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Access to public procurement for companies from third countries – revolution or evolution?

Abstract: The article discusses the judgment of the Court of Justice of the European Union (CJEU) issued on 22 October 2024 in case C-653/22 (the so-called Kolin case), which presents important findings for the practice of awarding public contracts in the EU. This ruling sheds new light on the participation of entities from non-EU countries in public procurement procedures, particularly those countries that have not concluded international agreements with the EU guaranteeing reciprocal and equal access to public procurement markets. Most importantly, the Kolin case judgment highlights the significant role of contracting authorities, who may restrict access for entities from such countries in specific public procurement procedures in Poland or other EU Member States.

Keywords: Court of Justice of the European Union; Public procurement; Third-country access; Public procurement directives

Introduction

In recent weeks, the judgment of the Court of Justice of the European Union (**CJEU**) issued on 22 October 2024 in the case of Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22), hereinafter referred to as the '**Kolin case judgment**,' has sparked considerable debate.

Rightly so, as its key findings regarding the differentiated treatment of companies from certain third countries in public procurement procedures could lead to a shift in approach, both among contracting authorities and the Polish legislator, concerning the participation of firms from these countries in public tenders in Poland. In light of the CJEU's ruling, Polish contracting authorities may entirely exclude offers from contractors based in countries such as Turkey, China, or India from public procurement procedures or apply different evaluation criteria, not treating them on an equal footing with companies from EU Member States and entities from non-EU countries that are parties to relevant international agreements with the EU. As a result, much will depend on individual contracting authorities and the specific rules they establish for participation in procurement procedures.

This topic is highly relevant not only to the railway sector but also to the broader transport industry, where companies from non-EU countries—including those without international agreements with the EU guaranteeing reciprocal and equal access to public procurement markets—compete for public contracts in Poland (and other EU Member States). These companies frequently appear in public tenders as third-party entities, providing resources to contractors (bidders) to help them meet participation requirements or selection criteria.

In the context of high-speed rail (HSR) projects in Poland, the Kolin case judgment may be particularly significant, given that Asian countries, especially China, have accumulated substantial expertise in this field, boasting the world's longest HSR network. Turkey is also a major player in this market.

Third-country entities: who does the Kolin case judgment apply to?

In the Kolin case judgment, the Court of Justice of the European Union **distinguished between third countries** that are not members of the European Union but have concluded relevant international agreements with the EU (specifically, agreements guaranteeing—on the basis of reciprocity and equality—access for EU contractors to public procurement markets in those third countries, as well as access for contractors from those third countries to public procurement markets in the EU) and third countries that have not concluded such agreements with the European Union.

The first group of countries primarily includes third countries that are signatories to the Agreement on Government Procurement (GPA), concluded within the framework of the World Trade Organization (WTO). These include, among others, Canada, Israel, Japan, South Korea, Switzerland, Ukraine, and the United States. Additionally, this group includes third countries that have signed bilateral international agreements with the European Union, which provide enhanced access to each other's public procurement markets, such as Canada, Japan, and the United Kingdom.

Contractors from these countries are guaranteed treatment no less favourable than EU contractors in EU public procurement markets, as reflected in EU public procurement directives. Regarding these countries, the CJEU in the Kolin case judgment reaffirmed that the right to 'no less favourable treatment' granted to contractors from these third countries means that they may invoke the provisions of EU public procurement directives.

The second group of countries consists of **third countries that have not concluded any agreements with the EU that formally open public procurement markets on a reciprocal basis**, such as Turkey, China, or India. The participation of entities from these countries in EU public procurement procedures is the subject of the CJEU's reasoning in the Kolin case judgment.

The Kolin case judgment – factual background

The Kolin case judgment concerns a public tender for railway infrastructure construction worth approximately €300 million, conducted in Croatia by the national railway infrastructure manager. In this tender, a Turkish entity challenged the selection of a competing bid submitted by a consortium of three companies from the Strabag group. The case was brought before a Croatian court, which raised doubts about whether the contracting authority's decision to award the contract to the winning consortium complied with Directive 2014/25/EU on public procurement in the utilities sector [1]. Consequently, the court referred preliminary questions to the CJEU, specifically regarding documents proving compliance with participation requirements, which had been submitted to the contracting authority after the deadline for tenders had passed.

On this factual basis, the Advocate General—whose role is to provide independent and objective legal opinions on cases before the CJEU—raised concerns about whether the Croatian request for a preliminary ruling was admissible at all. The source of controversy lay in the fact that the plaintiff in the Croatian proceedings was a Turkish company, meaning a firm from a third country with which the EU has not concluded international agreements guaranteeing reciprocal and equal access to public procurement markets. The Advocate General's concerns focused on two key questions:

- Can contractors from third countries that have not concluded international public procurement agreements with the EU participate in public procurement procedures within the EU at all?
- If so, can Member States set the conditions for their participation in such procedures, or is this an exclusive competence of the EU?

Ultimately, as Turkey is a third country that is not a party to international agreements with the EU guaranteeing reciprocal and equal access to public procurement markets, the CJEU declared the preliminary reference inadmissible and refused to answer the Croatian court's questions. However, the Court of Justice took the opportunity to analyse the situation of contractors from such third countries, presenting conclusions that fundamentally change the perspective on their participation in EU public tenders.

Access of contractors from third countries to public tenders

In the Kolin case judgment, the Court of Justice of the European Union (CJEU) ruled that **contractors from non-EU countries that have not concluded a relevant international agreement with the EU cannot** rely on EU public procurement directives **to claim equal treatment** of their bids alongside offers submitted by EU-based contractors or contractors from third countries that have signed such agreements with the EU.

The Court also held that the issue of access to public procurement procedures in EU Member States for contractors from third countries falls under the exclusive competence of the EU. As a result, Member States are not authorised to adopt general legislation in this area. In the absence of such an EU legal act, it is for the individual contracting authority to determine whether to allow a third-country contractor to participate in a public procurement procedure. Furthermore, the contracting authority may establish specific conditions in the procurement documents that reflect the objective differences in the status of such contractors.

Additionally, the CJEU emphasised that national authorities may not interpret national provisions transposing EU directives in such a way that they would automatically apply to contractors from third countries that have not signed an agreement with the EU. While it is conceivable that the treatment of such contractors should align with certain principles such as transparency and proportionality, any legal remedy available to a contractor seeking to challenge a contracting authority's breach of these principles would be considered exclusively under national law, not under EU law.

What is new in the Kolin case judgment?

Is the approach taken by the Court of Justice of the European Union (CJEU) in this judgment towards entities from non-EU countries that have not concluded international agreements with the EU guaranteeing reciprocal and equal access to public procurement markets surprising? Considering the evident evolution of the EU's stance, as well as EU policies and regulations emphasising the need for more balanced conditions based on reciprocity in relations with third countries, the conclusions drawn in the Kolin case judgment should not come as a surprise. A review of recent EU-level communications and legal acts confirms this trend.

As early as 24 July 2019, in the European Commission's guidelines on the participation of non-EU entities in the EU public procurement market [2], it was stated that **contractors from third countries** that have not concluded an international agreement with the EU providing for market access for EU-based contractors **should not be guaranteed equal access** to public procurement procedures within the EU. Three years later, on 29 August 2022, the EU Regulation on the access of third-country contractors [3] came into force, explicitly stating that the access of third-country contractors to EU public procurement markets falls within the scope of the EU's common commercial policy. This regulation empowers the European Commission to introduce **measures restricting access for third-country contractors to EU public procurement markets** (the International Procurement Instrument, IPI) by adjusting bid scoring or excluding offers where it is determined that third countries are engaging in measures or practices that disadvantage EU contractors. Subsequently, on 12 July 2023, the first provisions of the **Foreign Subsidies Regulation** (FSR) entered into force, introducing a broad set of legal instruments enabling the European

Commission to counter market distortions within the EU's internal market caused by subsidies granted by non-EU countries.

Given the above guidelines and legal acts adopted at the EU level, the conclusions of the Kolin case judgment align with the clear trend observed in recent years towards establishing more balanced conditions based on reciprocity in relations with non-EU countries.

Can contractors from third countries participate in public tenders in the European Union?

This question was raised by the Advocate General in the opinion on the Kolin case, specifically in relation to contractors from third countries with which the EU has not concluded an international public procurement agreement. The Court of Justice of the European Union reached a fundamental conclusion that entities from third countries that are not signatories to such agreements or international arrangements **have no guaranteed right** to participate in EU public procurement procedures, and their access to the EU public procurement market may be restricted.

Although the CJEU's findings directly apply to the factual circumstances of the case, in which the contractor (bidder) was from Turkey, an important question arises: to what extent do these conclusions apply to the participation of firms from such third countries in procurement procedures in other configurations, for example, when they act as third-party entities providing resources to contractors or as subcontractors—in other words, whether their participation in such roles may also be restricted by the contracting authority.

Opinion of the Public Procurement Office

In information published on its official website [4], the Public Procurement Office outlined the key implications of the CJEU ruling for procedures conducted under the Polish Public Procurement Law:

First, **contracting authorities have the right to restrict access to public procurement for contractors from third countries** with which the European Union has not concluded an international agreement guaranteeing reciprocal and equal access to the public procurement market. Such restrictions may take the form of excluding these entities from participation in the procedure or differentiating the treatment of such entities in the procurement process, and these conditions should be clearly specified in the procurement documents.

Second, in the view of the Public Procurement Office, such restrictions are **always a decision of the contracting authority** in a given procedure. Contracting authorities may choose not to restrict access to public procurement for contractors from third countries, even if those countries have not concluded an international agreement with the EU guaranteeing reciprocal and equal access to the public procurement market.

Third, if a contracting authority decides to exclude contractors from third countries that have no international agreement with the EU guaranteeing reciprocal and equal access to the public procurement market, and this is specified in the procurement documents, then any **bid submitted by such a contractor will be subject to rejection**.

Conclusion

The Kolin case judgment will undoubtedly influence the practice of awarding public contracts in Poland. Time will tell to what extent Polish contracting authorities will make use of the right confirmed by the CJEU in this judgment, which allows for differentiated treatment of entities from non-EU third countries that have not concluded international agreements with

the EU guaranteeing access to public procurement markets—meaning that these entities may be treated less favourably than others.

In procurement practice, there will certainly be a need to address numerous questions arising from this judgment, such as whether its conclusions also apply to third-party entities providing resources to contractors to meet participation requirements, or how the findings in the Kolin case affect the right of contractors from such third countries to seek legal remedies. It is also possible that the Polish legislator will introduce legislative amendments to the Public Procurement Law to clarify practical uncertainties resulting from this ruling.

Source materials

[1] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014).
[2] Communication from the Commission of 24 July 2019 — Guidance on the participation of third-country bidders and goods in the EU procurement market.
[3] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI) – (OJ L L 173, 30.6.2022, p. 1.
[4] Udział_wykonawców_z_państw_trzecich_w_świetle_wyroku_TSUE_w_sprawie_C-652_22 (1).pdf