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Threatened participation of contractors from so-called third countries in EU public procurement market

Why it matters

According to the opinion of Anthony Collins, Advocate General of the Court of Justice of the European Union, delivered on 7 March 2024 in case C-652/2, **contractors from non-EU countries and countries that are not party to certain agreements (e.g. the GPA) cannot compete for public contracts in EU countries. Such a prohibition would equally cover consortium members and entities that provide their resources.**

Right now, the procurement markets of individual Member States are open to a greater (like Poland) or smaller (like France) extent to contractors from third countries. If this position were upheld by the Court, their situation would change completely. They would have to change their business strategy and form of operation entirely by forming or taking over existing businesses in the EU.

Since when will this apply

For the time being, this radical position is expressed in the opinion of the Advocate General. There is no doubt that the situation would change if this position were shared by the Court of Justice. It is currently difficult to say when we can expect a ruling, probably within a few months. Although the Court shares the views of the advocates general in a significant number of cases, this is not the rule.

Nevertheless, the Advocate General's opinion shows his assessment of the current state of the law; after all, it is not creating new law. However, it is possible that, based on this position and interpretation, national institutions, particularly contracting authorities and review bodies, may decide to exclude third-country contractors from pending procurement procedures. However, the position of the Court of Justice will be decisive in this respect.

Recommendation

Given the above, **we recommend that foreign entities from so-called third countries, bidding for public procurement contracts in EU countries**, consider revising (expanding) their current business strategies, including in the following directions:

- acquiring local resources (including experience), through forming and developing subsidiaries (not branches) in the EU;
- acquiring EU-based entities;
- expanding cooperation with EU-based entities, including as subcontractors.

Who will my adviser be?



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