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“Or Equivalent”: Open Source, Product Neutrality, and the Service Contract

What the Bundestag opinion on open-source tenders says, what the Court of Justice changed, and what the Public Procurement Act should say

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Executive summary

In March 2026 the research service of the German Bundestag answered a member’s question: may a public contract for software be restricted to open-source software [1]? The opinion became public in July, in the middle of the debate on the EU Open Source Strategy [2] and the Cloud and AI Development Act [3]. Since then the procurement press has condensed it into one sentence: a purely blanket or politically motivated restriction to open source is impermissible [4][7]. That sentence is the second half of the opinion’s last paragraph.

The whole opinion says four things. A restriction to open source is lawful when it is justified by a reason related to the contract, proportionate, and written down. The reasons it names are the standard ones: IT security, interoperability, the buyer’s ability to develop the software further, and the avoidance of lock-in. Lock-in is the dependence on one supplier that makes every later purchase a purchase from that supplier. A political priority for open source written into a statute is lawful when it is conditioned on technical feasibility and economic efficiency, as Thuringia’s has been since 2020 [32]. After the Court of Justice’s ruling of 9 January 2025, choosing open source or full rights over the source code at first award “may be required by procurement law”, because a buyer that creates its own exclusivity may not later use that exclusivity to award without competition. The opinion prohibits a restriction with no reason on file. That is a drafting requirement.

The opinion analyses one object. The debate concerns three. They are licences to standard software, services on open-source software the buyer already runs, and the development of new software with an open-source licence on the deliverable. Procurement law never touches the code, which is free by construction; it governs the paid work around it. On the object that earns most of the open-source providers’ revenue, services on software already in place, naming the product restricts no bidder, because every qualified firm can read, modify and host the code. The Conseil d’État held exactly that in 2011 for a French region’s school platform. A German procurement chamber annulled in 2021, on the same reasoning, a sole-source award of maintenance on open-source software. The Commission’s promised tender guidelines do not cover that case. The Public Procurement Act proposal of 9 September 2026 codifies the Court’s rule against self-created exclusivity for technical reasons and leaves it out for exclusive rights, the ground the Court ruled on.

One number. In 2025 about one software or IT award notice in nine in the Union recorded a procedure without any prior call for competition; in Germany it was more than one in five. Two

thirds of those cite technical reasons or exclusive rights. That is the stock of exclusivity the Court's ruling addresses.

Five asks follow.

1. **Guidelines: add the service case.** The Strategy's tender guidelines should state that naming the open-source software already in place and tendering its services openly restricts no bidder, with the Picardie reasoning, and should publish a one-page model justification for an open-source requirement built on the opinion's own four reasons.
2. **Guidelines and CADA implementing acts: division into lots.** A subscription-and-support lot contracted with the publisher or maintainer, separate from the integration lot open to every integrator. The Public Procurement Act proposal makes considering lots mandatory and names dependency on a single supplier as a reason to divide; the guidelines should say what the software lots are.
3. **Public Procurement Act: name the grounds and fix the asymmetry.** Extend the attribution rule of Article 47(a)(ii) to exclusive rights in point (iii), so that the Court's ruling is codified for the case it decided. State that a requirement on the rights the buyer receives over software, including the right to have any third party maintain it, is a functional requirement under Article 88(3) and no reference to a make or type.
4. **National clauses: condition on lifecycle cost.** Any priority clause of the Thuringian kind should define "economically efficient" as lifecycle cost including exit and migration. Evaluated on acquisition price, the condition favours the incumbent in the common case and the priority never fires.
5. **Publish the number.** The share of software awards made without a prior call, by justification, year and Member State, from the Union's own notice data. The count in section 7 is one script against public data.

1. What the opinion says and what it is made to say

The opinion is an eighteen-page elaboration by the Bundestag's research service, department WD 7 for civil, criminal and media law, completed on 5 March 2026 at the request of one member of parliament [1]. Its disclaimer says what such documents always say: the work reflects the view of its authors, binds no organ of the Bundestag and states the law as of its date. It is a survey of German and EU procurement law with the open-source question answered in its last six pages. It can settle what the commentaries say the law is. It cannot settle what a court would do, and does not claim to.

Two readings of it circulate. The open-source associations read the permission: the Open Source Business Alliance titled its press release "Open-Source-First ist vergaberechtlich zulässig", open-source-first is lawful under procurement law [5]. The heise report said that "a restriction to open source is by no means generally impermissible" [6]. The procurement press read the limit: "Unzulässig bleibt eine rein pauschale oder politisch motivierte Festlegung ohne konkreten Bezug zum Auftragsgegenstand", a purely blanket or politically motivated determination with no concrete relation to the subject of the contract remains impermissible [4]; "Rein politische Erwägungen reichen für eine Festlegung auf Open Source nach dem Gutachten nicht aus", purely political considerations do not suffice [7]. The second reading drops three passages that belong to the first.

The first is the opinion's own conclusion, pages 17 and 18:

> Im Ergebnis ist eine Beschränkung auf Open Source Software vergaberechtlich zulässig, wenn sie sachlich gerechtfertigt, verhältnismäßig und transparent begründet ist. Unzulässig ist hingegen eine rein pauschale oder politisch motivierte Festlegung ohne konkreten Bezug zum Auftragsgegenstand.

A restriction to open source is lawful under procurement law when it is objectively justified, proportionate and transparently reasoned. A purely blanket or politically motivated determination with no concrete relation to the subject of the contract is impermissible. The second passage, page 17, concerns the statutory level:

> Landesrechtliche Regelungen – etwa in Thüringen – zeigen, dass eine politische Priorisierung von Open Source Software zulässig ausgestaltet werden kann, sofern sie an technische Möglichkeit und Wirtschaftlichkeit anknüpft.

State law, Thuringia's for instance, shows that a political priority for open source can be designed lawfully when it is tied to technical feasibility and economic efficiency. The third, also page 17, draws the consequence of the Court of Justice's January 2025 ruling:

> In diesem Kontext kann die Entscheidung für Open Source Software oder für umfassende Nutzungsrechte am Quellcode nicht nur wirtschaftlich sinnvoll, sondern auch vergaberechtlich geboten sein.

In that context the decision for open-source software, or for comprehensive rights of use over the source code, can be economically sensible and can be required by procurement law.

The press reading says	The opinion says
A blanket restriction to open source is impermissible.	A restriction is lawful when justified, proportionate and documented. A restriction with no stated reason is impermissible (pp. 17–18).
A politically motivated restriction is unlawful.	Purely political considerations do not count as a reason in a tender (p. 14). A political priority in a statute is lawful when conditioned (p. 17).
There is one rule.	There are two regimes. Above the EU thresholds the product-neutrality rule of § 31(6) of the procurement regulation applies. Below them budget law applies, where economy and efficiency "can even require" a preference for open source (p. 16).
Open source is the exception to be justified.	After the Court's ruling, open source or full source rights at first award "may be required by procurement law" (p. 17).

The body is more cautious than the conclusion: page 13 says that a blanket restriction to open source in the specification "kann" constitute an impermissible restriction of competition against proprietary suppliers; the conclusion says it "regelmäßig" does. The body supports the weaker form, which is also what the commentaries it cites say. The opinion cites no court decision on an open-source-only requirement, in Germany or at the Court of Justice; its authorities on that point are four commentaries. Two German decisions on open-source tenders exist, both on the service contract; section 5 reads them beside a third on exclusive rights.

2. The reasons are standard and one is always available

The opinion lists, at page 14, the reasons that can justify a restriction in a given case: IT security, compatibility with the infrastructure already in use, and the buyer's intention to develop the software itself. Its conclusion adds interoperability, long-term further-development capability and the avoidance of lock-in. Every one of them is a property of the contract's life cycle, as the 2014 procurement directive requires of any criterion. Article 67(3) links a criterion to the subject-matter when it relates to the supplies or services "at any stage of their life cycle". Article 70 admits performance conditions on the same footing [9].

The last reason is the one that matters, because it is available wherever maintenance and updates will follow, which is every software contract of consequence. The Court of Justice made anticipating it a duty. In the case decided on 9 January 2025 the Czech tax administration had bought an information system from IBM [8]. From the country's accession in 2004 until 2016 it kept awarding the system's maintenance to IBM without competition, on the ground that IBM held the copyright and no other firm could do the work. The Court held that a contracting authority "is required to do everything that can reasonably be expected of it in order to avoid the application" of the exclusivity exception (paragraph 31). It may not rely on the exception "when the creation or maintenance of the situation of exclusivity which it invokes for that purpose is attributable to it", including where "it had real and reasonable means from an economic point of view to put an end to such a situation". Whether the exclusivity is attributable is judged on the buyer's conduct when it concluded the previous contract and on "the action or inaction" that perpetuated the situation afterwards (paragraph 33). Intent is not required (paragraph 34). The Court also recalled its 2009 ruling against Germany: the technical specificity of software in use in an administration cannot justify a direct award "in the absence of evidence establishing that thorough research was carried out with a view to identifying operators" able to present suitable software (paragraph 30).

The ruling interprets the 2004 directive, because the Czech facts predate the 2014 one. The 2014 directive contains the same exception in Article 32(2)(b) with a sentence the older text lacked: the exceptions for technical reasons and exclusive rights "shall only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement" [9]. German law transposes it in § 14(6) of the procurement regulation [10]. The opinion draws the operational consequence at page 15:

> Durch die Entscheidung zur Nutzung von Open Source Software bereits bei der Erstvergabe kann der öffentliche Auftraggeber von Anfang an das Entstehen einer Ausschließlichkeitssituation in Form eines „Vendor Lock-ins“ mit den daraus folgenden Mehrkosten und Nachweispflichten bei Folgevergaben verhindern.

By choosing open source at the first award, the buyer prevents the exclusivity from arising, with the extra cost and the burden of proof it would bear at every later award. The opinion's further gloss, a continuing duty to monitor the market and an exception where a full migration would be a disproportionate burden on the budget, comes from the German commentary it cites and reads the Court's "real and reasonable means from an economic point of view" as a cost test. The reading is plausible; it is the commentary's.

So the operative cost of the opinion's rule is documentation. A buyer whose file says three things has stated a contract-related reason in the opinion's own terms: the software will need maintenance; any qualified firm should be able to provide it; the buyer will not be the Czech tax administration of 2016. The cost of writing that page falls hardest on the small buyers who procure most software, which is why a published model justification is the cheapest instrument in this note.

“Purely political” is a German category, the doctrine of criteria extraneous to procurement. The German legislator has been moving it. The Act to accelerate public procurement, in force since 1 July 2026, added “Aspekte der digitalen Souveränität”, aspects of digital sovereignty, to the award criteria a buyer may score under § 58(2) of the procurement regulation [10][11]. The committee’s reasoning names as examples “die Nutzung interoperabler und offener IT-Systeme oder Software, die Nachvollziehbarkeit und Kontrolle von Datenverarbeitungsvorgängen”, the use of interoperable and open IT systems or software, and traceability and control over data processing [12]. The same Act added security of supply and digital sovereignty to the conditions a buyer may impose on contract performance under § 128(2) of the competition act [13]. Two months earlier the federal digital ministry and the IT Planning Council had issued the revised standard contract terms for IT procurement, under which open source is the default for new software developed for the public sector [14]. The opinion is dated March and predates all three. The distinction that remains is between scoring and requiring: an award criterion ranks bids and a specification excludes them; the product-neutrality rule of § 31(6) governs the second. In Germany today a buyer may score openness and may require it with a documented reason.

3. “Or equivalent”: equivalent in what?

Article 42(4) of the 2014 directive reads [9]:

> Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words ‘or equivalent’.

German law transposes it as § 31(6) of the procurement regulation [10]. The Court read the provision on 16 January 2025 in a Belgian case about sewer pipes, where the utility had required vitrified clay for sewage and concrete for rainwater and excluded plastic without saying why [15]. The Court held four things.

- The list of methods for writing a specification in Article 42(3) is exhaustive.
- The opening words “unless justified by the subject-matter” are a distinct exception to be “interpreted restrictively”, covering “only situations in which a requirement … follows inevitably from the subject matter of the contract” (paragraph 53).
- The material of a product “cannot be classified as a ‘performance’ or ‘functional requirement’” even where it contributes to one (paragraph 56).
- Where the material does not follow inevitably from the subject-matter, the buyer “may not, without adding the words ‘or equivalent’, require a particular material to be used” (paragraph 61).

The opinion applies that regime to “open source” as if open source were a make, a type or a specific production. The alternative reading is that an open-source requirement specifies the rights the buyer receives: to inspect the code, to modify it, to redistribute it, and to have any third party maintain it. Any publisher can meet it by choosing the terms on which it delivers. Source-code escrow, unlimited rights of use and the transfer of intellectual property are ordinary contract terms that no one calls product restrictions. The directive says so in Article 42(1): “The technical specifications may also specify whether the transfer of intellectual property rights will be required” [9]. Italy’s Constitutional Court took that line in 2010, when the State challenged a Piedmont law giving preference to free software as a breach of

competition. The concepts of free software and of software with inspectable code, the Court held, “non sono nozioni concernenti una determinata tecnologia, marca o prodotto, bensì esprimono una caratteristica giuridica”, are no notions of a technology, brand or product and express a legal characteristic. The harm to competition the State feared “non è configurabile”, cannot be made out [16].

The Court of Justice has not ruled on the classification. The pipe judgment gives the other side its analogy: where products in a sector are distinguishable by how they are made, requiring one way of making them is a reference to a type. The safe drafting does not depend on winning that argument. A requirement stated at the rights level, with the words “or equivalent” attached, costs nothing: any licence that grants the same rights qualifies; no proprietary licence does. The requirement is emptied only when “equivalent” is read at the feature level, as a proprietary product with a matching feature list. The lab’s review of the European Interoperability Framework found the same escape at work for interface requirements, where “or equivalent” is read as functional similarity in place of substitutability at the named interface [17]. The two readings decide, in passing, the status of source-available licences that let the buyer read the code and forbid a third party from maintaining it commercially: they pass the feature test and fail the rights test.

Below the EU thresholds the German rule is § 23(5) of the sub-threshold procurement order [18]. It requires “or equivalent” as the regulation does, then lets the buyer drop it where a substantive reason justifies naming a product. It names one such reason: the case where the buyer would otherwise have to procure products with different characteristics from those it already has, at disproportionate cost or with disproportionate difficulties “bei Integration, Gebrauch, Betrieb oder Wartung”, in integration, use, operation or maintenance. That is the lock-in reason in reverse, written into the rule as a ground for naming the incumbent’s product. A buyer that reads it as a licence to specify what it has is choosing, each time, the situation the Court’s ruling penalises at the next award.

The Public Procurement Act proposal of 9 September 2026 would replace the three directives with one regulation [19]. Its Article 88 keeps the ban on references to a make, source or type, keeps “or equivalent”, and drops the opening words “unless justified by the subject-matter of the contract” that the Court had just read as a separate exception. It also makes functional requirements the default form: specifications “shall describe the characteristics of the solution to be procured in terms of functional requirements”, defined as requirements on “the performance, desired function, capability, outcome or result” a product must achieve “without referring to specific technical means”. Under that text the classification decides everything. A licence requirement read as a type could never be imposed without “or equivalent” and only on an exceptional basis. Read as a functional requirement on what the buyer and any third party may do with the deliverable, it is the default form the regulation prescribes. Ask 3 is that the text say which.

4. Three objects, one law

The opinion’s title covers the provision, development and modification of software; its analysis treats them as one object. Its own page 10 separates them. Downloading freely available open-source software is no contract at all, since nothing is paid. Adaptation and maintenance are services to be tendered. Standard software delivered on media is a supply contract; new development or adaptation for the buyer is a service contract. The debate needs three objects kept apart.

The first is licences to standard software. The product-neutrality rule fits it. It is also the object open source rarely presents: the code is a download; a publisher sells a subscription to support, updates and hosting, which is a service.

The second is services on open-source software the buyer already runs: implementation, adaptation, hosting, maintenance. The revenue of open-source publishers and integrators sits here, as does the German case law.

The third is the development of new software with an open-source licence on the deliverable. That is a term on the rights the buyer acquires, of the kind Article 42(1) expressly admits. The federal standard contract terms make it the default for new developments [14]. The Strategy's "public money, public code" principle is about it [2]. The Public Procurement Act proposal turns part of it into a statutory minimum. Article 63 requires the economic operator to grant licences permitting the public buyer, "either directly or through contractors or service providers acting on its behalf, to use, reproduce, execute, display, adapt, configure, integrate, maintain, repair, support, upgrade and otherwise exploit" the deliverables, over pre-existing and newly arising rights alike [19]. Third-party maintainability, which open source delivers by construction, would become a licence term every public software contract must include.

The lab's paper on buyers' clubs gives the vocabulary that keeps the three apart [20]. Open source has two layers with opposite economics: the code stock is free to all by construction; the flow that keeps it alive, maintenance, security work and evolution, has to be paid for. Procurement law never touches the stock. It governs the flow. The product-neutrality rule asks, of the flow, whether naming the stock favours one provider of it.

Object	Example	Does product neutrality bite?	Who can bid	Where it has been decided
Licences to standard software	A subscription to a proprietary office suite	Yes. Naming a product needs a reason and "or equivalent".	The publisher and its channel	Court of Justice, pipes case (2025)
Services on open-source software in place	Hosting, adaptation and maintenance of a workspace already deployed	Naming the software favours no bidder: the code is open to every bidder.	Any qualified integrator, the maintainer among them	Conseil d'État, Picardie (2011); VK Baden-Württemberg (2021)
New development with an open-source licence on the deliverable	A registry built to order and published	A term on rights, admitted by Article 42(1)	Any developer	Federal standard contract terms (2026); Public Procurement Act proposal, Article 63

5. The service contract in Picardie and in the German record

The Picardie region downloaded Lilie, an open-source digital workspace for secondary schools, at no cost. It tendered "la mise en oeuvre, l'exploitation, la maintenance et l'hébergement" of a service platform for it: implementation, operation, maintenance and hosting. Two publishers of proprietary workspaces, Kosmos and Itop, challenged the naming of Lilie as a breach of competition. The Amiens court annulled the procedure. On 30 September 2011 the Conseil d'État reversed [21]. The mention of Lilie, "en raison du caractère de logiciel libre que celui-ci présente et qui le rend librement et gratuitement modifiable et adaptable aux besoins de la collectivité par toute entreprise spécialisée", because it is free software, freely and gratuitously modifiable and adaptable to the region's needs by any specialised firm, could not be regarded as favouring Logica, the software's co-owner, nor as eliminating any operator. The commentary

on the ruling put the economics in a sentence: the contract was for services on software already acquired, so every firm in the trade could do the work, Logica included, which bid and lost on price [22].

The mirror case had been decided in Lille nine months earlier [23]. A water agency's tender for financial software required that data be stored in an Oracle database and reporting delivered in Business Objects format, with no "ou équivalent". The court annulled the procedure on the application of Nexedi, an open-source publisher: the specifications named products without justification by the object of the contract and excluded by construction every competing solution, the open-source ones among them. The two French rulings are the two sides of one rule. Naming an open-source product in a service tender favours no bidder, because any bidder can service it. Naming a proprietary product in any tender favours its publisher, because no other firm can.

German case law on open-source service tenders is two decisions, with a third on exclusive rights in a proprietary system; the 2022 decision is read from its published text, the other two from practitioner reports. The opinion cites none of them. In 2021 the Baden-Württemberg procurement chamber annulled a negotiated award without competition for the maintenance and further development of an open-source platform [24]. The buyer had reserved it to the incumbent on the ground that only the incumbent's services fitted and that any other provider would require costly interfaces. A competing open-source provider had objected that the code was open and that any third party could maintain it. The chamber agreed on both the procedure and the specification: the buyer, it found, had argued "rein von der Produktpalette des Bestandsanbieters her", purely from the incumbent's product range, and the decision's commentators drew the rule that the definition of a need should never start from one supplier's product range [24]. The file named no technical feature that justified exclusivity. That is the Picardie logic applied from the other direction: the open-source service market is contestable, so a buyer cannot sole-source it. In 2022 the Düsseldorf court decided the harder case [25]. A buyer had switched from one open-source publisher's product to a variant developed by former employees of that publisher, contracted its maintenance and over several years had it adapted to its own needs. When the contract expired it awarded maintenance and further development to the same firm without competition, citing the software's firm anchoring in its infrastructure. The original publisher's challenge failed for want of standing. Given the complexity of the adapted code, "nähere Darlegungen zur personellen sowie fachlichen Kompetenz" were required, detailed evidence of the staff and skills with which the challenger or a partner would do the work; a bare assertion of interest did not suffice. The court left open whether the direct award itself was lawful. In 2013 the Karlsruhe court had approved a direct follow-on award for the extension of a software-based dispatch system on the ground of the incumbent's copyright [26]. That was the German position on exclusive rights, which the Court of Justice's 2025 ruling now conditions on the buyer's own conduct.

The three decisions describe the service market as it is. It is contestable by construction; a chamber will annul a buyer that pretends otherwise. Adaptation can rebuild exclusivity in fact; the challenger then bears the burden of showing it can do the work. Exclusive rights, which used to close the question, now open it. Naming a product, whatever its licence, remains subject to the Düsseldorf court's three-part test for the buyer's right to define its need [27]. The specification must be justified by the subject-matter; the buyer must have stated comprehensible, objective and contract-related reasons that are actually present; the specification must not discriminate against other operators. The court applied the test on 2 September 2026 to a city that had specified one manufacturer's tablets because it already ran that manufacturer's devices and management system [28]. An existing estate alone, it held, does not justify a product specification: the buyer must document the technical dependencies, the switching costs and the feasibility of running two systems, and show why a neutral tender would be disproportionate. The incumbent-integration ground of the sub-threshold rule, read above the threshold, is a fact the buyer must prove.

The rule is symmetric in form and asymmetric in effect. A service tender on a proprietary product is sole-source in fact whatever its wording, because no other firm holds the rights to maintain it. A service tender on an open-source product is contestable whatever its wording. The litigation risk nonetheless falls on the second, because the challengers in these cases are a proprietary publisher pair in Picardie and, in Germany, an open-source firm objecting to sole-sourcing of its own market. Open-source firms challenging a tender written around a proprietary product are rarer; Nexedi is the example. A rule enforced from one side tilts buyers toward the default that draws no challenge.

6. What follows for providers

For integrators the Court's ruling changes the procedure at every follow-on award. Maintenance of a proprietary system now needs either a competitive procedure that no third party can win or a documented proof that the exclusivity is not the buyer's doing, which after the first award it usually is. Maintenance of an open-source system is a plain competitive tender that any integrator can win and that a chamber will require the buyer to hold. The buyer-side incentive runs toward open source on procedural cost alone, before any argument about price.

For publishers the same doctrine has a cost. If any integrator can win services on the publisher's product, the publisher competes on its own code with no legal advantage, as Logica did in Picardie. The question is then what funds the stock. Two instruments answer it; both are already in the CNLL's position on the Cloud and AI Development Act [29]. The first is division into lots: a subscription-and-support lot contracted with the publisher or maintainer, separate from the integration and managed-services lot open to every integrator. The 2014 directive allows it under Article 46 and asks a buyer that does not divide to say why [9]. The Public Procurement Act proposal goes further: Article 100 makes considering lots mandatory and names, among the reasons to divide, "reducing dependency on a single supplier" [19]. The second is an award criterion on maintainer status or upstream contribution. Under Article 67(3) a criterion linked to the life cycle of the service is linked to the subject-matter [9]. The quality of maintenance and the speed of security response are life-cycle properties. The Cloud and AI Development Act would introduce such a criterion for cloud and AI and then require it to be "ancillary and not decisive in the award of the contract", Article 32(2)(d), which the CNLL position asks to delete [3][29].

For both, the requirement has a property the sovereignty labels lack. A licence is public text. The lab's screening paper shows that a requirement screens only where it is verifiable and where the types it separates differ in the cost of meeting it; sovereignty labels fail the first condition and cost money to audit [30]. An open-source requirement is one of the few sovereignty-relevant requirements a buyer can verify for free.

7. The number

Neither the opinion nor the debate around it contains data. The Union's notice database records, for every award above the EU thresholds, the procedure used and, since the 2023 notice forms, the justification a buyer gives for awarding without a prior call for competition. The count below covers award notices in the software and IT-services categories, the procedure "negotiated without prior call for competition" and the two justification codes that correspond to the exception the Court ruled on: technical reasons and exclusive rights.

	Award notices	Without prior call	Share	Technical reasons or exclusive rights	Share of awards
Union, 2024	25,421	3,221	12.7%	1,557	6.1%
Union, 2025	30,479	3,263	10.7%	2,107	6.9%
Germany, 2024	3,900	944	24.2%	504	12.9%
Germany, 2025	4,247	938	22.1%	617	14.5%
France, 2024	1,601	222	13.9%	99	6.2%
France, 2025	1,661	192	11.6%	120	7.2%
Spain, 2024	2,977	370	12.4%	267	9.0%
Spain, 2025	4,360	375	8.6%	308	7.1%
Netherlands, 2024	865	168	19.4%	96	11.1%
Netherlands, 2025	1,048	203	19.4%	116	11.1%

Source: TED award notices, CPV 48 and 72, counted on 22 September 2026 from the public TED search API. Unit: the notice.

Awards without a prior call are a tenth of the Union's software awards and a fifth of Germany's. In 2025 two thirds of them cite technical reasons or exclusive rights, the grounds that the Court now conditions on the buyer's own conduct. Germany, whose parliament asked whether it may require open source, records the highest share of the exclusivity the Court says a buyer must have done everything reasonable to avoid.

The count has limits. It sees only awards above the EU thresholds; most municipal software buying sits below them. The justification is what the buyer declared. The unit is the notice, so a procedure with several award notices counts several times, which is why Germany's absolute counts are large. The country field and the justification codes exist only on the newer notice forms, so 2023 and earlier undercount and are omitted. Italy is omitted because its counts are small, most Italian awards being published on the national portal. None of these limits changes the reading. The stock of declared exclusivity in public software is measured and large.

8. EU level and national level

The Strategy of 3 June 2026 diagnoses the problem in the same terms: tenders "designed around the characteristics of proprietary vendors" that "favour incumbent suppliers and tolerate vendor lock-in" [2]. It states that "an open source first principle in the purchase and procurement of software by public administration could revert this trend". It promises guidelines on three things: drafting calls for tender "that include open standards, specifications and models and allow open source solutions to compete with proprietary solutions", evaluating bids based on open-source solutions, and innovation partnerships for open-source alternatives with provisions for prototypes and maintenance. All three concern the first and third objects of section 4. The second, naming the open-source software already in place and tendering its services openly, is absent. It is the object that earns the providers' revenue and that the German case law addresses. The Strategy also proposes less than the opinion says German law already permits: a level playing field on which open source may compete, where the opinion allows an open-source-only tender with a written reason.

The Cloud and AI Development Act proposal writes the Strategy's principle into Article 41 as a duty on Member States "to encourage" public bodies to use open standards and open-source components "taking into account functionalities, including security, total cost, and other relevant, duly justified objective criteria" [3]. The CNLL's position reads the article-level consequences [29]. The operative verb binds no one. The award criteria of Article 32 may never decide an award. Article 30(4)(c) lets a buyer leave the sovereignty framework where applying it "would require the contracting authority to procure services at disproportionate cost", the same cost test that the exclusivity doctrine turns on.

The Public Procurement Act proposal is the venue where these categories are being rewritten. Four of its articles bear directly on them [19]. Article 88 is read in section 3: functional requirements by default, "or equivalent" retained, the subject-matter exception gone. Article 63 is read in section 4: licences permitting third-party maintenance as a statutory minimum. Article 100 makes lots a mandatory consideration and names single-supplier dependency. Article 47(a) restates the exception for awards without competition and codifies the Court's ruling for one of its two grounds: competition may be absent "for technical reasons that cannot be attributed to the design of a prior procurement procedure or an artificial narrowing down of the parameters", point (ii), while "the protection of exclusive rights, including intellectual property rights", point (iii), has no attribution clause. The Court's January ruling was about exclusive rights. Under the proposal as drafted, the Czech tax administration's defence would be excluded for technical reasons and available for copyright. Ask 3 is to extend the clause to point (iii). The proposal also names open source twice among innovation objectives and techniques, Articles 59(b) and 61(1)(b). Article 64(4) admits "the need to prevent technological lock-in" as an overriding public interest that justifies transferring intellectual property. The material is there. The sentence saying which category a licence requirement falls in is missing.

At national level the instrument that exists is Thuringia's, § 4(2) of the state procurement act: "Dort, wo es technisch möglich und wirtschaftlich ist, soll der Einsatz von Open-Source-Software vorrangig erfolgen", where technically feasible and economically efficient, open-source software is to be used in priority [31]. The clause came through the 2023 reform of the act unchanged, after the opposition had proposed deleting it [32]. The open-source association had asked in the same consultation for the condition to be struck: "es gibt keine eindeutig verbindlichen Definitionen" of when the priority is technically feasible and economically efficient, so the clause can always be read as not applying [33]. That is the design question for any clause of this kind. It arises in Thuringia, in a federal rule of the type the Centre for Digital Sovereignty has proposed for the procurement regulation [34], and in the federal coalition's own commitment to "ambitionierte Ziele für Open Source" and a sovereign Deutschland-Stack [35]. "Wirtschaftlich" measured at acquisition price favours the incumbent in the common case, because the cost of leaving it appears in no purchase price. The priority then never fires. Italy's digital administration code has made the other choice since 2012 [36]. Article 68 requires a comparative evaluation of every option, reuse and open source included, on "costo complessivo", the total cost of acquisition, implementation, maintenance and support. It admits proprietary licences only where the evaluation shows that no adequate open solution exists. Whether the clause is applied is a separate question; the Italian debate says it often is not. Its design is the one that can be applied.

9. Asks

1. **Guidelines: add the service case.** The tender guidelines the Strategy promises should state that naming the open-source software already in place and tendering its implementation, hosting and maintenance openly restricts no bidder, with the Picardie and Baden-Württemberg reasoning, and should publish a one-page model justification for an open-source requirement, built on the opinion's four reasons and on the Court's attribution rule.

2. **Guidelines and Cloud and AI Development Act implementing acts: division into lots.** A subscription-and-support lot with the publisher or maintainer and an integration lot open to every integrator, with the lot structure named in the guidelines so that a buyer does not have to invent it.
3. **Public Procurement Act: name the grounds and fix the asymmetry.** Extend the attribution clause of Article 47(a)(ii) to exclusive rights in point (iii). State in Article 88 that a requirement on the rights the buyer receives over software, including the right to have any third party maintain it, is a functional requirement and no reference to a make, type or production.
4. **National clauses: condition on lifecycle cost.** Any priority clause should define economic efficiency as lifecycle cost including exit and migration, on the Italian model, so that the condition can be met and the priority can fire.
5. **Publish the number.** The share of software awards made without a prior call, by justification, year and Member State, as a standing indicator from the Union's own notice data. The data exist and the query is short; the number is the one the Court's ruling is about. It belongs with the substitution series proposed for a European technology stack observatory [37], which counts the same spend from the side of the suppliers that win it.

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