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Judgment of the ECJ of 30 January 2020 in case C-395/18 — obligation to exclude a contractor when the grounds for exclusion concern subcontractors

Wyrok ETS z 30.01.2020 r. w sprawie C-395/18 —
obowiązek wykluczenia wykonawcy, w przypadku gdy ustalono
podstawy wykluczenia w stosunku do jego podwykonawców

Abstract

The commented ruling of the ECJ has practical implications for the public procurement market in the Member States. The ECJ examined whether in the situation when grounds for exclusion arise in relation to a subcontractor, the contracting authority may exclude from the procedure the contractor who indicated the subcontractor in its tender. The aim of the article is to show the correct procedure of the contracting authority in a situation where the grounds for exclusion concern subcontractors. The ECJ confirmed the compliance with EU law of national regulations providing for the possibility of examining exclusion criteria also in relation to subcontractors. However, according to the principle of proportionality, the contracting authority must be able to assess whether the economic operator is able to perform the contract without the subcontractor's participation before the exclusion of the economic operator. Thus, the ECJ ruled that national legislation providing for the automatic character of such exclusion are incompatible with EU law.

Keywords: judgment of the ECJ, exclusion from the proceedings, Directive 2014/24, public procurement, automatic exclusion

JEL: K22, K29

Facts

The Regional Administrative Court for Lazio in Italy referred the questions to the ECJ for the preliminary ruling as a part of the proceedings between a company, Tim SpA and the Ministry of the Economy and Finance concerning

Streszczenie

Omawiane orzeczenie TSUE ma istotne znaczenie praktyczne dla rynku zamówień publicznych w państwach członkowskich. TSUE badał, czy w sytuacji zaistnienia podstaw wykluczenia z postępowania w stosunku do podwykonawcy instytucja zamawiająca może wykluczyć z postępowania tego wykonawcę, który w ofercie wskazał podwykonawcę. Celem artykułu jest ukazanie prawidłowego postępowania zamawiającego w sytuacji, gdy podstawy wykluczenia dotyczą podwykonawców. TSUE potwierdził zgodność z prawem unijnym regulacji krajowych przewidujących możliwość badania przesłanek wykluczenia także w stosunku do podwykonawców. Jednak zgodnie z zasadą proporcjonalności instytucja zamawiająca musi mieć możliwość oceny przed wykluczeniem wykonawcy, czy jest on zdolny do wykonania zamówienia bez udziału podwykonawcy. TSUE uznał tym samym, że niezgodne z prawem unijnym są regulacje krajowe przewidujące automatyczny charakter takiego wykluczenia.

Słowa kluczowe: wyrok TSUE, wykluczenie z postępowania, wykluczenie automatyczne, dyrektywa 2014/24, zamówienia publiczne

the exclusion of Tim from an open tender procedure organised by the Ministry.

Tim submitted a tender mentioning the intention of using the services of the subcontractors. In the course of the procedure, the contracting authority found that one of the subcontractors mentioned by Tim in its tender did not

comply with the standards relating to the right to work for people with disabilities and therefore excluded Tim from the procedure. Tim brought an action before the national court, challenging the disproportionate nature of its exclusion. The referring court deemed the exclusion as valid since the replacement of a subcontractor may be required, following Italian public procurement law, only if the ground for exclusion is established in respect of that subcontractor after the award of the contract. The referring court questioned whether the national regulations which provide that the contracting authority is required, where there is a ground for exclusion found in respect of a subcontractor at the tender stage, to exclude from the procedure the tenderer who has indicated its intention to have recourse to that subcontractor complies with Art. 57 paras 4 and 5 and Art. 71 para. 6b of the classical directive. Moreover, the referring court considered if the Court were to find that the provisions of Directive 2014/24 do not preclude national legislation such as the one at issue, such legislation complies with the principle of proportionality, where exclusion of the tenderer is automatic.

Position of the ECJ

In the judgment, the ECJ remarked that as regards an optional ground for exclusion such as that provided for in Art. 57 para. 4a of Directive 2014/24, it should be noted at the outset that, in accordance with Art. 57 para. 7 of that directive, it is for the Member States, in compliance with EU law, to lay down the 'implementing conditions' (see Racziewicz, 2020, p. 179). The ECJ emphasized that it is apparent from its case-law that Art. 57 para. 7 of directive does not provide for uniform application at Union level of the exclusion grounds it mentions, since the Member States may choose not to apply those grounds, or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at the national level. Member States, therefore, enjoy some discretion in determining the implementing conditions of the optional grounds for exclusion laid down in Art. 57 para. 4 of Directive 2014/24.

The ECJ ruled that the wording of Art. 57 para. 4(a) of directive, even when read in the light of the first subparagraph of recital 101 of that directive, from which it is apparent that contracting authorities should be able to exclude unreliable economic operators for failure to comply with environmental or social obligations, does not prevent Member States from considering that the party responsible for the identified failure to fulfil obligations may also be the subcontractor and thus provide for the contracting authority to have the option, or even the obligation, to exclude, as a result, the economic operator who submitted the tender from participation in the contract award procedure.

It is worth stressing the importance of the principle of proportionality. As regards the context of Art. 57 para. 4(a)

of Directive 2014/24 and the systematics of that directive, it must be noted that that provision expressly concerns the breach of the obligations provided for in Art. 18 para. 2 of that directive, that is to say, the obligations applicable in the areas of environmental law, social law and labour law. This Article, entitled 'Principles for procurement', is the first provision in Chapter II of the Directive, devoted to general rules on public procurement procedures. Thus, by providing in para. 2 of that Article that economic operators must comply with obligations relating to environmental, social or labour law when performing the contract, the EU legislator intended to transform that requirement into a principle on the same basis as the principles laid down in para. 1 of that Article, namely the principles of equal treatment, non-discrimination, transparency (Olszewska, 2020).

The ECJ determined that the Member States may provide, for the purposes of applying Art. 57 para. 4a of Directive 2014/24, that the contracting authority has the option, or even the obligation, to exclude the economic operator who submitted the tender from participating in the contract award procedure where a failure to fulfil the obligations referred to in Art. 18 para. 2 of that directive is established with regard to one of the subcontractors referred to in that operator's tender. The ECJ recalled, first, that the contracting authorities must, throughout the procedure, observe the principles of procurement set out in Art. 18 of directive, which include, *inter alia*, the principles of equal treatment and proportionality (judgment of 26 September 2019, *Vitali*, C-63/18, EU:C:2019:787, para. 39 and the case-law cited), and, second, that, in accordance with the principle of proportionality, which is a general principle of EU law, the rules laid down by the Member States or contracting authorities in implementing the provisions of that directive, such as the rules intended to lay down the implementing conditions of Art. 57 of that directive, must not go beyond what is necessary to achieve the objectives of that directive (judgment of 26 September 2019, *Vitali*, C-63/18, EU:C:2019:787, para. 39; judgments of 7 July 2016, *Ambisig*, C-46/15, EU:C:2016:530, para. 40, and of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, para. 32). Therefore, where the contracting authority undertakes to verify during the contract award procedure, whether there are exclusion grounds within the meaning of Art. 57 para. 4a of that directive and the national rules provide that it has the option, or even the obligation, to exclude the economic operator on the grounds that a subcontractor has failed to comply with obligations relating to environmental, social and labour law, it is required, in order to comply with the principle of equal treatment, to verify whether there is any failure to comply with those obligations in respect not only of all the economic operators who have submitted a tender, but also in respect of all the subcontractors indicated by those operators in their respective tenders. The ECJ also noted that the principle of equal treatment does not preclude national legislation from providing that a finding of failure

to fulfil obligations in respect of a subcontractor after the award of the contract does not entail the exclusion of the successful tenderer, but only the replacement of the subcontractor. The ECJ also referred to the principle of proportionality, especially in regard to whether an economic operator may provide evidence to show that the measures it has taken are sufficient to demonstrate its reliability despite the existence of that ground for exclusion. This is confirmed by the wording of the first subparagraph of Art. 57 para. 6 of directive specifies that, if such evidence is considered sufficient, the economic operator concerned must not be excluded from the contract award procedure. That provision thus introduces a mechanism for corrective measures (self-cleaning) which underlines the importance attaching to the reliability of the economic operator.

Finally, the ECJ referred to the national regulation at issue in the main proceedings which provided in a general and abstract manner for the automatic exclusion of the economic operator where a failure to fulfil obligations under environmental, social and labour law is established in relation to one of the subcontractors indicated in that operator's tender, irrespective of the circumstances which led to that failure, and thus establishes an irrebuttable presumption that the economic operator must be excluded for any failure attributable to one of its subcontractors, without leaving the contracting authority the option of assessing, on a case-by-case basis, the particular circumstances of the case or the economic operator being able to demonstrate its reliability despite the finding of that failure. On this point the ECJ ruled that such regulation deprives the economic operator of the possibility of providing detailed information about the situation and the contracting authority of any discretion in that regard, thus it cannot be regarded as being compatible with Art. 57 paras 4 and 6 of directive and the principle of proportionality (see, to that effect, judgment of 26 September 2019, *Vitali*, C-63/18, EU:C:2019:787, paras 23, 43). Thus, Art. 57 para. 6 of directive and the principle of proportionality preclude national legislation providing for the automatic nature of such exclusion.

Commentary

It is apparent from the case-law of the ECJ that Art. 57 para. 7 of Directive 2014/24 does not provide for uniform application at EU level of the exclusion grounds listed therein. Member States may choose not to apply those grounds, or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. **As emphasized by the ECJ, Member States therefore enjoy some discretion when determining the conditions for the non-mandatory grounds for exclusion laid down in Art. 57 para. 4 of Directive 2014/24.**¹

It becomes necessary to determine whether each conduct of the subcontractor may lead to non-mandatory exclusion of the economic operator or whether exclusion can only be effected with regard to the economic operator's conduct. It is worth emphasising that the absence of an exclusionary sanction against the economic operator where the subcontractor is subject to exclusion would lead to violation of fair competition in the procedure. This would be the case where the subcontractor's violation affects the economic operator's ability to win contracts. Therefore, the non-mandatory grounds for exclusion allow Member States to pursue general interest objectives, provide a guarantee of reliability, diligence and professional integrity.² Additionally, Advocate General in his opinion, pointed out that the legislator did not use the designation of entities in relation to Art. 57 para. 4(a) of Directive 2014/24. It uses an impersonal expression "violation of [...] obligations" to refer to breach of social or labour obligations, without specifying who has perpetrated those breaches.³

The principle of proportionality applies to all activities undertaken by the contracting authority in the procedure (*Hryc-Ląd et al.*, 2016, p. 27). The ECJ has repeatedly emphasised in its judgments that the proportionality consists in the contracting authority setting out only requirements which are necessary to achieve the objective pursued (judgment of 26 September 2019, *Vitali*, C-63/18, EU:C:2019:787, para. 39).

Infringement of the principle of proportionality means that the conditions imposed by the contracting authority are detached from the principal objective of conducting the procedure and are not necessary to attain the objectives pursued or are clearly disproportionate to them. The ECJ stressed in para. 55 of the judgment that the contracting authority may exclude a contractor for the violation of a subcontractor. That is, if any of the subcontractors listed in that economic operator's tender have been found to have a ground for exclusion under this provision. On the other hand, that provision, in conjunction with Art. 57 para. 6 of that directive, and the principle of proportionality, preclude national rules which provide for the automatic nature of such exclusion. The automatic exclusion of the economic operator should be considered as infringing the principle of proportionality.

In view of the above construction of the provision, it is acceptable that the subcontractor is the person responsible for the infringement and, consequently, for the exclusion of the economic operator (tenderer). The exclusion of the economic operator because of the violation committed by their subcontractor, may take place within the framework of the violation at the preliminary stage of the procurement procedure, up to the selection stage. The above is consistent with recital 40 of Directive 2014/24 providing that control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure. It therefore follows that Member States may provide, for the purposes of applying Art. 57 para. 4(a) of Directive 2014/24, that the contracting authority has the option, or even the

obligation, to exclude the economic operator who submitted the tender from participating in the contract award procedure where a failure to fulfil the obligations referred to in Art. 18 para. 2 of that directive is established with regard to one of the subcontractors referred to in that operator's tender. However, ECJ emphasized that those provisions must observe the principle of equal treatment as well as the principle of proportionality and that the exclusion of the economic operator should not be automatic. The economic operator should be able to present the evidence confirming their reliability despite the found failure.

Polish context

The ruling of the Court of Justice of the European Union is also of great practical importance for the practice of public procurement in Poland. In Polish law, under Art. 462 para. 2 of Public Procurement Law of 11 September 2019 (later: PPL), the contracting authority may demand that the economic operator indicate in the tender the part of the contract, the performance of which they intend to entrust to subcontractors and provides the names of possible subcontractors, if known. Pursuant to Art. 462 para. 5 of PPL, the contracting authority may examine whether there are grounds for exclusion of the subcontractor who is not the entity making the resources available, if it provided for such grounds in the contract documents. If there are grounds for exclusion of a subcontractor, the contracting authority shall demand that the contractor replace the subcontractor within the period determined by the contracting authority, under pain of no allowing the subcontractor to perform a part of the contract (Art. 462 para. 6 of PPL).

Taking into account the above provisions, they do not specify the consequences of finding grounds for exclusion with regard to a subcontractor at the stage of the public procurement procedure. At this point, it is worth pointing out that the contracting authority is bound by the principle of proportionality laid down in Art. 7 of Public Procurement Law as confirmed by the ECJ in the commented judgment. Art. 18 "Principles of procurement" provides that: contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

In the light of commented judgment of the ECJ, it is necessary to establish whether Public Procurement Law provides for negative consequences for the economic operator in the form of exclusion if there are grounds for exclusion of their subcontractor. Two situations must be distinguished here. In the first, at the stage of applying for public procurement the economic operator decides to entrust a part of performance of the contract. Then the contracting authority may verify whether there are the grounds for mandatory (Art. 108 of PPL) and non-mandatory exclusion (Art. 109 of PPL) against the

subcontractor who is not the entity making the resources available, as far as provided for in the contract documents. The contractor shall attach to the request for participation in the proceedings or the tender a declaration of not being subject to exclusion, of satisfaction of the conditions for participation in the proceedings or of the selection criteria to the extent specified by the contracting authority. The declaration shall be submitted on a form of the European Single Procurement Document.

Taking the above into consideration, the contracting authority may examine whether there are grounds for the exclusion of the subcontractor who is not the entity making the resources available. If there are grounds for exclusion of a subcontractor, the contracting authority shall demand that the economic operator replace the subcontractor within the period determined by the contracting authority, under pain of refusing to allow the subcontractor to perform a part of the contract. It follows from the above provision that the examination of the existence of grounds for exclusion of the subcontractor from the procedure cannot result in the exclusion of the economic operator as well as the subcontractor. Importantly, however, the provision of Art. 462 of PPL concerns the determination of the grounds for exclusion in relation to the subcontractor during the performance of the contract. There is no provision in the PPL which regulates the effects of the finding of grounds for exclusion in relation to the subcontractor at the stage of the public procurement procedure, although, under Art. 462 para. 5 of PPL, the contracting authority may require the economic operator to demonstrate that there are no grounds for exclusion from participation in the procedure also in the case of subcontractors. In view of the above, the examination of the existence of grounds for exclusion of the subcontractor from the procedure cannot result in the exclusion of the economic operator and the subcontractor. The PPL does not provide for a penalty for exclusion from the proceedings where it does not show that there are no grounds for excluding the subcontractor (see: judgment KIO⁴ 27.02.2019 r. KIO 254/19). The negative assessment of the subcontractor with regard to the existence of grounds for exclusion from the procedure can only result in the contracting authority not authorising the participation of such entity in the performance of the contract. However, provided that the contracting authority provided for the possibility of examining the subcontractor for the absence of grounds for exclusion.⁵

The participation of subcontractors may also apply where the economic operator relies on the subcontractor's resources. This is the situation referred to in Art. 118 para. 1 of PPL, i.e. the economic operator's reliance on technical or professional capacity or the financial or economic situation of the entities making available resources independently of the legal nature of the legal relations between them. Therefore the question arises as to whether at the stage of offer assessment the economic operator may change the entity providing resources. The provision of Art. 122 of PPL points out the possibility of changing the

entity providing resources submitted at the stage of submission of the tender or request to participate in the procedure, during the procedure of verifying the conditions of the contract by the economic operator. However, the replacement of a third party is only possible if the technical or professional capacity or the economic or financial situation of the third party initially designated by the economic operator does not confirm the economic operator's fulfilment of the conditions for participation in the procedure or there are grounds for exclusion against those entities. Art. 122 of PPL allows the economic operator to change the submitted third party to different third party or to demonstrate the fulfilment of conditions by their own potential. It should be also kept in mind that entrusting the subcontractors with the performance of part of the contract does not relieve the economic operator of any liability for the due execution of the contract.

Conclusion

In accordance with the position of the ECJ in the judgment C-395/18, Art. 57 para. 4(a) of Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC does not preclude national legislation under which the contracting authority has the option, or even the

obligation, to exclude the economic operator who submitted the tender from participation in the contract award procedure where the ground for exclusion referred to in that provision is established in respect of one of the subcontractors mentioned in that operator's tender. However, that provision, read in conjunction with Art. 57 para. 6 of that directive, and the principle of proportionality preclude national legislation providing for the automatic nature of such an exclusion.

Public Procurement Law does not provide for sanctions for the exclusion of the economic operator for the misconduct of subcontractors. Firstly — in case of use of subcontractors at the stage of performance of the contract, failure to comply with the conditions for participation in the procurement procedure results in not allowing the subcontractor to perform the contract. It is for the economic operator to demonstrate the absence of grounds for exclusion. Secondly — Art. 122 of PPL allows the economic operator to change the submitted third party for different one or prove the fulfilment of the conditions by their own potential. Such change is allowed only in the situation where at the stage of submitting the tender (request to participate in the procurement procedure) the economic operator relied on the capacities of third party to a certain extent. Thus, it becomes possible to replace subcontractors who do not meet the conditions for participation in the public procurement procedure.

Przypisy/Notes

¹ See, by analogy, judgment of 20 December 2017, *Impresa di Costruzioni Ing. E. Mantovani et Guerrato*, C-178/16, EU:C:2017:1000, paras 31, 32.

² Judgment of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paras 29, 31, 32.

³ In his opinion, Advocate General indicated that viewed literally, this provision thus contrasts with other provisions that identify who is responsible for behaviour that constitutes grounds for exclusion. See opinion of Advocate General Manuel Campos Sánchez-Bordony delivered on 11 July 2019, *Case C 395/18 Tim SpA — Direzione e coordinamento Vivendi SA v. Consip SpA, Ministero dell'Economia e delle Finanze*, with the intervention of: *E-VIA SpA*, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216087&pageIndex=0&doclang=pl&mode=lst&dir=&occ=first&part=1&cid=8983615> (30.09.2021).

⁴ National Appeal Chamber.

⁵ Art. 462 para. 5 of Public Procurement Law.

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