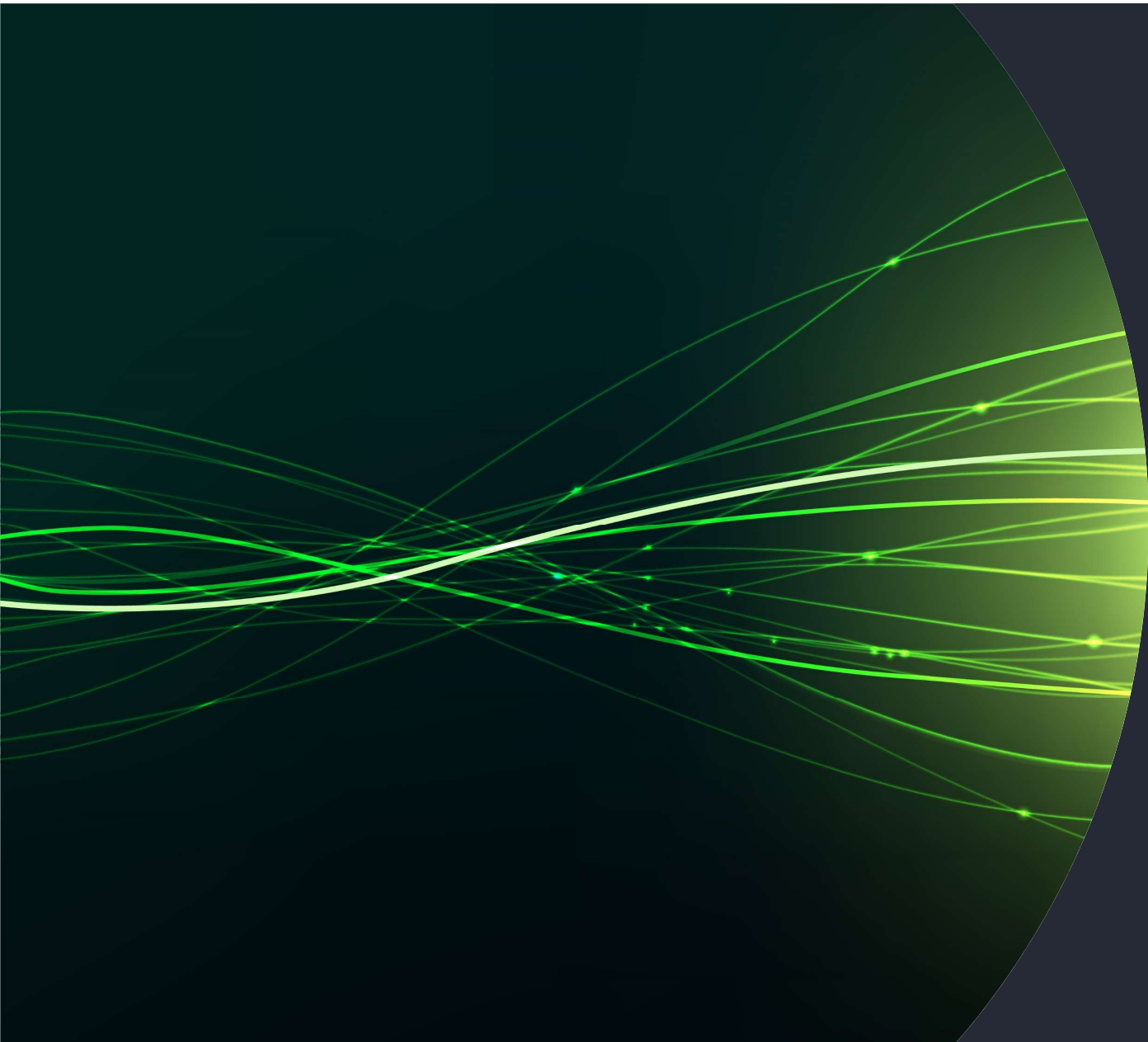
1. The removal of the £4,405 was technically easy
2. It was economically justified (namely not to deter competition where there was an inherent advantage)
3. It did not infringe Arbor's (as incumbent) rights.

Bromcom Computers plc v United Learning Trust, United Church Schools Trust [2022]

Arbor's rebate

In respect of the contractual rebate offered by Arbor, the Court held that the issue here was...

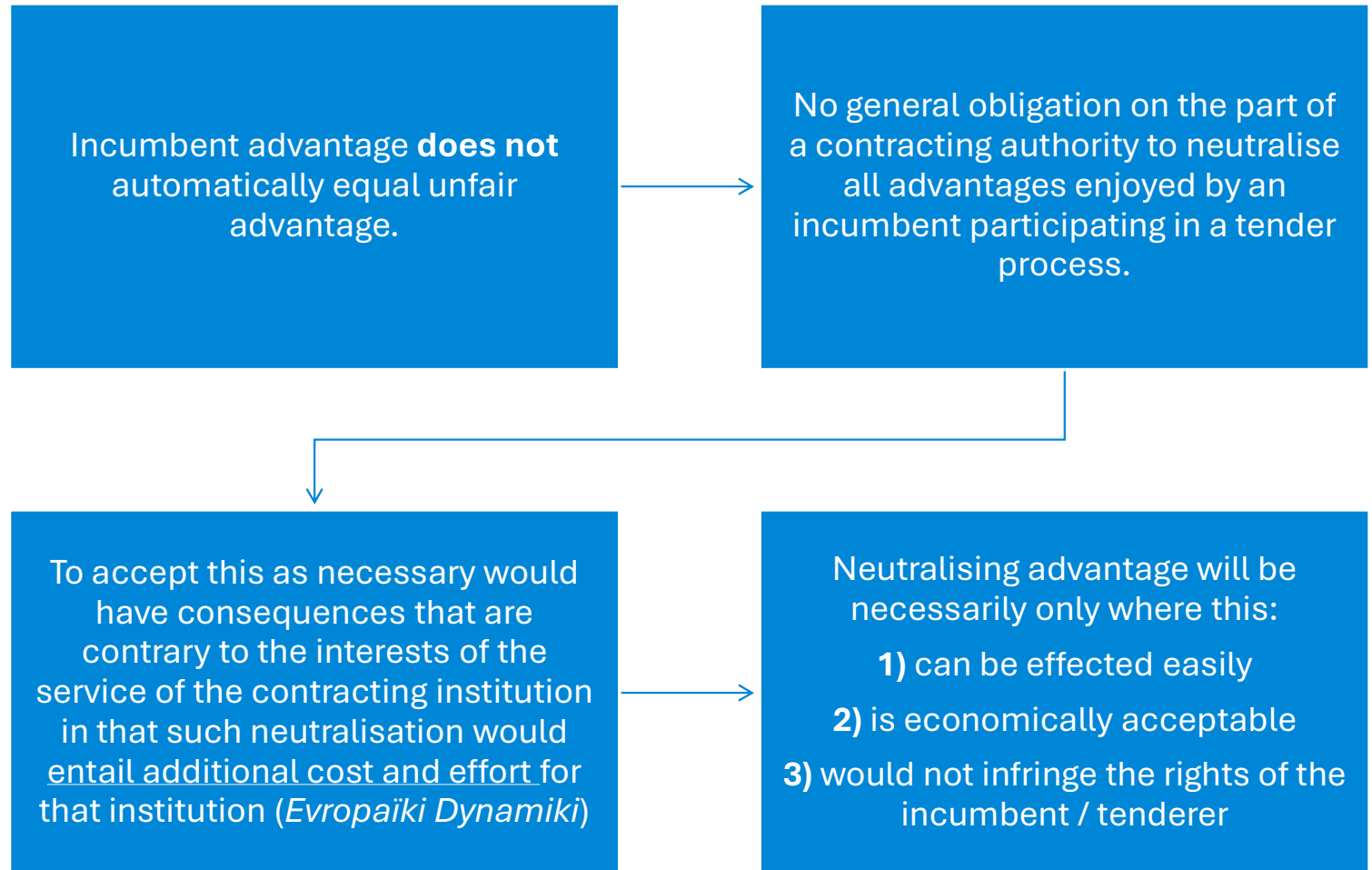
- “***not so much the inherent advantage of the incumbent***” but rather the actions of the contracting authority (ULT) in permitting Arbor to offer something that “***is in substance relating to a different contract.***”
- This was held to have infringed Regulation 67(2) and 67(5) (*Contract award criteria*) of the Public Contracts Regulations 2015 (applying in England).



Conclusion

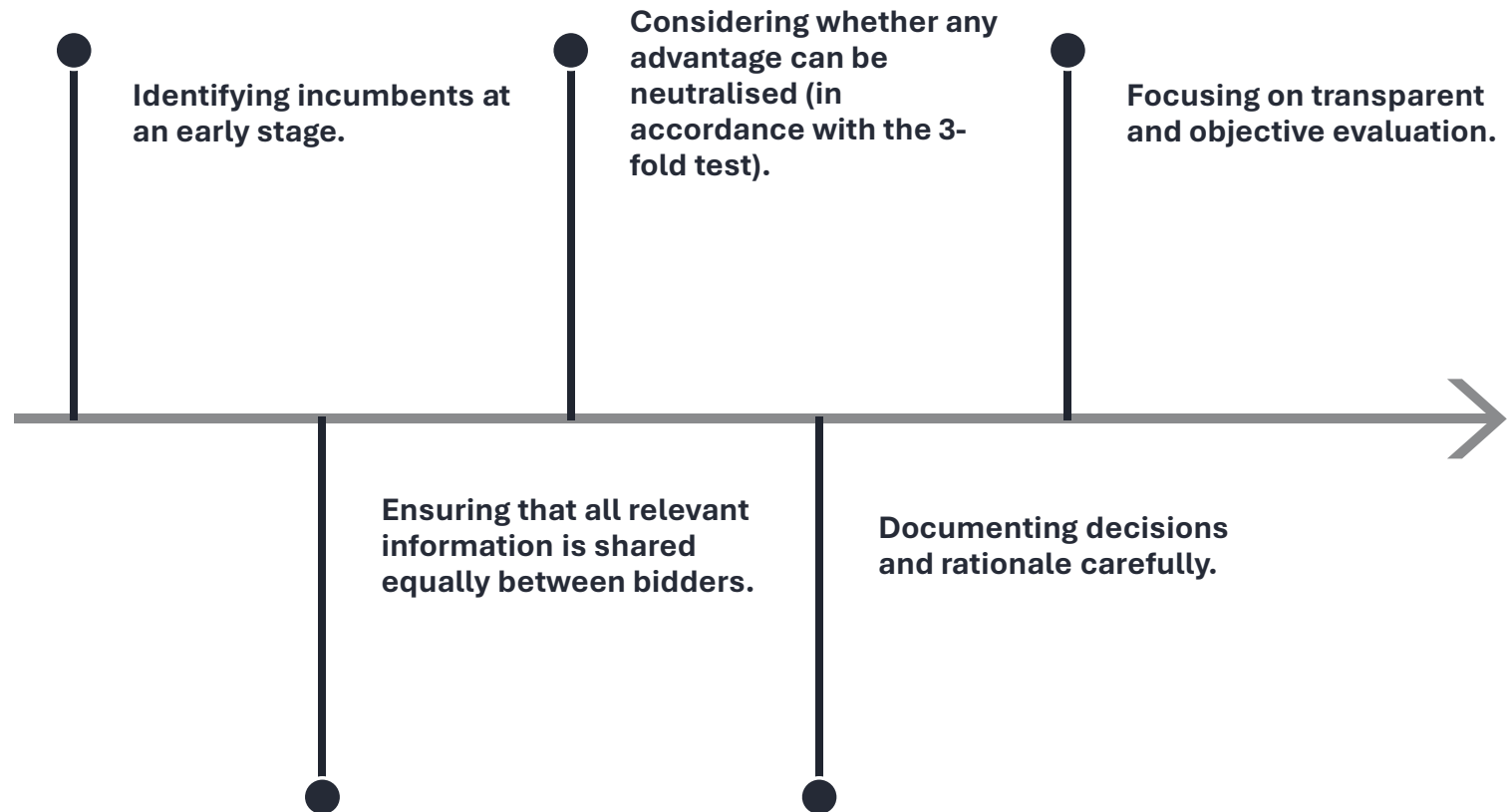
Case Law Roundup

Levelling the playing field: neutralising advantage



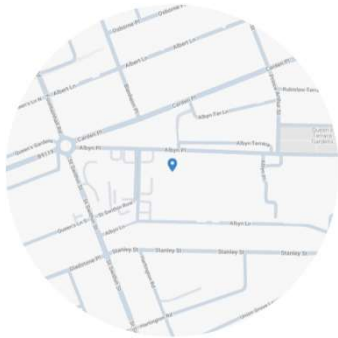
Practical Takeaways

Creating a level playing field in practice



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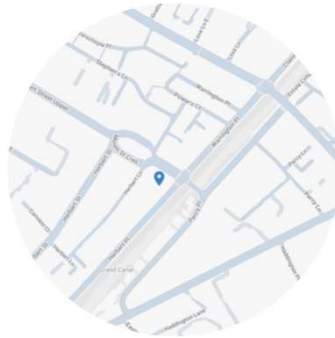


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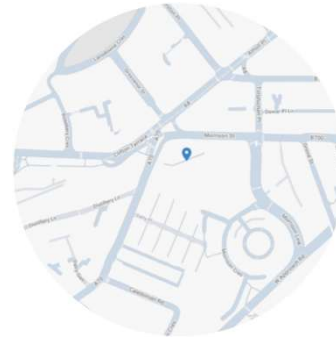
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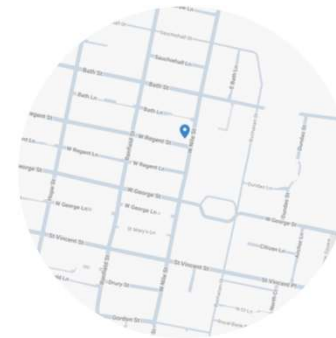


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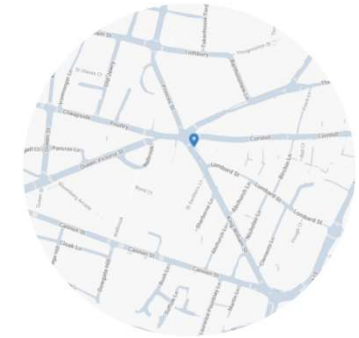


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