

RECENT DEVELOPMENTS ON PUBLIC PROCUREMENT

FROM THE COURT OF JUSTICE OF THE EUROPEAN UNION

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Abstract

The article assesses the recent development CJEU of a line of cases, *Kolin* and *Qingdao*, which reinforced the protection of the EU public procurement market against third-country operators belonging to states which don't enter into reciprocal agreements with the EU, introduced a flexible approach to the access of such operators to public procurement procedures held in the Member States, to be decided by the contracting authorities. The Court stated that the access of third-country operators to this market is part of the EU commercial policy, and therefore an exclusive competence of the Union. A Member State can neither open nor close its procurement market to operators from countries that have not concluded a procurement agreement with the Union. Until the Union legislature acts, the decision lies with every contracting authority. An operator admitted on those terms gains doesn't fall under the protection of EU legal framework, from the national laws transposing it or from the EU general principles, such as equal treatment. The article analyses the reasoning of the two judgments and follows through their guidance from the European Commission and their national applications through a Romanian court case.

Keywords: EU public procurement; equal treatment; non-covered operators; *Kolin*; *Qingdao*.

1. INTRODUCTION

The award of the public contracts for the acquisition of works, supplies and services by the public bodies from the Member States of the European Union must follow the rules of the EU procurement directives, and contractors from outside the Union were traditionally allowed to compete for them.

The “essential objective” of the EU public procurement law – to favour competition¹ – lead to an initial permissive approach to the participation of third-countries operators in EU tender

¹ As expressed by CJEU in C-95/10 *Strong Securança*, para. 37: “[...] whereas effective competition constitutes the essential objective of that directive [...]”. Also relevant for this aspect are the judgments in C-243/89 *Commission v. Denmark*, para. 33: “the directive whose purpose is, according to the ninth Recital in its preamble,

procedures, due to its potential to lower prices and increase quality of final products. But competition must be built on similar conditions, for example, without state aid. This is not the case when the operators originating from the states which don't guarantee free competition rules are allowed to participate, leading to a distortion in the detriment of the EU operators.

As many times in European integration history, the objective was pursued by the work of the Court of Justice of the European Union ('CJEU' or 'the Court'). The participation standing of the third-country operators was nuanced by two recent judgments. The first, *Kolin*, was delivered by the Grand Chamber on 22 October 2024 on a Croatian preliminary reference concerning a Turkish construction company²; the second, *Qingdao*, was released on 13 March 2025 on a Romanian preliminary reference concerning a Chinese rolling-stock manufacturer³.

The Court clarified the legal status of third-country operators in EU public procurement market. Their access is a matter of Union exclusive competence on common commercial policy and can take the form of a legislative act (Article 3 TFEU). The operators from countries which are not bound to the Union by a procurement agreement (non-covered operators) do not have a legal right to participate nor a right to equal treatment. Until the Union legislates in this domain, each contracting authority decides on whom allows to participate and under which conditions (less favourable or equal to EU operators).

2. THE EU LAW FRAMEWORK

The EU legal order has several characteristics which need to be remembered. EU law has direct effect and primacy into the legal orders of the Member States: national authorities and courts must apply it even of their own motion and must set aside whatever domestic legislation conflicts with it. Its uniform interpretation is achieved through the preliminary-ruling mechanism of Article 267 TFEU, under which any national court may refer a question of interpretation or validity to the CJEU, and a court of last resort is in principle obliged to do so. The Court's answers bind all national courts and administrative authorities⁴. Because a

to ensure in particular the development of effective competition in the field of public contracts and which, in Title IV, lays down criteria for selection and for award of the contracts, by means of which such competition is to be ensured" and C-336/12 *Manova*, para. 28: "One of the principal objectives of the public procurement rules under EU law is to ensure the free movement of services and the opening up of undistorted competition in all the Member States. In order to pursue that twofold objective, EU law applies, *inter alia*, the principle of the equal treatment of tenderers and the corollary obligation of transparency.", apud C. Risvig Hamer and M. Andhov, 18. Public procurement principles, in R. Caranta, A. Sanchez-Graells, *European Public Procurement. Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, 2021, p. 197, 18.29. and notes 53 and 54.

² CJEU, C-652/22, *Kolin İnşaat Turizm Sanayi ve Ticaret*, Judgment of 22 October 2024, ECLI:EU:C:2024:910 ('*Kolin*').

³ CJEU, C-266/22, *CRRC Qingdao Sifang and Others*, Judgment of 13 March 2025, ECLI:EU:C:2025:178 ('*Qingdao*').

⁴ See T. Chiuariu, *Contenciosul administrativ român*, Hamangiu, 2020, p. 72, with reference to CJEU, 103/88, *Costanzo*, Judgment of 22 June 1998, ECLI:EU:C:1989:256.

preliminary ruling clarifies the interpreted provision as it was meant since its entry into force, it applies retroactively as a rule, to pending procedures as much as to future ones⁵.

Directives, the chosen instrument of EU procurement law, bind the Member States as to the objectives to be achieved and leave them the choice of means⁶. Directive 2014/24/EU (the general regime) and Directive 2014/25/EU (the sectoral regime for water, energy, transport and postal services)⁷ both leave contracting authorities a wide margin of discretion when they frame qualification criteria, award criteria and contract conditions.

The two directives refer to the legal standing of third-country operators. Article 25 of Directive 2014/24 and Article 43 of Directive 2014/25 allow the economic operators of the signatories of the WTO Agreement on Government Procurement (“GPA”), and of other international agreements binding on the Union, to compete, under the regime of “treatment no less favourable” than that reserved for their Union counterparts. Everyone else is “non-covered”, a category that includes both Türkiye and China⁸.

Meanwhile the Union had started to use its procurement market as a lever of trade policy.

Under the International Procurement Instrument – Regulation (EU) 2022/1031, “IPI”⁹ – the European Commission (EC), where it finds that a third country applies restrictive measures against EU operators, may adopt ‘IPI measures’ against tenderers from that country: an adjustment of their evaluation score of up to 50% (doubled where price is the only award criterion) or their outright exclusion, in procedures worth at least EUR 15 million for works and concessions and EUR 5 million for goods and services¹⁰.

The Foreign Subsidies Regulation (Regulation (EU) 2022/2560, ‘FSR’)¹¹ obliges tenderers in procedures of at least EUR 250 million to notify foreign financial contributions of EUR 4 million or more, and allows the EC to investigate and, in the last resort, to block the award to a subsidised tenderer. Neither instrument makes sense unless the conditions of third-country access are fixed at Union level.

⁵ See, e.g., CJEU, 61/79, *Denkavit*, Judgment of 27 March 1980, ECLI:EU:C:1980:100, para. 16.

⁶ Article 288 TFEU.

⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ L 94, 28.3.2014, p. 65); Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L 94, 28.3.2014, p. 243).

⁸ Türkiye participates in the WTO Committee on Government Procurement only as an observer and has not acceded to the GPA. China applied for accession in 2007, but its accession has not been concluded.

⁹ Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union’s public procurement and concession markets (International Procurement Instrument – IPI) (OJ L 173, 30.6.2022, p. 1).

¹⁰ Articles 6(4), 6(6) and 6(8) of Regulation (EU) 2022/1031.

¹¹ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (OJ L 330, 23.12.2022, p. 1), in particular Articles 27 to 29.

CJEU found in *Kolin* the occasion to enforce this position.

3. THE KOLIN JUDGMENT

The Croatian railway infrastructure company had tendered works under Directive 2014/25 and Kolin, a Turkish contractor, challenged the award. The dispute reached the High Administrative Court of Croatia, which sought guidance from the EU court on whether the successful tenderer could supplement its references after an initial annulment and relaunch of the procedure, and on how the equal treatment requirements of the directive bore on that point.

The Grand Chamber never reached to answer those questions. It decided to settle firstly who may invoke it: Article 43 guarantees access, on terms of equality and reciprocity, to the operators of third countries covered by the GPA or by another international agreement binding on the Union, and Türkiye is covered by neither¹². EU law does not forbid a contracting entity from letting such an operator take part where no exclusion measure applies, but it rules out that such operator, once inside the procedure, can invoke the directive and rely on equal treatment with EU tenderers¹³.

The solution seems sensible, despite criticism¹⁴ based mainly on possible unpredictability and lack of uniform application from the contracting authorities. In my opinion, the Court's approach opens a range of options for the contracting authority and therefore favours flexibility and the dynamic protection of competition: if there are enough qualified bidders who can perform, there is no need for the outsiders; but if there are not, the external input can definitely save the competition and lower costs.

The Court settled that the access of non-covered third-country operators to EU procurement falls within the common commercial policy, which is the exclusive competence of the Union. Therefore, the acts of general application in this area can be enacted only by the EU legislature, and the Member States have no powers to regulate in this domain¹⁵. As for now no such act exists, the decision lies with the contracting entity. It has to assess whether non-covered operators should be admitted to the procedure and, if it admits them, "whether provision should be made for an adjustment of the result arising from a comparison between the tenders submitted by those operators and those submitted by other operators"¹⁶. The procurement documents may contain arrangements "intended to reflect the objective difference" between the legal position of non-covered operators and that of Union and covered operators¹⁷. The national

¹² *Kolin*, paras. 40 to 47.

¹³ *Kolin*, para. 45.

¹⁴ For example, M. Turudic, *Principles? What Principles? Third-Country Economic Operators and Public Procurement Principles after Kolin and Qingdao* (June 02, 2025). Available at SSRN: <https://ssrn.com/abstract=5278570> or <http://dx.doi.org/10.2139/ssrn.5278570>

¹⁵ *Kolin*, paras. 55 to 62; the common commercial policy is an exclusive competence under Article 3(1)(e) TFEU.

¹⁶ *Kolin*, para. 63.

¹⁷ *Kolin*, para. 64.

transposing provisions cannot grant rights that the EU original legislation didn't express, so a complaint filed by a non-covered operator has to be examined solely under national law¹⁸. The last part of this *rationale* seems to me the most controversial because not so much "pure" national law has survived (or was added to) the transposition process. As observed in the legal doctrine, the transposition, at least in Romania, is characterized by the copy-out approach¹⁹.

Kolin could not rely on the directive whose interpretation it sought, and the Court declared the reference inadmissible²⁰. Such judgment binds every contracting authority, review body and court in the Union and affects procedures already under way.

4. THE QINGDAO JUDGMENT

Kolin might have left a question unanswered: even if a Member State cannot grant access by general acts, may it at least refuse it *via* such an act?

The explicit answer arrived five months later, following a dispute that originated in Romania. The Railway Authority had tendered, under Directive 2014/24, twenty interregional electric multiple units together with their long-term maintenance. The best-ranked tender came from a consortium of CRRC Qingdao Sifang Co. Ltd, a Chinese manufacturer, and a Romanian company; it was rejected under emergency legislation that Romania had adopted in 2021²¹, after publication of the contract notice, to restrict the participation of non-covered operators in its public procurement.

The Bucharest Court of Appeal referred the matter to the Luxembourg Court and wanted to know, in essence, whether EU law allows such a national measure to produce legal effects on a procedure launched before the restricting act was adopted²².

The Court confirmed *Kolin* and extended its effects. Member States cannot close the market by an act of general application, unless Union law empowers the measure. A contracting authority therefore cannot rest an exclusion on such national legislation. That being decided, the original contested conduct of changing the rules during the game, i.e. after the procurement procedure

¹⁸ *Kolin*, paras. 65 and 66.

¹⁹ D. Dragoş and B. Neamţu, *Transposition of the EU Procurement Directives in Romania: complex issues of implementation and control*, in S. Treumer, M. Comba, *Modernising Public Procurement. The Approach of EU Member States*, Edward Elgar Publishing, 2018, p. 200.

²⁰ Opinion of Advocate General Collins of 7 March 2024, *Kolin*, C-652/22, which had likewise proposed that the reference should be declared inadmissible (para. 55).

²¹ The national measure was Government Emergency Ordinance (OUG) no. 25/2021, (published in the Official Journal of Romania, Part I no. 346 of 5 April 2021) which restricted the participation of economic operators from non-covered third countries in Romanian public procurement, by amending Article 3 para. (1), letter jj) of Law no. 98/2016 on public procurement, the implementing act of Directive 2014/24.

²² *Qingdao*, cited above. See also the Opinion of Advocate General Rantos of 11 May 2023, C-266/22, ECLI:EU:C:2023:399, delivered before *Kolin* was decided.

was launched, remained without effect²³ and then created a questionable boomerang for the interested person who raised the preliminary issue.

The same judgment confirmed the contracting authority as gatekeeper. Until the Union legislates, the contracting authority may choose in every procedure among three courses of action: to exclude non-covered operators; to admit them on adapted terms, for instance with a corrective applied to the comparison of tenders; or to admit them on the same footing as everyone else²⁴. The authority cannot grant to such operators the protection of EU procurement law: they cannot invoke Directive 2014/24 nor the general principle of EU law (as equal treatment) nor the Union rules on remedies, and their pleas can be rooted only in “pure” (i.e. non-transposing) national law²⁵.

5. THE AFTERMATH: GUIDANCE AND NATIONAL PRACTICE

A. The Commission’s Non-Binding Guidance

Following the sudden change of perspective brought by such judgments, contracting authorities, review bodies and courts needed to adjust to the new *Kolin-Qingdao* doctrine.

In May 2025 the European Commission released a question-and-answer ‘non-paper’²⁶. It restates the case-by-case approach: every authority decides, for each procedure, whether to admit non-covered operators and whether to attach adapted conditions such as score adjustments. On two points it goes further. In the Commission’s reading, the admission decision may be taken at any moment of the procedure, with no obligation to announce it in advance; and an admitted operator draws no rights whatever from EU procurement law, not even from its transparency and proportionality requirements, its only anchor being national provisions that do not transpose that law. The “non-paper” must be read as “non-binding”, but exerts considerable influence in practice, especially as the overturn was radical and brought a degree of uncertainty. The release of this document have drawn criticism: A. Sánchez-Graells finds the idea of an admission decided without prior announcement hard to reconcile with good administration and an open invitation to arbitrariness²⁷.

²³ *Qingdao*, para. 65 and the final sentence of the operative part.

²⁴ *Qingdao*, para. 63.

²⁵ *Qingdao*, para. 66.

²⁶ European Commission, *Non-paper regarding participation in the EU procurement market of bidders from non-covered third countries in view of the recent Court of Justice case-law*, May 2025, <https://webgate.ec.europa.eu/circabc-ewpp/d/d/workspace/SpacesStore/0e5f20cf-6e13-42e6-a132-7a78488ef6cb/file.bin>

²⁷ See A. Sánchez-Graells (2025, May 20), *Bordering the irresponsible: Commission’s Q&A on third country access to EU procurement post-Kolin/Qingdao*, How to Crack a Nut, <https://www.howtocrackanut.com/blog/2025/5/20/bordering-the-irresponsible-commission-non-paper-on-third-country-access>

B. A Romanian Case Study

The courts' reception of such judgments in Romania, a relevant market for non-covered operators, can be illustrated by the following case²⁸. A contracting authority, which launched a tender after *Kolin*, admitted a Turkish contractor under the same conditions as the rest of the bidders. The contractor lost on evaluation and complained. The National Council for Solving Complaints (the specialised first-instance review body) read *Kolin* as an absolute bar: an operator that cannot invoke the procurement legislation, and therefore, cannot bring a complaint at all.

The Bucharest Court of Appeal²⁹ disagreed and quashed the review body decision. It held that the conditions of admissibility of an action are governed by national procedural law (the “pure” national law that *Kolin* leaves to a non-covered operator), and that those conditions were met. On the merits the court then traced the demarcation line: the pleas resting directly on the directive or on the equal treatment principle were set aside as unavailable to this claimant, while pleas resting on national law (among them the authority's duty to abide by its own tender documentation on qualification criteria and scoring methodology³⁰) were examined and decided. In conclusion, EU procurement law refuses the non-covered operator its remedies, while national law, procedural and substantive, still offers some, to the extent such local rules have survived to the transposition process.

6. CONCLUSIONS

Three rules imposed by the *Kolin-Qingdao* line of jurisprudence redesigned the EU public procurement domain.

The first is *the clarification of the regulatory level*: access to the procurement market is part of the common commercial policy and belongs exclusively to the Union, so a Member State cannot regulate it by general acts.

The second is the *subsidiary decentralisation of decision*. If the Union legislature does not regulate the domain, then each contracting authority has the discretion to decide on its own procedure: it may exclude the non-covered operator, admit it on corrected less favourable terms or admit it on equal conditions with EU operators.

The third is an *asymmetry of protection*: the operator that is allowed in competes without the protection of the directive, of the transposing statute and of the EU law general principles, and its remedies, such as they are only the pure national ones.

²⁸ Bucharest Court of Appeal, Case no. 52/2/2025, Judgment no. 79/2025 (not published, available at <https://www.rejust.ro/juris/86g377436>).

²⁹ The court which settles approx. 95% of the public procurement cases in the country.

³⁰ It's disputable that this provision doesn't transpose EU law.

The practical lessons are different for the various actors in this field. A contracting authority should decide early on access and include such mentions in the procurement documents: an announced, transparent approach is less vulnerable than a made-on-the-go one. A non-covered contractor must now treat access with caution: seek for the clarification of any special condition or scoring corrective at the outset, test consortium and subcontracting arrangements with Union partners against this case-law and the Commission's guidance, and build any challenge on national law, which, as the Bucharest court case shows, can still be effective to a certain point.

REFERENCES

- T. Chiuariu, *Contenciosul administrativ român*, Hamangiu, 2020
- D. Dragoș and B. Neamțu, *Transposition of the EU Procurement Directives in Romania: complex issues of implementation and control*, in S. Treumer, M. Comba, *Modernising Public Procurement. The Approach of EU Member States*, Edward Elgar Publishing, 2018
- C. Risvig Hamer and M. Andhov, *18. Public procurement principles*, in R. Caranta, A. Sanchez-Graells, *European Public Procurement. Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, 2021
- A. Sánchez-Graells (2025, May 20). *Bordering the irresponsible: Commission's Q&A on third country access to EU procurement post-Kolin/Qingdao*. How to Crack a Nut. <https://www.howtocrackanut.com/blog/2025/5/20/bordering-the-irresponsible-commission-non-paper-on-third-country-access>
- M. Turudic, *Principles? What Principles? Third-Country Economic Operators and Public Procurement Principles after Kolin and Qingdao* (June 02, 2025). Available at SSRN: <https://ssrn.com/abstract=5278570> or <http://dx.doi.org/10.2139/ssrn.5278570>
- European Commission. (2019). *Guidance on the participation of third country bidders and goods in the EU procurement market* (C(2019) 5494 final). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2019_271_R_0002
- European Commission. (2025). *Non-paper regarding participation in the EU procurement market of bidders from non-covered third countries in view of the recent Court of Justice case-law*. <https://webgate.ec.europa.eu/circabc-ewpp/d/d/workspace/SpacesStore/0e5f20cf-6e13-42e6-a132-7a78488ef6cb/file.bin>