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**PARTICIPATION OF NON-EUROPEAN UNION CONTRACTORS
IN PUBLIC TENDERS IN THE LIGHT OF THE LATEST CASE
LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION**

**УЧАСТЬ ПІДРЯДНИКІВ З-ЗА МЕЖ ЄВРОПЕЙСЬКОГО СОЮЗУ
В ПУБЛІЧНИХ ТЕНДЕРАХ У СВІТЛІ ОСТАННЬОЇ СУДОВОЇ
ПРАКТИКИ СУДУ ЄВРОПЕЙСЬКОГО СОЮЗУ**

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The European Union actively seeks to open up public procurement opportunities for European enterprises by advocating for mutual opening of EU public procurement markets and those of third countries. Directive 2014/24/EU on public procurement includes principles regarding the awarding of public contracts, including ensuring equal treatment of contractors, as well as providing as unrestricted access as possible to apply for contracts [1]. Similar provisions are included in the WTO Agreement on Government Procurement (GPA) [2]. The principle of equal treatment does not apply to all contractors, but rather to contractors from those countries that provide reciprocity in equal treatment, which serves to emphasize the community nature of EU directives and the goal of establishing the European Union, which is to set out rules binding on all contracting parties.

The situation in this regard changed following the landmark ruling issued by the Court of Justice of the European Union on October 22 in the case of Kolin İnşaat Turizm Sanayi ve Ticaret (C-652/22) [3]. This ruling is crucial for contractors participating in or intending to participate in public tenders within the European Union, who come from non-EU countries that are not parties to international agreements with the EU.

The Kolin ruling was delivered in response to a request for a preliminary ruling made to the CJEU by a Croatian court in the course of proceedings aimed at assessing the legality of a decision to award a contract for the construction of railway infrastructure to a competitor of Kolin İnşaat Turizm Sanayi ve Ticaret based in Turkey, after this contractor had been granted permission to significantly modify and clarify its bid after the deadline for submissions had passed. The Croatian court expressed uncertainty as to whether this decision was in accordance with the provisions of EU Directive 2014/25 on awarding contracts by entities operating in the water, energy, transport, and postal services sectors.

The CJEU refused to answer the questions posed by the Croatian court, justifying its refusal by distinguishing the legal status of contractors from non-EU countries that have concluded an international agreement with the European Union guaranteeing, based on reciprocity and equality, access to public procurement for contractors and the legal status of contractors from non-EU countries that have not concluded such an agreement (like Kolin). The CJEU indicated that:

1) Contractors from non-EU countries without an appropriate agreement cannot effectively invoke the provisions of the directive and thus demand equal treatment of their bids compared to those submitted by other tenderers.

2) The issue of access for economic operators from third countries to public procurement procedures in the Member States falls within the exclusive competence of the EU; thus, Member States are not competent to adopt general legal acts in this area, even if the EU has not yet adopted any applicable legal acts in this field.

3) In the absence of such legal acts, it is up to the specific contracting entity to assess whether it should allow such a contractor to participate in the procurement procedure. The contracting authority may specify in the procurement documents the treatment conditions that reflect an objective difference in the situation of such contractors.

4) National authorities cannot interpret the same national provisions transposing the directive in such a way that they simultaneously apply to contractors from third countries that have not entered into an appropriate agreement with the EU.

5) The treatment of such contractors should comply with certain requirements, such as transparency or proportionality, but the remedy available to a contractor who wishes to raise a violation of such requirements by the contracting authority can only be considered in light of national law, not EU law.

Based on this ruling, contracting authorities gain greater flexibility in deciding on the participation of such entities, being able to set different requirements for them compared to EU contractors. This may lead to a situation where companies from outside the EU are treated less favorably, for example, through requirements for subcontractors from the EU or other participation conditions that are tailored to the specifics of the European market. Contracting authorities obtain the possibility of completely excluding contractors from third countries that do not have international agreements with the European Union (e.g., Turkey, China). These decisions will be unchallengeable by bidders from those countries. Furthermore, even if a contracting authority decides to allow contractors from outside the EU to participate in the procedure, they may be treated differently from bidders from EU member states or countries bound by relevant agreements. Ultimately, the way such contractors are treated will depend on the decision of the specific contracting authority, which is not obliged to ensure equal conditions with EU entities.

In light of the CJEU ruling, entrepreneurs from countries that have not concluded an international agreement on public procurement do not have an automatic right to participate in EU tenders; contractors from these countries cannot demand treatment equivalent to that of EU contractors, and the decision to allow them to participate in the procedure rests with the contracting authority.

This ruling represents a groundbreaking decision that will not only impact the Polish public procurement market but may also change the overall approach of the European Union to the issue of equal treatment of contractors in international tenders.

However, it remains unclear how far contracting authorities can go in applying different requirements to contractors from third countries—such as whether they can require non-EU companies to use EU subcontractors or purchase a portion of goods within the EU. In this regard, many issues remain unregulated, which may lead to further uncertainties and legal disputes.

One of the key arguments criticizing the CJEU ruling is the fact that many companies from outside the EU, especially from Asia, offer innovative technologies that could be beneficial for the implementation of projects in the European Union. The interpretation of provisions made by the CJEU may thus result in limiting access to such technologies. Additionally, restricting competition in the public procurement market may hinder access to modern solutions, which in turn could lead to delays in project implementation.

In conclusion, it is worth noting that in light of the aforementioned ruling, the first decision has already been issued by the National Appeals Chamber

in Poland, which is the body authorized to resolve appeals submitted by contractors in public procurement proceedings. The case concerned a procedure for the supply of 30 electric buses conducted by the Municipal Transport Authority in Gdańsk. The specifications for this contract did not contain any information regarding the possibility of submitting bids by companies from third countries. The contracting authority, citing the referenced CJEU ruling, excluded a contractor from Turkey who submitted a bid in this procedure. The National Appeals Chamber upheld the appeal made by the excluded contractor, stating that under national law, if the procedural documentation lacks provisions excluding or altering the participation conditions for contractors from third countries that do not have a mutual agreement with the EU, there are no grounds or legal possibility to exclude such contractors. The condition for limiting the admissibility of participation in the procedure for the indicated contractors is the inclusion of precise provisions in this regard in the procedural documentation.

The indicated ruling of the CJEU undoubtedly represents a significant change in the approach to the participation of non-EU contractors in public procurement. It provides member states with greater discretion in deciding whether to allow such contractors, but at the same time poses challenges for contracting authorities in creating transparent and fair rules for participation in proceedings. These changes may be beneficial for domestic contractors, but they raise concerns about the effects on the openness and competitiveness of the public procurement market in the European Union.

References:

1. Directive of the European Parliament and of the Council 2014/24/EU of 26 February 2014 on public procurement, repealing Directive 2004/18/EC
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3. Judgment of the Court (Grand Chamber) of 22 October 2024 in the case Kolin İnşaat Turizm Sanayi ve Ticaret AŞ v. Državna komisija za kontrolu postupaka javne nabave. Case No. C-652/22, ECLI:EU:C:2024:910