



## Reports of Cases

### JUDGMENT OF THE COURT (Grand Chamber)

22 October 2024\*

(Reference for a preliminary ruling – Public procurement in the European Union – Directive 2014/25/EU – Article 43 – Economic 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 – No right on the part of those economic operators to ‘no less favourable’ treatment – Participation of such an economic operator in a public procurement procedure – Inapplicability of Directive 2014/25 – Inadmissibility in the context of an action brought by that economic operator seeking a request for a preliminary ruling concerning the interpretation of provisions of that directive)

In Case C-652/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Visoki upravni sud (High Administrative Court, Croatia), made by decision of 10 October 2022, received at the Court on 18 October 2022, in the proceedings

**Kolin Inšaat Turizm Sanayi ve Ticaret AŞ**

v

**Državna komisija za kontrolu postupaka javne nabave,**

intervening parties:

**HŽ Infrastruktura d.o.o.,**

**Strabag AG,**

**Strabag d.o.o.,**

**Strabag Rail a.s.,**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, T. von Danwitz, Vice-President, C. Lycourgos (Rapporteur), I. Jarukaitis, A. Kumin, N. Jääskinen and M. Gavalec, Presidents of Chambers, A. Arabadjiev, E. Regan, Z. Csehi and O. Spineanu-Matei, Judges,

Advocate General: A.M. Collins,

\* Language of the case: Croatian.

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 21 November 2023,

after considering the observations submitted on behalf of:

- Kolin İnşaat Turizm Sanayi ve Ticaret AŞ, by I. Božić and Z. Tomić, odvjetnici,
- the Državna komisija za kontrolu postupaka javne nabave, by M. Kuhar, acting as Agent,
- HŽ Infrastruktura d.o.o., by I. Kršić, acting as Agent, and by I. Mršo Nastić and M. Paulinović, odvjetnici,
- Strabag AG, Strabag d.o.o. and Strabag Rail a.s., by Ž. Potoku, odvjetnica,
- the Croatian Government, by G. Vidović Mesarek, acting as Agent,
- the Czech Government, by L. Halajová, T. Müller, M. Smolek and J. Vláčil, acting as Agents,
- the Danish Government, by D. Elkan, acting as Agent,
- the Estonian Government,, by N. Grünberg and M. Kriisa, acting as Agents,
- the French Government, by R. Bénard, O. Duprat-Mazaré and J. Illouz, acting as Agents,
- the Austrian Government, by J. Schmoll, acting as Agent,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by G. Gattinara, M. Mataija and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 March 2024,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Articles 36 and 76 of 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 and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).
- 2 The request has been made in proceedings between the company governed by Turkish law Kolin İnşaat Turizm Sanayi ve Ticaret AŞ ('Kolin') and the Državna komisija za kontrolu postupaka javne nabave (State Commission for Supervision of Public Procurement Procedures, Croatia) ('the supervisory commission') concerning the award of a public contract for construction of railway infrastructure in Croatia.

## Legal context

### *European Union law*

#### *The Agreement establishing an Association between the European Economic Community and Turkey and the Additional Protocol*

3 The Agreement establishing an Association between the European Economic Community and Turkey was signed on 12 September 1963 in Ankara and was concluded, approved and confirmed on behalf of the European Economic Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1977 L 361, p. 29).

4 The additional protocol annexed to that agreement, signed on 23 November 1970 in Brussels and concluded, approved and confirmed on behalf of the European Economic Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1977 L 361, p. 60; ‘the Additional Protocol’), provides in Article 41(1):

‘The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.’

5 Under Article 57 of the Additional Protocol:

‘The Contracting Parties shall progressively adjust the conditions for participation in contracts awarded by public authorities and public undertakings, and by private undertakings which have been granted special or exclusive rights, so that by the end of the period of twenty-two years there is no discrimination between nationals of Member States and nationals of Turkey established in the territory of the Contracting Parties.

The Council of Association shall determine the timetable and rules for this adjustment; when doing so it shall be guided by the solutions adopted by the Community in this field.’

#### *Directive 2014/25*

6 Recitals 2 and 27 of Directive 2014/25 state:

‘(2) In order to ensure the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a certain value. Such coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union (TFEU) and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. ...

...

- (27) Council Decision 94/800/EC [of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994) (OJ 1994 L 336, p. 1)] approved in particular the World Trade Organization Agreement on Government Procurement (the ‘GPA’). The aim of the GPA is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. For contracts covered by Annexes 3, 4 and 5 and the General Notes to the European Union’s Appendix I to the GPA, as well as by other relevant international agreements by which the Union is bound, contracting entities should fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.’
- 7 Article 1 of that directive, entitled ‘Subject matter and scope’, provides in paragraph 1:  
‘This Directive establishes rules on the procedures for procurement by contracting entities with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 15.’
- 8 Under Article 11 of that directive, entitled ‘Transport services’:  
‘This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.’
- 9 Article 15 of that directive, entitled ‘Threshold amounts’, provides:  
‘... this Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:  
...  
(b) EUR 5 186 000 for works contracts;  
...’
- 10 Article 36 of Directive 2014/25, headed ‘Principles of procurement’, provides in paragraph 1:  
‘Contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.’
- 11 Article 43 of that directive, entitled ‘Conditions relating to the GPA and other international agreements’, provides:  
‘In so far as they 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, contracting entities within the meaning of Article 4(1)(a) shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.’

12 Article 45 of that directive, entitled ‘Open procedure’, provides in paragraph 1:

‘In open procedures any interested economic operator may submit a tender in response to a call for competition[.]

...’

13 Article 76 of that directive, entitled ‘General principles’, provides in paragraph 4:

‘Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, contracting entities may, unless otherwise provided for by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.’

14 Under Article 86 of Directive 2014/25, under the heading ‘Relations with third countries as regards works, supplies and service contracts’:

‘1. Member States shall inform the [European] Commission of any general difficulties, in law or in fact, encountered and reported by their undertakings in securing the award of service contracts in third countries.

2. The Commission shall report to the Council [of the European Union] by 18 April 2019, and periodically thereafter, on the opening up of service contracts in third countries and on progress in negotiations with these countries on this subject, particularly within the framework of the World Trade Organization (WTO).

3. The Commission shall endeavour, by approaching the third country concerned, to remedy any situation whereby it finds, on the basis either of the reports referred to in paragraph 2 or of other information, that, in the context of the award of service contracts, a third country:

(a) does not grant Union undertakings effective access comparable to that granted by the Union to undertakings from that country;

(b) does not grant Union undertakings national treatment or the same competitive opportunities as are available to national undertakings; or

(c) grants undertakings from other third countries more favourable treatment than Union undertakings.

4. Member States shall inform the Commission of any difficulties, in law or in fact, encountered and reported by their undertakings and which are due to the non-observance of the international labour law provisions ... when those undertakings have tried to secure the award of contracts in third countries.

5. In the circumstances referred to in paragraphs 3 and 4, the Commission may at any time propose that the Council adopt an implementing act to suspend or restrict, over a period to be laid down in that implementing act, the award of service contracts to:

(a) undertakings governed by the law of the third country in question;

- (b) undertakings affiliated to the undertakings specified in point (a) and having their registered office in the Union but having no direct and effective link with the economy of a Member State;
- (c) undertakings submitting tenders which have as their subject matter services originating in the third country in question.

The Council shall act, by qualified majority, as soon as possible.

The Commission may propose those measures on its own initiative or at the request of a Member State.

6. This Article shall be without prejudice to the commitments of the Union in relation to third countries ensuing from international agreements on public procurement, particularly within the framework of the WTO.’

### *The IPI Regulation*

- 15 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) (OJ 2022 L 173, p. 1; ‘the IPI Regulation’) entered into force, in accordance with Article 15 thereof, on 29 August 2022.
- 16 Recitals (3) and (10) of that regulation are worded as follows:

‘(3) In accordance with Article 26 TFEU, the Union is to adopt measures with the aim of establishing or ensuring the functioning of the internal market, comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the Treaties. The access of third-country economic operators, goods and services to the public procurement or concession markets of the Union falls within the scope of the common commercial policy.

...

(10) International market access commitments undertaken by the Union towards third countries in the field of public procurement and concessions require, inter alia, the equal treatment of economic operators from those third countries. Consequently, measures adopted under this Regulation can only apply to economic operators, goods or services from third countries that are not parties to the plurilateral WTO Agreement on Government Procurement or to bilateral or multilateral trade agreements concluded with the Union that include commitments on access to public procurement or concession markets, or to economic operators, goods or services from countries that are parties to such agreements but only with respect to public procurement procedures for goods, services or concessions that are not covered by those agreements. In accordance with Directives 2014/23/EU [of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1)], 2014/24/EU [of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)] and [2014/25] ...

and as clarified by the communication of the Commission of 24 July 2019 on Guidance on the participation of third-country bidders and goods in the EU procurement market, 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.'

17 Article 1 of that regulation, entitled 'Subject matter and scope of application', provides:

'1. This Regulation establishes measures regarding non-covered procurement, intended to improve the access of Union economic operators, goods and services to the public procurement and concession markets of third countries. It lays down procedures for the Commission to undertake investigations into alleged third-country measures or practices against Union economic operators, goods and services, and to enter into consultations with the third countries concerned.

This Regulation provides for the possibility for the Commission to impose IPI measures in relation to such third-country measures or practices to restrict the access of economic operators, goods or services from third countries to Union public procurement procedures.

2. This Regulation shall apply to public procurement procedures covered by the following acts:

(a) Directive [2014/23];

(b) Directive [2014/24];

(c) Directive [2014/25].

3. This Regulation shall be without prejudice to any international obligations of the Union or to measures that Member States or their contracting authorities or contracting entities may take in accordance with the acts referred to in paragraph 2.

...'

18 Article 6 of that regulation, entitled 'IPI measures', provides:

'1. Where the Commission finds, following an investigation and consultations pursuant to Article 5, that a third-country measure or practice exists, it shall, if it considers it to be in the interest of the Union, adopt an IPI measure by means of an implementing act. ...

...

6. In the IPI measure referred to in paragraph 1, the Commission may decide, within the scope established in paragraph 8, to restrict the access of economic operators, goods or services from a third country to public procurement procedures by requiring contracting authorities or contracting entities to:

(a) impose a score adjustment on tenders submitted by economic operators originating in that third country; or

(b) exclude tenders submitted by economic operators originating in that third country.

...'

### ***Croatian law***

- 19 The Zakon o javnoj nabavi (Law on Public Procurement), in the version applicable to the main proceedings ('the Law on Public Procurement'), provides in Article 262:

'A contracting authority may, at any point during the procurement procedure, check, if it is necessary in order to ensure the proper conduct of the procedure, the information contained in the European Single Procurement Document with the authority responsible for keeping the official records of those data ... and may request the issue of a certificate to that effect, by consulting the supporting documents or evidence already in its possession ...

...'

- 20 Article 263 of that law states:

'1. In a procedure for the award of high-value public contracts, the contracting authority, before taking a decision, must, and, in procedures for the award of low-value public contracts, may ask the tenderer who has submitted the most economically advantageous tender to submit, within an appropriate period of at least five days, updated supporting documents ..., unless it has them already in its possession.

2. The contracting authority may invite economic operators to supplement or explain the documents received ...'

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 21 On 7 September 2020, HŽ Infrastruktura d.o.o., a company governed by Croatian law responsible for the management, maintenance and construction of railway infrastructure in Croatia, opened a procedure for the award of a public contract with an estimated value of 2 042 900 000 kuna (HRK) (approximately EUR 271 million), excluding VAT, for the construction of railway infrastructure connecting the towns of Hrvatski Leskovac (Croatia) and Karlovac (Croatia), to be awarded on the basis of the criterion of the most economically advantageous tender.
- 22 According to the instructions sent to tenderers by HŽ Infrastruktura, they were to demonstrate their technical and professional abilities by providing a document showing that, during the 10 years preceding the opening of that procedure, construction work on railway or road infrastructure, including bridges, viaducts or underpasses and overpasses, with a total value of at least HRK 30 000 000 (approximately EUR 4 million) excluding VAT, had been carried out by those tenderers.
- 23 On 25 January 2022, HŽ Infrastruktura adopted a decision awarding the contract at issue in the main proceedings, selecting, as the most economically advantageous tender, that of the Austrian company Strabag AG, the Croatian company Strabag d.o.o. and the Czech company Strabag Rail a.s. (together, 'the Strabag group').
- 24 Kolin, which was one of the tenderers, filed a complaint against that decision with the supervisory commission.

- 25 By decision of 10 March 2022, that commission set aside the decision of HŽ Infrastruktura referred to in paragraph 23 of the present judgment, on the ground that it had not been duly established that the Strabag group had the required technical and professional capacity.
- 26 On 6 April 2022, during the procedure following the setting aside of its award decision, HŽ Infrastruktura requested the Strabag group, pursuant to Article 263(2) of the Law on Public Procurement, to submit, where appropriate, an expanded list of the works carried out, accompanied by a certificate attesting to the proper execution and completion of those works.
- 27 On 7 April 2022, the Strabag group submitted such a list, accompanied by the relevant certificate, which dated from 21 March 2016. The expanded list contained a new reference, entitled ‘A9 Pyhrn Autobahn Tunnelkette Klaus Vollausbau Baulos 1, Talübergang Steyr und Rampenbrücke’ (‘Lot 1 – Complete construction of the Klaus tunnel chain along the A9 Pyhrn motorway, a viaduct over the Steyr River valley and an arch bridge’).
- 28 On 13 April 2022, pursuant to Article 263(2) of the Law on Public Procurement, HŽ Infrastruktura asked the Strabag group to provide clarifications concerning the certificate of 21 March 2016.
- 29 On 21 April 2022, the Strabag group supplemented that certificate with documents showing the precise value of the works relating to the infrastructure in question and an expanded list referring to the works carried out.
- 30 Following a review and re-evaluation of the tenders, on 28 April 2022 HŽ Infrastruktura adopted a new decision to award the contract at issue in the main proceedings to the Strabag group. It took the view that the new reference referred to in paragraph 27 of the present judgment was sufficient in itself to establish that that group had the required technical and professional capacity.
- 31 Kolin filed a complaint against that new award decision with the supervisory commission, claiming that the choice of HŽ Infrastruktura to invite the Strabag group to supplement its list of works was unlawful.
- 32 By decision of 15 June 2022, the supervisory commission rejected that complaint on the ground that there was no provision of national law which prevented the Strabag group from supplementing the list of works by indicating other work it had carried out in addition to that initially included, since Article 263(2) of the Law on Public Procurement allowed the contracting authority to invite a tenderer to supplement or provide an explanation for the evidence provided.
- 33 Kolin brought an action for annulment of that decision before the Visoki upravni sud (High Administrative Court, Croatia), which is the referring court, claiming that both the invitation to the Strabag group, by HŽ Infrastruktura, to supplement the list of works that initially accompanied its tender and the taking into account of the expanded list of works, in so far as acceptance of the reference referred to in paragraph 27 of the present judgment would alter the group’s tender substantially and would infringe, inter alia, the principle of equal treatment, are unlawful.
- 34 In the light of Articles 36 and 76 of Directive 2014/25, the referring court has doubts as to whether a contracting entity, such as HŽ Infrastruktura, is entitled to take into account, after the supervisory commission set aside its initial decision awarding the contract in question, additional

documents relating to the technical and professional capacity of the Strabag group, which were not included in the initial tender submitted by that group and which were presented by it at the request of that contracting entity.

35 In those circumstances, the Visoki upravni sud (High Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 76 [of Directive 2014/25], read in conjunction with Article 36 of [Directive 2014/25] permit the contracting entity to take into account documents that the tenderer provided for the first time after the time limit for the submission of tenders, where those documents were not included in the original tender and demonstrate circumstances that the tenderer did not indicate in the original tender?’

(2) If the answer to the first question is in the affirmative, must Article 76 [of Directive 2014/25], read in conjunction with Article 36 of [Directive 2014/25], be interpreted as precluding the contracting authority from requesting, after the first contract award decision has been set aside and the case has been referred back to the contracting entity for a re-examination and re-evaluation of the tenders, additional documents from the contractor demonstrating compliance with the conditions for participation in the public procurement procedure that were not included in the original tender, such as a list of works carried out supplemented by a reference that was not included in the original list of works, that is to say, a reference that was not part of the original tender?

(3) Must Article 76 [of Directive 2014/25], read in conjunction with Article 36 of [Directive 2014/25], be interpreted as precluding a contractor from providing to the contracting entity, after the first contract award decision has been set aside and the case has been referred back to the contracting entity for a re-examination and re-evaluation of the tenders, documents demonstrating compliance with the conditions for participation in the public procurement procedure that were not included in the original tender, such as a list of works carried out supplemented by a reference that was not included in the original list of works, that is to say, a reference that was not part of the original tender?’

### **Admissibility of the questions referred**

36 In accordance with settled case-law, in proceedings under Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 24 July 2023, *Lin*, C-107/23 PPU, EU:C:2023:606, paragraph 61 and the case-law cited).

37 Nevertheless, the Court must examine the circumstances in which cases are referred to it by the national court, in order to assess whether it has jurisdiction or whether the request submitted to it is admissible (see, to that effect, judgment of 22 March 2022, *Prokurator Generalny (Disciplinary Chamber of the Supreme Court – Appointment)*, C-508/19, EU:C:2022:201, paragraph 59 and the case-law cited).

- 38 The Court may, in particular, find it necessary to examine whether the provisions of EU law to which the questions referred relate are applicable to the dispute in the main proceedings. If that is not the case, those provisions are irrelevant in resolving that dispute and the questions referred for a preliminary ruling are not necessary to enable the referring court to give judgment, with the result that those questions must be held to be inadmissible.
- 39 In the present case, it is necessary to assess whether an action brought before a court of a Member State by an economic operator of a third country, in this case the Republic of Türkiye, in order to challenge the decision to award a public contract made in that Member State, may be examined in the light of the public procurement rules established by the EU legislature, such as Articles 36 and 76 of Directive 2014/25 on which Kolin relies in the present case and which are the subject of the questions referred for a preliminary ruling.
- 40 To that end, the Court invited the parties to the main proceedings and the other interested parties referred to in the first paragraph of Article 23 of the Statute of the Court of Justice of the European Union to express their views on what rules apply to the participation of an economic operator of a third country, such as Kolin, in a procedure for the award of a public contract in the European Union, which those parties and other interested parties did both in writing and at the hearing before the Court.
- 41 In that regard, it must be observed at the outset that the European Union is bound, with respect to certain third countries, by international agreements, in particular the GPA, which guarantee, on a reciprocal and equal basis, access for EU economic operators to public procurement in those third countries and for economic operators of those third countries to public procurement in the European Union.
- 42 Article 43 of Directive 2014/25 reflects those international commitments of the European Union by providing that, in so far as the GPA or other international agreements by which the European Union is bound so provide, contracting entities of the Member States must accord to economic operators of third countries which are parties to such an agreement treatment no less favourable than that accorded to EU economic operators.
- 43 As is apparent from recital 27 of that directive, that right to no less favourable treatment enjoyed by economic operators of those third countries means that those economic operators may rely on the provisions of that directive.
- 44 Other third countries have not, to date, concluded with the European Union an international agreement such as those referred to in paragraph 41 of the present judgment.
- 45 As regards economic operators of those third countries, it should be noted that, although EU law does not preclude those economic operators, in the absence of exclusion measures adopted by the European Union, from being allowed to participate in a public procurement procedure governed by Directive 2014/25, it does, however, preclude those economic operators from being able, in the context of their participation in such a procedure, 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 referred to in Article 43 of that directive.
- 46 The inclusion of the economic operators of the third countries referred to in paragraph 44 of the present judgment within the scope of the rules on public procurement established by the EU legislature, as is apparent from recital 2 of Directive 2014/25, in order to ensure undistorted

competition, at the very heart of which lies the principle of equal treatment (see, to that effect, judgments of 17 September 2002, *Concordia Bus Finland*, C-513/99, EU:C:2002:495, paragraph 81; of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 43; and of 13 June 2024, *BibMedia*, C-737/22, EU:C:2024:495, paragraph 30), would have the effect of conferring on them a right to no less favourable treatment, contrary to Article 43 of that directive, which limits the benefit of that right to economic operators from third countries which have concluded with the European Union an international agreement such as those referred to in that article.

- 47 Therefore, the right conferred by Article 45(1) of Directive 2014/25 on ‘any interested economic operator’ to submit a tender in response to a call for competition in the context of an open public procurement procedure in the European Union does not extend to economic operators of third countries which have not concluded such an international agreement with the European Union. Nor does it imply that those operators, where they are admitted to participate in such a procedure, are entitled to rely on that directive. To interpret that provision differently and thus to render unlimited the personal scope of that directive would be tantamount to guaranteeing economic operators of those third countries equal access to public procurement procedures in the European Union. For the reason set out in paragraph 46 of the present judgment and as is also stated, now, in recital 10 of the IPI Regulation, Directive 2014/25 must be understood as meaning that the access of economic operators of those third countries to public procurement procedures in the European Union is not guaranteed and that those operators may be excluded from them.
- 48 The third countries referred to in paragraph 44 of the present judgment include the Republic of Türkiye, which is not a party to the GPA or to any other agreement conferring on Turkish economic operators, on a reciprocal basis, the right to participate in public procurement procedures in the European Union on an equal footing with EU economic operators.
- 49 It is true that Article 57 of the Additional Protocol provides for the progressive adjustment, in accordance with a timetable and the detailed rules laid down by the Association Council, of the conditions for participation in the respective public procurement markets of the European Union and Turkey, with a view to eliminating, in the long term, discrimination between EU economic operators and Turkish economic operators. However, as the Advocate General observed in points 9 and 10 of his Opinion, the adjustment provided for in Article 57 has not, to date, taken place and the mutual opening of public procurement markets between the European Union and the Republic of Türkiye has therefore not yet been achieved.
- 50 Moreover, there is nothing in the documents before the Court to suggest that the European Union, or the Republic of Croatia since its accession to the European Union, has introduced any new restriction, within the meaning of Article 41(1) of the Additional Protocol, the object or effect of which would be to limit, in relation to the situation which existed at the time of the entry into force of that protocol or, as regards the Republic of Croatia, at the time of its accession, the opportunities for Turkish economic operators to have access to public procurement in the European Union or, more specifically, in that Member State. In those circumstances, Turkish economic operators cannot, in any event, rely on that provision in order to claim entitlement to no less favourable treatment, within the meaning of Article 43 of Directive 2014/25, or, more broadly, to the application of that directive to them.

- 51 Therefore, in a situation such as that at issue in the main proceedings, involving the participation, as accepted by the contracting entity, of a Turkish economic operator in a public procurement procedure governed by Directive 2014/25, that operator cannot rely on Articles 36 and 76 of that directive in order to challenge the decision awarding the contract concerned.
- 52 It remains to examine whether the questions referred, which concern the interpretation of those provisions of Directive 2014/25, are nevertheless admissible in the light of the fact, which is apparent from the request for a preliminary ruling and the response of the supervisory commission to a question put by the Court, that the provisions of the Croatian legislation transposing those provisions are interpreted as applying without distinction to all tenderers from the European Union and third countries and as therefore being capable of being relied on by Kolin.
- 53 In that regard, it should be borne in mind that it is true that requests for a preliminary ruling concerning the interpretation of provisions of EU law in situations which fall outside the scope of EU law are admissible where those provisions, without amendment of their purpose or scope, have been rendered applicable on account of a direct and unconditional reference made by national law. In those situations, it is clearly in the interest of the EU legal order that, in order to forestall future differences of interpretation, the provisions taken from EU law should be interpreted uniformly (see, to that effect, judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraphs 36 and 37, and of 13 October 2022, *Baltijas Starptautiskā Akadēmija and Stockholm School of Economics in Riga*, C-164/21 and C-318/21, EU:C:2022:785, paragraph 35).
- 54 However, that case-law cannot apply where the provisions of national law transposing a directive are rendered applicable by the authorities of a Member State in disregard of an exclusive competence of the European Union.
- 55 That is the case here as regards the participation in public procurement procedures of economic operators of third countries which have not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to those procedures.
- 56 It is settled case-law that the common commercial policy, referred to in Article 207 TFEU, for which the European Union has exclusive competence by virtue of Article 3(1)(e) TFEU, concerns trade with third countries and encompasses any EU act which is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it (see, inter alia, judgment of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520, paragraphs 50 and 51, and Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017, EU:C:2017:376, paragraph 36).
- 57 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 European Union is such as to have direct and immediate effects on trade in goods and services between that third country and the European Union, with the result that it falls within the exclusive competence of the European Union under Article 3(1)(e) TFEU (see, to that effect, Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017, EU:C:2017:376, paragraphs 76 and 77). This is true of acts which, in the absence of an agreement between the European Union and a third country, determine unilaterally whether and, if so, under what arrangements the economic operators of that third country may participate in public

procurement procedures in the European Union. Like agreements, those unilateral acts have direct and immediate effects on trade in goods and services between that third country and the European Union.

- 58 That exclusive competence is illustrated by Article 86 of Directive 2014/25, which, in the event of any general difficulties encountered and reported by the undertakings of one or more Member States in securing the award of public contracts in a third country, confers on the European Union and not on the Member States the power to suspend or restrict the participation of undertakings of that third country in EU public procurement procedures.
- 59 The exclusive nature of that EU competence is also confirmed by the IPI Regulation, which relates to measures of general application that may be taken with regard to economic operators of a third country which has not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement markets, as regards the exclusion or restriction of access of those operators to public procurement procedures. That regulation, which, admittedly, was not yet applicable at the time of the facts in the main proceedings, was adopted on the basis of Article 207 TFEU and states, in recital 3, that access by economic operators from third countries to the EU public procurement market falls within the scope of the common commercial policy.
- 60 Although, on the other hand, as is apparent from Article 207(5) TFEU, the common commercial policy does not cover the negotiation and conclusion of international agreements in the field of transport and cannot therefore entirely cover the question of access of economic operators of third countries to the sectoral public procurement covered by Directive 2014/25, the fact remains that the conclusion of an agreement guaranteeing access of economic operators of a third country to that sectoral public procurement also falls within an exclusive competence of the European Union, namely that referred to in Article 3(2) TFEU (see, to that effect, Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017, EU:C:2017:376, paragraphs 219 to 224). It is clear that the adoption of acts which determine, in the absence of such an agreement, whether and, as the case may be, under what arrangements, economic operators of the third country concerned may participate in sectoral procurement procedures in the European Union is not covered by Article 207(5) TFEU and therefore falls within the scope of the common commercial policy.
- 61 It follows from the findings set out in paragraphs 55 to 60 of the present judgment that only the European Union has competence to adopt an act of general application concerning access, within the European Union, to public procurement procedures for economic operators of a third country which has not concluded an international agreement with the European Union 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 excludes them or provides for an adjustment of the result arising from a comparison of their tenders with those submitted by other economic operators.
- 62 By virtue of Article 2(1) TFEU, in the areas of exclusive competence of the European Union, only the European Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the European Union or for the implementation of EU acts. However, the European Union has not empowered the Member States to legislate or adopt legally binding acts concerning access to public procurement procedures for economic operators

of a third country which has not concluded an international agreement with the European Union. As the Advocate General observed in points 50 to 52 of his Opinion, nor has the European Union, to date, adopted any acts of that nature which the Member States could implement.

- 63 In the absence of acts adopted by the European Union, it is for the contracting entity to assess whether economic operators of a third country which has not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement should be admitted to a public procurement procedure and, if it decides to admit 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.
- 64 Given that economic operators of third countries which have not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement do not enjoy a right to no less favourable treatment under Article 43 of Directive 2014/25, it is open to the contracting entity 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 economic operators of the European Union and of third countries which have concluded such an agreement with the European Union, within the meaning of Article 43 of that directive, on the other hand.
- 65 In any event, national authorities cannot interpret the national provisions transposing Directive 2014/25 as also applying to economic operators of third countries which have not concluded such an agreement with the European Union, which have been admitted, by a contracting entity, to participate in a procedure for the award of a public contract in the Member State concerned, as otherwise the exclusive nature of the European Union's competence in that area would be disregarded.
- 66 While it is conceivable that the arrangements for treatment of such operators should comply with certain requirements, such as transparency or proportionality, an action by one of those operators seeking to complain that the contracting entity has infringed such requirements can be examined only in the light of national law and not of EU law.
- 67 It follows from all of the foregoing that national authorities are not competent to render applicable, to economic operators of third countries which have not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement, national provisions transposing the rules contained in Directive 2014/25. In those circumstances, the case-law referred to in paragraph 53 of the present judgment cannot lead to a finding of admissibility of the questions referred for a preliminary ruling concerning the interpretation of those rules in the context of the dispute between Kolin and the supervisory commission.
- 68 Consequently, the interpretation of Articles 36 and 76 of Directive 2014/25 cannot in any way be relevant to the outcome of the dispute in the main proceedings.
- 69 It follows that the request for a preliminary ruling is inadmissible.

## Costs

- 70 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

**The request for a preliminary ruling made by the Visoki upravni sud (High Administrative Court, Croatia), by decision of 10 October 2022, is inadmissible.**

[Signatures]