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Exclusion of third-country economic operators from EU public procurement and the Kolin judgment - new rules and lingering questions

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Legislation:

Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors

Regulation 2022/2560 on foreign subsidies distorting the internal market

Regulation 2022/1031 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations and access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument)

Case:

Kolin Insaat Turizm Sanayi ve Ticaret AS v Drzavna komisija za kontrolu postupaka javne nabave (C-652/22) EU:C:2024:910; [2024] 10 WLUK 340 (ECJ (Grand Chamber))

*317 Abstract

Until recently, economic operators from third countries—those without a trade agreement with the European Union (EU)—were generally free to participate in EU-based public procurement procedures. This slowly started to change from 2019, with new Commission guidance on the interpretation of the 2014 public procurement directives, but also with the adoption of new legal instruments aimed at limiting the participation of such economic operators in EU based public procurement procedures. This paper will examine the gradual shift in EU policy towards third-country economic operators, transitioning from a largely laissez-faire approach to the implementation of significant restrictions. I will also analyse the recent (late October 2024) Court of Justice of the European Union (CJEU) judgment in the Kolin case (C-652/22),[1] *which introduced a significantly different legal regime for the participation of third-country economic operators in EU public procurement procedures.*

1. Introduction

The 2004[2] and the 2014[3] public procurement directives allowed different treatment of economic operators based on whether their countries had signed a Free Trade Agreement (FTA) with the EU. In the 2011 Resolution on equal access to public sector

markets in the EU and in third countries,[4] the European Parliament stated that "while arguing strongly against protectionist measures in the field of public procurement at global level, it firmly believes in the principle of reciprocity, mutual benefit and proportionality in that area; and calls on the Commission to conduct a detailed analysis of the potential benefits and problems associated with imposing proportional, targeted restrictions on access to parts of the EU's procurement markets, an impact assessment analysing when it might be used and an assessment of the legal basis that such an instrument would take for those trading partners which benefit from the openness of the EU market, but have not shown any intention of opening up their own markets to EU companies".[5] This reasoning was evident even in the negotiations preceding the revision of the World Trade Organisation Government Procurement Agreement[6] (WTO GPA) in 2012, when "the EU, in ***318** particular, desiring to open up procurement markets to an important degree, saw itself forced to introduce different levels of market access offered to different trading partners, depending on the extent of their own liberalisation efforts".[7]

Cernat and Kutlina-Dimitrova highlight the scope of the issue by noting that almost half of the 20 countries most impacted by international discriminatory measures in public procurement are EU Member States.[8] This is strongly contrasted by the fact that the EU has opened up to 80% of its public procurement market, while other developed countries have opened up only 20%.[9] But, in some EU Member States (for example, Croatia) the possibility to implement a differential treatment of third-country economic operators in public procurement procedures was ignored by the State and contracting authorities.[10]

In 2019, the European Commission (Commission) issued its Guidance on the participation of third-country bidders and goods in the EU procurement market[11] (Guidance). In this Guidance, the Commission clearly states that third-country economic operators "do not have secured access to procurement procedures in the EU and may be excluded".[12]

Soon after, two important pieces of legislation followed—the International Procurement Instrument[13] (IPI) and the Foreign Subsidies Regulation[14] (FSR). Both the IPI and the FSR limit third-country economic operator participation in EU-based public procurement procedures to a certain extent.

The most significant development regarding the involvement of economic operators from third countries in EU public procurement procedures was recently established by the CJEU's judgment in the Kolin case.[15] The CJEU has allowed contracting authorities to decide will they allow participation of third-country economic operators in their public procurement procedures, but also drastically limited available recourse and remedies for such economic operators if they are allowed to participate in a certain procedure.

In this article, I will show the recent and relevant normative developments in third-country economic operators' participation in EU public procurement procedures, I will analyse the Kolin judgment and show the changes it brings to EU public procurement law. Furthermore, I will critically examine it to show if the CJEU created legal uncertainty along the way.

2. Third countries and the 2014 EU Public Procurement Regulatory Framework

The 2014 EU Public Procurement Regulatory Framework provides limited guidance on third-country economic operators. Nevertheless, valuable insights can be derived from articles that discuss the involvement of economic operators from countries that have FTAs with the EU. ***319**

Directive 2024/25 has two articles which allow contracting authorities to reject certain tenders submitted by third-country economic operators, in a way that is similar to arts 58 and 59[16] of the previous Utilities Directive (2004/17).[17]

Article 85(2) of Directive 2014/25[18] allows utilities contracting authorities to reject tenders submitted for the award of supply contracts if the proportion of the products originating in third countries exceeds 50% of the total value of the products constituting the tender. Furthermore, if two or more tenders are equivalent, preference shall be given to those tenders which may not be rejected because their products originate in third countries.[19]

Article 86(1) of Directive 2014/25 allows Member States to inform the Commission of any difficulties met by their economic operators in securing service contracts in third countries. The Commission shall try to remedy any situation whereby it finds that a third country discriminates against EU economic operators.[20] The Commission can propose that the Council adopt an implementing act to suspend or restrict the award of service contracts to undertakings connected the third country in question. With regard to Directive 2014/23,[21] it is stated in para.65 that award criteria or concession performance conditions concerning social aspects of the production process should be applied in accordance with Directive 96/71, as interpreted by the CJEU, and should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States or from third countries parties to the WTO GPA or to FTAs to which the EU is party. This implies the possibility of a direct or indirect differential treatment of third-country economic operators.

Article 25 of Directive 2014/24[22] and the practically identical art.43 of Directive 2014/25 prescribe the obligation that contracting authorities must accord to the works, supplies, services and economic operators of the signatories to FTAs with the EU (including, of course, the GPA)[23] treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU.[24] This underlines that the EU favours reciprocity[25] and FTAs as a method of mutual and equal participation in public procurement markets. So, it is possible to conclude that since these Articles forbid less favourable treatment for economic operators from countries with FTAs with the EU—less favourable treatment is possible for economic operators from third countries.

La Chimia sees art.25 of Directive 2014/24 as a "bargaining tool used by the EU to flex its muscle as a normative agent when negotiating international agreements on procurement with third countries: a ‘bargaining tool’ used by the EU to persuade other countries to sign not just any international agreements on procurement, but international agreements on procurement that are framed around and are aligned with the principles of free trade and market liberalisation".[26] In other words, art.25 should help the Commission to persuade third countries to sign FTAs so they could access the EUs public procurement market on an equal footing with EU economic operators and economic operators from countries with those FTAs already in place. ***320**

2.1. Commission Guidance

The main reason for the publishing of the 2019 Guidance is the perceived lack on reciprocity in accessing public procurement markets with third countries—China being the biggest problem.[27] This was emphasised by the European Council (Council)—the Council mentioned "unfair practices of third countries making full use of trade defence instruments and our public procurement rules, as well as ensuring effective reciprocity for public procurement with third countries".[28]

One of the most important aspects of the Guidance is the Commission’s interpretation of the already mentioned art.25 of Directive 2014/24. The Commission mentioned FTAs, and that "the public procurement directives provide, for public buyers in the EU, to accord to the works, supplies, services and economic operators of the signatories to those agreements treatment that is no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU, in so far as these are covered by these agreements".[29] But, when addressing third-country economic operators and their access to EU public procurement procedures, the Commission states that "economic operators from third countries, which do not have any agreement providing for the opening of the EU procurement market or whose goods, services and works are not covered by such an agreement, do not have secured access to procurement procedures in the EU and may be excluded".[30]

This is an important instance where the Commission explicitly mentions the possibility of excluding third-country economic operators from taking part in EU public procurement procedures based on art.25 of Directive 2014/24. But here the Commission links the possibility of exclusion with the established lack of reciprocity. To help in establishing the existence of reciprocity in access to public procurement markets between the EU and a specific third country, the Commission proposed the IPI.

3. International Procurement Instrument

The IPI entered into force in July 2022 (after 10 years of discussions),[31] and it imposes public procurement access restrictions to third-country economic operators. Dawar and Skalova point out that this was seen as imperative because the "EU public procurement market is open to foreign bidders, unlike the procurement markets for foreign goods and services in third countries which remain to a large extent closed de iure or de facto".[32] The proposed restrictions are not absolute—they apply only in certain conditions and above certain thresholds.

The Commission can start an investigation on its own initiative or upon a substantiated complaint of an EU interested party or a Member State.[33] After the Commission concludes the investigation, it must publish a report. If the Commission finds that the third country in question has implemented measures of practices that limit EU economic operators in accessing its public procurement market, the Commission can institute measures against that third-country's economic operators—the Commission can require the contracting authorities to impose score adjustments on tenders submitted by economic operators originating in that third country, or even exclude those tenders.[34] But the measures can only be applied to public ***321** procurement procedures with an estimated value equal to or above €15,000,000.00 net of value added tax (VAT) for works and concessions, and equal to or above € 5,000,000.00 net of VAT for goods and services.[35]

Since the main goal of the IPI is to ensure reciprocity and the interests of the EU, Member States and EU economic operators, the IPI establishes extensive exemptions from the application of the IPI.[36]

In April 2024, the first investigation under the IPI was initiated concerning practices in the Chinese medical equipment public procurement market.[37] The Commission claims that the investigation was initiated "due to measures introduced by China that unfairly differentiate between local and foreign companies, and between locally produced and imported medical devices".[38] On 14 January 2025, the Commission published a detailed report on the investigation[39] where it states that "the investigation showed that the measures and practices favouring the procurement of domestic medical devices and those restricting the procurement of imported medical devices, referred to in the Notice of Initiation, are two interlinked elements of a 'Buy China' policy implemented by the GOC, which sets a generally applicable preference for the procurement of domestic medical devices to the detriment of imported ones".[40]

4. Foreign Subsidies Regulation

The FSR came into full effect in July 2023, with wide reaching changes (albeit for only the public procurement procedures with the highest value). The main goal of the FSR is to minimise the negative effect of tenders subsidised by third countries, thus distorting the market. This has been recognised as one of the biggest dangers to a transparent and competitive common public procurement market.

The FSR applies only to public procurement procedures with a value equal to or above €250 million, and cumulatively—if the subsidised economic operator was granted aggregate financial contributions in the three years prior to notification or,

if applicable, the updated notification, equal to or greater than € 4 million per third country.[41] The "financial contributions" in questions are quite broad—they can include loans, capital injections or tax exemptions granted by a third country.[42] The economic operator must inform the contracting authority about the problematic subsidies received, and the economic operator must inform the Commission.[43] The Commission can decide to start an in-depth investigation. If the in-depth investigation shows that the economic operator benefited from a foreign subsidy that distorted the market, but the economic operator offers commitments to remedy the distortion, the Commission will adopt a decision making those commitments binding on the economic operator.[44] But if the economic operator in questions does not offer those commitments or if the commitments offered are not considered adequate, the Commission shall adopt a decision prohibiting the award of the contract to the economic operator in question.[45]

The first public procurement related FSR investigation began in February 2024, when the Commission investigated a tender submitted by the Chinese state-owned train manufacturer CRRC in a Bulgarian ***322** public procurement procedure. In March 2024, CRRC dropped out of the public procurement procedure, and the investigation was closed.[46]

The Commission opened two more FSR investigations in April 2024, against ENEVO Group including LONGi Solar Technologie GmbH, and Shanghai Electric UK Co Ltd and Shanghai Electric Hong Kong International Engineering Co Ltd. Both tenders were submitted in a Romanian public procurement procedure for the design, production and instalation of a photovoltaic park.[47] Both investigations were closed when the economic operators in question withdrew from the public procurement procedure in June 2024.[48]

5. The ***Kolin*** case

Even though the Guidance, IPI and FSR are significant steps toward limiting participation of third-country economic operators in EU public procurement procedures, the CJEUs judgment in the Kolin case has had the biggest impact. The judgment is even more interesting because it was rendered in a request for a preliminary ruling that had nothing to do with the questions the CJEU decided to answer.

5.1. Facts of the case before Croatian authorities

HŽ Infrastruktura d.o.o. (a state-owned limited liability company tasked with the management, maintenance and building of railway infrastructure in Croatia—a utilities contracting authority under Directive 2014/25) started an open public procurement procedure for the award of a construction works contract for the Hrvatski Leskovac-Karlovac infrastructure upgrade project in September 2020. In January 2022, the contracting authority selected the tender submitted by the following group of contractors: Strabag AG, Spittal an der Drau, Republic of Austria, Strabag d.o.o. Zagreb, Republic of Croatia, and Strabag Rail a.s., Usti nad Labem, Czech Republic as the most economically advantageous.[49] Kolin, also a tenderer in this public procurement procedure, submitted an appeal to the Croatian State Commission for the Control of Public Procurement Procedures (Državna komisija za kontrolu postupaka javne nabave—DKOM). The appeal was successful and DKOM set aside the selection decision based on problematic references of the successful tenderer.

While re-examining and re-evaluating the tenders after DKOM set aside the first selection decision, the contracting authority asked the selected group of contractors to submit a supplemented list of completed works, which contained references not included in the original tender documentation. Subsequently, the contracting authority selected the same group of contractors again in April 2022. Kolin appealed to DKOM again on the basis of, inter alia, that the contracting entity had no legal basis, when re-examining and re-evaluating the tenders, to call on the selected group of contractors to supplement the up-to-date

evidence already provided regarding the demonstration of their technical and professional capacity,[50] but this time DKOM dismissed the appeal.

Kolin then initiated an administrative dispute before the High Administrative Court of the Republic of Croatia (Visoki upravni sud Republike Hrvatske—VUSRH) against DKOM's decision, claiming that "accepting a new reference that was not included in the successful tenderer's original tender de facto ***323** constitutes an amended tender—the contracting entity acted unlawfully through its conduct as described above; it infringed applicable EU law, specifically the principle of equal treatment".[51]

VUSRH had "doubts as to whether taking into account a new reference that was not indicated in the original tender, but was only provided after the contracting entity had called for supplementary documentation (after the time limit for the submission of tenders), is lawful".[52] VUSRH claims that it was aware of the Esaprojekt judgment of the CJEU[53] which interpreted Directive 2004/18[54] but is also applicable to Directive 2024/24. However, VUSRH was unsure if Esaprojekt also applied to Directive 2024/25.

So, VUSRH stayed the administrative dispute, submitted a request for preliminary ruling to the CJEU, and referred questions regarding the possibility of the contracting authority to consider documents provided by the tenderer that were not included in the original tender.

5.2. AG Collins' Opinion

AG Collins' opinion was submitted in March 2024.[55] On the questions raised by VUSRH, AG Collins emphasises that the text of art.76(4) of Directive 2014/25 is identical to art.56(3) of Directive 2014/24, and that there is no reason those two provisions ought not to be interpreted in the same way.[56] The submission of new documents which relate to a tenderer's technical and professional ability by way of reference to works not mentioned in the original tender does not amount to a correction, clarification, or explanation—it constitutes a significant amendment of that tender, without which that bid would be rejected.[57] Furthermore, even though the facts of this case and the facts of the Esaprojekt case differ, those factual differences have no bearing upon the legal principles applicable.[58] This way AG Collins suggests that the issues raised by VUSRH before the CJEU have already been resolved by the Esaprojekt judgment.[59]

With regard to the admissibility of the request, AG Collins states that economic operators from non-covered third countries do not fall within the scope *ratione personae* of Directive 2014/25, and since Kolin is not entitled to participate in a procedure for the award of a public contract governed by Directive 2014/25, it cannot seek to rely on the provisions thereof before a Member State court.[60] This is the reason VUSRH cannot obtain a response to a reference for a preliminary ruling since any answer that the CJEU might give to its request would not have binding effect.[61]

Furthermore, AG Collins considers who has the power to regulate the participation of economic operators from third countries in EU public procurement procedures—the Member States or the EU. AG Collins believes this to be an exclusive competence of the EU, and that Member States cannot unilaterally decide to extend the scope of the relevant EU rules.[62]

AG Collins concludes with recommending that the CJEU declare the request for a preliminary ruling inadmissible in its entirety. ***324**

6. The Kolin judgment—analysis

The CJEU concentrated on the evaluation of the admissibility of the request made by the VUSRH, since the action before the VUSRH was brought by Kolin—a third-country economic operator and declared the request for preliminary ruling as inadmissible. The reasoning behind such a decision is important and will have far reaching consequences on EU and Member State public procurement law.

6.1. Third-country economic operators may participate, but not on an equal footing—they are not protected by the Directive(s)

The CJEU states that, although EU law does not preclude third-country economic operators (in the absence of exclusion measures adopted by the EU) from being allowed to participate in a public procurement procedure governed by Directive 2014/25, they are not allowed to rely on that Directive and thus to require that their tender be treated equally to those submitted by tenderers from Member States and by the tenderers from third countries that have signed FTAs with the EU.[63] The opposite conclusion would reduce the benefits of that right (equal treatment) to economic operators from countries with signed FTAs with the EU.[64]

Article 45(1) of Directive 2014/25 states that "any interested economic operator" may submit a tender. The CJEU states that this right does not extend to third-country economic operators—they may be excluded, and if admitted into the public procurement procedure—they are not entitled to rely on Directive 2014/25.[65]

This part of the Kolin judgment should not be, at least in principle, problematic. Article 25 of Directive 2014/24 and art.43 of Directive 2014/25 indeed reserve equal treatment only for economic operators from countries with signed FTAs with the EU. Allowing equal access and treatment to such economic operators negates the need for FTAs, limits the ability of the EU to reach beneficial FTAs with third countries and puts economic operators from countries with FTAs in place at an unfair disadvantage.

6.2. Access to the EU public procurement market is an exclusive competence of the EU

The CJEU states that any act of general application specifically intended to determine the arrangements under which economic operators from a third country may participate in public procurement procedures in the EU, is such as to have direct and immediate effects on trade in goods and services between that third country and the EU, with the result that it falls within the exclusive competence of the EU under art.3(1)(e) TFEU.[66] The CJEU further claims that this conclusion is confirmed by art.86 of Directive 2014/25 (which confers to the EU and not the Member States the power to suspend or restrict access to the EU public procurement market to economic operators from third countries that impede public procurement access to EU economic operators), and the IPI—which states (in recital 3) that the access of third-country economic operators, goods and services to the public procurement or concession markets of the EU falls within the scope of the common commercial policy.[67]

Furthermore, only the EU has competence to adopt an act of general application concerning access to EU public procurement procedures for economic operators of a third-country which has not concluded an FTA with the EU guaranteeing equal and reciprocal access to public procurement, by establishing either a system of guaranteed access to those procedures for those economic operators or a system which ***325** excludes them or provides for an adjustment of the result arising from a comparison of their tenders with those submitted by other economic operators.[68]

The CJEU claims that the EU has the authority to establish a "system of guaranteed access to those procedures for those economic operators or a system which excludes them or provides for an adjustment of the result arising from a comparison of their tenders with those submitted by other economic operators". But the EU has already established a system in which third-country economic operators may be excluded or they can suffer an "adjustment of results" from a comparison with EU economic operators or economic operators form countries with FTAs—by adopting the IPI and the FSR.

A further point of contention is the mentioning od FTA's guaranteeing "equal and reciprocal access to public procurement". This can complicate further enlargement of the EU, since it can be argued that Stabilisation and Association Agreements are not reciprocal—at least temporarily.

For example, The Stabilisation and Association Agreement between the EU and Bosnia and Herzegovina[69] (Agreement) was signed in 2015. Article 74 of the Agreement prescribes basic market access public procurement rules. Bosnian companies are granted access to the EU public procurement market "under treatment no less favourable than that accorded to Community companies as from the entry into force of this Agreement". But EU companies not established in Bosnia "shall be granted access to contract award procedures in Bosnia and Herzegovina under treatment no less favourable than that accorded to companies of Bosnia and Herzegovina at the latest five years after the entry into force of this Agreement". So, reciprocity comes with a time delay, which is meant to protect Bosnian economic operators from EU based competition in a transitional period. This transitional period is in place in all other Stabilisation and Association Agreements, and the Commission states that the "reciprocal commitments are usually construed on an asymmetrical basis",[70] bringing into question reciprocity itself as mentioned by the CJEU. Even though the transitional period has passed in all of these Agreements, it is possible that more of these Agreements will be signed in the future, and that access of economic operators from those countries to EU public procurement procedures will come into question because of the (lacking) interpretation of "reciprocity" in FTAs by the CJEU.

Another problem is the fact that art.74(2) of the Agreement prescribes periodic evaluation of Bosnia and Herzegovinas' progress in adopting EU legislation in utilities procurement, and a positive evaluation is a prerequisite for granting access to Bosnian economic operators access to EU utilities public procurement procedures. This is another example of the lack of reciprocity in these agreements (the same provision can be found, for example, in art.76(2) of the Serbian Stabilisation and Association Agreement).[71] This will cause practical problems to contracting authorities, especially to contracting authorities from Member States where economic operators from membership candidate countries often take part in public procurement procedures (Croatia, Slovenia, Hungary).

The "equal and reciprocal access" condition reminds us that even the WTO GPA is not applicable to all public procurement procedures. The WTO GPA is applicable only to the public procurement procedures explicitly mentioned in the parties coverage schedules, which means that the obligations under the WTO GPA are variable.[72] The lack of reciprocity is especially evident in the fact that the list of exceptions from the coverage of the GPA is "more extensive in the case of the US, than in the case of the EU". ***326** [73]

For example, the United States (US) has no access to the EU transportation sector procurement and services purchased by subcentral entities.[74] So—if there is no reciprocity—even economic operators from WTO GPA countries must be excluded from EU based public procurement procedures.

Contracting authorities will now have to have this in mind also.[75]

6.3. Wide discretion awarded to contracting authorities

The CJEU claims that the EU has not adopted legally binding acts concerning access to public procurement procedures for third-country economic operators and has not empowered the Member States to do so. Therefore, until the EU decides to adopt such

an act, the CJEU states that it is for the contracting authority to decide should third-country economic operators be admitted to a public procurement procedure and, if it decides to admit them, whether there should be an adjustment of the result arising from a comparison between the tenders submitted by those operators and those submitted by other operators.[76]

This conclusion of the CJEU is problematic. If Member States are not allowed to decide on the participation of third-country economic operators in national procurement procedures—why are contracting authorities allowed to do so? Is there (and should there be) a separation between contracting authorities and the state in this regard?[77] Even though this conclusion allows contracting authorities a lot more flexibility to decide which public procurement procedures are suitable for third-country economic operator participation and which ones are not, I still believe that this level of flexibility will not be beneficial overall. Allowing every contracting authority to decide on a case-by-case basis will it allow participation of third-country economic operators is not only an added burden for contracting authorities but significantly increases legal uncertainty in public procurement participation across the EU.

Furthermore, the CJEU states that it is open to the contracting authority to set out, in the procurement documents, arrangements for treatment intended to reflect the objective difference between the legal situation of those operators, on the one hand, and that of EU economic operators and of third countries which have concluded FTAs with the EU.[78]

The CJEU allows the contracting authorities to:
exclude third-country economic operators from a public procurement procedure,
admit them to the procedure and implement an "adjustment of the results" arising from the comparison of third-country economic operators' tenders with the tenders of other economic operators,
admit them to the procedure without an "adjustment of the results".

Contracting authorities must transparently state their decision regarding third-country economic operators in the initial procurement documentation. But, it is foreseeable that some (especially smaller) contracting authorities will have problems with establishing the "adjustment of results" methodology, and will either completely exclude third-country economic operators from all of their public procurement procedures, or need help in establishing rules for the result adjustment from the state or state bodies—which would circumvent the CJEUs conclusion that Member States cannot decide on third-country economic operator participation in public procurement procedures. Additionally, it seems that a universal "arrangement for treatment intended to reflect the objective difference between the legal situation" of third-country and ***327** other economic operators is out of the question, since the CJEU clearly states that this something only contracting authorities can do on a case-by-case basis.

6.4. Third-country economic operators are not protected by national provisions transposing Directive 2014/25

In situations where contracting authorities decide to allow third-country economic operators to participate in a public procurement procedure, national authorities cannot interpret the national provisions transposing Directive 2014/25 as also applying to third-country economic operators, "as otherwise the exclusive nature of the EU's competence in that area would be disregarded".[79]

Even though the CJEU mentions only Directive 2014/25, I believe the logical conclusion to be that it also applies Directive 2014/24, but also the Remedies Directive 2007/66.[80] I see no logic in excluding third-country economic operators only from utilities public procurement procedures. Also, the Remedies Directive is intricately linked to all the public procurement directives and is transposed in national public procurement acts, making it hard to separate it from the application of Directives 2014/24 and 2014/25.

This means that third-country economic operators that have been allowed to participate in a public procurement procedure cannot count on the protection of a big part of national public procurement legislation, and it is imperative for Member States to set up parallel legal protection as soon as possible. For instance, a third-country economic operator (if admitted to an EU-based public procurement procedure), can use national remedies established by national administrative procedure acts and/or national administrative dispute acts. However, most grounds for appeal are closely linked to national public procurement legislation, leaving a third-country economic operator with very little recourse.

6.5. Remedies parallelism?

The CJEU states that third-country economic operators that were allowed to participate in certain EU public procurement procedures can be treated in accordance with certain requirements like transparency and proportionality. But 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.[81]

It was previously established that third-country economic operators that have been allowed to participate in a certain public procurement procedure cannot invoke EU law or national public procurement law transposing EU law to protect their rights.

The CJEU states that it is conceivable that third-country economic operators should be treated with transparency and proportionality (this is not an exhaustive list of applicable principles). While the CJEU does not explicitly state that third-country economic operators must be treated with transparency and proportionality, it would be difficult to conduct administrative or judicial proceedings in the EU without considering these obligations for any party. Additionally, treating third-country economic operators differently could violate art.6 of the European Convention on Human Rights (ECHR).[82] This implies that third-country economic operators should have a remedy available to address violations of these principles as outlined by the CJEU, which also indicates that only national law can apply in this context.

This is a highly questionable solution by the CJEU. First, it puts an additional burden on Member States to introduce new remedies legislation only applicable to (a presumably exceedingly small number of) third-country economic operators that were allowed by contracting authorities to participate in certain ***328** public procurement procedures. This opens the door to parallel remedies procedures: a Croatian economic operator submits a standard appeal to DKOM under the Croatian Public Procurement Act, and a Chinese economic operator also submits an appeal to DKOM in the same public procurement procedure —but with a much narrower choice of appeal grounds. Member States will need to decide on the competent body to address those new remedies (a new body or—preferably—the existing remedies body and/our court) and decide the scope of possible appeal allegations third-country economic operators will be able to use.

But, since third-country economic operators must be treated (at least) in accordance with the principles of transparency and proportionality—principles explicitly mentioned in Directives 2014/24 and 2014/25—will these parallel remedies procedures really be separate and distinct from EU law?[83]

7. Open questions

The Kolin judgment raises many questions that contracting authorities, Member States, and national appeal bodies and courts need to address. We face prolonged legal uncertainty, which could have been minimised if the CJEU had considered the potential consequences of the Kolin judgment.

7.1. Are new documents allowed in public procurement procedures?

Regrettably, the CJEU chose not to address the questions referred by VUSHR. However, these questions were redundant as they have already been resolved by the Esaprojekt judgment.[84] Submission of new documents should not be allowed as this leads to the amendment of tenders and the breach of principle of equal treatment. This was the view of the Commission during the Kolin case,[85] and of AG Collins. AG Collins emphasises that the submission of new documents which relate to a tenderer's technical and professional ability by way of reference to works not mentioned in the original tender does not amount to a correction, clarification, or explanation—it constitutes a significant amendment of that tender, without which that bid would be rejected.[86] Furthermore, AG Collins explicitly states that the CJEU judgment in Esaprojekt also applies here.[87]

7.2. Below threshold procurement?

The CJEU does not clarify how the Kolin judgment effects below threshold public procurement procedures. The 2014 EU public procurement regulatory framework applies only to public procurement procedures above a certain value[88] (€5,538,000.00 for works and €221,000.00 for most services and goods), and Member States are mostly free to set up public procurement procedures below those thresholds but having basic transparency and equal treatment principles in mind. This has always been a problematic part of the EU public procurement directives, especially for the eastern Member States—the thresholds have been too high (especially for works contracts) and many Member States (Croatia included) have extended the same public procurement and remedies rules to above and below threshold public procurement procedures—the exception in Croatia being"simple" procurement procedures, with value below €26,549.00 for goods and services and below € 66,360.00 for works. ***329**

In this regard, the Kolin judgment poses important questions—should third-country economic operators be treated differently in above and below threshold public procurement procedures?

An argument can be made that since Directives 2014/24 and 2014/25 should apply only to above threshold contracts—Member States can freely allow them to participate and offer full legal protection in below threshold contracts. But such an interpretation would again encroach on the EUs exclusive competence in trade with third countries. Furthermore, as I already mentioned above, many Member States decided to expand the application of the same rules on above and below threshold public procurement procedures. So, the national Public Procurement Act transposing Directive 2014/24, 2014/25 and 2007/66 applies in the same way to below threshold procedures, and I believe Kolin should apply to below threshold public procurement procedures also. The CJEU judgment in Leur-Bloem[89] confirms this—the CJEU states that when Member States, in regulating purely internal situations, adopt the same solutions as those adopted in Community law in order, in particular, to avoid discrimination against its own nationals or, as in the case before the national court, any distortion of competition, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.[90]

7.3. Origin of economic operators and consortiums?

This is a two-tier problem; contracting authorities must establish what countries are "third countries" and what is the country of origin of a specific economic operator. This will not be an easy task—every contracting authority will know China and Türkiye are third countries, but what about EU membership candidate countries, or WTO GPA countries in certain public procurement procedures where there is no "reciprocity"? The Commission's tool for determining whether there are FTAs with a particular country can be of some assistance in this matter.[91]

But establishing the origin of an economic operator is going to be more difficult. This is already a problem in some Member States—like Romania. In 2021, Romania amended its Public Procurement Act[92] and the most important change was the new definition of economic operators, a definition that completely excluded third-country economic operators.[93] The Romanian authorities claimed that this was necessary because third-country economic operators could jeopardise strategic public procurement procedures in Romania because of their unacceptable quality guarantees, bad record on environmental protection and sustainability, failure to ensure minimum working and welfare conditions, and failure to protect fundamental human rights or observe basic competition rules. ***330** [94]

But the effectiveness of such a solution is heavily debated since Chinese economic operators (mostly via subsidiaries) still take part in Romanian public procurement procedures. Good examples are the already mentioned FSR investigations from April 2024, which were initiated against Chinese economic operators in Romanian public procurement procedures, three years after the aforementioned legislative changes in Romania.[95]

This underscores the importance for contracting authorities to have well-defined rules for determining whether an economic operator is a third-country economic operator, and to apply these rules consistently. This is important if contracting authorities decide to ban third-country economic operators from a specific procedure, but also if they decide to allow them to take part—since the rules applicable to the participation of a economic operator and the available appeal grounds depend of the correct determination of the country of origin of the economic operator in question.

Since the CJEU does not offer any guidance on how to establish the origin of an economic operator, contracting authorities should fall back on the IPI—a legal instrument heavily referenced in the Kolin judgment. Article 3(1) of the IPI prescribes that the country of origin of an economic operator shall deemed to be:

a)

in the case of a natural person, the country of which the person is a national or where that person has a right of permanent residence,

b)

in the case of a legal person, either of the following:

(i)

the country under the laws of which the legal person is constituted or otherwise organised and in the territory of which the legal person is engaged in substantive business operations,

(ii)

if the legal person is not engaged in substantive business operations in the territory of the country in which it is constituted or otherwise organised, the origin of the legal person is to be that of the person or persons who may exercise, directly or indirectly, a dominant influence[96] on the legal person by virtue of their ownership of that legal person, their financial participation therein, or the rules which govern that legal person.

Article 3 of the IPI provides sufficient guidance to contracting authorities regarding the determination of the origin of economic operators post-Kolin. However, art.3 appears to permit the participation of subsidiaries of third-country economic operators, established within a Member State according to its laws, in public procurement procedures within the EU. Third-country economic operators can establish subsidiaries in Member States that are primarily focused on conducting business within those specific Member States. This way, the second part of art.3(1)b(ii) of the IPI, establishing the need for ascertaining the dominant influence from abroad may not kick in. Bovis believes that "controlling interest in an EU economic operator by economic operators originating from non-GPA-covered third countries represents a ground for disqualification on the premise of reliability and financial and economic standing", and mentions recital 101 of Directive 2014/24, which stipulates that contracting authorities may exclude economic operators which have proven unreliable.[97] But I believe a rewriting of art.3 of the IPI would be a more straightforward solution so that the establishment of origin of a legal person must always consider foreign influence. For example, new a version of art.3(1)(b)(ii) of the IPI: ***331**

ii)

if it is established that a person or persons exercise, directly or indirectly, a dominant influence on the legal person by virtue of their ownership of that legal person, their financial participation therein, or the rules which govern that legal person, the origin of the legal person shall be the same as the origin of the person or persons that insert dominant influence.

Consortiums may represent another practical problem for contracting authorities post Kolin. The CJEU offers no guidance on establishing the origin of consortiums, and it is possible that third-country economic operators will attempt to use the combination of subsidiaries and consortiums to gain full access to EU public procurement procedures and to avoid being labeled as third-country economic operators.

Even though the CJEU offers no guidance in Kolin on how to establish the origin of consortiums, art.3(2) of the IPI clearly states which consortiums are problematic and can be interpreted for use in these cases. If an economic operator is a consortium, and at least one of such persons or entities originates from a third country, the whole consortium will be considered a third-country economic operator. However, where the participation of such persons or entities in a consortium amounts to less than 15% of the value of a tender submitted by that consortium, the consortium shall not be considered a third-country economic operator, unless those persons or entities are necessary in order to fulfil the majority of at least one of the selection criteria in a public procurement procedure.

7.4. What should the remedies for third-country economic operators look like?

The CJEU states that national authorities cannot interpret the national provisions transposing Directive 2014/25 (but also Directive 2014/24 and Directive 2006/77, see above) as also applying to economic operators of third countries. Furthermore, if admitted into a public procurement procedure, the CJEU states that third-country economic operators can be treated with (at least) transparency and proportionality in mind (but this should definitely be an obligation because a different approach would violate art.6 of the ECHR), but the available remedies ("actions by one of those operators seeking to complain") can be examined only in the light of national law. It seems to me that this part of the Kolin judgment creates an obligation to establish a parallel remedies system—and especially parallel appeal grounds—for third-country economic operators allowed to participate in a public procurement procedure. At [65] and [66] of the Kolin judgment, read together, do not allow the application of the majority of articles of national public procurement acts to third-country economic operators, and especially do not allow third-country economic operators to claim a breach of an Article of a national public procurement act that represents a transposition of either Directive 2014/25, Directive 2014/24 of Directive 2007/66.

What does this mean in practice? The majority of Articles of the Croatian Public Procurement Act represent a direct transposition of EU public procurement directives—definition of economic operators, technical specifications, selection criteria and so on. But some of the Articles are exclusively national, for example—the Articles establishing the appeal procedure as an administrative procedure. Are the contracting authorities now expected to know exactly what is the basis for each Article of the Croatian Public Procurement Act? But even though the Articles establishing the appeal procedure as an administrative procedure are (probably) national, it can be argued that they are also transposing Directive 2006/77. So, can they be applied to third-country economic operators? If we decide they can, third-country economic operators should be able to submit appeals to DKOM. But, on what appeal grounds? Most of the Articles in the Croatian Public Procurement Act are transpositions of the EU public procurement directives. Therefore, economic operators from third countries cannot use their violation as grounds for appeal. If they are permitted to appeal solely on the grounds of certain principles, as indicated by the Kolin judgment, does this mean they are also appealing a breach of EU law? This question arises because nearly all public procurement principles are derived from and incorporated into EU law. ***332**

The issue of remedies is notably complex, and it must be the responsibility of Member States to establish new remedy rules applicable to third-country economic operators. However, in doing so, Member States should be cautious of the Kolin judgment. The CJEU states that Member States cannot adopt legally binding acts in this regard ([62]). It is only contracting authorities that can decide whether to allow the participation of third-country economic operators and under which rules ([63], [64]).

It seems to me that the CJEU has put contracting authorities and Member States in a difficult position—Member States may be in breach of EU law if they decide to adopt specific appeal procedures for third-country economic operators, and in breach of the CJEU judgment in the Kolin case if they decide to do nothing.

Some Member States have nevertheless decided to do nothing and transfer the responsibility to issue guidance to the Commission. Croatia's Ministry of Economy (the competent state body for the public procurement system) has issued an opinion on the Kolin case in January 2025, stating the following:

"Given that the judgment caused a number of legal doubts, and with the aim of ensuring uniform application in all Member States, especially taking into account new (upcoming) judgments of the CJEU, such as the judgment in case C-266/22 (CRRC Qingdao Sifang CO LTD v Astra Vagoane Calatori SA), and the conclusions of the judgment in question (C-652/22) in which it is stated that the issue of treatment of economic entities from third countries, which have not concluded an international agreement with the European Union in the field of public procurement, is exclusively within the jurisdiction of the EU, the Ministry will, after receiving instructions from the European Commission and answers to questions about the manner of treatment of these economic entities, publish detailed instructions or information."[98]

With this in mind, it is essential to monitor the impact of the Kolin judgment on Bilateral Investment Treaty (BIT) alternative dispute resolution in public procurement procedures. This is particularly important during the contract execution phase, especially when a third-country economic operator is the contractor and the public procurement procedure was concluded prior to the Kolin judgment. If a need arises to amend the contract, national contract amendment Articles are transposed from EU public procurement directives, and it is questionable can a third-country economic operator participate in a contract amendment based on transposed Articles of EU public procurement directives. So, it is foreseeable that a third-country economic operator might fall back on a BIT signed between its country and the Members State in which the public procurement took place. But since this is not an agreement entered into by the EU as a whole, it could be viewed as encroaching EU exclusive competence in trade relations and economic policy.

7.5. What about existing national provisions excluding third-country economic operators?

Certain Member States have already enacted national legislation excluding third-country economic operators from national public procurement procedures. One of those Member States is Romania (see above) which enacted such amendments to its Public Procurement Act in 2021. Bucharest Court of Appeal (Curtea de Apel Bucuresti—CAB) submitted a request for preliminary ruling to the CJEU concerning, inter alia, these amendments in 2022, a few months before VUSRH in the Kolin case.[99] The case is still pending but considering that the appellant before the CAB is a Chinese economic operator and having AG Rantos' opinion in mind,[100] I expect that the CJEU will declare the preliminary ruling inadmissible—like in the Kolin case. ***333**

So, what will happen to those national provisions post-Kolin? In Kolin, the CJEU clearly states that only the EU has competence to adopt an act of general application concerning access, within the EU, to public procurement procedures for third-country economic operators[101] and that the Member States can do so by themselves only if so empowered by the EU or for the implementation of EU acts.[102]

Since there is (still) no EU general act addressing third-country economic operators' access to the EU public procurement market and since the EU has not delegated (a part) of this authority to Member States—national legal acts completely preventing participation of third-country economic operators in national public procurement procedures are not in line with EU law post-Kolin.

7.6. What about EU membership candidate countries?

Albania, Bosnia and Herzegovina, Georgia, Moldova, Montenegro, North Macedonia, Serbia, Türkiye and Ukraine are current candidate countries for EU membership. Until they become full members—the Kolin judgment does not apply, and third-country economic operators may participate in their public procurement procedures. But the EU funds many public procurement projects in candidate countries with its Pre-Accession Assistance Programme, which has a budget of €14.16 billion for the 2021–27 time period.[103] For example, EU has approved a €600 million investment grant to Serbia for the large-scale modernisation of the rail link between Belgrade and Niš.[104] The public procurement procedures will begin soon, and the Serbian Government expects the construction to begin in the second half of 2025.[105] Since Chinese economic operators are already widely present in the Serbian construction market,[106] it is very likely that a big part of the €600 million EU grant will be diverted to a Chinese company.

8. Conclusion

The Kolin judgment is one of the most significant public procurement CJEU judgments in recent years. It will have significant consequences on the internal public procurement market and international relations between the EU and "third countries" like China.

The CJEU's basic premise—that third-country economic operators are not afforded the same rights and privileges as EU economic operators and economic operators from countries with FTAs with the EU—should not be controversial and is in line with art.25 of Directive 2014/24 and art.43 of Directive 2014/25. A different interpretation of arts 25 and 43 would make it very difficult for the EU to negotiate FTAs and secure free access for EU economic operators in third-country markets.

But the way in which the CJEU implements this basic premise is problematic. The practical consequences of the Kolin judgment will most likely be the frequent exclusion of third-country economic operators from EU public procurement procedures. Even though the CJEU allows contracting authorities to admit them into their public procurement procedures, I find it highly unlikely that contracting authorities will do so in the majority of public procurement procedures—because of the high legal uncertainty such a decision brings: how to establish rules governing "the adjustment of results arising from comparison" of third-country and other economic operators, which law to apply and what remedies/appeal grounds are available? I ***334** further expect a big reduction in tenders submitted by third-country economic operators in EU public procurement procedures—it would be a big gamble since the use of appeal grounds in very restricted.

The CJEU claims that the general decision to allow (or not to allow) participation of third-country economic operators in EU public procurement procedures, and the rules that will apply, is an exclusive competence of the EU. So, Member States cannot enact general legal acts without EU delegation of authority to do so. But it can be argued that the EU already exercised this competence by enacting IPI and FSR—which limit third-country economic operators' participation in EU public procurement procedures and establish a system easily understandable and applicable by Member States and contracting authorities. By making it difficult for those operators to participate in EU public procurement procedures, the CJEU has unnecessarily went "above and beyond" the system put in place by the EU and made it significantly more burdensome for contracting authorities to conduct public procurement procedures.

Furthermore, the CJEU has left may unanswered questions Member States, contracting authorities, national review bodies and courts will have to answer: what is a third-country economic operator, which consortiums are problematic, how to establish parallel review procedures and appeal grounds for third-country economic operators, what to do with sub-threshold public procurement procedures and many others.

And in the end there is the question of the efficacy of the Kolin judgment. If subsidiaries of third-country economic operators established in Member States will be treated as EU contracting authorities—the Kolin judgment will have little results and a lot of unnecessary obligations for contracting authorities. The Romanian example shows that even after total exclusion of third-country economic operators in 2021 there were still Romanian subsidiaries of Chinese economic operators in Romanian public procurement procedures in 2024. Furthermore, art.3 of the IPI seems to allow the participation of subsidiaries of third-country economic operators, established in a Member State under the laws of the Member State in public procurement procedures in the EU.

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Footnotes

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1 Kolin Insaat Turizm Sanayi ve Ticaret AS v Drzavna komisija za kontrolu postupaka javne nabave (C-652/22) EU:C:2024:910.

2 See art.5 of Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

3 See art.25 of Directive 2014/24 on public procurement and repealing Directive 2004/18/EC [2014] OJ L/94/65.

4 European Parliament resolution of 12 May 2011 on equal access to public sector markets in the EU and in third countries and on the revision of the legal framework of public procurement including concessions (2012/C 377 E/12).

5 See also *J. M. Gimeno Feliu, "Public Procurement as a Strategy for the Development of Innovation Policy" in G.M. Racca and C. R. Yukins (eds), Joint Procurement and Innovation—Lessons Across Borders (Brussels: Bruylant, 2019), p.275*.

6 *World Trade Organisation, Agreement on Government Procurement 2012 (2014)*, https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf.

7 R.D. Anderson and A.C. Mueller, "The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development" (2017) 48 Georgetown Journal of International Law 961.

8 *L. Cernat and Z. Kutlina-Dimitrova, "Transatlantic trade and public procurement openness—Going beyond the tip of the iceberg" in A. Castelli, G. Piga,S. Saussier and T. Tartai (eds), The Challenges of Public Procurement Reforms (Abingdon: Routledge, 2021), p.226*.

9 *A. La Chimia, "Commentary on Article 25" in R. Caranta and A. Sanchez-Graells (eds), European Public Procurement—Commentary on Directive 2014/24/EU (Cheltenham: Edward Elgar Publishing, 2021), p.276*.

10 There is no public procurement procedure in Croatia, prior to the Kolin judgement, that implemented a differential treatment of economic operators in accodrdance with art.25 of Directive 2014/24.

11 Communication from the Commission—Guidance on the participation of third country bidders and goods in the EU procurement market C(2019) 5494 final [2019] OJ C271/43.

12 Communication from the Commission—Guidance on the participation of third country bidders and goods in the EU procurement market C(2019) 5494 [2019] OJ C271/43, p.6.

13 Regulation 2022/1031 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) [2022] OJ L173/1.

14 Regulation 2022/2560 on foreign subsidies distorting the internal market [2022] OJ L330/1.

15 Kolin Inşaat Turizm Sanayi ve Ticaret AS v Državna komisija za kontrolu postupaka javne nabave (C-652/22) EU:C:2024:910.

16 For a detailed explanation see *C. Bovis, The Law of EU Public Procurement, 2nd edn (Oxford: Oxford University Press, 2015), pp.160–162*.

17 Directive 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134.

18 Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17 [2014] OJ L94/243.

19 Article 85(3) of Directive 2014/25.
20 Article 86(3) of Directive 2014/25.
21 Directive 2014/23 on the award of concession contracts [2014] OJ L94/1.
22 Directive 2014/24 on public procurement [2014].
23 *World Trade Organisation, Agreement on Government Procurement 2012 (2014)*.
24 For more on the treatment of economic operators form GPA signatories see *R. Caranta, "Commentary on Article 25" in M. Steinicke and P.L. Vesterdorf (eds), EU Public Procurement Law—Brussels Commentary (Baden-Baden: Nomos, 2018), pp.373–377*.
25 See also *S. Arrowsmith, The Law of Public and Utilities Procurement, Vol.2 (London: Sweet & Maxwell 2019), Ch.21*.
26 *La Chimia, "Commentary on Article 25" in Caranta and Sanchez-Graells (eds), European Public Procurement—Commentary on Directive 2014/24 (2021), p.275*.
27 Joint Communication to the European Parliament, the European Council and the Council: EU-China—A strategic outlook, JOIN(2019) 5 final.
28 Communication from the Commission—Guidance on the participation of third country bidders and goods in the EU procurement market C(2019) 5494 final [2019] OJ C271/43, p.3.
29 Communication from the Commission—Guidance on the participation of third country bidders and goods in the EU procurement market C(2019) 5494 final [2019] OJ C271/43, p.5.
30 Communication from the Commission—Guidance on the participation of third country bidders and goods in the EU procurement market C(2019) 5494 final [2019] OJ C271/43, p.6.
31 L. Folliot Lalliot and C. Yukins, "Will Protectionism Prevail in Global Public Procurement?" (2024) 2 Concurrences—Competition Law Review 8.
32 *K. Dawar and M. Skalova, "The evolution of EU public procurement rules and its interface with WTO: SME promotion and policy space" in G. Skovgaard Ølykke and A. Sanchez-Graells (eds), Reformation or Deformation of the EU Public Procurement Rules (Cheltenham: Edward Elgar Publishing, 2016), p.70*.
33 Article 5(1) of the IPI.
34 Article 6(6) of the IPI.
35 Article 5(4) of the IPI.
36 Articles 7 and 9 of the IPI.
37 Notice of initiation of an investigation pursuant to the International Procurement Instrument concerning measures and practices of the People's Republic of China in the public procurement market for medical devices (C/2024/2343) OJ C/2024/2973.
38 Notice of initiation of an investigation pursuant to the International Procurement Instrument concerning measures and practices of the People's Republic of China in the public procurement market for medical devices (C/2024/2343) OJ C/2024/2973.
39 Report from the Commission pursuant to art.5(4) of Regulation (EU) 2022/1031 on the investigation under the International Procurement Instrument concerning measures and practices of the People's Republic of China in the public procurement market for medical devices COM(2025) 5 final.
40 Report from the Commission pursuant to art.5(4) of Regulation (EU) 2022/1031 on the investigation under the International Procurement Instrument concerning measures and practices of the People's Republic of China in the public procurement market for medical devices COM(2025) 5 final, p.2.
41 Article 28(1) of the FSR.
42 P. Friton, M. Klasse and C. Yukins, "The EU Foreign Subsidies Regulation: Implications for Public Procurement And Some Collateral Damage" (2023) 11 The Government Contractor 163.
43 Article 29(1) of the FSR.
44 Article 31(1) of the FSR.
45 Article 31(2) of the FSR.
46 Statement by Commissioner Breton on withdrawal by CRRC Qingdao Sifang Locomotive Co Ltd. from public procurement following the Commission's opening of an investigation under the Foreign Subsidies Regulation (26 March 2024), https://ec.europa.eu/commission/presscorner/detail/en/statement_24_1729.
47 European Commission, "Commission opens two in-depth investigations under the Foreign Subsidies Regulation in the solar photovoltaic sector" (3 April 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1803.
48 European Commission, "Commission closes two in-depth investigations in the solar photovoltaic sector following the withdrawal of the companies from public procurement" (7 June 2024), https://public-buyers-community.ec.europa.eu/news/commission-closes-two-depth-investigations-solar-photovoltaic-sector-following-withdrawal.

49 "Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice in Case C-652/22", https://curia.europa.eu/juris/showPdf.jsf?text=&docid=268244&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3644011.

50 "Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice in Case C-652/22", p.5.

51 "Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice in Case C-652/22", p.6.

52 "Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice in Case C-652/22", p.8.

53 Esaprojekt sp. z o.o. v Województwo Łódzkie (C-387/14) EU:C:2017:338.

54 Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004].

55 Opinion of Advocate General Collins Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:212.

56 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:212 at [66].

57 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:212 at [70].

58 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:212 at [75].

59 See also M. Turudić, "Are New References Allowed in Utilities Public Procurement Procedures—a New Request for a Preliminary Ruling by the High Administrative Court of the Republic of Croatia" (2023) 3 European Procurement and Public Private Partnership Law Review 226.

60 Opinion of Advocate General Collins in Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:212 at [33].

61 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:212 at [33].

62 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:212 at [54].

63 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:910 at [45].

64 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:910 at [46].

65 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:910 at [47].

66 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:910 at [57].

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71 Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part [2013] OJ L278/14.

72 *Caranta, "Commentary on Article 25" in Steinicke and Vesterdorf (eds), EU Public Procurement Law—Brussels Commentary (2018), p.376.*

73 Z. Raczkiewicz, "Public Procurement within the Framework of a Transatlantic Trade and Investment Partnership" (2016) 4 European Procurement and Public Private Partnership Law Review 265.

74 J. Heilman Grier, "Court Restricts Access of Third Countries to EU Procurement" (4 November 2024), https://trade.djaghe.com/court-restricts-access-of-third-countries-to-eu-procurement/.

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76 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:910 at [63].

77 See also *A. Sanchez-Graells, "The Court of Justice decidedly jumps on the Procurement Protectionism Bandwagon, creating legal Uncertainty along the Way (C-652/22)" (25 October 2024), EU Law Live*, https://eulawlive.com/op-ed-the-court-of-justice-decidedly-jumps-on-the-procurement-protectionism-bandwagon-creating-legal-uncertainty-along-the-way-c%E2%80%91652-22/.

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80 Council Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33, as amended by Directive 2007/66 [2007] OJ L335/31.

81 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:910 at [66].

82 European Convention on Human Rights, as amended by Protocols Nos 11, 14 and 15, supplemented by Protocols Nos 1, 4, 6, 7, 12, 13, and 16.

83 For a similar conclusion see *P. Telles, "On case C-652/22 Kolin Insaat Turizm Sanayi ve Ticaret" (25 October 2024), Telles.eu*, https://www.telles.eu/on-case-c-652-22-kolin-insaat-turizm-sanayi-ve-ticaret/.

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86 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:212 at [70].

87 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:212 at [75].

88 European Commission, "EU Public Procurement Thresholds", https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/thresholds_en.

89 Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2 (C-28/95) EU:C:1997:369; [1998] 1 C.M.L.R. 157.

90 Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2 (C-28/95) EU:C:1997:369 at [32].

91 European Commission, "Procurement for buyers", https://webgate.ec.europa.eu/procurementbuyers/#/procumementlocation.

92 Legea nr. 98/2016 privind achizițiile publice, forma în vigoare la 19 aprilie 2021 (data depunerii ofertelor) (Law No.98/2016 on public procurement, in the version in force on 19 April 2021).

93 "For the purposes of this Law, the following definitions shall apply: […]

‘economic operator’
any natural or legal person, whether governed by public or private law, or any group or association of such persons, including any temporary association between two or more such entities, which lawfully offers on the market the performance of works, the supply of goods or the provision of services, and which is established in:
(i)
a Member State of the European Union;
(ii)
a Member State of the European Economic Area (EEA);
(iii)
third countries which have ratified the World Trade Organization’s Agreement on Government Procurement (GPA), in so far as the public contract awarded falls within the scope of Annexes 1, 2, 4, 5, 6 and 7 to the European Union’s Appendix I to that agreement;
(iv)
third countries acceding to the European Union;
(v)
third countries which do not fall within the scope of point (iii) but which are signatories to other international agreements requiring the European Union to grant free access to the public procurement market; translation from the "Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice in Case C-266/22", p.4.

94 I. Baciu, "The Exclusion of Third-Country Suppliers from EU Public Procurement Procedures: The Romanian Case" (2021) 2 European Procurement and Public Private Partnership Law Review 156.

95 European Commission, "Commission opens two in-depth investigations under the Foreign Subsidies Regulation in the solar photovoltaic sector" (3 April 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1803.

96 "A person or persons shall be presumed to have a dominant influence on the legal person in any of the following cases in which they, directly or indirectly: hold the majority of the legal person’s subscribed capital; control the majority of the votes attaching to shares issued by the legal person; or can appoint more than half of the legal person’s administrative, management or supervisory body", art.3(1) of the IPI.

97 C. Bovis, "Third-Country Access to EU Public Procurement Markets" (2024) 4 European Procurement and Public Private Partnership Law Review 239.

98 Croatian Ministry of Economy—Opinion on (C-652/22), https://www.javnanabava.hr/medunarodna-suradnja/presuda.

99 "Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice in case C-266/22", p.4.

100 AG Ranotos Opinion in CRRC Qingdao Sifang Co Ltd and Astra Vagoane Călători SA v Autoritatea pentru Reformă Feroviară and Alstom Ferroviaria SPA (C-266/22) EU:C:2023:399, https://curia.europa.eu/juris/document/document.jsf?text=&docid=273624&pageIndex=0&doclang=HR&mode=req&dir=&occ=first&part=1&cid=2876873.

101 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:910 at [61].

102 Kolin Inşaat Turizm Sanayi ve Ticaret (C-652/22) EU:C:2024:910 at [62].

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