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PARTICIPATION IN THE EU PROCUREMENT MARKET OF BIDDERS FROM NON-COVERED THIRD COUNTRIES IN VIEW OF THE RECENT COURT OF JUSTICE CASE-LAW (JUDGMENTS IN CASES C-652/22, *KOLIN*, AND C-266/22, *QINGDAO*)

This non-paper prepared by the Commission services[1] comes in response to queries received from different stakeholders (EXPP, public procurement review bodies' network and the Council Working Party on public procurement), between October 2024 and March 2025, about the conditions for possible participation in the EU procurement market by bidders from non-covered third-countries in view of the recent judgments of the Court of Justice of the EU of 22 October 2025 in case C-652/22, Kolin, and of 13 March 2025, in case C-266/22, Qingdao.

1. COVERAGE	
1.1.	**How should contracting authorities / entities understand the reference in the Kolin judgment to operators of a "third country which has not concluded an international agreement with the European Union which guarantees access to public procurement in a reciprocal and equal manner" (hereinafter *"non-covered countries"*)?**
	Contracting authorities / entities in the EU have an obligation to admit to a specific procurement procedure, and on a non-discriminatory basis, only operators from third countries with which the EU has international commitments in procurement (see points 41 to 43 of the Kolin judgment). *As regards operators from non-covered countries (see point 44 of the Kolin judgment), it is for each contracting authority / entity to determine whether it admits, or not, such operators to a public procurement procedure (see point 63 of the Kolin judgment).* *The Union's international commitments are defined in the respective international agreements– i.e. the plurilateral WTO Government Procurement Agreement (GPA) and other bilateral agreements, by which the Union is bound (European Economic Area, the stabilisation and association agreements with candidate countries, and other bilateral agreements with procurement commitments). These commitments determine whether a specific procurement is or is not covered by the Union's international agreements. Only a procurement that is carried out by an entity specified in a given agreement ('covered entity') purchasing goods, services or construction services listed in that agreement ('covered goods / services') and of a value exceeding the threshold values specified in that agreement, is covered by that agreement.*

[1] *On the basis of their understanding of the Treaties, the public procurement directives and the case-law of the Court of Justice of the European Union. It should be noted that, in any event, the binding interpretation of Union law is ultimately the role of the Court of Justice of the European Union. This document does not change the legal framework.*

1.2.	**Can the Commission IT tool (available here) which provides information on the EU's agreements with third countries concerning public procurement, be deemed accurate? Should contracting authorities rely solely on this tool, without additional verification or further verification being necessary to confirm whether third countries have complied with the commitments included in these agreements?**
	Notwithstanding the practical added value of the Commission tools listed below, it is the sole responsibility of the contracting authorities / entities in the EU to assess whether the bidder is established in a country that has or, does not have, an international agreement with a chapter on public procurement. For that purpose, they can use the dedicated online tool – Procurement4Buyers - to check whether a given tender is, or is not, covered by EU's international commitments: *https://webgate.ec.europa.eu/procurementbuyers/#/procumementlocation* *Here is a link to the WTO GPA website where the EU's commitments under the GPA can be found:* *https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm* *For an overview of all international agreements in which the Union may have procurement commitments, please visit:* *https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en.*
1.3.	**What if there is no reciprocity in practice in certain cases with third countries that have signed an agreement with the EU? Should a contracting authority exclude such bidders also?**
	If a given procurement procedure is covered by the Union's international commitments, contracting authorities / entities do not need to assess if access to the third country procurement market has been granted in a reciprocal and equal manner. *Concerning reciprocity and equality of market access, economic operators from a third country with which the EU has international commitments (a party to the GPA or to a bilateral agreement with procurement commitments) have secured access to the EU procurement market to the extent of the commitments undertaken by the Union in those agreements.*
1.4.	**Can the Kolin judgment be applied also to goods and services originating in non-covered countries? Do contracting authorities have a similar margin of discretion to reject tenders if the tenderer offers goods from non-covered countries?**
	The Kolin judgment deals only with the question of access by economic operators from non-covered countries and remains silent in relation to access for goods (or services) that originate in non-covered countries and are not governed by the Union's international commitments.

	Article 85 of the Utilities Directive 2014/25/EU establishes rules for the award of a supply contract consisting also of products originating in non-covered countries. This article provides that tenders submitted for the award of a supply contract may be rejected where the proportion of the products originating in non-covered countries exceeds 50 % of the total value of the products constituting the tender. In addition, if two or more tenders are equivalent (up to 3% price difference being considered equivalent), preference should be given to tenders that may not be rejected.
1.5.	**Is it correct to interpret this judgment as not affecting procedures below EU thresholds?**
	The EU's common commercial policy, which is at the core of the Court's reasoning, is not subject to any threshold or the existence of a cross-border interest, unlike the freedoms of the internal market, which are the basis of the public procurement directives and apply only above certain thresholds. Therefore, the principles of the Kolin judgment apply to any public procurement procedure, independently of EU thresholds and the value of the tender.
2.	**CONSORTIA / SUB-CONTRACTORS / COMPANIES PROVIDING CAPACITY**
2.1.	**How to interpret the judgment regarding members of consortia?**
	The Kolin judgment does not pronounce in an explicit manner on consortia or members of consortia from non-covered countries that submit tenders in EU procurement procedures. *It is therefore up to each contracting authority / entity to decide on a case-by-case basis whether to admit the participation of economic operators from non-covered countries in a specific procurement procedure, either in their own capacity or as members of consortia.* *In this respect, Article 3 of the International Procurement Instrument Regulation[2] ('IPI') and point 1 of the IPI Guidelines[3], which refers to the determination of the origin of economic operators for the purposes of the application of that Regulation, may be used as an inspiration for determining the origin of economic operators.* *When allowing participation of consortia, or members of consortia from non-covered third countries, contracting authorities / entities may adjust the evaluation results arising from a comparison between the tenders submitted by such consortia and those submitted by other tenderers.* *.*
2.2.	**How should the ruling be interpreted regarding subcontractors and companies, whose capacities the tenderer relies on?**

[2] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 june 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI)

[3] Guidelines to facilitate the application of the IPI Regulation by contracting authorities and contracting entities and by economic operators' (2023/C 64/04)

	The Kolin judgment does not pronounce in an explicit manner on subcontractors, or the use of the capacities of economic operators from non-covered countries, in EU procurement procedures. *It is up to each contracting authority / entity to decide on a case-by-case basis whether to admit or not tenders proposing sub-contractors from non-covered countries in a specific procurement procedure.* *It is also up to each contracting authority / entity to decide to accept tenders relying on the capacities of companies from non-covered third countries.*
2.3.	**Is Article 9 of classical Directive 2014/24/EU (and its equivalents in other Directives) affected/repealed?**
	Article 9 of Directive 2014/24/EU (and equivalent in other Directives) does not concern access by third country economic operators to public procurement covered by the EU directives on public procurement. It is therefore not affected by the Kolin judgment.
3.	**LEGISLATING ON ACCESS / TREATMENT**
3.1.	**How should point 62 of the Kolin judgment be interpreted? Does the national legislation need to be amended following the Kolin judgment, or is this completely prohibited due to EU exclusive competence?**
	To the extent that the national legislation of a Member State contains provisions concerning access, or lack thereof, to public procurement within the EU for economic operators from non-covered countries, that legislation should be amended as appropriate to take the judgment into account. This is because such provisions were adopted in disregard of the EU's exclusive competence on this matter. *In the meantime, those national provisions – adopted in breach of EU exclusive competence - cannot be applied. It is incumbent on the contracting authority to decide whether to accept or exclude economic operators from non-covered countries (see point 64 of Case C-266/22, Qingdao).*
3.2.	**Should specific national rules be introduced for the legal protection of economic operators from non-covered countries? Can we draw some inspiration from Article 10 of the IPI Regulation, or is this not possible according to the judgment**?
	As confirmed by the Court in point 62 of the Kolin judgment, Member States cannot legislate or adopt legally binding acts of general application concerning access to the EU public procurement market by operators from non-covered third countries. Domestic legislation ensuring the legal protection of economic operators having or having had an interest in obtaining a particular contract, as stated in Article 10 of the IPI Regulation, may apply to operators from non-covered countries, provided that it does not build in the principles and rules laid down by Directives 89/665/EEC and 92/13/EEC. As stated by the Court in

	para 66 of Kolin, any remedies available to operators from non-covered third countries are solely within the remit of national law.
3.3.	**When conducting a public procurement procedure, could a contracting authority (e.g. a Ministry) be seen as a 'national authority' that, in line with the Kolin judgment, is not empowered to take decisions concerning access by economic operators from non-covered countries?**
	In the Kolin judgment the Court ruled that Member States, including any national authority that has the power to adopt acts of general application, cannot adopt any acts of general application specifically intended to determine arrangements under which economic operators from non-covered countries may participate in PP procedures in the EU. *In contrast, when a Ministry conducts a public procurement procedure to purchase goods or services, it acts as a contracting authority in a single procurement procedure.*
4.	**WHAT SHOULD GUIDE THE CONTRACTING AUTHORITIES / ENTITIES' DECISION**
4.1.	**What should guide the contracting authority in its decision regarding participation and the terms of participation? What criteria or legal basis should this decision be based upon?** **And who decides upon these criteria? May Member States decide that contracting authorities must base their decision to allow or deny an economic operator market access on certain criteria, such as ensuring fair competition? And if not, who then decides what the contracting authorities should base their decisions upon?**
	As confirmed by the Court in the Kolin judgment, any matter or condition related to access by economic operators from non-covered countries to the EU public procurement market falls within the EU's common commercial policy, which is an exclusive competence of the Union. Therefore, it is only the Union that may legislate or adopt other acts of general application in this respect, unless it decides to empower Member States to do so. *The Union has not empowered Member States in this respect. Consequently, Member States cannot legislate / adopt legally binding acts of general application concerning access by, and treatment of, operators from non-covered countries in the EU public procurement market.* *In the absence of acts adopted by the Union, it is for each contracting authority / entity to decide whether economic operators of a non-covered country should be admitted or not to a public procurement procedure and as regards the criteria for that decision.*
4.2.	**Should the decision of the contracting authority be made on a case-by-case basis, always considering the specifics of the contract and the economic operator? Or can the contracting authority, for example, make internal**

	guidelines for their decisions? Could the contracting authority, for example, decide to always exclude economic operators from all third countries or certain third countries? This would not constitute national legislation, but just an internal policy for that specific contracting authority.
	Member States authorities cannot adopt any rule of general application regarding the treatment or legal protection of economic operators from non-covered countries, or any other matter or condition related to access by economic operators from non-covered countries to the EU public procurement market. *Individual contracting authorities may take decisions as regards their own procurement procedures concerning access by non-covered economic operators, either on a case-by-case basis, or following a non-binding uniform approach.*
5.	**TREATMENT OF BIDDERS FROM A THIRD COUNTRY WHERE THE CA/ CE DECIDED TO ACCEPT THEM**
5.1.	**May a contracting authority apply the same tender conditions to suppliers covered and not covered by EU international agreements when it decides to give access to a procurement procedure for both?**
	Yes, the Court acknowledged at para 63 of the Qingdao judgment that this is permissible, as long as this occurs on the basis of national law, not Union law or transposition thereof. Indeed, there is no EU legal basis that ensures no less favourable treatment for economic operators from third countries which have not concluded an international agreement with the EU, or which guarantees access for their economic operators to public procurement in the Union. *The contracting authority may decide nevertheless to apply the same conditions to tenders from non-covered third countries and treat them no less favourably than the tenders submitted by economic operators from EU / covered countries. However, economic operators from non-covered countries do not enjoy a right of redress under the national legislation transposing the EU legislation (paragraph 66 of the Qingdao judgment)*.
5.2.	**Does Union law prevent a contracting authority from treating a tenderer from a non-covered country less favourably even if this was not provided for in the tender documents?**
	Union public procurement law does not presently cover such third country economic operators. The only legal constraints concerning their treatment stem from national legislation that is not transposing EU law.
5.3.	**Should a contracting authority's decision to allow or prohibit participation of suppliers not covered by EU international agreements be clearly indicated in the procurement documents, including a description of which conditions apply equally, and which differ?**

	Contracting authorities may indicate in advance in the tender documents their decision to accept or not participation of non-covered third country economic operators and, if they admit them, the arrangements applicable to their tenders. *They may also decide not to make this known in advance. In the absence of any reference to this matter in the contract notice / tender specifications, the contracting authority / entity still has the possibility to accept or to reject a tender from an economic operator from a non-covered country at any moment during the procurement process.*
5.4.	**If a buyer allows the participation of economic operators from non-covered countries in procurement, in what way can the buyer adjust the procurement results? Is it optional or mandatory? Should the buyer follow certain rules while adjusting the procurement results, and if so, which ones? May contracting authorities apply the provisions of IPI regarding the 'adjustment of points' as per Article 2, paragraph 1, item d) in the procurement documentation?**
	As stated in point 63 of the Kolin judgment, if the contracting authority/entity admits such economic operators in a specific public procurement procedure, it is for that authority/entity to decide "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". *In doing so, it could take inspiration from the rules under the second subparagraph of Article 6(8) of Regulation (EU) 2022/1031 related to the International Procurement Instrument (IPI), or decide to apply any adjustment mechanism it may consider appropriate for a specific public procurement procedure.* If the contracting authority / entity accepts the participation of economic operators from non-covered countries in a procurement procedure, it may specify in the individual tendering documents the adjustment mechanism it may decide to use.
6.	**RIGHTS OF OPERATORS FROM NON-COVERED COUNTRIES**
6.1.	**Are operators from non-covered countries permitted to invoke national provisions based on EU public procurement law in an appeal procedure? If not, how can legal remedies be ensured?**
	National authorities cannot interpret the national provisions transposing EU public procurement law as also applying to economic operators from non-covered countries (see point 65 of the Kolin judgment). An action by those operators claiming that the contracting authority / entity has infringed certain requirements can be examined only in the light of national law and not of EU law (see point 66 of the Kolin judgment and point 66 of the Qingdao judgment).

6.2.	**How should we interpret certain requirements, such as transparency and proportionality, and infringements of such principles in the scope of only national law?**
	Economic operators from non-covered countries do not enjoy any rights deriving from EU public procurement law, including requirements for transparency and proportionality enshrined in EU law and transposed into the national legal order. It is open to competent national authorities to identify other national provisions (not transposing EU public procurement law) on which such economic operators might rely.
6.3.	**Could national contract law (for example, rules on "culpa in contrahendo" as interpreted by national civil courts) be considered such a "national law"? However, if this national law grants economic operators from 3rd countries legal standing and in this way grants them (an enforceable) "access" to a procurement procedure – would this be in line with the Kolin judgment (because it would not be a specific procurement provision)?**
	It is for the competent national authorities to identify other national provisions (not transposing EU public procurement law) on which such economic operators may rely. *National contract law cannot provide access to participate in a procurement procedure, as giving such access is a decision to be taken by the relevant contracting authority/entity. However, it might, in some cases, provide access to a national civil or administrative legal remedy that does not constitute transposition of the EU public procurement directives.*
6.4.	**How should compliance with the rule of law principle be ensured?**
	Contracting authorities/ entities may base themselves on national legislation that does not transpose EU law.
6.5.	**In the light of the ECHR, Member States must grant access to courts in "civil matters" (procurement falls within the scope of Article 6 ECHR). What should Member States do to fulfil this obligation, if operators from third countries are to be excluded and cannot rely on the EU Remedies Directive? Would national law granting them access to courts be considered incompatible with Union Law (exclusive competence)?**
	Nothing in the Kolin judgment relates to access to justice or to the right to a fair trial. Rather, the judgment concerns only the substantive rights of access to procurement procedures and remedies that economic operators may enjoy exclusively as a matter of national law. *Economic operators from non-covered countries do not enjoy rights deriving from EU public procurement law, and in particular the remedies system based on the provisions of Directive 89/665/EEC and Directive 92/13/EEC, as amended by*

	Directive 2007/66/EC and Directive 2014/23/EU, and transposed into national law. National review bodies may identify other national provisions that may apply in such cases. Accordingly, any possible issue of compliance with the ECHR would concern national law only and would be unrelated to any instance of implementation of EU law by a Member State.