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The CJEU finds that operators from third States are not entitled to equal treatment in EU public procurement procedures in the absence of an international agreement guaranteeing reciprocity between the EU and that third State

The Court of Justice of the European Union (the "**CJEU**"), through its judgment of the Grand Chamber of 22 October 2024 (the "**Judgment**"),[1] delivered in the case of Kolin Inşaat Turizm Sanayi v. Ticaret, C-652/22, declared the inadmissibility of the question referred for a preliminary ruling. Specifically, the Court found that Directive 2014/25 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 (the "**Directive**") cannot apply to economic operators from third countries which have not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement procedures.

I. Analysis of the Judgment

The preliminary question arose in proceedings brought by a Turkish company against a decision of the "State Commission for Supervision of Public Procurement Procedures" to award a contract to an Austrian company in Croatia.

The High Administrative Court of the Republic of Croatia referred a question on certain aspects of the Directive for a preliminary ruling, but the CJEU did not consider the national court's request on the grounds that the Directive could not be applied. The novelty of the Judgment lies in the analysis of the inadmissibility and the effects of such a declaration on foreign operators participating in tenders.

The relevant facts for the purposes of the analysis are as follows:

- The Republic of Turkey is not a party to the World Trade Organisation's Agreement on Government Procurement ("**GPA**"), nor to any other agreement which confers, on a reciprocal basis, on Turkish economic operators the right to participate in Union public procurement procedures on an equal footing with Union economic operators. Furthermore, the Additional Protocol of the Association Agreement was not drafted with a view to eliminating discrimination between economic operators of the Union.[2]
- The Croatian authority had authorised the Turkish company to participate in the public tender, and the provisions transposing the Directive into Croatian law were interpreted, as explained in the court proceedings, as applying without distinction to all EU tenderers from third countries, and were capable of being relied on by the Turkish company.[3]

The CJEU has not gone so far as to declare the exclusion of the Turkish tenderer, but has stated that the Turkish operator cannot enjoy treatment which is no less favourable as recognised in Article 43 of the Directive, and therefore cannot invoke Articles 36 and 76 of the Directive to challenge the award decision, as the Republic of Turkey is not a signatory to the GPA or an equivalent agreement.

In addition, the following considerations are relevant:

Firstly, **commercial policy is an exclusive competence of the European Union** and includes the determination of the conditions under which economic operators from a third country may participate in the procedures for

1 Judgment of the Court of Justice of the European Union of 22 October 2024, Case C-652/22, Kolin Inşaat Turizm Sanayi v. Ticaret, EU:C:2024:910.
2 Paragraphs 48 and 49 of the Judgment.
3 Paragraph 52 of the Judgment.

the award of public contracts in the Union. The International Procurement Instrument,[4] as a legislative act with a legal basis in Article 207 TFEU, demonstrates that this is an exclusive competence of the European Union, and not of its Member States.

Therefore, any measure excluding operators from tendering procedures must be adopted by the European Union, either to ensure equal and reciprocal access to public contracts, or to implement a regime excluding them or providing for an adjustment of the score resulting from the comparison of their tenders with those submitted by other economic operators.[5]

Secondly, **if there is no European Union act to that effect, the contracting authority must assess whether it is appropriate to admit such an economic operator to a public contract award procedure**, and, if so, whether it is appropriate to provide for an adjustment of the score resulting from the comparison of the tenders submitted, but without the latter being able to rely on the Directive as it is not entitled to no less favourable treatment.[6]

However, it states that the contracting authority must set out, in the procurement documents, the arrangements for treatment reflecting this objective difference between, on the one hand, EU operators and those with whom it has concluded an agreement and, on the other hand, those with whom it has not concluded an agreement. Furthermore, it provides that any treatment they establish must comply with certain requirements, such as those of transparency or proportionality, exclusively in accordance with national law.[7]

Thirdly, in any event, the contracting authority is prohibited from interpreting and applying the national provisions transposing the Directive to economic operators from third countries which have not concluded an international agreement with the Union guaranteeing equal and reciprocal access to public contracts.[8]

II. Scope of the Judgment

The Judgment is significant because it is the first ruling of the CJEU on the application of the Directive in the area of public procurement regarding tenderers from third States, clearly allowing this difference in treatment with respect to operators from third States that have not signed the GPA or an equivalent agreement on the basis of national law. In this case, the exclusion of the tenderer did not arise because participation was permitted under Croatian law.

The Judgment makes it clear that general competence in these matters belongs to the European Union, but admits that contracting authorities may differentiate treatment between operators. Therefore, it leaves some uncertainty as to how the contracting authority, meeting the requirements of transparency and proportionality, may go so far as to establish procedures for differentiating between operators, while at the same time guaranteeing the tenderer's rights of defence.

In reality, the Judgment is aligned with the objective of recent instruments, such as the International Procurement Instrument (interpreted for the first time, albeit only in greater detail) or the Foreign Subsidies Regulation.[9] In effect, the Judgment does not seek to guarantee this level playing field between operators participating in the tender, but rather departs from what was traditionally the open and unrestricted approach to public procurement markets in the European Union.

The fundamental problem with the Judgment lies in its practical application, and whether contracting authorities will make such a distinction. The reasoning behind the application of national law is questionable, even though this is an area that is largely harmonised and in which, as the CJEU itself states, the EU has exclusive competence. Time will tell whether this is an isolated ruling or whether the CJEU will clarify or add further nuance to it. In any case, we will have to monitor the way in which the national authorities interpret the Judgment.

4 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 173, 30/06/2022, p. 1-16.
5 Paragraphs 56 to 61 of the Judgment.
6 Paragraph 63 of the Judgment.
7 Paragraphs 64 and 66 of the Judgment.
8 Paragraph 67 of the Judgment.
9 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330, 23.12.2022, p. 1-45.

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