ORDER OF THE PRESIDENT OF THE GENERAL COURT

8 May 2024 (*)

(Interim relief – Public procurement – Exclusion from procurement procedures and from the award of grants financed by the general budget of the European Union and by the EDF – Application for suspension of operation of a measure – No urgency)

In Case T-113/24 R,

Lattanzio KIBS SpA, established in Milan (Italy),

CY,

CV,

represented by B. O'Connor and M. Hommé, lawyers,

applicants,

v

European Commission, represented by P. Rossi, F. Behre and F. Moro, acting as Agents,

defendant,

THE PRESIDENT OF THE GENERAL COURT

makes the following

Order

1 By their application under Articles 278 and 279 TFEU, the applicants, Lattanzio KIBS SpA, CY and CV, seek suspension of the operation of the decision of the European Commission of 13 December 2023 by which Lattanzio KIBS is excluded from participating in award procedures governed by Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1), and by Council Regulation (EU) 2018/1877 of 26 November 2018 on the financial regulation applicable to the 11th European Development Fund, and repealing Regulation (EU) 2015/323 (OJ 2018 L 307, p. 1), or from being selected for the implementation of funds governed by those regulations ('the contested decision').

Background to the dispute and forms of order sought

2 On 13 July 2021, the judge in charge of preliminary investigations at the Tribunale di Milano (District Court, Milan, Italy) delivered a judgment concerning CY and CV pursuant to Article 444 of the codice di procedura penale (Code of Criminal Procedure).

3 In July 2022, February 2023 and May 2023, Lattanzio KIBS submitted requests to participate in three procurement procedures funded by the European Union, but the Commission rejected those requests to participate on the ground that Lattanzio KIBS had submitted incomplete or misleading information.

4 By letter of 7 August 2023, the Commission informed Lattanzio KIBS of its intention to exclude it from participating in award procedures funded by the general budget of the European Union and the European Development Fund until 26 April 2024 and stated that that information could be published on its website. The Commission added that the reason for the exclusion was that CY and CV had been found guilty of corruption by a final judgment and that they had effective control over Lattanzio KIBS. As for CY and CV, the Commission stated that it intended to include their names in a database in order to inform authorising officers that they were in the situation provided for in Article 136(1)(d)(ii) of Regulation 2018/1046. The persons concerned were invited to submit their comments by 11 September 2023 at the latest.

5 By letters of 11 September 2023, the applicants replied to the Commission. In those letters, they stated, inter alia, that CY and CV had no power of decision-making or control over Lattanzio KIBS and had not been found guilty of corruption by a final judgment.

6 On 13 December 2023, the Commission adopted the contested decision.

7 By application lodged at the Court Registry on 23 February 2024, the applicants brought an action for annulment of the contested decision.

8 By separate document lodged at the Court Registry on 29 February 2024, the applicants brought the present application for interim measures, in which they claim that the President of the General Court should:

– order suspension of the operation of the contested decision;

– order the Commission to pay the costs.

9 In its observations on the application for interim measures, which were lodged at the Court Registry on 15 March 2024, the Commission contends that the President of the General Court should:

– dismiss the application for interim measures as inadmissible or, in the alternative, as unfounded;

– order the applicants to pay the costs.

Law

General considerations

10 It is apparent from reading Articles 278 and 279 TFEU together with Article 256(1) TFEU that the judge hearing an application for interim measures may, if he or she considers that the circumstances so require, order that the operation of a measure challenged before the General Court be suspended or prescribe any necessary interim measures, pursuant to Article 156 of the Rules of Procedure of the General Court. Nevertheless, Article 278 TFEU establishes the principle that actions do not have suspensory effect, since acts adopted by the institutions of the European Union are presumed to be lawful. It is therefore only exceptionally that the judge hearing an application for interim measures may order the suspension of operation of an act challenged before the General Court or prescribe any interim measures (order of 19 July 2016, *Belgium* v *Commission*, T-131/16 R, EU:T:2016:427, paragraph 12).

11 The first sentence of Article 156(4) of the Rules of Procedure requires applications for interim measures to state ‘the subject matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measure applied for.’

12 The judge hearing an application for interim relief may order suspension of operation of an act and other interim measures, if it is established that such an order is justified, prima facie, in fact and in law, and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant’s interests, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, and consequently an application for interim measures must be dismissed if

any one of them is not satisfied. The judge hearing an application for interim relief is also to undertake, when necessary, a weighing of the competing interests (see order of 2 March 2016, *Evonik Degussa* v *Commission*, C-162/15 P-R, EU:C:2016:142, paragraph 21 and the case-law cited).

13 In the context of that overall examination, the judge hearing the application for interim measures enjoys a broad discretion and is free to determine, having regard to the particular circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed (see order of 19 July 2012, *Akhras* v *Council*, C-110/12 P(R), not published, EU:C:2012:507, paragraph 23 and the case-law cited).

14 Having regard to the material in the case file, the President of the General Court considers that he has all the information needed to rule on the present application for interim measures without there being any need first to hear oral argument from the parties.

15 In order to assess whether the cumulative conditions necessary for the grant of interim measures are satisfied in the present case, without it being necessary to rule on the admissibility of the present application for interim measures, it is appropriate to begin by examining whether the condition relating to urgency is satisfied.

The condition relating to urgency

16 In order to determine whether the interim measures sought are urgent, it should be noted that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the future final decision, in order to prevent a lacuna in the legal protection afforded by the EU Courts. To attain that objective, urgency must generally be assessed in the light of the need for an interlocutory order to avoid serious and irreparable harm to the party requesting the interim measure. That party must demonstrate that it cannot await the outcome of the main proceedings without suffering serious and irreparable harm (see order of 14 January 2016, *AGC Glass Europe and Others* v *Commission*, C-517/15 P-R, EU:C:2016:21, paragraph 27 and the case-law cited).

17 It is necessary to examine whether the applicants have succeeded in demonstrating urgency in the light of those criteria.

18 In the present case, in order to demonstrate that the alleged harm is serious and irreparable, in the first place, the applicants submit that the contested decision prevents them from performing existing contracts and from participating in calls for tenders worldwide.

19 More specifically, the applicants argue that all of the revenue of Lattanzio KIBS is generated through public contracts and the contested decision's effect goes beyond the exclusion laid down in the contested decision on account of its repercussions on national, European and international procurement procedures. Those effects show that suspension is necessary in order to prevent serious and irreparable harm to the applicants.

20 On account of the grounds for exclusion or declaration requirements linked to participation in public procurement procedures, the serious and irreparable harm materialises in several ways. According to the applicants, this prevents them from submitting tenders ab initio, from being shortlisted among previously submitted expressions of interest and from being awarded previously submitted tenders. There is also a risk that contracts that have already been awarded but not yet signed will be withdrawn.

21 In the second place, the applicants claim that, failing any interim measures, they would suffer serious and irreparable harm to their reputation due to the exclusion itself, the publication thereof and the registration of CY and CV in the early detection and exclusion system (EDES).

22 In the third place, the applicants submit, in essence, that the estimated losses will cause irreparable harm to Lattanzio KIBS, as they threaten its very existence. To that end, the applicants argue that the income of Lattanzio KIBS from services in 2023 was EUR 18 million and that the contested decision would result in a decrease in turnover of at least 50%, which could lead to the imminent collapse of the company's financial and asset base.

23 The Commission disputes the applicants' arguments.

24 It must be observed at the outset that the exclusion imposed by the contested decision in respect of the period from 14 December 2023 to 26 April 2024 is very short and has come to an end by the date of delivery of the present order. There is therefore no longer any need to order interim measures in order to prevent serious and irreparable harm from occurring. The purpose of interim proceedings is not to secure reparation of damage already suffered (see, to that effect, order of 16 June 2015, *Alcogroup and Alcodis* v *Commission*, T-274/15 R, not published, EU:T:2015:389, paragraph 16). However, given that the application for interim measures was made before the exclusion deadline of 26 April 2024 had expired, the judge hearing the application for interim measures considers that it is nevertheless appropriate to rule on the application.

25 In that connection, in the first place, it is appropriate to begin by recalling that the contested decision covers only award procedures governed by Regulations 2018/1046 and 2018/1877 and implementation of the funds governed by those regulations. The contested decision does not, therefore, cover national or international award procedures. Although it cannot be ruled out that national and international contracting authorities will become aware of the contested decision, this does not in any way affect their margin of discretion. It therefore cannot be maintained that it extends its legal effects beyond its scope. As a result, the applicants' arguments regarding the risk that they will be excluded from markets where the contracting authority is aware of the contested decision must be rejected.

26 Regarding the serious and irreparable harm allegedly suffered by Lattanzio KIBS in connection with public procurement procedures at EU level, it is appropriate to establish, as the Commission submits, a distinction between any damage flowing from existing contracts and that resulting from the loss of future opportunities.

27 First, as far as the ongoing contracts are concerned, it is clear that the applicants do not submit any evidence regarding the existence or irreparable nature of the harm claimed, having regard, in particular, to the very short duration of the exclusion decision, which runs only from 14 December 2023 to 26 April 2024.

28 Specifically, as regards the four lots of the new round of the EU multiple framework contracts for external aid (SEA 2023), detailed in Annex 22 to the application for interim measures, the applicants merely set out the value thereof but do not explain why Lattanzio KIBS would not be in a position to sign each of those contracts after the expiry of the exclusion period.

29 Regarding the ETF and FRANET contracts – which concern, according to the applicants, orders with a value exceeding EUR 800 000 which have already been blocked – and the framework contract signed on 12 September 2023 between Lattanzio KIBS and the European Food Safety Authority (EFSA) for an amount of EUR 314 100, which EFSA terminated following the contested decision, the damage claimed is quantifiable.

30 However, it is well-established case-law that damage of a pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable or even hardly reparable since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the situation that obtained before that person suffered the damage. Contrary to the applicants' claims, such damage could be recouped by the applicants' bringing an action for compensation on the basis of Articles 268 TFEU and 340 TFEU (see orders of 28 November 2013, *EMA* v *InterMune UK and Others*, C-390/13 P(R), EU:C:2013:795, paragraph 48 and the case-law cited, and of 28 April 2009, *United Phosphorus* v *Commission*, T-95/09 R, not published, EU:T:2009:124, paragraph 33 and the case-law cited).

31 Last, regarding the applicants' overall financial situation, the applicants merely set out in very succinct terms, without substantiating this to the requisite legal standard, that Lattanzio KIBS' revenue from services in 2023 was EUR 18 million and they expected to suffer a decrease in turnover of 50% on account of the contested decision.

32 Second, regarding contracts that have not yet been awarded, it is clear that the harm claimed by the applicants is purely hypothetical. Economic operators have, in actual fact, no guarantee that they will be awarded a contract in a tendering procedure.

33 The adverse financial consequences which unsuccessful tenderers might suffer as a result of the rejection of their tenders have, generally, to be considered to be part of the normal commercial risk which each undertaking active in the market must face. Accordingly, the mere fact that the rejection of a tender may have adverse, even serious, financial consequences for an unsuccessful tenderer cannot therefore justify, in itself, the interim measures sought by that tenderer (see order of 3 July 2017, *Proximus* v *Council*, T-117/17 R, EU:T:2017:600, paragraph 40 and the case-law cited).

34 Consequently, the applicants cannot base their arguments on the potential rejection of Lattanzio KIBS from procurement procedures, given that such rejection is part of the commercial risk intrinsic to Lattanzio KIBS' activities.

35 In the second place, the applicants' arguments cannot, similarly, be endorsed regarding non-material harm allegedly flowing, in essence, from serious and irreparable harm to their reputation on account of the exclusion itself, the publication thereof and the registration of CY and CV in the EDES database.

36 In that regard, first of all, it should be stated that suspending the operation of a decision would not make good the damage to that reputation – if such damage is assumed to be established and to have essentially materialised – more than the possible future annulment of the decision at the end of the main action (see order of 17 February 2017, *Janssen-Cases* v *Commission*, T-688/16 R, not published, EU:T:2017:107, paragraph 20 and the case-law cited).

37 Indeed, in the present case, should harm to the applicants result from the adoption of the contested decision due to the exclusion itself, it must be stated that the contested decision has been in force since 14 December 2023 in the EDES internal database. Consequently, the contested decision has full effect and any alleged harm to reputation already exists.

38 As observed in paragraph 24 above, the purpose of interim proceedings is not to ensure compensation for harm which has already materialised, as such harm can no longer be avoided by granting the interim measures sought.

39 Should the applicants' reputation indeed be compromised by the contested decision due to the exclusion itself, it is settled case-law that its annulment on conclusion of the main proceedings would provide sufficient reparation for the alleged non-material harm (see, to that effect, orders of 25 March 1999, *Willeme* v *Commission*, C-65/99 P(R), EU:C:1999:176, paragraphs 14, 61 and 62; of 22 July 2010, *H* v *Council and Others*, T-271/10 R, not published, EU:T:2010:315, paragraph 36; and of 18 November 2011, *EMA* v *Commission*, T-116/11 R, not published, EU:T:2011:681, paragraph 21).

40 Next, regarding the harm to reputation that the applicants claim they would suffer following the publication on the Commission's website of information relating to the exclusion of Lattanzio KIBS from participation in the award procedures governed by Regulations 2018/1046 and 2018/1877 in particular, it is admittedly true that that publication is not restricted to the sphere of the EU institutions, but is accessible to the general public. Such a publication is liable to have a significant impact on the applicants' reputation and, as a result, on the applicants' opportunities to conclude new contracts and pursue their economic activities.

41 However, the period of publication of the information relating to the exclusion is limited to the period from 21 March 2024 to 26 April 2024, when the exclusion came to an end and the information relating thereto must be withdrawn, in accordance with the fourth subparagraph of Article 140(1) of Regulation 2018/1046.

42 In addition, the harm that the applicants might suffer during that short period in the event of disclosure of that information can be quantified appropriately, as stated in paragraphs 28 and 29 above.

43 Consequently, any harm suffered by the applicants could, inter alia, be made good in the context of an action for damages brought under Articles 268 and 340 TFEU.

44 Last, regarding the registration of CY and CV in the EDES database, it must be stated that that registration is intended only for internal use and is accessible only to authorised users, not to all

authorities. As the Commission submits, the contested decision does not alter the legal position of CY and CV, given that it does not exclude them personally from participating in procurement procedures for contracts funded by the European Union or prevent them personally from receiving EU grants or other forms of funding, but is merely intended to make it possible for authorised users to carry out the verification provided for, as specified in Article 142(3)(c) of Regulation 2018/1046.

45 Consequently, the registration at issue does not, per se, result in any harm to the applicants' reputation.

46 In the third place, regarding the applicants' argument that the estimated losses will cause irreparable harm to Lattanzio KIBS, which will threaten its very existence, the applicants merely claim a loss of turnover of 50%, without putting forward specific figures regarding the cost efficiency of their company and the effect of the exclusion on the company. Similarly, they do not give reasons why such a loss would cause the immediate collapse of the company's financial base and the value of its assets. Such an explanation is necessary on account of the particularly short duration of the exclusion period, given that it is not clear why an exclusion limited in time is enough to cause their company to experience difficulties.

47 It follows from all of the foregoing that the applicants have not succeeded in establishing that the harm claimed by the applicants is serious and irreparable and that the application for interim measures must therefore be dismissed, as the applicants have failed to establish that the condition relating to urgency is met, without it being necessary to rule on the prima facie case or to weigh up the competing interests.

48 Under Article 158(5) of the Rules of Procedure, the costs must be reserved.

On those grounds,

THE PRESIDENT OF THE GENERAL COURT

hereby orders:

1. The application for interim measures is dismissed.

2. The costs are reserved.

Luxembourg, 8 May 2024.

V. Di Bucci M. van der Woude

Registrar President

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* Language of the case: English.