

# ICAPP2024

**International Conference  
for Advancing Public Procurement**

*Bridging Academics and Practitioners  
in Public Procurement*

**EXCLUSION OF THIRD COUNTRY ECONOMIC  
OPERATORS FROM EU PUBLIC PROCUREMENT –  
THE AFTERMATH OF THE KOLIN JUDGEMENT**

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# WHAT I THOUGHT I WAS GOING TO TALK ABOUT



Article 25 of Directive 2014/24



Commission Guidance on the participation on third country bidders



IPI



FSR

CJEU KOLIN  
JUDGEMENT



## THE FACTS

Croatian utilities public procurement procedure

Contracting authority selected a consortium after asking for (and receiving) new references

Kolin (Turkish economic operator) unsuccessfully appealed to DKOM, then initiated an administrative dispute before the Croatian High Administrative Court

Request for a preliminary ruling!

**”Can additional references be submitted in utilities procurement procedures”**



## WHAT DID THE CJEU SAY?



**Access to the EU public procurement market is an exclusive competence of the EU**

Third country economic operators may participate, but not on an equal footing – they are not protected by the Directive(s)

Third country economic operators are not protected by national provisions



**Wide discretion awarded to contracting authorities**

Remedies parallelism?

ACCESS TO THE EU PUBLIC  
PROCUREMENT MARKET IS  
AN EXCLUSIVE  
COMPETENCE OF THE EU

- Only the EU has competence to adopt general acts concerning access to EU public procurement procedures for economic operators of a third country which has not concluded an FTA with the EU guaranteeing equal and **reciprocal** access to public procurement
- What about Stabilization and Association Agreements?
- Are the WTO GPA countries safe?
- EU has incorporated some reciprocal conditions in its GPA commitments, which means access to certain public procurement procedures is denied if there is no reciprocity

## WIDE DISCRETION AWARDED TO CONTRACTING AUTHORITIES

It is for the contracting authority to decide should third country economic operators be admitted to a public procurement procedure and, if it decides to admit them, whether there should be an adjustment of the result arising from a comparison between the tenders submitted by those operators and those submitted by other operators

Separation of the state and contracting authorities?

Can Member States establish general rules?

## WHAT DIDN'T THE CJEU SAY?

Are new documents allowed in public procurement procedures?



**Below threshold procurement?**



**Origin of economic operators and consortiums?**



**What should the remedies for third country economic operators look like?**

What about existing national provisions excluding third country economic operators?



**What about EU membership candidate countries and EIB funded projects?**



## BELOW THRESHOLD PROCUREMENT?

Can third country economic operators participate on equal footing?

No – EU exclusive competence

Many Member States decided to expand the application of the same rules to above and below threshold public procurement procedures (Croatia included)

*Leur-Bloem (C-28/95)* - when Member States adopt the same solutions as those adopted in Community law (...) provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply

## ORIGIN OF ECONOMIC OPERATORS AND CONSORTIUMS?

Enormous burden on contracting authorities!

EU membership candidate countries, WTO GPA reciprocity?

IPI helps with consortiums, but not with subsidiaries!

If the problem with subsidiaries is not solved – easy circumvention of the exclusion

Romanian example!

PRESS RELEASE | Apr 3, 2024 | Brussels | 4 min read

# Commission opens two in-depth investigations under the Foreign Subsidies Regulation in the solar photovoltaic sector

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Today, the Commission launched two in-depth investigations under the [Foreign Subsidies Regulation](#). The investigations relate to the potentially market distortive role of foreign subsidies given to bidders in a public procurement procedure. The Commission will assess whether the economic operators concerned did benefit from an unfair advantage to win public contracts in the EU.

The investigations launched today follow notifications submitted by on the one hand the ENEVO Group including LONGi Solar Technologie GmbH, and on the other hand Shanghai Electric UK Co. Ltd. and Shanghai Electric Hong Kong International Engineering Co. Ltd. The relevant public procedure was launched by a Romanian contracting authority (Societatea PARC FOTOVOLTAIC ROVINARI EST S.A.) for the design, construction and operation of a photovoltaic park in Romania, with an installed power of 454.97 MW\*. This project is partially financed by the EU Modernisation Fund.

WHAT SHOULD THE REMEDIES FOR THIRD  
COUNTRY ECONOMIC OPERATORS LOOK  
LIKE?

If allowed to participate – no protection of EU law and national law transposing EU law

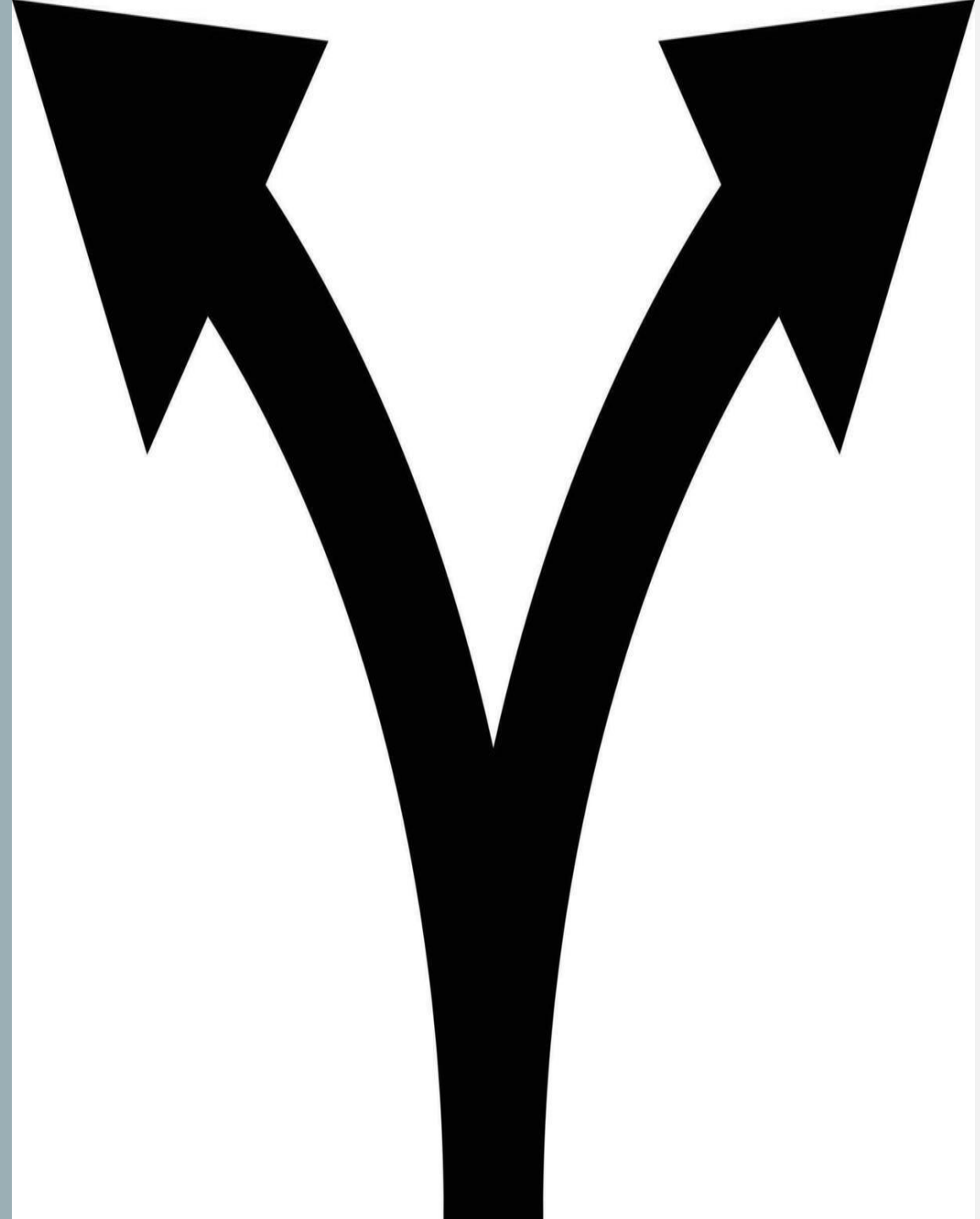
But - should be treated in accordance with requirements "like transparency and proportionality"

The majority of Articles of the Croatian PPA - direct transposition of EU Directives

But some are not, for example – the Articles establishing the appeal procedure as an administrative procedure (but it can be argued that they are also transposing Directive 2006/77)

Are the contracting authorities now expected to know the origin of each Article of the PPA?

What about BITs?



# WHAT ABOUT EU MEMBERSHIP CANDIDATE COUNTRIES AND EIB FUNDED PROJECTS?

Kolin does not apply  
EU funds public procurement  
procedures in candidate countries via  
the Pre-Accession Assistance  
Programme, which has a budget of €  
14.16 billion (2021-2027)  
Third country economic operators  
will benefit

## From Belgrade to Niš for 100 Minutes at up to 200 km/h

28/02/2023 | Categories: News



€2.2 billion financial package for Rail Corridor X has been announced today between Serbia, the European Union, European Investment Bank (EIB) and European Bank for Reconstruction and Development (EBRD). The package supports upgrade of the Belgrade-Niš section of Railway Corridor X, which will allow fast train connection of up to 200km/h between the two cities enabling faster flow of goods and services as well as contribute to the speedy integration into the EU railway networks.

The package consists of an investment grant of up to €598 million from the EU – the largest EU grant donation for a single project in Serbia to date; a €1.1 billion loan from the EIB and a €550 million EBRD loan. The EU has already approved €265 million worth grants and the first tranche amounting to €82.8 million was sealed in a symbolical signature event onboard a train from Belgrade towards Niš.

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## Brussels' global infrastructure plan isn't challenging Beijing — it's relying on it

EU-funded projects abroad are being built by Chinese companies.

LISTEN SHARE



What Brussels saw the 'Belt and Road' as an EU green development. Being approved as a 'key strategic project' of the Belt and Road Initiative. (Dan Baruch/AFP via Getty Images)

NOVEMBER 4, 2024 6:00 AM CET  
BY JACOB MARSHALL, ANA ČUKIĆ AND MARIJKA TOSARIĆ

BORTI, Georgia — Two neighbors, Murman and Natela, sit together sipping coffee as the early autumn sun sets over the village of Borti, in Georgia. Just a few kilometers away, the newly built East-West Highway roars with traffic.

The question — whether the new highway is European or Chinese — is met with confusion.

"The road is built by those who pay, so it's European," argues Murman, 47, who has been working on the construction of the road since day one.

## THE FUTURE?

- Contracting authorities as international trade law experts!
- Third country economic operators can circumvent exclusions through subsidiaries
- System established by the IPI and FSR clearer, easily understandable – and now in danger
- Kolin brings legal uncertainty, even if it encourages more FTAs