



The EU sanctions against Russia and their impact on procurement: recent practice of a national review body

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Abstract

As a political reaction to Russia's invasion of Ukraine, a series of restrictive measures (sanctions) have been adopted by the European Union. The so called "Fifth package of sanctions" adopted in April 2022 covers the area of public procurement contracts through Regulation (Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in light of Russia's actions destabilising the situation in Ukraine). The Regulation prohibits the awarding and continuation of performance of public contracts above the threshold set if the contractor is in any way prescribed connected to Russia.

Keywords Public procurement contracts · Russia · Sanctions · Case law

1 Introduction

Due to the high relevance of public procurement to economic outcomes, as implied by its large volume, governments use public procurement as a strategic policy lever for achieving additional policy goals, which aim to address environmental, economic and social challenges according to national priorities.¹

In the last ten to fifteen years, we have been witnessing the efforts of policy makers and contracting authorities to achieve a different set of policy goals through public procurement procedures. Therefore, focus has been put on environmental and social

¹OECD (2017), "Strategic public procurement", in *Government at a Glance 2017*, OECD Publishing, Paris.

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goals, sustainability, fostering innovation or even gender equality, while delivering goods and services necessary to accomplish the contracting authority's missions in a timely, economical and efficient manner.

Besides these usual policy goals due to Russia's invasion of Ukraine since April 2022, we are for the first time facing a set of pure political goals trying to be achieved through public procurement procedures. These goals are defined through new Regulation - Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (hereinafter: the Regulation).² The general goal of the sanctions against Russia is to weaken the Russian government's ability to finance its war of aggression against Ukraine. The sanctions are calibrated in order to minimise the negative consequences on the Russian population and to maximise the negative impact on the Russian economy while limiting, as much as possible, the consequences on EU businesses and citizens.³ The part of the sanctions regarding public procurement contracts is specifically designed to prevent European public money that is being spent through public procurement procedures to be directed into financing Russia's war activities in Ukraine.

2 Fifth package of sanctions and their impact on public procurement

After the long-term uncertainty caused by the COVID-19 pandemic in recent years, the war events that began in Ukraine at the beginning of 2022 led to tectonic disturbances in the global economy. In our (European) geographical area, these disturbances are even more pronounced due to the strong business connection with Russia and Ukraine.

In light of Russia's continued military aggression against Ukraine, the Council of the European Union decided to introduce a fifth package of economic and individual sanctions against Russia, which seek to increase pressure on the Russian government and economy and limit the resources available for aggression. Given that public procurement makes up a large share of European economies, it is not unexpected that the fifth package of sanctions included certain restrictions in the field of public procurement.

In April 2022 the fifth package of sanctions was adopted imposing the complete prohibition of the participation of Russian nationals and organisations in procurement contracts in the EU. According to the Art. 5k of the Regulation: "...it shall be prohibited to award or continue the execution of any public or concession contract falling within the scope of the public procurement Directives, as well as Article 10, paragraphs 1, 3, 6(a) to 6(e), 8, 9 and 10, Articles 11, 12, 13 and 14 of Directive 2014/23/EU, Article 7 and 8, Article 10 (b) to (f) and (h) to (j) of Directive 2014/24/EU, Article 18, Article 21 (b) to (e) and (g) to (i), Articles 29 and

²Council Regulation (EU) 2022/576 of 8.4.2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (2022) OJ L 111/1.

³European Commission; Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014; p. 7.; source: https://finance.ec.europa.eu/system/files/2023-03/faqs-sanctions-russia-consolidated_en_5.pdf.

30 of Directive 2014/25/EU and Article 13 (a) to (d), (f) to (h) and (j) of Directive 2009/81/EC, to or with:

- (a) a Russian national, or a natural or legal person, entity or body established in Russia;
- (b) a legal person, entity or body whose proprietary rights are directly or indirectly owned for more than 50% by an entity referred to in point (a) of this paragraph; or
- (c) a natural or legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of this paragraph,

including, where they account for more than 10% of the contract value, subcontractors, suppliers or entities whose capacities are being relied on within the meaning of the public procurement Directives.”

In other words, it is forbidden for a contracting authority to award a contract, or to continue with the execution of an existing contract if the contracting party on the other side is one of the entities (natural or legal persons) defined in Art. 5k of the Regulation. Furthermore, it is forbidden to award a contract, or to continue with its execution if a subcontractor, supplier or capacity provider is one of the entities referred to in Art. 5k of the Regulation where these entities account for more than 10% of the contract value.

In July 2022 the so called “Maintenance and alignment package” was adopted, including Council Regulation (EU) 2022/1269 amending Regulation (EU) No 833/2014 concerning the restrictive measures in light of Russia’s actions destabilising the situation in Ukraine.⁴ This regulation slightly broadened the scope of the existing Art. 5k of the Regulation including in the list of entities sanctioned “a natural person residing in Russia” in para.1 (a).⁵

According to Art. 5k para.2 of the Regulation by way of derogation from para. 1., the competent authorities may authorise the award and continued execution of contracts intended for certain areas such as:

⁴Council Regulation (EU) 2022/1269 of 21.7.2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine (2022) OJ L 193/1.

⁵Art. 1, paragraph 15, of Council Regulation (EU) 2022/1269 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine:

“in Article 5k, paragraph 1 is replaced by the following:

‘1. It shall be prohibited to award or continue the execution of any public or concession contract falling within the scope of the public procurement Directives, as well as Article 10(1), (3), (6) points (a) to (e), (8), (9) and (10), Articles 11, 12, 13 and 14 of Directive 2014/23/EU, Article 7, points (a) to (d), and Article 8, Article 10 points (b) to (f) and (h) to (j) of Directive 2014/24/EU, Article 18, Article 21 points (b) to (e) and (g) to (i), Articles 29 and 30 of Directive 2014/25/EU and Article 13 points (a) to (d), (f) to (h) and (j) of Directive 2009/81/EC, and Title VII of Regulation (EU, Euratom) 2018/1046, to or with:

(a) a Russian national, a natural person residing in Russia, or a legal person, entity or body established in Russia;

(b) a legal person, entity or body whose proprietary rights are directly or indirectly owned for more than 50% by an entity referred to in point (a) of this paragraph; or (c) a natural or legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of this paragraph, including, where they account for more than 10% of the contract value, subcontractors, suppliers or entities whose capacities are being relied on within the meaning of the public procurement Directives.’

- (a) the operation, maintenance, decommissioning and radioactive waste management, fuel supply and retreatment and safety of civil nuclear capabilities, and the continuation of design, construction and commissioning required for the completion of civil nuclear facilities, as well as the supply of precursor material for the production of medical radioisotopes and similar medical applications, critical technology for environmental radiation monitoring, as well as civil nuclear cooperation, in particular in the field of research and development;
- (b) intergovernmental cooperation in space programmes;
- (c) the provision of strictly necessary goods or services which can only be provided, or which can only be provided in sufficient quantities, by the persons referred to in para. 1;
- (d) the functioning of diplomatic and consular representations of the Union and of the Member States in Russia, including delegations, embassies and missions, or international organisations in Russia enjoying immunities in accordance with international law;
- (e) the purchase, import or transport of natural gas and oil, including refined petroleum products, as well as titanium, aluminium, copper, nickel, palladium and iron ore from or through Russia into the Union; or
- (f) the purchase, import or transport into the Union of coal and other solid fossil fuels, as listed in Annex XXII of the Regulation until 10 August 2022.

Therefore, the Regulation still leaves the possibility for certain contracts in some specific areas to be concluded or continued, all in order to protect the prevailing interests of the European economy.

2.1 Scope of application

The sanctions cover ongoing and future public procurement and concession procedures, as well as awarded public contracts and concessions. They apply to the majority of public procurement contracts covered by the EU public procurement Directives (Directive 2014/23/EU;⁶ 2014/24/EU;⁷ 2014/25/EU;⁸ 2009/81/EC⁹) and to a big part of contracts excluded from their scope explicitly stated in the Regulation.

Sanctions do not cover procurement contracts not covered by the procurement Directives and not specifically included in the sanctions, neither procurement below the Directives' thresholds.

Therefore, it would be questionable to apply them on the contracts below the thresholds.

⁶Directive 2014/23/EU of the European Parliament and of the Council of 26.2.2014 on the award of concession contracts (2014); OJ L 94/1.

⁷Directive 2014/24/EU of the European Parliament and of the Council of 26.2.2014 on public procurement and repealing Directive 2004/18/EC (2014) OJ L 94/65.

⁸Directive 2014/25/EU of the European Parliament and of the Council of 26.2.2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (2014) OJ L 94/243.

⁹Directive 2009/81/EC of the European Parliament and of the Council of 13.7.2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (2009) OJ L 216/76.

2.2 Questions and answers provided by European Commission

The wording of Art. 5k of the Regulation leaves significant room for interpretation regarding the meaning of certain provisions. The European Commission (hereinafter: the Commission) recognized the need to provide additional guidelines for contracting authorities in order to help them with the implementation of the Regulation and has therefore published guidance and extensively *Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014* (hereinafter: FAQs) covering a broad range of topics. The Commission continues to update the FAQs' list and, in that way, tries to unify the application of the Regulation in different member states.¹⁰

It is clear from the FAQs that their aim is supporting EU public buyers in implementing the Regulation by explaining their reasoning behind its conception and advising on its application. However, it is explicitly stated that the FAQs themselves are not legally binding and do not replace the relevant legal provisions.¹¹

This is important to note since the FAQs are (in certain parts) interpreting the provisions of the Regulation quite broadly. This can be seen, for example, in the answer regarding the question about the possibility to replace a subcontractor, supplier or capacity provider in cases falling under conditions defined in Art. 5.k. of the Regulation. According to the FAQs, the public buyer receiving a tender or having a contract involving an entity (supplier, subcontractor or capacity provider) falling under sanctions should, in accordance with the principle of non-discrimination and equal treatment, require from the tenderer or contractor to replace such a subcontractor, supplier or capacity provider in line with Art. 63(2) and 71(6)(b) of Directive 2014/24/EU. Furthermore, a proposed replacement should be accepted if a new subcontractor, supplier or capacity provider is not in an exclusion situation, situation covered by sanctions and after the replacement the selection criteria remain fulfilled by the tenderer or contractor.¹²

It will be interesting to see the reaction of the courts if contracting authorities do not apply this part of the specific question, taking into consideration that this kind of replacement obligation is not clearly stated in the Regulation.

Regarding the question of replacement of "Russian" subjects in the tender, it is interesting to note that, unlike the case with subcontractors, suppliers and capacity providers, according to the FAQs, it is not allowed to replace a member of consortium. More specifically, "*all the members of a consortium, a group of natural or legal*

¹⁰https://finance.ec.europa.eu/system/files/2023-03/faqs-sanctions-russia-consolidated_en_5.pdf. In the document it is clearly stated that "*This document is a working document drafted by the Commission services to give guidance to national authorities, EU operators and citizens for the implementation and the interpretation of Council Regulation (EU) No 833/2014, Council Regulation (EU) No 269/2014, Council Regulation (EU) No 692/2014 and Council Regulation (EU) 2022/263. By analogy, the FAQs therein also apply to Council Regulation (EC) No 765/2006. Only the Court of Justice of the EU is competent to interpret EU law. National authorities and economic operators may make use of this guidance based on the text, context and purpose of the aforementioned regulations, to achieve the uniform application of sanctions across the EU.*"

¹¹European Commission; Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014; p. 291.; source: https://finance.ec.europa.eu/system/files/2023-03/faqs-sanctions-russia-consolidated_en_5.pdf.

¹²Ibid.; p. 298.

*persons or public entities, when they jointly submit an offer having joint and several responsibilities for contract implementation, constitute together one economic operator and therefore cannot be replaced”.*¹³

2.3 Acting on behalf of or on instruction of the “Russian” subject

The FAQs provide some necessary explanation and guidelines on interpreting the rather vague provisions of the Regulation such as Art. 5.k para. 1. c) which stipulates that the contract cannot be awarded to a contractor who is a natural or legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of that paragraph. In other words, contracting is also prohibited with those entities who act on behalf of or on instruction of a Russian citizen, natural person residing in Russia or natural or legal person, entity or body established in Russia, legal entity, or entity or body whose ownership rights are directly or indirectly more than 50% owned by such persons or bodies.

The meaning of the phrase *acting on behalf of or at the direction* of the subject from points a) and b) is very difficult to determine unequivocally.

Therefore, the FAQs provide us with additional explanation on how to interpret this phrase saying that this is an issue of factual assessment which needs to be made by the contracting authority in each particular case. In giving their explanation, the Commission referred to previous guidance given in the Commission’s opinion of 17 October 2019 saying: *“In the absence of a definition and/or criteria that can be used to assess whether an entity acted on behalf or at the direction of a targeted entity, the NCA should consider all the relevant circumstances in order to establish the situation at hand. These can include, for example, the precise ownership/control structure, including links between natural persons; the nature and purpose of the transaction, coupled with the stated business duties of the entity that is owned or controlled; previous instances of acting on behalf or at the direction of the targeted entity; disclosure made by third parties and/or factual evidence indicating that directions were given by the targeted entity”.*¹⁴

In accordance with this explanation, the contracting authority is required to carry out a detailed and thorough analysis of the background of each individual bidder, as well as the background of all other relevant entities covered by the bid. From this obligation, the logical question arises as to whether the contracting authorities have adequate tools and powers to carry out such an investigation which includes almost forensic insight into the background and details of day-to-day business and functioning of the entities involved in the bid. This task seems almost impossible even for bigger, more skilled and experienced contracting authorities, let alone for smaller and insufficiently capacitated ones (e.g. an average kindergarten or municipality).

¹³Ibid.

¹⁴European Commission; Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014; p. 300.; source: https://finance.ec.europa.eu/system/files/2023-03/faqs-sanctions-russia-consolidated_en_5.pdf.

2.4 What does it mean “it shall be prohibited to award a contract”?

The wording used in Art. 5k. of the Regulation, saying “*it shall be prohibited to award a contract*” leaves room for discussion on how the contracting authority should qualify the bid of a bidder meeting the conditions prescribed in Art. 5k. of the Regulation.

Neither the Regulation itself, nor the specific question provide an explicit answer to the above.

Although the Regulation is directly applicable to all member states upon its entry into force, some member states have decided to include the fulfilment of the conditions from Art. 5k of the Regulation as new exclusion ground in their Public Procurement Laws (e.g. Czech Republic).

On the other hand, due to the nature of the Regulation and therefore its direct application in all member states, it is clear from the FAQs that failure to state the content of Art. 5k. of the Regulation in procurement documentation cannot be considered a violation of the principle of transparency.¹⁵ The Regulation is directly applicable and the fact that such a provision was not explicitly stated in the procurement documentation, nor in the relevant procurement Directives, does not affect the obligation of the contracting authority to apply the Regulation directly from the moment of its entry into force.

At the same time, certain understandings appear, that the bid of such a bidder must necessarily be formally “rejected” or “excluded” no matter if such a provision was not part of the tender documentation. However, there is no basis for such an understanding in the relevant public procurement Directives. Therefore, the contracting authority is not necessarily obliged to qualify such a bid as “rejected” or “excluded”, but can, after the established factual situation related to the fulfilment of the conditions from Art. 5k of the Regulation, assert that the conditions from that article are met and therefore, the contract cannot be awarded to this bidder and proceed to the selection of the next most economically advantageous bid not fulfilling the assumptions from Art. 5k of the Regulation.

The basic goal of Art. 5k. of the Regulation was to ensure that the contract will not be awarded to the bidder on whose side the assumptions from Art. 5.k. are fulfilled, whereby it remains irrelevant how exactly the bid of such a bidder will be qualified (as rejected, as excluded or as something else).

2.5 “Russian” subcontractors, suppliers or entities on whose capacities the bidder relies

As already mentioned, the Regulation prohibits contracting authorities to award a contract, or to continue with the execution of a contract if a subcontractor, supplier or entity on whose capacities the tenderer is relying on is one of the entities (natural or legal persons) defined in Art. 5k of the Regulation, when these entities account for more than 10% of the contract value.

In the FAQs, the question of whether the limit of 10% of the value of the contract for subcontractors/suppliers/entities on which the bidder relies applies to the

¹⁵Ibid.; p. 299.

cumulative participation of several entities or to the individual participation of each of them was raised. At the same time, the answer shows that the limit of 10% of the value of the contract should apply to each of such entities individually. Furthermore, it is clearly stated that the terms “subcontractors” and “suppliers” include the whole supply chain and not only direct suppliers.¹⁶

There are two other questions arising from this interpretation; how will the contracting authorities determine the entities lower in the supply chain; and, how “low” in the supply chain should the contracting authority be allowed to determine (and the tenderer prove) the (non)existence of the circumstances described in Art.5k of the Regulation? To help contracting authorities, the Commission suggests requesting a statement by the tenderer in which it declares that none of the sanctions are applicable.

In connection to the above, the answer given in the FAQs to the question of whether the limit of 10% of the contract value applies only to those subcontractors, suppliers and entities on whose ability the bidder relies, and who are known to the contracting authority, is also interesting. It follows from the answer that the Regulation should be interpreted so that the restriction in question refers to “all third parties involved in the execution of more than 10% of the value of the contract”.

The first impression is that contracting authorities will have to act in good faith/exercise due diligence, but mostly rely on honesty and cooperation of bidders. On the other side, while contracting authorities may face difficulties in determining the facts relating to the fulfilment of the assumptions in/of Art. 5k. of the Regulation, competing tenderers might be motivated to become involved in such an investigation and provide necessary information (and proof) to the contracting authorities, additionally motivated by the possibility to win the contract if they discover and prove that the other tenderer is covered by sanctions.

2.6 Existing contracts with “Russian” entities

According to Art. 5k. of the Regulation, existing contracts concluded before 9 April 2022 can continue with their execution until 10 October 2022. After that date ongoing contracts covered by the sanctions cannot be further implemented and thus, must be terminated.

The FAQs provide guidance to contracting authorities including detailed steps to be taken as follows:

“All public buyers should verify whether they have concluded any public contract above the EU public procurement thresholds. For these contracts public buyers should:

- consider the possibility of Russian involvement in the sense of Article 5k(1)
- check if the scope of contracts with Russian involvement is in principle covered by the sanctions (probably they are)
- in order to ensure that there is no Russian involvement in the contract, the public buyer may request a statement by the contractor along the following lines:

¹⁶Ibid.; p. 297.

I declare under honour that there is no Russian involvement in the contract of the company, I represent exceeding the limits set in Article 5k of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, as amended by Council Regulation (EU) No 2022/578 of 8 April 2022.

In particular, I declare that:

(a) the contractor I represent (and none of the companies which are members of our consortium) is not a Russian national, or a natural or legal person, entity or body established in Russia;

(b) the contractor I represent (and none of the companies which are members of our consortium) is not a legal person, entity or body whose proprietary rights are directly or indirectly owned for more than 50% by an entity referred to in point (a) of this paragraph;

(c) neither I nor the company I represent is a natural or legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) above;

(d) there is no participation of over 10% of the contract value of subcontractors, suppliers or entities whose capacities the contractor I represent relies on by entities listed in points (a) to (c).

In case of any doubts, public buyers should request additional information, explanation or documents.¹⁷

There was also a question if the contracts could be terminated before 10 October 2022. According to the given answer, the Regulation prohibits the execution of contracts only from 10 October 2022, thus the Regulation is not a legal basis to terminate them before that date. Since in practice, the majority of contracts cannot be terminated from one day to the next the Commission suggests starting the termination procedure defined by national laws sufficiently early to ensure that contracts are not executed beyond 10 October 2022.¹⁸

Furthermore, it is stated in the FAQs that contracting authorities should not be held accountable for terminating ongoing contracts with sanctioned parties. According to Art. 11. of the Regulation, Russian parties and those acting on their behalf cannot obtain compensation for damages resulting from contracting authorities complying with the obligations under the Regulation.

2.7 Legal protection

As any other decision made by the contracting authority regarding the rights of a tenderer in the public procurement procedure, decisions of the contracting authority which are based on the provisions of the Regulation are subject to legal protection established by the relevant directives governing this area.

This is confirmed in the FAQs stating clearly that “a tenderer having or having had an interest in obtaining a particular contract and who has been harmed or risks being

¹⁷Ibid.; p. 295.

¹⁸Ibid.; p. 303.

harmed by a decision of the public buyer allegedly contrary to the Sanctions Regulation, may lodge a complaint before the first instance public procurement review body”.

3 Relevant case law in Croatia

Since 9 April 2022, when the provisions of the Regulation came into force, several appeal cases were decided in front of the State Commission for the Control of Public Procurement Procedures (first instance review body in Croatia, hereinafter: DKOM) in which the subject of determination was the question of fulfilment of the circumstances referred to in Art. 5.k of the Regulation.

In the appeal case CLASS: UP/II-034-02/22-01/333,¹⁹ which was conducted before DKOM, the appellant challenged the actions of the contracting authority, who assessed that the circumstances from Art. 5k of the Regulation were met on the side of the appellant who was a member of consortium submitting the most economically advantageous tender. In that procurement procedure, the contracting authority based its decision on data gathered from the Register of Beneficial Owners, and at the same time the contracting authority obtained an opinion on the fulfilment of the conditions from the Permanent Group for the application and monitoring of the implementation of international restrictive measures (hereinafter: Permanent Group) established by the Government of the Republic of Croatia.

The contracting authority attached the opinion received from the Permanent Group to the Minutes from bid evaluation. In this opinion of the Permanent Group, it is stated that the following was concluded at the meeting of the Permanent Group: “In the context of the implementation of Council Regulation (EU) 2022/576 amending Regulation (EU) no. 833/2014 on restrictive measures with regard to Russia’s actions that destabilise the situation in Ukraine, especially Art. 5.k of the said Regulation, and in connection with the implementation of the tender of the Central State Office for Central Public Procurement from February 14 of this year, the Permanent Group concludes that according to the data from the Register of Beneficial Owners about the company *Softline d.o.o.* that applied for the said tender, and, according to other data submitted for inspection to the Permanent Group regarding that and other companies in the same community of bidders, the said companies cannot be taken into account for the conclusion of the framework agreement, even though they submitted the most economically advantageous offer in the tender in question.”

The facts of this particular case showed that a member of the group of the economic operators submitting the winning tender was *Softline L.t.d. Zagreb* and the founder of this company holding 100% of its shares was *Softline holding PLC, Cyprus. Softline group Inc. BVI* was at the same time holder of 81,1% of shares in *Softline holding PLC, Cyprus*, while 100% of ownership in *Softline group Inc. BVI* belonged to *Igor Borovnikov* – a Russian national. Therefore, according to the Register of Beneficial Owners *Igor Borovnikov* was named as the “real owner” of *Softline L.t.d., Zagreb*.

¹⁹Decision of the State Commission for Supervision of Public Procurement Procedures CLASS: UP/II-034-02/22-01/333 of 9.6.2022.; full version of the decision available at: <https://pdf.dkom.hr/dokumentit/202206151501499285.pdf>.

In this particular case, the Regulation came into force after the procedure was launched and, therefore, the tender documentation did not state anything regarding the Regulation nor the application of Art. 5k.

Furthermore, it is important to say that the contracting authority in this case did not qualify this tender as “rejected” or “excluded” but just stated in the Minutes from bids evaluation that this tender “cannot be taken into consideration” because of the fulfilment of conditions stated in Art. 5k of the Regulation.

In the appeal, the appellant (the consortium of economic operators placing the most economically advantageous bid) claimed the following:

- his tender should have been qualified by the contracting authority as rejected or excluded, and not as “not being taken into consideration”;
- restrictions from Art. 5k of the Regulation were not mentioned in any tender documentation so they cannot be applied;
- the contracting authority was not allowed to seek help from Permanent Group because this group has no competences in this public procurement procedure.

After determining the relevant facts in the appellate procedure, DKOM rejected the appeal as unfounded stating that:

- it is clear that the conditions under Art. 5k of the Regulation are fulfilled on the side of *Softline L.t.d., Zagreb* and that the contracting authority made this conclusion based on data from the Register of Beneficial Owners;
- seeking help and assistance from the Permanent Group did not distort the contracting authority’s independence in bid evaluation;
- provisions of the Regulation are directly applicable regardless of whether conditions stated in Art. 5. k of the Regulation are explicitly mentioned in the tender documentation as an obstacle for awarding the contract.

In the specific case, the contracting authority determined that assumptions from Art. 5k of the Regulation were met on the side of the appellant, using data from the Register of Beneficial Owners, while the appellant, on the other hand, failed to prove (with the evidence he submitted in the appeal procedure) that the contracting authority did not determine key facts regarding conditions from Art.5k of the Regulation.

Although it has already been stated in this article that it will be difficult for the contracting authorities to assess whether such circumstances have been met, it should be noted here that it will be just as difficult for a potential appellant to prove that such circumstances exist if, for example, he decides to challenge the selection of a certain bid, claiming that the conditions from Art. 5k of the Regulation have been met on the side of the selected bidder.

This decision of DKOM was confirmed by the High Administrative Court as the second instance review body.²⁰

In the second case discussed in front of DKOM under CLASS: UP/II-034-02/22-01/323²¹ dealing with the application of Art. 5k of the Regulation the appellant

²⁰Decision of the High Administrative Court of Croatia; number UsII-161/22-13; of 23.8.2022.; full version of the decision available at: <https://pdf.dkom.hr/dokumentit/202208301350274380.pdf>.

²¹Decision of the State Commission for Supervision of Public Procurement Procedures CLASS: UP/II-034-02/22-01/323 of 15.6.2022.; full version of the decision available at: <https://pdf.dkom.hr/dokumentit/202207051456201836.pdf>.

claimed that there are circumstances on the side of the selected bidder that fall under Art. 5.k of the Regulation and tried to prove the said circumstances in the appeal procedure.

In that specific case a consortium of bidders (*Strabag AG, Austria, Strabag L.t.D., Zagreb and Strabag Rail a.s., Czech Republic*) was awarded the contract.

The appellant (second ranking bidder) lodged an appeal against the award decision claiming that on the side of *Strabag AG, Austria* the conditions under article 5k. of the Regulation were fulfilled. Namely, the appellant was claiming that *Rasperia Trading Limited Ltd.* (completely owned by a Russian citizen *Oleg Vladimirovich Deripaska*) is a company holding 27.8% shares in *Strabag SE*, and *Strabag SE* is holding 100% of shares in *Strabag AG, Austria* (member of the winning consortium of bidders).

The winning consortium of bidders replied to the appeal saying that:

- *Rasperia Trading Limited Ltd.* has less than 50% of shares in *Strabag SE* and *Strabag SE* was never under the control of this company;
- Russian citizen *Oleg Vladimirovich Deripaska* (the only owner of *Rasperia Trading Limited Ltd.* holding 27.8% shares in *Strabag SE*) has been included on a list of persons to be sanctioned and by this fact all his rights coming out of this share had been suspended and he was removed from the Register of real owners of companies *Strabag SE* and *Strabag AG*.

After evaluating all submitted evidence in the appeal procedure, DKOM rejected the appeal stating in its decision that the appellant did not prove that any of the conditions listed in Art.5k of the Regulation were fulfilled by a member of the consortium. Namely, *Rasperia Trading Limited Ltd.* was holding less than 50% of the shares in *Strabag SE* so this does not fall under Art. 5k. para. 1. b) of the Regulation, and the appellant did not prove that this member of the consortium is acting on behalf of or at the direction of entities covered by sanctions and thus falling under the provision of Art. 5. k. para. 1. c) of the Regulation.

4 Conclusion

The measures contained in the Regulation represent a reaction to the situation that Europe is facing in an unexpected manner. As the Regulation constitutes the European Council's reaction to an emergency, it is evident that the mechanisms used in it were defined quite hastily and adopted literally "overnight". Therefore, since their implementation is also expected in equal time intervals (to ensure the desired effects of these measures) it is logical that certain challenges and doubts arise in the application of these newly adopted norms.

Through the FAQs, the European Commission tries to facilitate the contracting authorities in applying these not so clear norms of the Regulation. Nevertheless, a large number of questions still remain unanswered. It is up to the contracting authorities, guided, above all, by the basic principles of public procurement, to try to clarify in every possible way the circumstances of each individual case and to assess whether the conditions stipulated in Art. 5k of the Regulation are met.

On the other hand, this difficult task imposed on contracting authorities will be almost impossible to fulfil without support from the Commission, not only by sharing guidelines on implementation, but also by providing various practical tools which would be available to contracting authorities, such as centralized registers, databases, etc. These tools could also serve as a platform for the exchange of specific information and the results of each individual assessment carried out by each contracting authority, all in order to rationalize resources and make the assessment more efficient.

Declarations

Competing Interests The authors declare no competing interests.

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