COURT OF JUSTICE
OF THE EUROPEAN UNION

Opinion of the Advocate General at the Court
Andrea Biondi
in Joined Cases C-271/25 | Autovici and C-334/25 | Skinest Baltija

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Advocate General Biondi: exclusion from procurement procedures for reasons of national security is compatible with EU law, provided that the principles and guarantees laid down in that law are respected

In 2022, following the Russian invasion of Ukraine, the Lithuanian Government implemented national legislation which permits the exclusion, for reasons of national security, of certain undertakings or tenders from public procurement procedures.

On the basis of that legislation, the undertaking Autovici was excluded from a procedure for the sale and hire of passenger cars, as, according to the information sent by the competent authority to the procuring authority, that undertaking had connections with foreign actors regarded as a threat to national security.

The undertaking Skinest Baltija was likewise excluded from a tendering procedure for the purchase of railway equipment on the basis of similar information and two government decrees of 2018 which, in previous procurement procedures, prohibited the railway company, on the same grounds, from entering into contracts with that undertaking.

Both undertakings contested their respective exclusions before the national courts. In the course of the proceedings, the Lithuanian Supreme Court made a reference to the Court of Justice seeking clarification as to whether the national legislation in question is compatible with EU law [1] and as to the conditions under which it may be applied.

Advocate General Andrea Biondi observes that legislation which provides for the exclusion of undertakings from tendering procedures for reasons of national security is compatible with EU law, provided that it respects the general principles of EU law and the guarantees laid down thereby.

In the first place, the Advocate General notes that it is for the Member States to assess the requirements of national security and to adopt measures in relation thereto; [2] however, such measures must comply with EU law when they concern areas governed by EU law and, in the case of procurement, in particular, must respect the principle of proportionality.

Consequently, grounds for exclusion for reasons relating to the protection of national security such as those laid down in the national legislation in question constitute grounds which are distinct from the cases provided for by the European legislation on procurement, which is therefore not applicable to such grounds. [3] Nevertheless, those grounds are not, as a whole, exempt from the application of EU law, which instead lays down forms of guarantee which must be safeguarded.

In the second place, it is for the Member States to identify the authority which is competent to assess the requirements of national security. That authority may issue opinions which impose, in a binding manner and on other administrative authorities, measures aimed at safeguarding national security, provided that that competent national security body complies with the fundamental requirements deriving from EU law. Those requirements include the need to carry out a specific and individual assessment of all the relevant circumstances in the light of the principle of proportionality and the fundamental rights, as well as the need for the decision to be reasoned and for it to be possible to challenge that decision before a court or tribunal.

In addition, the principle of proportionality requires that the exclusion decision be based on sufficiently recent evidence

that is capable of reflecting the current nature of the threat and its relevance to the procurement procedure in question, which, moreover, it is for the body responsible for safeguarding national security to assess. It is also for that body to assess the duration of the exclusion, and this assessment must be carried out on a case-by-case basis, taking into account the specific circumstances of each Member State, each procurement contract and each economic operator.

The rights of defence of the excluded operator must be observed – including that operator's right to express its views and to have access to the file – however, this must be done on the basis of a balance being struck between, on the one hand, the general principle of good administration and, on the other, interests relating to national security.

Furthermore, the person concerned must be informed of, at the very least, the substance of the exclusion decision; however, that person is not to be sent classified information or data that could constitute a risk for national security. [4]

By contrast, the court responsible for examining the exclusion decision must have full access to all the legal and factual elements on which that decision is based, including confidential information, in order to ensure an effective remedy.

Lastly, it is not necessary that the ground for exclusion at issue be expressly indicated in the tendering documents, as it derives from the application of generally applicable legislation and must therefore be known to a reasonably informed tenderer exercising ordinary care.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice of the European Union about the interpretation of EU law or the validity of an EU act.

The General Court has jurisdiction to deal with requests for a preliminary ruling coming exclusively within the following areas (1) the common system of value added tax (VAT), (2) excise duties, (3) the Customs Code, (4) the tariff classification of goods under the Combined Nomenclature, (5) compensation and assistance to passengers in the event of denied boarding or delay or cancellation of transport services, or (6) the system for greenhouse gas emission allowance trading. The Court of Justice has jurisdiction to deal with all other requests for a preliminary ruling.

Neither the Court of Justice nor the General Court decides the national dispute itself. It is for the national court or tribunal to resolve the case in accordance with the ruling by the Court of Justice or by the General Court, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Unofficial document for media use, not binding on the Court of Justice. The presentation of the facts and the legal context refers to the relevant period and is based on the case files.

The full text of the Opinion is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ✆ (+352) 4303 3355.

Images of the delivery of the Opinion are available on 'Curia Web TV' and on 'European Broadcasting Service' ✆ (+32) 2 2964106.

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[1] See the following references:

- the principles of equal treatment, non-discrimination, transparency and proportionality laid down in Article 18 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, and Article 36 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;

- the criteria for the selection and exclusion of tenders laid down in Articles 56 and 57 of Directive 2014/24 and Article 80 of Directive 2014/25;

- the right to an effective remedy and to a fair trial provided for in Article 47 of the Charter of Fundamental Rights of the European Union, as well as the principle of good administration, the adversarial principle, and the principle of legal certainty.

[2] Article 4(2) TEU.

[3] Article 15(2) of Directive 2014/24 and Article 24(2) of Directive 2014/25.

[4] It is for the national court to assess, in the proceedings pending before it, whether the requirements regarding the adequacy of the statement of reasons have been met.