DOI: 10.52694/LES.I/2025.5

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Revised Concept of Economic Operator under Directive 2014/25/EU in the Context of Equal Access to Public Procurement in the Wake of CJEU's Judgment in Case C-652/22 of 22 October 2024

Rewizja definicji Wykonawcy zawartej w dyrektywie 2014/25/UE w kontekście równego dostępu do zamówień publicznych na kanwie orzeczenia TSUE w sprawie C-652/22 z dnia 22 października 2024 r.

Abstract: The judgment of the Court of Justice of the European Union on 22 October 2024 in the case *Kolin Inşaat Turizm Sanayi ve Ticaret* C-652/22 concerns the interpretation of the provisions on the participation of entities from third countries in public procurement procedures conducted in the European Union. This is a novelty in the current approach to the availability of public procurement and a breakthrough in the application of legal standards governing public procurement. Its implications are particularly far-reaching for economic operators from third countries that are neither EU Member States nor parties to relevant agreements with the EU. The sentence, on the one hand, reminds us of the principles of equal treatment and openness within the European public procurement market, and on the other hand, confirms that access to this market may be limited for companies from countries that have not signed appropriate international agreements with the EU. This is a novelty in the current approach to the accessibility of public procurement and a breakthrough in the application of legal norms regarding public

procurement, especially since it will have a huge impact on participants in the global economic market that are not members of the EU and have not concluded appropriate agreements with the EU.

Keywords: public procurement, judgment of the Court of Justice, protection of the European Union market, principle of transparency, principle of reciprocity, access to public procurement, principle of equal access

Streszczenie: Orzeczenie Trybunału Sprawiedliwości Unii Europejskiej z dnia 22 października 2024 r. w sprawie *Kolin Inşaat Turizm Sanayi ve Ticaret* C-652/22 dotyczy interpretacji przepisów dotyczących udziału podmiotów z państw trzecich w postępowaniach o udzielenie zamówień publicznych toczących się na terenie Unii Europejskiej. Jest to istotny i przełomowy wyrok w temacie równego traktowania wykonawców z państw unijnych i tych spoza jej obszaru w kontekście dotychczasowej interpretacji definicji zasady równego dostępu dla wykonawców w postepowaniach o udzielenie zamówienia publicznego. Orzeczenie z jednej strony przypomina o zasadach równego traktowania i otwartości w ramach europejskiego rynku zamówień publicznych, z drugiej potwierdza, że dostęp do tego rynku może być ograniczony dla firm z krajów, które nie podpisały odpowiednich umów międzynarodowych z UE. Jest to *novum* w dotychczasowym podejściu do dostępności zamówień publicznych i swoisty przełom w stosowaniu norm prawnych dotyczących zamówień publicznych, tym bardziej że będzie to miało ogromny wpływ na uczestników globalnego rynku gospodarczego, którzy nie są członkami UE i nie zawarli stosownych umów z UE.

Słowa kluczowe: zamówienia publiczne, orzecznictwo TS, państwa trzecie, dostęp do zamówień publicznych, ochrona rynku zamówień publicznych UE, zasada równego dostępu

Introduction

The judgment delivered by the Court of Justice of the European Union on 22 October 2024 in Case C-652/22, *Kolin Inşaat Turizm Sanayi ve Ticaret*, marks a watershed moment in the evolving jurisprudence on the equal treatment of economic operators from both EU Member States and third countries, in the context of the prevailing interpretation of equal

access to public procurement procedures. This is a novelty in the current approach to the availability of public procurement and a breakthrough in the application of legal standards governing public procurement. Its implications are particularly far-reaching for economic operators from third countries that are neither EU Member States nor parties to relevant agreements with the EU. It is therefore worth asking whether, in light of the aforementioned CJEU judgment, one can speak of a revision of the definition of 'contractor' as laid down in Directive 2014/25/EU.

Factual background of the judgment

The judgment of the CJEU in the Kolin case[1] was delivered in response to a request for a preliminary ruling submitted by the High Administrative Court of Croatia as part of a dispute held between the Turkish company Kolin and the Croatian State Commission for Supervision of Public Procurement Procedures. The dispute was triggered by a contract award procedure related to the development of railway infrastructure in Croatia. Kolin, as one of the competing bidders, contested the award of the contract to the Strabag consortium. Kolin's representatives argued that the Strabag group fell short of the necessary technical and professional qualifications, contending that the construction projects referenced in Strabag's bid failed to satisfy the requirements stipulated in the contract notice. Following a request from the contracting authority, the Strabag group provided an updated list of works along with a certificate attesting to their proper completion. The revised submission included projects not listed in the original bid. This change, in Kolin's view, was procedurally impermissible. After the Croatian State Commission for Supervision of Public Procurement Procedures dismissed Kolin's appeal, the company brought an action for annulment before the High Administrative Court of Croatia. The court harboured doubts regarding the interpretation of Articles 36 and 75 of Directive 2014/25/EU[2], specifically, whether these provisions allow a contracting authority to consider documents

[1] Judgment of the Court of Justice of the European Union of 22 October 2024 in Case *Kolin Inşaat Turizm Sanayi ve Ticaret* C-652/22, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:62022CJ0652 (accessed 25 April 2025).

[2] 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 EU.L.2014.94.243)

submitted for the first time after the time limit for the submission of tenders, where these documents were absent from the original tender and reveal circumstances that the tenderer had not disclosed previously[3]. Interestingly, the CJEU refrained from engaging with the specific questions submitted in the request for a preliminary ruling, leaving them unexamined in the judgment at hand.

The findings and legal effects of the judgment

Advocate General A.M. Collins, in his Opinion delivered prior to the judgement, took the view that economic operators from third countries not covered by relevant agreements do not fall within the application *ratione personae* of Directive 2014/25/EU. According to the Advocate, Kolin, as the applicant, was not entitled to participate in a procedure for the award of a public contract governed by Directive 2014/25/EU, and, consequently, was not in a position to seek to rely on the provisions thereof before a Member State court. From his point of view, the referring court cannot obtain a response to a request for a preliminary ruling on the interpretation of those provisions, since any answer that the CJEU might give to this request would not have a binding effect. Moreover, the Advocate General emphasised that, in its external dimension, the award of public contracts falls within the exclusive competence of the European Union[4].

In this respect, with reference to Article 2(1) of the Treaty on the Functioning of the European Union, the CJEU held that economic operators from third countries not covered by relevant agreements cannot invoke rights derived from domestic legislations even if adopted for the purpose of transposing EU law[5].

[3] P. Bogdanowicz, *Z małej chmury duży deszcz – uwagi na tle wyroku Trybunału Sprawiedliwości z 22.10.2024 r., C-652/22, Kolin Inşaat Turizm Sanayi ve Ticaret AŞ przeciwko Državna komisija za kontrolu postupaka javne nabave*, EPS 4(2025), pp. 33-39.

[4] Opinion of Advocate General Collins delivered on 7 March 2024, Case C-652/22, *Kolin Inşaat Turizm Sanayi ve Ticaret A.Ş. v Državna komisija za kontrolu postupaka javne nabave*, EU:C:2024:212

[5] Ibidem.

The CJEU noted that the European Union is bound by international agreements[6] with certain third countries, chief among them the Agreement on Government Procurement[7]. They guarantee equal and reciprocal access for third-country economic operators to the EU's public procurement markets. As a consequence, contracting authorities from Member States must accord to economic operators from third countries, which are parties to such agreements, treatment no less favourable than the treatment accorded to EU-based operators[8]. As Recital 27 of Directive 2014/25/EU makes clear, the entitlement to "no less favourable treatment" accorded to economic operators under third-country agreements enables them to rely on the provisions of this piece of EU legislation.

Having established that the EU had not yet adopted any act of general application in this area, the CJEU held that it falls to the contracting authorities to decide whether to admit economic operators not covered by the relevant agreements to the contract award procedure and, if so, whether to allow "an adjustment of the result arising from a comparison of their tenders with those submitted by other economic operators". However, given that economic operators from third countries outside the scope of the relevant agreements are not guaranteed "no less favourable treatment" under Directive 2014/25/EU, contracting authorities are permitted to include in the procurement documents terms of participation

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[6] The European Community has entered into agreements on equal treatment of entrepreneurs with the following countries:

I. International agreements governing public procurement:
   a) Agreement on the European Economic Area (EEA Agreement) – economic operators from Iceland, Norway, and Liechtenstein have full access to EU public procurement markets;
   b) Free Trade Agreement (FTA) – bilateral free trade agreements with Mexico and Chile;
   c) Stabilisation and Association Agreement (SAA) – an agreement with Macedonia, Croatia, and Albania.

II. Government Procurement Agreement (GPA) – Next to the European Community and its Member States, the signatories are: Canada, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, Aruba (an autonomous area administered by the Netherlands), Singapore, Norway, Switzerland, and the United States.

Following: W. Dzierżanowski, *Skutki wyroku Trybunału Sprawiedliwości UE w sprawie C-652/22 dla udziału wykonawców z państw trzecich w postępowaniu o udzielenie zamówienia w kraju członkowskim Unii Europejskiej*, PS 4(2025), pp. 44-57.

[7] Agreement on Government Procurement done at Marrakesh on 15 April 1994 (OJ L 336, p. 273, as amended)

[8] Judgement in C-652/22, *Kolin*, 42. Under Article 43 of Directive 2014/25/EU, "In so far as they are covered by Annexes 3, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA and by the other international agreements by which the Union is bound, contracting entities within the meaning of Article 4(1)(a) shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union."

that acknowledge an "objective difference" between tenderers from countries that have not entered into relevant agreements with the EU and EU-based operators or those from third countries with which the EU has concluded such agreements[9]. The CJEU further found that while the arrangements for treatment of operators from countries which have not concluded the said agreements with the EU should comply with certain requirements, such as transparency or proportionality, an action by one of those operators seeking to complain that the contracting authority has infringed such requirements can be examined only in the light of national law and not of EU law. The CJEU also noted that national authorities cannot interpret domestic provisions transposing Directive 2014/25/EU as also applying to economic operators from third countries not covered by the agreements who would be permitted by the contracting authority to participate in a public contract award procedure in the Member State concerned, failing which the exclusive nature of the EU's competence in that area would be infringed.

It is beyond dispute that access of economic operators from third countries not party to relevant agreements to the EU's public procurement markets falls squarely within the ambit of the common commercial policy and thus lies within the EU's exclusive competence[10].

A contracting authority may choose to allow economic operators from third countries not covered by international agreements with the EU to participate in a public procurement procedure without applying any objective criteria for differential treatment. Paragraph 64 of Judgment in C-652/22, *Kolin*, clearly says that "it is open to the contracting entity to set out, in the procurement documents", objective differentiating criteria. Such criteria must be "objective" and, at the same time, meet the requirement of proportionality. Therefore, in certain scenarios, there may be no basis for applying such criteria for specific contracts. Paragraph 63 of

[9] Similarly: Communication from the Commission of 24 July 2019 – Guidance on the participation of third-country bidders and goods in the EU procurement market (OJ C 271, p. 43.) and Recitals to 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 (OJ L 173, p. 1).

[10] For more, see S. Arrowsmith, P. Wang, *Third Relations with Third Countries in Public Procurement* [in:] *The Law of Public and Utilities Procurement. Regulation in the EU and UK*, vol. 2, ed. S. Arrowsmith, London 2018, nb 21.03 ff.; and A.M. La Chimia, Article 25. *Conditions relating to the GPA and other international agreements* [in:] *European Public Procurement. Commentary on Directive 2014/24/EU*, R. Caranta, A. Sanchez-Graells (eds.), Cheltenham 2021, nb 25.13.

the Judgment affirms this position, noting that the contracting authority must first decide to admit such operators and only "if it decides to admit them", consider whether their distinct legal status justifies differentiated treatment. For example, Regulation (EU) 2022/256[11] refers directly to the participation of economic operators from third countries not covered by the agreements in public procurement procedures and thus seems to permit a situation in which no objective differentiating criteria have been defined.

Where a contracting authority allows an economic operator from a third country not covered by the relevant agreements to participate in public contract award procedures, and that operator subsequently alleges a breach of the requirements of transparency or proportionality by the contracting authority, any remedy available to that operator may be assessed "only in the light of national law and not of EU law"[12].

Consequences of the Judgment in C-652/22, *Kolin,* for Polish public procurement law

In the Polish legal system (as in Croatian public procurement law, as noted by the national authorities during the proceedings before the CJEU), the definition of an economic operator set out in Article 7(30) of the Public Procurement Law[13] is notably expansive, extending to all operators regardless of their place of residence/registration. As a consequence, Article 16(1) PPL provides that the contracting authority should prepare and conduct a contract award procedure in a manner that ensures fair competition and equal treatment of economic operators (implicitly referring to all such operators, in line with the inclusive definition mentioned above). The desirable approach in this regard is to interpret national law in a manner consistent with the content and purpose of EU law. In this respect, it follows from the settled CJEU case-law that, when applying domestic law, national authorities are required to interpret it,

[11] 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, p. 1).

[12] Paragraph 66 of the Judgement in Case C-652/22.

[13] Act of 11 September 2019 – Public Procurement Law (Journal of Laws of 2024, item 1320), hereinafter "PPL".

so far as possible, in the light of the wording and the purpose of EU law in order to achieve the result sought therein[14].

The implications of the judgment for the public procurement market within the European Union, including Poland, are highly significant. The CJEU judgement unequivocally affirms that, where no public procurement agreement exists between the EU and a third country, economic operators from that country have no entitlement under the relevant directive to claim equality of treatment with EU-based tenderers or those from third countries covered by such agreements. Moreover, given that the EU has exclusive competence in the field of the common commercial policy, national authorities may not apply national provisions transposing the directive to economic operators from third countries that have not concluded a relevant agreement with the EU.

For Poland's public procurement landscape, it signals a profound shift in established practice. First, Polish contracting authorities will be entitled to exclude tenders submitted by economic operators from third countries that are not parties to international agreements with the EU, among them, Turkey, China, or India, and such operators will have no legal option to challenge these decisions under EU law. Second, even if admitted to procurement procedures by Polish contracting authorities, tenderers from such third countries may now be subject to differential treatment and will no longer be entitled to the same level of equal treatment as tenderers from EU Member States or from third countries that are parties to international agreements with the EU (e.g. the United States, Canada, Switzerland, Norway, or South Korea). Ultimately, much will depend on the discretion of the contracting authority, which retains the option, but not the obligation, to apply differential treatment to tenderers from countries that are not parties to international agreements with the EU[15].

However, the *Kolin* judgment alters the commonly held view that the EU's freedom of establishment does not preclude national legislation from extending that freedom to economic operators from outside the EU. Previous scholarship has emphasised that economic operators from other Member States should not, as a matter of law, be wholly excluded

[14] See, for example: Judgement of the CJEU of 24 January 2012 in Case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique i Préfet de la région Centre*, EU:C:2012:33, p. 24.

[15] R. Bujalski, *Dla kogo unijne i polskie przetargi? Omówienie wyroku TS z dnia 22 października 2024 r., C-652/22 (Kolin Inşaat Turizm Sanayi ve Ticaret)*, LEX/el. 2024.

from exercising certain fundamental rights namely, the right to submit tenders and participate in contract award procedures organised by public or private entities, either as main contractors or subcontractors; the right to obtain concessions and licences; and the right to acquire, use, and dispose of movable and immovable property[16]. Although the right to participate did not necessarily imply the right to participate on equal terms, for example, Article 85 of Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors[17] (sectoral directive) and, by extension, Article 393(1)(4) PPL permit the application of the so-called EU preferences, i.e. a requirement for a predominant share of EU-origin products in the tender or preferential evaluation criteria for tenders submitted by economic operators from the EU and from countries with which the EU has concluded agreements on equal treatment[18].

Position of the Polish Public Procurement Office

Following the analysis of the CJEU's judgment in Case C-652/22, the Polish Public Procurement Office issued an opinion entitled, "Participation of Economic Operators from Third Countries in the Light of the Judgment of the Court of Justice of the European Union in Case C-652/22"[19]. The opinion reads that, in the absence of any relevant terms in the procurement documents, and in light of the principle of transparency, it should be presumed that the contracting authority does not restrict access to the contract award procedure for economic operators from third countries with which the European Union has not concluded an international agreement to guarantee reciprocal and equal access to public procurement markets.

This thesis lacks grounding both in the CJEU's ruling in Case C-652/22 and in the established principles of pro-EU interpretation and the rule

[16] M. Ahlt, M. Szpunar, *Prawo europejskie*, Warszawa 2011, p. 211.

[17] 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, p. 243).

[18] W. Dzierżanowski, *Skutki wyroku Trybunału Sprawiedliwości UE w sprawie C-652/22 dla udziału wykonawców z państw trzecich w postępowaniu o udzielenie zamówienia w kraju członkowskim Unii Europejskiej*, PS 4(2025), pp. 44-57.

[19] Opinion of the Public Procurement Office: https://www.gov.pl/web/uzp/udzial-wykonawcow-z-panstw-trzecich-w-swietle-wyroku-tsue-w-sprawie-c-65223, (accessed: 25 April 2025).

of inference from legislative silence as recognised in the legal doctrine and the case-law of the Supreme Court[20]. The assumption that silence equates to consent to the participation of an economic operator established in a third country should be regarded as a complete misreading of the CJEU's intention. The judgment clearly says that what is required is not an express exclusion, but rather an affirmative indication, within the procurement documents, that the contracting authority permits such participation. The view that the principle of transparency causes the contracting authority's silence in the procurement documents to be interpreted as consent to the participation of contractors from third countries stands in stark contrast to the prevailing legal doctrine and case-law on construing silence as a manifestation of intent[21].

Summary

The judgment in Case C-652/22, *Kolin*, should be regarded as one of the most significant CJEU rulings in the field of public procurement in recent years. It is arguably no coincidence that the judgment was delivered by the Grand Chamber, particularly given that the central issue was not the interpretation of the provisions of Directive 2014/25/EU, but rather the question of whether the directive applied to the case at all. Consequently, what could have been an ordinary judgement confined to the interpretation of the directive instead emerged as a landmark ruling with ramifications that reach well beyond[22].

All in all, the CJEU judgement is of significance for the entire European Union, including Poland. A revision of the definition of contractor as set out in Directive 2014/25/EU, in the context of ensuring equal access to public procurement, has indeed occurred in light of the judgment of the Court of Justice of the European Union in Case C-652/22, delivered on 22 October 2024. In view of the CJEU's stance, any cross-border public procurement contract awarded to an economic operator from a third country lacking a reciprocal and equality-based agreement with the EU

[20] More in: Judgment of the Supreme Court of 2 February 2017, I CSK 203/16, *LEX* (2252212), Judgment of the Supreme Court of 22 June 2006, V CSK 70/06, OSNC 2007/4, item 59, *LEX* (214149), Judgment of the Supreme Court of 16 January 1970, III PRN 96/69, OSNCP 1970/9, item 161, *LEX* (15215).

[21] W. Dzierżanowski, …..*op.cit.*

[22] P. Bogdanowicz, …….*op.cit*.

should be governed solely by EU law, to the exclusion of domestic provisions enacted without the EU's legal mandate. In particular, this means that Polish contracting authorities should not rely upon domestic laws, PPL included, when facing such cases. In such a case, and in the absence of legal instruments adopted by the EU, it is for the contracting authority to determine whether to admit to a public contract award procedure economic operators from a third country that has not entered into an international agreement with the EU guaranteeing equal and reciprocal access to public procurement markets and, if so, whether to apply an adjustment of the result arising from a comparison of their tenders with those submitted by other economic operators.

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