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# Правовые гарантии экономической конкуренции в системе государственных закупок Европейского Союза

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**Аннотация**

**Цель**: *Целью настоящей статьи является оценка правовых гарантий конкуренции (в том числе свободной) между подрядчиками при осуществлении процесса государственных закупок, что означает не только заключение контракта в соответствии с конкретными правовыми нормами между государственным (либо частным) покупателем и подрядчиком (подрядчиками) для удовлетворения спроса на определенные товары или услуги, но и надлежащее соблюдение процессуальных норм и порядка осуществления государственных закупок, т.е. последовательность фактических и юридических действий с момента публичного объявления о закупке до окончательного выполнения всех обязательств сторон по договору о государственных закупках.*

**Методология проведения работы:** *Основным методом исследования является догматико-юридический сравнительный метод, а именно – анализ юридического текста различных законов. Кроме того, осуществлен критический анализ научной литературы. В данном контексте наиболее важным представляется указание взаимоотношений между конкуренцией и добросовестной конкуренцией в системе государственных закупок, а также других основных принципов и правил: недискриминации, прозрачности, беспристрастности, объективности, законности, открытости, правило письменной формы, приоритет использования тендерного режима, т.е. правило применения неконкурентных режимов или приоритетов предоставления государственных закупок в тендерном режиме. Соблюдение всех этих правил гарантирует добросовестную конкуренцию в течение всего процесса государственных закупок. Следует подчеркнуть, что научных исследований на данную тему проведено довольно мало как в Польше, так и в других странах ЕС.*

**Результаты работы:** *Результаты исследования показывают, что новые директивы ЕС о государственных закупках 2014 года, а именно, Директива 2014/23/ЕС, Директива 2014/24/ЕС и Директива 2014/25/ЕС, на самом деле не направлены на регулирование конкуренции в качестве основной цели. Тем не менее, тщательный анализ упомянутых директив приводит к выводу, что эти директивы предусматривают стимулирование экономической конкуренции. Это достигается в целом благодаря открытию рынка государственных закупок для микро-, малых и средних предприятий (сектор малого и среднего бизнеса).*

**Ключевые слова:** *Государственные закупки; конкуренция; открытые торги; микро-, малый и средний бизнес; субъект экономики*

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# Legal Guarantees of Economic Competition in the European Union Public Procurement Regulation

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**Abstract**

**Purpose**: *the purpose of this publication is to assess legal guaranties of competition (free competition) between contractors in broadly perceived process of granting public procurement, which means not only entering into a contract subject to the specific legal regime, concluded by a public purchaser, or possible private purchaser subordinated to that legal regime, with a contractor (contractors) in order to satisfy its demand for certain goods or services, but also a due course of the whole process of granting public procurement, perceived as a sequence of factual and legal actions beginning with the moment of public announcement of a procurement, sending an invitation for submitting offers or sending invitation to negotiate for selection of an offer of a given contractor, up till final fulfilment of all obligations of the parties under the public procurement contract.*

**Methods:** *the major research method is the dogmatic-legal method, namely an analysis of legal text of different laws. Moreover, there is a critical analysis of scholar literature. The most important in this context is to indicate mutual co-relations between competition and fair competition in area of public procurement system and to point other major principles of the public procurement process, such as non-discrimination rule, transparency, impartiality and objectiveness rule, legality rule, openness, rule of written form, primate of using tender mode (competitive mode, in another words it is a rule of extraordinary application of non-competitive modes or primate of granting public procurement in a tender mode). All of those rules constitute together components of the guarantee of genuine competition within the whole process of granting a public procurement. It must be stressed that the literature in the area of research in not really rich. This is accurate in terms of Polish literature and EU literature, too.*

**Results. Conclusions and relevance:** *results of the research are such that new 2014 EU public procurement directives, viz. Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU, are not really aimed at fostering the competition as the main goal. Nevertheless, a specific and deep analysis of regulation of mentioned directives leads to the conclusion that those directives provide for bigger and broader economic competition. This is achieved generally thanks to opening of the public procurement market for micro, small and medium enterprises (SMBs' sector).*

**Keywords:** *public procurement; competition; open tendering; micro, medium and small businesses; economic operators*

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## 1. Introduction

The essay is the second part of the series of publications which are suppose to provide for a broad legal analysis of all legal safeguards of economic competition within the public procurement legal system. As stated in the previous article, all different sets of regulations, at all various levels, including international law in the subject area, the European Union regulations and national state regulations of public procurement should be analysed [1].

An appropriate and rational legal regulation of acquisitions undertaken by public entities recently has become the crucial factor which influences economic development and social welfare of modern state. Moreover, the global economic crisis increases the necessity of seeking the most effective system of organising such purchases. It is naturally connected with an amount of public funds involved in many public projects. Public money is often spend in big amounts for either huge public constructions (like roads, highways, airports, railways, metro and subway systems, schools, universities, hospitals etc. – majority connected to public transportation). But, what is often forgotten, the biggest government spending relates to military expenditure – according to the 2016 different countries' budgets: USA spent 604.5 bn. dollars, China – 145 bn. dollars, Russian Federation – 58.9 bn. dollars, Saudi Arabia – 56.9 bn. dollars, United Kingdom – 52.5 bn. dollars, India – 51.1, South Korea – 47.3 bn. dollars, Australia – 24.2 bn. dollars, Brazil – 23.5 bn. dollars, Italy – 22.3 bn. dollars, Israel – 19.1, Iraq – 18.1 bn. dollars [2], and Poland spent 9 bn. dollars (2 % of GDP) [3].

Noteworthy, legal regulation of public procurement and antitrust regulation (competition protection law) are perceived as equally relevant in terms of competition on the market [4]. It may be said that in fact the main goal of regulation of public procurement is to guarantee a competition between entities struggling for acquisition of goods and services from the public sector. In such terms, other goals of the public procurement legal regulations have secondary importance and in fact they circulate around the main goal. Therefore, secondary goals cannot remain contradictory to the main goal. As a consequence, it seems that public procurement

[1] See Eryk Kosiński, *Legal guarantees of economic competition in the public procurement under international law regulations. The 1994 Government Procurement Agreement*, "Вестник Волжского Университета имени В.Н. Татищева" No. 3/2016 (ISSN 2076-7919, ББК 65), p. 5 ff. Additionally: Eryk Kosiński, *Prawne gwarancje wolnej konkurencji w systemie zamówień publicznych w Polsce* (in:) Marcin Smaga, Mateusz Winiarz, *Dyscyplina finansów publicznych. Doktryna, orzecznictwo, praktyka*, Warszawa 201 5, p. 297 ff.

[2] *See The Military Balance 2017. The annual assessment of global military capabilities and defence economics*, The International Institute for Strategic Studies, https://www.iiss.org/-/media//images/publications/the%20military%20balance/milbal%202017/final%20free%20graphics/mb2017-top-15-defence-budgets.jpg?la=en (16.03.2017).

[3] See http://www.mon.gov.pl/d/pliki/dokumenty/rozne/2016/02/budzet2016.pdf (16.03.2017).

[4] Stefan E. Weishaar, *Cartels, Competition and Public Procurement*, Cheltenham, UK, Northampton, MA, USA, 2013, p. 1.

law belongs to the same group of legal regulations as competition law (antitrust regulation). It is rightly underlined in the literature that "Antitrust policy aims at preventing companies from abusing market power, restraining free trade and/or forming anti-competitive agreements. Its objective is to foster competition in the interest of consumer welfare" [5].

As for the purpose of this essay, the public procurement shall be understood as the whole process of purchasing goods, services, labour etc. by public entity, finalized after a public tender by conclusion of an appropriate agreement (contract). This process includes preliminary announcement about planned public procurement organised by a certain public institution, announcement about an acquisition, technical specifications of tender, formal conclusion of a public procurement contract of and its fulfilment (till the very moment when all mutual obligations of parties expire). That means a public procurement in broad meaning (public procurement *sensu largo*) [6].

Public procurement can be also perceived as a form of spending public funds, where tendering institutions intend to spend public money as to achieve certain economic effects (acquisition of goods, services, supplies, constructions) in a competitive environment [7].

Taking all abovementioned remarks into account, it can be stated that legal regulation of public procurement constitute a part of general regulation of competition on the market (free market-protective function). Other functions have secondary meaning, for example economic effectiveness (value for money), anti-crime policy (general fight against bribery), promotion of economic development (industrial policy), achieving certain social aims (social welfare, like general employment policy, stimulation of disabled persons' employment, post-prison employment, young people employment, etc.), or environment protection aims (pro-ecological policy). This concept may be supported by the broad acceptance of variety of tasks put before competition law besides maximising of economic effectiveness before, such as for instance European integration, social welfare, or industrial policy [8].

## 2. The meaning of competition

It is beyond doubt that the concept of competition constitutes one of the most ambiguous concepts of law and economy [9]. Moreover, one has to point that the term of competition is also a phenomenon which appears in other sciences, like sociology, polytology, biology, physics, mathematics, etc. However, one ought to notice, law and economy use the term "competition" in economic sense. So, as far as legal texts concerned, there is so-called "legal conceptualization of economy" taking place (viz. economic terms transferred directly into the law) [10].

[5] Panagiotis N. Fotis, *Competition Policy and firm's damages* (in:): Joseph E. Harrington Jr, Yannis Katsoulacos, *Recent Advantages in the Analysis of Competition Policy and Regulation*, Cheltenham, UK – Northampton, MA, USA, 2012, p. 116.

[6] In Poland the term "public procurement" is defined as a contract which is subordinated to specific legal regime, concluded by public purchaser or private purchaser subject to the regime, named 'Tendering Authority', with 'Supplier' (named originally in Polish "a Performer"), in order to satisfy its demand for certain goods (commodities or services) – see art. 2 point 12 of the 2004 Public Procurement Act (act of 29 January 2004 on public procurement; consolidated version Official Journal of the Polish Republic of 2013, sec. 907 with further amendments). According to the European Union law, there is a division between a public tender and a public contract. According to the art. 1 sec. 2 of the Directive of the European Parliament and of the Council 2014/24/UE of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Official Journal of the European Union L 94, 28.3.2014, p. 65) the public procurement (franc. la passation d'un marché publics; niem. öffentliche Auftragsvergabe) defines as "the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose". Furthermore, the term of public contracts (franc. marchés publics; niem. öffentliche Aufträge) is defined by art. 2 sec. 1 point 5 of Directive 2014/24/UE as "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services". So, obviously there is a difference in terminology between Polish and the EU regulations. Consequently, a harmonization of terminology seems to be required.

[7] Leon Kieres in: Maciej Guziński, red., *Zamówienia publiczne jako przedmiot regulacji prawnej*, Wrocław 2012, p. 12.

[8] Maximising of economic effectiveness is recognized as the main aim of public procurement regulations by Marek Szydło. Vide: *Prawna koncepcja zamówienia publicznego*, Warszawa 2014, p. 1ff. There are different approaches in the literature as far as aims of public procurement regulations concerned. For example, Michał Wieloński in: *Europejskie prawo zamówień publicznych jako narzędzie polityki społeczno-gospodarczej*, Warszawa 2013, p. 80, writes: „generally, public procurements have to ease pathologies connected with forced sequestration of money of owners and giving them bureaucratic management". Further, on p. 87 this author points out that public procurements constitute a manner of accomplishment of public expenditure.

[9] See inter alia: Friedrich August von Hayek, The Meaning of Competition (in:) *Individualism and Economic Order*, The University of Chicago Press, Chicago,Third Impression 1958, pp. 92–94.

[10] See generally about legal conceptualization of different areas of human life in: Marcin Hotel, Aleksandra Rychlewska, *Jurydyzacja życia a skuteczność prawa*, Kwartalnik Prawo-Społeczeństwo-Ekonomia 1/2015, p. 43 ff.

The term "competition" comes from Latin. In Latin verb 'competo' (competo, competere, competivi, competitus) meant 'to solicit for, to fight for something together; to meet, to coincide in the same time; to agree, to scramble for something together; to be eligible, to be sufficient', and noun 'competition' was understood as 'common search' [11].

Now-a-days competition is viewed as a process of rivalry between (among) organisms, animals, groups etc. for territory, niche, resources, goods, female/male partner, prestige, respect, prizes, social status, group status, leadership. Competition is the opposite term to cooperation [12]. In the economy competition means rivalry between salesmen aspiring to achieve such goals as growth of income, shares in market or sales volume by diversification elements of marketing composition: price, product, strategy of distribution and promotion, and efforts of two or more subjects acting separately to assure themselves change with third party by offering the best conditions [13].

Robert H. Bork in his fundamental work „The Antitrust Paradox: A Policy at War with Itself" (1978) described five possible meaning of competition. Firstly, competition can be perceived as a rivalry process. Secondly, competition can be understood as a state of lack of restrictions of doing business. Next, competition is a state of market where an individual purchaser or seller does not affect price of buying or selling goods. Fourthly, competition can be perceived as a state of atomisation of sections of a market. According to the last conception, competition is a state when interest of a consumer is fully protected (without intervention of a court) [14].

According to some economists there is no need to define the term of competition. More important is to describe all the crucial features of competition. Outstanding Polish economist Adam Noga pointed at such characteristics as a fear towards competitors as a motivation to act more effectively, lack of space for all entrepreneurs within a certain sector of economy, selection of entrepreneurs and adjustment to the needs of consumers, etc. [15] Robert Bork and Ward S. Bowman has written that the most important feature of competition is "the essential mechanism of competition and its prime virtue that more efficient firms take business away from the less efficient" [16].

However, from the juridical point of view, strict describing the concept of competition seems to be crucial. An accurate definition of competition circumscribes an area of state intervention in term of antitrust. It delineates the borders of public interest at stake [17].

Depending on economic ideas, we can perceive economic competition from many perspectives, starting from perfect competition (also known as symmetric competition or pure competition) to imperfect competition (also known as asymmetric competition) and monopolistic competition. In 1940s and 1950s, there was born the new theory of workable competition and effective competition in the economy [18]. German economists from the Freiburg Ordoliberal

[10] See generally about legal conceptualization of different areas of human life in: Marcin Hotel, Aleksandra Rychlewska, *Jurydyzacja życia a skuteczność prawa*, Kwartalnik Prawo-Społeczeństwo-Ekonomia 1/2015, p. 43 ff.

[11] See *AbleMedia English-Latin Latin-English Dictionary by William Whitaker*, http://ablemedia.com/ctcweb/showcase/wordsonline.html (27.03.2017).

[12] *Competition*, Wikipedia, http://en.wikipedia.org/wiki/Competition (27.03.2017).

[13] *Mirriam-Webster On-line Dictionary*, http://www.merriam-webster.com/dictionary/competition (28.03.2017).

[14] *„... a state of affairs in which consumer welfare cannot be increased by moving to alternative state of affairs through judicial decree"*. Robert Bork, *The Antitrust Paradox: A Policy at War with Itself*, New York 1978, p. 58 ff.

[15] Adam Noga, *Piąta fala konkurencji*, Roczniki Kolegium Analiz Ekonomicznych, Warszawa 2003, z. 11, p. 138.

[16] Robert H. Bork, Ward S. Bowman, *The Crisis in Antitrust*, Columbia Law Review Vol. 65, No. 3, 1965, p. 364.

[17] See: Elżbieta Modzelewska Wąchal, *Ustawa o ochronie konkurencji i konsumentów*. Komentarz, Warszawa 2002, p. 14-15. See further considerations in: Eryk Kosiński, *Rodzaje i zakres sektorowych wyłączeń zastosowania ogolnych reguł ochrony konkurencji*, Poznań 2007, p. 55 ff; Pinar Akman, *The Concept of Abuse in EU Competition Law. Law and Eonomic Approaches*, Oxford and Portland, Oregon, 2012, p. 25 ff.

[18] The workable competition theory was developed by John Maurice Clark (see his publication: *Toward a Concept of Workable Competition*, The American Economic Review 1940, Vol. 30, Nr 2, p. 241 ff).Moreover, in 1961 he introduced the effective competition theory – see: *Competition as a Dynamic Process*, Washington D.C. 1961, p. IX ff). See additionally: Michaela Drahos, *Convergence of Competition Laws and Policie in the European Community. Germany, Austria and Netherlands*, The Hague – London – Boston 2001, pp. 40–41; Simon Bishop, Mike Walker, *Economics of E.C. Competition Law: Concepts, Application and Measurment*, London – Dublin – Hong Kong 1999, p. 13 ff; F.A. von Hayek, supra, p. 92 ff.

School have created concept of so-called "complete competition" (*vollständiger Konkurrenz; vollständiger Wettbewerb*), which is fact is similar to the perfect competition [19].

Besides the term of "competition", both scholar literature and legal texts are using quite often the term of "free competition". The concept of free competition can be described as a full and unrestricted competition on the market (which is similar to the perfect competition) or, on the other hand, may be rendered into a freedom to compete [20]. Generally speaking, when approaching free competition the idea of freedom is prerequisite. It is rightly stated that „Freedom in common terms means owning personal spiritual space (in internal sense), and additionally lack of any personal coercion, lack of restrictions from the government and other authorities together with social customs and natural conditions (in outer sense). In other words, freedom is perceived as a lack of external restrictions, both physical and psychological, imposed by other people (...) the idea of freedom generates necessity of elimination of obstacles and behaviours which restrict an individual in terms of his/her choices and actions" [21].

Noteworthy, economic (or any other) competition does not enjoy in any country such position (such extent of protection) as freedom of doing business (economic freedom). Moreover, nowhere competition (free competition) does constitute determinant of public interest or such legally protected public interest as freedom of doing business. The only one state, in which constitution guarantee the freedom of competition is Mexico. Mexican Constitution of 1917 (Constitutión Politica de los Estados Unidos Mexicanos) in art. 28 prohibits creating monopoly, granting tax exemptions, price speculations, or any other actions which restrict competition in production, industry, trade and services, concluding an agreement between producers, manufacturers, merchants, carriers, providers of services, aiming at competition restrictions or forcing consumers to pay unreasonable prices, and generally prohibits achieving exclusive and undue benefits by one or more individuals at the expense of entire society or certain social class. What is interesting, art. 28 is located in Section I of Constitution of Mexico titled "Individual guaranties" (Chart of liberties and civil rights) [22].

### 3. Safeguards of competition in the European Union latest public procurement directives

There is a set of three latest directives adopted by the European parliament and the Council that is relevant in terms of public procurement regulation. There are following legal acts: Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [23], Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (called: the "classical public sector directive") [24], 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 and repealing Directive 2004/17/EC (called: the "utilities directive") [25]. Therefore, the previous set of public procurement directives was repealed, namely Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (the 'utilities directive") [26], and Directive 2004/18/EC of the European Parliament and of the

[19] See more information about those theories in: Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominancie in European Competition Law*, Cambridge 2010, p. 20 ff; and: Maher M. Dabbah, *International and Comparative Competition Law*, Cambridge 2010, p. 20 ff.

[20] See: Leopold Caro, *Liberalizm i kapitalizm*, Włocławek 1937, pp. 6–7; Karol Sobczak, *Wolność gospodarcza a regulacje*, Życie Gospodarcze 1997, Nr 29, p. 60. See considerations on free competition in: Ewa Przeszło, *Zasada konkurencji w ustawie – Prawo zamówień publicznych, (w:) Granice wolności gospodarczej w systemie społecznej gospodarki rynkowej. Księga jubileuszowa z okazji 40-lecia pracy naukowej prof. dr hab. Jana Grabowskiego*, Katowice 2004, p. 217–218.

[21] Ewa Kozerska (in:) Ewa Kozerska, Piotr Sadowski, Andrzej Szymański, ed., *Wolność w ujęciu historycznym i prawnym. Wybrane zagadnienia*, Toruń 2010, p. 6.

[22] Legal regulation of competition law which is set in art. 28 of the Constitution of Mexico shall be regarded as being quite extensive. Nevertheless, more detailed regulation was introduced by the Mexican Federal Act of 24 December 1992 on Economic Competition (*Ley Federal de la Competencia Económica*) *Diario Oficial de la Federación* of 24.12.1992 r. (English version: http://r0.unctad.org/en/substites/cpolicy/laws; 24.05.2016). See: Eduardo Pérez Motta, Heidi Claudia Sada Correa, *Competition Policy in Mexico* (in:) David Lewis, ed., *Building New Competition Law Regimes. Selected Essays*, Cheltenham, UK – Northampton, MA, USA, 2013, p. 3 ff.

[23] OJ L 94, 28.3.2014, p. 1.

[24] OJ L 94, 28.3.2014, p. 65.

[25] OJ L 94, 28.3.2014, p. 243.

[26] OJ L 134, 30.4.2004, p. 1.

Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the "classical public sector directive")[27].

Nevertheless, some legal acts remained in power. There are such directives like: Directive 2009/81/EC of the European Parliament and of the Council of 13 July 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 [28] (called: the "defence directive"), Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [29], Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. They are mostly of procedural nature, but not only.

The latest directives of the European Parliament and of the Council, viz. directives 2014/23/EU, 2014/24/EU and 2014/25/EU, are strongly concentrated on competition. However, competition among economic operators, where 'economic operator' is defined as any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market (art. 2 sec. 1 subs.10 of Directive 2014/24/EU), is not the main and the only goal within this set of directives. It is quite broadly admitted that those directives are to achieve further simplification of the public tendering procedure, digitalization and computerization of the system (services provided via Internet), and general promotion of non-economic goals of public procurement system (qualitative factors, and additionally social, ecologic and pro-innovative goals). The main procompetitive goal is defined as provision of broad access to public tendering for micro, small and middle business (small and medium-sized undertakings, entrepreneurs; SMB). It remains beyond doubt that general simplification of the public tendering procedure (deformalizing the system), together with digitalization and computerization of the system (access via Internet), helps and stimulates SMBs access to the public procurement market, as well.

Starting with the Preamble to Directive 2014/24/EU we can read: "The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency" (paragraph 1). Any direct reference to competition (or free competition) is missing. This however does not mean that competition remains outside the scope of interest of the EU law. There are many specific regulations inside the mentioned directives which are actually aimed at fostering the economic competition. So it is necessary to start with article 18 of Directive 2014/24/EU [30] which is titled "Principles of procurement".

According to this regulation "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators". Similar wording we can find in article 3 titled "Principle of equal treatment, non-discrimination and transparency" of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, nonetheless there is no competition mentioned. Moreover, there is no competition as a principle provided in similar regulation inside 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 and repealing Directive 2004/17/EC ("utilities directive"), and neither there is such regulation in Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the

[27] OJ L 134, 30.4.2004, p. 114.

[28] OJ L 216, 20.8.2009, p. 76.

[29] OJ L 335, 20.12.2007, p. 31.

[30] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ("classical public sector directive") is the main point of reference in this Article. Nevertheless, other Directives cannot be undermined, and they are subjects of analyses as often as possible.

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 ("defence directive").

One of the very important elements of broadly understood guarantees of free competition within the government acquisitions' processes is the notion of 'supplier'. It must be stressed that if there are many possible identities which may bid in the public tender, the range of competition is much broader. So the personal scope of public tendering on the side of supply plays the very crucial role. According to the Preamble to Directive 2014/24/EU the term "economic operators" (viz. suppliers) shall be interpreted as broadly as to make it possible to cover all persons and entities which offer provision of constructions' works, supply of products or the provision of services on the market "irrespective of the legal form under which they have chosen to operate. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are 'legal persons' in all circumstances (paragraph 14 of the Preamble). Noteworthy, a definition of 'public operator' is provided by art. 2 point 10 of Directive 2014/24/EU). The same definition can be found in art. 2 sec. 6 of Directive 2014/25/EU ("utilities directive") and art. 5 point 2 of Directive 2014/23/EU ("concessions directive"). A different, and much more vague definition, may be found in the previous generation public procurement directive, namely Directive 2009/81/EC ("defence directive"), where according to art. 1 point 14 "'economic operator' means a contractor, supplier or service provider. It is used merely in the interests of simplification".

Additionally, it is important to notice, that new 2014 directives show a very relaxed approach to the concept of a consortium of entrepreneurs. The main goal of the mentioned concept is to allow suppliers to join their forces as to be able to cope with the tender. "It should be clarified that groups of economic operators, including where they have come together in the form of a temporary association, may participate in award procedures without it being necessary for them to take on a specific legal form. To the extent this is necessary, for instance where joint and several liability is required, a specific form may be required when such groups are awarded the contract" (paragraph 15 of the Preamble to Directive 2014/24/EU) [31]. There is a very relaxed approach to the concept of "economic operator" in definitions provided in Directive 2014/24/EU, where there is „any temporary association of undertakings" regarded as economic operator (art. 2 point 10 and art. 19 titled "Economic operators", secs. 2–3, regulating so-called 'groups of operators'). The same wording we can find in art. 2 point 6 of Directive 2014/25/EU and art. 5 point 2 of Directive 2014/23/EU. Moreover, there is an obligation provided to countervail any distortion of competition among private suppliers in case of so-called public-public cooperation (art. 12 of directive 2014/24/UE). "There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities. It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors" (paragraph 31 of the Preamble to Directive 2014/24/EU) [32].

Furtherly, there are safeguards of SMB sector's interests in terms of centralization of tendering process. "There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive

[31] See same words in paragraph 49 of the Preamble to Directive 2014/23/EU.

[32] See same words in paragraph 45 of the Preamble to Directive 2014/23/UE (concessions).

concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs" (paragraph 59 of the Preamble to Directive 2014/24/EU). "Centralised purchasing techniques are increasingly used in most Member States. Central purchasing bodies are responsible for making acquisitions, managing dynamic purchasing systems or awarding public contracts/framework agreements for other contracting authorities, with or without remuneration. The contracting authorities for whom a framework agreement is concluded should be able to use it for individual or repetitive purchases. In view of the large volumes purchased, such techniques may help increase competition and should help to professionalise public purchasing. Provision should therefore be made for a Union definition of central purchasing bodies dedicated to contracting authorities and it should be clarified that central purchasing bodies operate in two different manners. Firstly, they should be able to act as wholesalers by buying, stocking and reselling or, secondly, they should be able to act as intermediaries by awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting authorities. Such an intermediary role might in some cases be carried out by conducting the relevant award procedures autonomously, without detailed instructions from the contracting authorities concerned; in other cases, by conducting the relevant award procedures under the instructions of the contracting authorities concerned, on their behalf and for their account. Furthermore, rules should be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, as between the central purchasing body and the contracting authorities procuring from or through it. Where the central purchasing body has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures. Where a contracting authority conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts" (paragraph 69 of the Preamble to Directive 2014/24/EU).

The access of SMBs to public tendering must be more open, especially in case of dynamic purchasing systems and framework agreements (see paragraphs 61-66 of the Preamble to Directive 2014/24/EU). "In view of the experience acquired, there is also a need to adjust the rules governing dynamic purchasing systems to enable contracting authorities to take full advantage of the possibilities afforded by that instrument. The systems need to be simplified; in particular they should be operated in the form of a restricted procedure, hence eliminating the need for indicative tenders, which have been identified as one of the major burdens associated with dynamic purchasing systems. Thus any economic operator that submits a request to participate and meets the selection criteria should be allowed to take part in procurement procedures carried out through the dynamic purchasing system over its period of validity. This purchasing technique allows the contracting authority to have a particularly broad range of tenders and hence to ensure optimum use of public funds through broad competition in respect of commonly used or off-the-shelf products, works or services which are generally available on the market" (paragraph 63 of the Preamble to Directive 2014/24/EU). "In order to further the possibilities of SMEs to participate in a large-scale dynamic purchasing system, for instance one that is operated by a central purchasing body, the contracting authority concerned should be able to articulate the system in objectively defined categories of products, works or services. Such categories should be defined by reference to objective factors which might for instance include the maximum allowable size of specific contracts to be awarded within the category concerned or a specific geographic area in which specific contracts are to be performed. Where a dynamic purchasing system is divided into categories, the contracting authority should apply selection criteria that are proportionate to the characteristics of the category concerned" (paragraph 66 of the Preamble to Directive 2014/24/EU). Legal regulation of mentioned area is provided by arts. 33-34 of Directive 2014/24/EU.

The need for transparency and competition within the framework agreements is firmly stressed in Directive 2009/81/EC ("defence directive"), as well. "Contracting authorities/entities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition". "Framework agreements may not be used improperly or in such a way as to prevent, restrict or distort competition" (art. 29 sec. 2, art. 52 sec. 6 of Directive 2009/81/EC).

It ought to be underlined that EU law legislator generally requires public tendering to be adjusted for SMBs. One of the most relevant means which are to serve this purpose is an obligation of partition of public procurement into parts with regard to quantitative and qualitative factors. "Public procurement should be adapted to the needs of SMEs. (...) To that end and to enhance competition, contracting authorities should in particular be encouraged to divide large contracts into lots. Such division could be done on a quantitative basis, making the size of the individual contracts better correspond to the capacity of SMEs, or on a qualitative basis, in accordance with the different trades and specialisations involved, to adapt the content of the individual contracts more closely to the specialised sectors of SMEs or in accordance with different

subsequent project phases. (...) Member States should remain free to go further in their efforts to facilitate the involvement of SMEs in the public procurement market, by extending the scope of the obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting authorities to provide a justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory under certain conditions" (paragraph 78 tirets 1 and 3 of the Preamble to Directive 2014/24/EU; see art. 46 of Directive 2014/24/EU).

Members States may limit the access to public procurement for only one supplier in terms of different parts of tendering: "Where contracts are divided into lots, contracting authorities should, for instance in order to preserve competition or to ensure reliability of supply, be allowed to limit the number of lots for which an economic operator may tender; they should also be allowed to limit the number of lots that may be awarded to any one tenderer" " (paragraph 79 tiret1 of the Preamble to Directive 2014/24/EU). Similar provisions may be found in Directive 2014/25/UE (utilities; paragraphs 87–88 of the Preamble to Directive 2014/25/EU).

The problem of payments to subcontractors (most often SMBs) is noticed by European Union. Consequently, as to help the sector of SMBs, Member States should provide mechanisms for direct payments to subcontractors (paragraph 78 tiret 3 in fine of the Preamble to Directive 2014/24/EU; see art. art. 71 sec. 3 of Directive 2014/24/EU). In the same time it is required that all subcontractors must be known to procuring entities (viz. transparency of the chain of subcontractors). "It is also necessary to ensure some transparency in the subcontracting chain, as this gives contracting authorities information on who is present at building sites on which works are being performed for them, or on which undertakings are providing services in or at buildings, infrastructures or areas, such as town halls, municipal schools, sports facilities, ports or motorways, for which the contracting authorities are responsible or over which they have a direct oversight (paragraph 105 tiret 2 of the Preamble to Directive 2014/24/EU; see art. 71 secs. 2 and 5 of Directive 2014/24/EU).

Another mean with an aim to simplify the process and to make it more open for SMBs and competition as such is a more relaxed approach to technical specifications. According to art. 42 titled "Technical specifications") sec. 2 of Directive 2014/24/EU "Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition. Generally, the technical specifications shall be prepared as to avoid any artificial limitation of competition. Such a limitation could be achieved by posing requirements which would be in favour of a certain supplier. "Consequently, technical specifications should be drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows that objective to be achieved in the best way possible. Functional and performance-related requirements are also appropriate means to favour innovation in public procurement and should be used as widely as possible. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements should be considered by contracting authorities. It should be the responsibility of the economic operator to prove equivalence with the requested label" (paragraph 74 tiret 2 of the Preamble to Directive 2014/24/EU; see arts. 42–44 Directive 2014/24/EU).

The same purpose is served by relaxed approach to economic and financial capacity requirements put before suppliers in the public tendering process. "Overly demanding requirements concerning economic and financial capacity frequently constitute an unjustified obstacle to the involvement of SMEs in public procurement. Any such requirements should be related and proportionate to the subject- matter of the contract. In particular, contracting authorities should not be allowed to require economic operators to have a minimum turnover that would be disproportionate to the subject-matter of the contract; the requirement should normally not exceed at the most twice the estimated contract value. However, in duly justified circumstances, it should be possible to apply higher requirements. Such circumstances might relate to the high risks attached to the performance of the contract or the fact that its timely and correct performance is critical, for instance because it constitutes a necessary preliminary for the performance of other contracts" (paragraph 83 tiret 1 of the Preamble to Directive 2014/24/EU). Requirements in such terms may be aggravated merely in case of a necessity to safeguard regularity and promptness of the work or supply[33], or in case of high risk immanent to a given procurement (art. 58 secs. 1 and 3 of Directive 2014/24/EU).

[33] For example, when a given work is a certain stage of given procurement, which is prerequisite for possibility to proceed to next stages.

Suppliers have to be chosen on non-discriminatory and equal basis. "Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender. It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. It is furthermore appropriate to recall that contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions. In order to encourage a greater quality orientation of public procurement, Member States should be permitted to prohibit or restrict use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate" (paragraph 90 tirets 1-2 of the Preamble to Directive 2014/24/EU). There are obligations of informative nature posed upon procuring entities, including obligation to indicate precisely the contract award criteria and the relative weighting given to each of those criteria (paragraph 90 tiret 3 of the Preamble to Directive 2014/24/EU; art. 67 sec. 5 of Directive 2014/24/EU).

The crucial notion in 2014 Directives is the term "award criteria". The best way to present the notion is to use another term namely 'most economically advantageous tender' as "the economically best solution among those offered". This is all aimed to avoid any misunderstanding and confusion with the concept used under previous generation of 2014 directives (i.a. Directives 2004/17/EC and 2004/18/EC) called 'most economically advantageous tender'. At present the goal of regulation is to achieve 'best price-quality ratio' (paragraph 89 of the Preamble to Directive 2014/24/EU). In this area EU legislator is pointing at necessity to guarantee effective and fair competition. There is a list of criteria which decide to which supplier a procurement should be granted. This mentioned list encompasses criteria of a non-economic nature, like social and ecologic criteria as well [34]. According to Directive 2014/24/EU quality effectiveness should be supported by cost effectiveness, including price and life-cycle costing (paragraphs 92, 93–99 of the Preamble to Directive 2014/24/EU; art. 67–68 of Directive 2014/24/EU).

As a principle, offers which present price that is blatantly low ("abnormally low price or costs proposed") shall be rejected after submission of explanation which does not account for the low price or cost proposed (art. 69 titled "Abnormally low tenders", secs. 1–5, of Directive 2014/24/EU; see additionally paragraph 103 of the Preamble to Directive 2014/24/EU).

Another pro-competitive safeguard is provided in art. 57 sec. 4 in fine and sec. 6 of Directive 2014/24/EU. According to mentioned regulation, there is a principle of proportionality introduced in case of minor irregularities on side of suppliers (see additionally paragraph 101 tiret 3 of the Preamble to Directive 2014/24/EU).

Last, but not least, there must be an issue of general priority of the open tendering mode of procedure within the public procurement process underlined (as opposite to any methods of selective or limited tendering). Under art. 26 sec. 2 of Directive 2014/24/EU there are two procedures mentioned: open procedure (fr. *procédure ouverte*, germ. *Offenes Verfahren*), regulated specifically by art. 27 of Directive 2014/24/EU, and restricted procedure (fr. *procédure restreinte*, germ. *Nichtoffenes Verfahren*), regulated specifically by art. 28 of Directive 2014/24/EU. At the same time Directive 2014/24/EU stresses firmly the right of procuring entities (contracting authorithies) to pick a given procedure of its choice, especially in terms of trans-border public procurements. In such circumstances, Directive 2014/24/EU offers a competitive procedure with negotiation (fr. *procédure concurrentielle avec négociation*, germ. *Verhandlungsverfahren*), regulated by art. 29 of Directive, and competitive dialogue (fr. *dialogue competitive*, germ. *Wettbewerblicher Dialog*), regulated by art. 30 of Directive. According to the Preamble to Directive 2014/24/EU: "There is a great need for contracting authorities to have additional flexibility to choose a procurement procedure, which provides for negotiations. A greater use of those procedures is also likely to increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders. Member States should be able to provide for use of the competitive procedure with negotiation or the competitive dialogue, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes. It should be recalled that use of the competitive dialogue has significantly increased in terms of contract values over

[34] See additionally for example paragraph 35 of the Preamble to Directive 2009/81/EC ("defence directive").

the past years. It has shown itself to be of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing. Where relevant, contracting authorities should be encouraged to appoint a project leader to ensure good cooperation between the economic operators and the contracting authority during the award procedure".

### 4. Results. Conclusions and relevance

It is important to notice that direct references to competition (or free competition) as to the main principle are missing in new 2014 EU public procurement directives, namely Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts ("concessions directive"), Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ("classical public sector directive"), 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 and repealing Directive 2004/17/EC ("utilities directive"). Nevertheless, it does not mean that competition remains outside the scope of interest of the EU law. There are many specific regulations inside the mentioned directives which are actually aimed at fostering economic competition. Generally speaking, the overall shape of the public tendering cannot contradict the free competition among suppliers (called in latest directives as "economic operators"). Furthermore, there are many specific regulations which in fact provide for a competition on the public procurement market in the EU, too. One of the most important areas of regulation at stake is a general attempt to open public procurement market for micro, small and medium enterprises (SMBs' sector). So many particular means of achieving this goal serve in fact the competition, as well, and they cannot be undermined.

Noteworthy, the only old directive of material scope which remained in force is Directive 2009/81/EC of the European Parliament and of the Council of 13 July 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 ("defence directive"). This 'old style' directive does not provide for open access to the procurement for SMBs. However, terms 'competition' and 'free competition' are often used in the legal text of Directive.

Consequently, it may be stated that to outward seeming an economic competition is not the main goal of the regulation at stake. However, the analysis of legal texts of all directives which regulate the public procurement in the European Union leads to a conclusion that in fact all regulation is about competition. This is achieved by opening of the public procurement market to SMBs sector and by relaxing and simplifying the public procurement requirements and procedure. So the relevance of the research and its results is such, that the EU public procurement regulation may be regarded as a part of general competition regulation, with an aim to foster and guarantee and economic free competition on the public procurement market.

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