

New barriers to access public procurement in the EU?

DEVELOPMENTS & TRENDS

Since the adoption of the 2014 Directives on public procurement [Directive 2014/23/EU on concession contracts, Directive 2014/24/EU on public procurement and Directive 2014/25/EU on utilities] the EU has passed several defense instruments to safeguard its objectives and the Single Market as well as to ensure a level playing field for all participants to EU public procurement. While they may arguably be considered as a step back or a reevaluation of the openness of the EU towards the trade with third countries, the efficiency of such measures [mostly] hinges on the political support of the Member States towards the European Commission and the EU¹. The public procurement landscape based on the principles of the Treaty including equal treatment, non-discrimination and transparency was not immutable and static, but changed by means of transposition by the Member States, mandatory interpretation by the European Court of Justice (ECJ) or by other acts adopted by the EU, such as:

The Framework for the screening of foreign direct investments into the Union [Regulation (EU) 2019/452], whose objective is to make sure that the EU is better equipped to identify, assess and mitigate potential risks to security or public order, while remaining among the world's most open investment areas². Though this framework regulation is generally referred to and applied in M&A/Corporate/Private transactions, it should be mentioned that being asked whether the regulation also apply in the context of public procurement or privatization, the Commission answered that 'a public tender awarding a concession for the building and operation of critical infrastructure could, for example, involve a foreign direct investment and thus fall under the scope of the FDI Screening

Regulation'³. Moreover, the Commission stated that whether a specific public contract or concession might fall under the scope of the Regulation shall be assessed on case-by-case basis prior to the tender and recommended for the tender notice/documentation to mention from the outset that the procedure or the award of the contract is subject to the FDI Screening Regulation.

The European Commission Guidance on the participation of third-country bidders and goods in the EU procurement market [2019/C 271/02] aimed to assist public buyers by improving understanding of certain practical aspects of the public procurement procedures laid down in the relevant EU legislation when dealing with third country participation in tenders.

The Romanian Government Emergency Ordinance no. 25/05.04.2021 amended the definition of the 'economic operator' entitled to participate in Romanian public procurement tenders as being a natural or legal person established in the EU; EEA; third countries that have ratified the WTO Agreement on public procurement; third-countries in the process of accession to the EU; and third countries which are signatories to other international agreements by means of which EU is bound to grant open market access in the field of public procurement. For clarity, this piece of legislation expressly requires contracting authorities/entities to **exclude** economic operators that do not fall within the definition mentioned above. Furthermore, the Explanatory Memorandum to the EGO no. 25/2021 states that the ordinance was issued to transpose art. 43 of the Directive 2015/25 and that it was [priorly] notified to DG Regio and DG Grow.

International Procurement Instrument –

IPI [Regulation (EU) 2022/1031] aimed to achieve reciprocity in the opening of public procurement and concessions markets to third country trading partners and improving market access opportunities for EU economic operators.

The Foreign Subsidies Regulation – FSR [Regulation (EU) 2022/2560] targeted to ensure fair conditions for all undertakings engaging in an economic activity in the internal market.

The Kolin Decision [C-652/22], by means of which the ECJ ruled that: EU law does not preclude third-country operators from being allowed to participate in procurement procedures governed by the Directive 2014/25/EU, but it precludes them from relying on the directive and thus to demand that their tender is treated equally to those submitted by other bidders; any act of general application specifically intended to guarantee equal access to such operators falls within the exclusive competence of the EU; national authorities are not allowed to interpret the national provisions transposing the Directive 2014/25/EU as also applying to third-country operators; in the absence of such general provisions, it is for the national authorities to decide whether it should allow such operators to participate and what will be the conditions of treatment that should apply.

What to expect next?

- **The Decision of the ECJ in the CRRC Qingdao Sifang case (C-266/22)**

The ECJ is expected to rule on the interpretation of art. 25 of the Directive 2014/24/EU, this time in a request from the Bucharest Court of Appeal in relation to the participation of a Chinese operator to a tender organized by a railway authority. While the context seems different from the Kolin case, as the question refers mainly to the application

¹ As also highlighted by Enrico Letta in his report on the Single Market as of April 2024, which may be accessible here:

<https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf>

² https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en

³ See the Frequently asked questions on the EU framework for FDI screening:

<https://circabc.europa.eu/ui/group/be8b568f-73f3-409c-b4a4-30acfcec5283/library/7c76619a-2fcd-48a4-8138-63a813182df2/details>

in time of the EGO no. 25/2021, it will still be interesting to see the position of the Court⁴.

- **Contracting entities to pay more attention to the provisions of art. 23⁵ [Conditions relating to the GPA and other international agreements] under Directive 2014/24/EU following Kolin Decision**

While the Kolin Decision does not interpret the Utilities Directive as encompassing a prohibition to participate in EU public procurement tenders, it clearly stressed that the obligation to accord to the third-country operators no less favorable than the treatment accorded to the economic operators of the Union is strictly applied to those economic operators, works, supplies and services that 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. As the GPA contains also some caveats and exclusions of certain types of services coming from its signatories, it is expected for national authorities to pay more attention to the terms of the GPA and to apply different treatment to economic operators coming from the same country depending on the scope of the contract⁶.

- **More investigations and complaints under the FSR & Investigations under the IPI**

Besides the already known cases of in-depth investigations under the FSR followed by notifications submitted by bidders in public procurement procedures that were closed to date in all cases as a result of the withdrawal of their bids, a [new] trend appears to be shaping due to the reporting system embedded in the FSR. As any legal or natural person may report to the Commission any information relating to foreign subsidies distorting the internal market under the FSR, it seems

that this 'whistleblowing' instrument is used by competitors to ask the Commission to investigate financial contributions received by other party/ies⁷.

Also, with the aim to remove discrimination in public procurement, the Commission is expected to launch new investigations under the IPI, especially where there are barriers to EU companies due to unfair differentiation between local and foreign companies or between locally produced and imported products. To date, the Commission has initiated its first investigation under the IPI in response to measures and practices in the Chinese procurement market for medical devices which are unfairly discriminating against European companies and products⁸.

- **An evaluation of the Public Procurement Directives**

As requested by the European Court of Auditors (ECA)⁹ and the Council¹⁰, the European Commission is set to carry out an in-depth evaluation of the existing legislative framework on public procurement. This measure was announced in the Political guidelines for the next term 2024-2029¹¹ and appears to be currently in preparation¹², with public consultation planned for the fourth quarter of 2024 and Commission adoption planned for the third quarter of 2025. The aim is to assess whether the rules are working as intended and whether a revision is necessary during the 2024-2029 term.

The results of such exercise and most importantly the measures that will be taken, including around third-country bidders' access to public procurement procedures will most likely be prompted by the shifts in the political landscape of many European countries and in the European Parliament and on the foreseeable policy change following the election of a new administration in the United States of America.



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⁴ Especially as the General Advocate proposed to the Court an interpretation similar to the one in the Kolin case, in the sense that the bidders established in third countries that are not signatories to the agreements mentioned in art. 25 of the Directive do not benefit from the rights set under the directive and cannot effectively invoke a breach of the equal-treatment, non-discrimination or legal certainty and the protection of legitimate expectations laid down by Union law.

⁵ Art. 43 under the Directive 2014/25/EU

⁶ See a more detailed analysis on this subject in the article published by Jean Heilman Grier on November 4. 2024, which is accessible here: <https://trade.djaghe.com/court-restricts-access-of-third-countries-to-eu-procurement/>

⁷ See for example: <https://www.laliga.com/en-GB/news/laliga-files-complaint-against-psg-with-european-commission>

⁸ See the press release here: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2044

⁹ Available here: <https://public-buyers-community.ec.europa.eu/news/european-court-auditors-eca-publishes-special-report-public-procurement-eu>

¹⁰ Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C_202403521

¹¹ Available here: https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf

¹² Available here: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14427-Public-procurement-directives-evaluation_en