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The EU State aid and public procurement rules

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Summary

The authors' goal with this paper is to give insight into the complex world of European Union's State aid and public procurement rules which have an ever-increasing importance in EU law, in the EU, and consequently, in Croatia as well. The paper will first explain the four conditions that have to be cumulatively fulfilled in order for a certain measure to constitute an illegal State aid and after that, the authors will give an overview of the most relevant rules and conditions of the public procurement procedures. In their elaboration the authors will cover the EU State aid and public procurement rules from the perspective of: a) the primary legislation of the EU, that is, the Treaties; b) the secondary legislation; c) case-law of the Court of Justice of the European Union; d) European Commission's documents and e) current academic legal reasoning. Moreover, the authors will pass their own judgement and give their opinion on the relevant rules and issues of EU State aid and public procurement rules.

Key words: State aid, public procurement, state resources, thresholds, restricted procedure.

1. Introduction

It is February 2016, and the European Commission has updated its State Aid Scoreboard, from which it is visible that in the year 2014, 28 Members States (hereinafter: MS) have spent 101,2 billion euro, that is, 0.72% of EU's BDP on State aids in sectors such as agriculture, services, fishery, etc.¹ To put things in perspective, one should note that the EU spends 1.55% of BDP on defence which is an essential function of every state or in this case union.² Judging by the numbers, one can conclude that MSs' governments think that giving away State aids is also an essential function of the State. This trend seems to be on the rise, because in the year 2014 there was around 33 billion euro more spent on State

¹ European Commission, 'State aid Control', <http://ec.europa.eu/competition/state_aid/register/>, accessed 19 February 2016; Index, 'Zemlje EU na državne potpore u 2014. potrošile 101 milijardu eura', <http://www.index.hr/novac/clanak/zemlje-eu-na-drzavne-potpore-u-2014-potrosile-101-milijardu-eura/87562_9.aspx>, accessed 20 February 2016.

² The World Bank, 'Military expenditure (% of GDP)', <<http://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS/countries/EU?display=graph>>, accessed 21 February 2016

aids than in the last year.³ According to the European Commission, such an increase reflects MSs' increased awareness, following adoption of the 2014 Energy and Environmental Aid Guidelines,⁴ that renewable energy support involves State aid.⁵

After the 2015 United Nations Climate Change Conference, held in Paris, France, in December 2015, it is fair to say that the European Union will continue to stimulate MS to give State aid to eco-friendly projects. As a result, State aid and public procurement procedures will be more and more used for ecological purposes. The authors are supportive to every effort which leads to saving our world's climate. But, on the other hand, the authors also believe that valuable State aid and public procurement rules should not be violated because of the lack of knowledge and/or under the disguise of giving eco-friendly State aids within or outside of the public procurement procedure.

So, the question is - why are the EU State aid and public procurement rules valuable to the EU project and why is their study (in general and in this paper) and respect needed? It might come as a surprise that public procurement rules (which are about how public authorities spend public money when buying goods, works or services) are a valuable tool for the EU in achieving its ecological and other goals. But these rules have a significant financial impact because they range from buying IT equipment or providing water, gas and electricity to building a hospital or a road. The Directive 2014/24/EU of 26 February 2014 on public procurement⁶ and the Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors⁷ play a key role in the '*Europe 2020 strategy for smart, sustainable and inclusive growth*', as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds.⁸ They were enacted in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (hereinafter: SMEs) in public procurement and to enable procurers to make better use of public procurement in support of common societal goals.⁹

How effective public procurement rules may be in fulfilling the urgent needs of the EU? Public procurement affects a substantial share of world trade flows, amounting to 1000 billion per year; it makes up a significant part of national economies: 10-25% of gross domestic product (hereinafter: GDP).¹⁰ In the EU, the public purchase of goods and services

³ European Commission, 'State aid Control', *ibid*; Index, 'Zemlje EU na državne potpore u 2014. potrošile 101 milijardu eura', *ibid*.

⁴ See more: Communication from the Commission, 'Guidelines on State aid for environmental protection and energy 2014-2020', <[http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0628\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0628(01))>, accessed 22 February 2016

⁵ European Commission, 'Daily News 17/02/2016', <<http://europa.eu/rapid/midday-express-17-02-2016.htm>>, accessed 23 February 2016

⁶ Directive 2014/24/EU.

⁷ 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 Text with EEA relevance 2014 OJ L 94/243. The paper will concentrate more on the General Directive 2014/24/EU, than on the Utilities Directive 2014/25/EU due to the general nature of Directive 2014/24/EU and because the differences between the General and the Utilities Directive are not important for the purpose of this paper.

⁸ Paragraph 4 of the Recital to the 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 Text with EEA relevance 2014 OJ L 94/243 (Directive 2014/25/EU).

⁹ Paragraph 4 of the Recital to the Directive 2014/25/EU; there is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union. 196 Paragraph 17 of the Recital to the Directive 2014/25/EU

¹⁰ See more: European Commission, 'Public Procurement' <<http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/>> accessed 24 March 2015.

has been estimated to account for 16% of GDP.¹¹ For instance, in Croatia the public purchase of goods and services accounts for about 40 billion Croatian kuna per year, which is almost a third of the State's budget.¹² As one Commission official put it: 'you aren't buying pencils'.¹³ Since the State is buying with the public purse, it should always aim to achieve the best value for money and, at the same time, it should foster social justice and the protection of the environment.

The original rationale for imposing EU oversight on State aid was to prevent countries from deliberately using State aid to benefit their own enterprises at the expense of rivals located in other Member States.¹⁴ If a country subsidizes national producers of goods for which there is international trade, similar subsidies may be granted in retaliation by other countries, which in turn creates an escalation in the level of subsidies and ignites a potentially wasteful subsidy race.¹⁵ Moreover, State aid may distort the dynamics of the competitive process; aid may help perpetuate failed business models; it may reduce the incentive to compete; and may create moral hazard by encouraging excessive risk taking.¹⁶ These effects are likely to be even more serious and long-lasting than the mere distortions of the level playing field. In particular, moral hazard is a key concern. An implicit promise of the future aid may affect firms' incentives by protecting them from the adverse consequences of their risk-taking thereby fostering overly risky behaviour.¹⁷ Repeated State aid may eventually create the expectation that certain undertakings are 'too big to fail' (or too politically important to fail), and thus perpetuate overly risky or inefficient business practice.¹⁸ Therefore, State aid rules are valuable for the European Union, so any environmental, societal or any other gain should not be offset by a loss of jeopardizing the goals of State aid rules. Hence, the authors will demonstrate the most important parts of the current legislation and the case-law regarding State aid and public procurement.

2. State aid

State aid is defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities.¹⁹ More precisely, article 107(1) of the Treaty on the Functioning of the European Union (hereinafter: TFEU) states:

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

In order to define a measure as State aid, it is necessary to cumulatively fulfil the following conditions:²⁰

¹¹ *ibid*

¹² HRT vijesti, 'Zamjerka javnoj nabavi: Nije najjeftinije uvijek najbolje' (HRT, 17 March 2015) <<http://vijesti.hrt.hr/276643/tvrtke-imaju-zamjerki-na-sustav-javne-nabave-ponajvise-na-kriterij-najnije-cijene-23>> accessed 25 March 2015.

¹³ Dylan M Hughes, 'The Inter relationship between the European State Aid and Public Procurement Rules: When does a government contractor gain an 'economic advantage'?' (2009) EIPA 1, 5.

¹⁴ Kelyn Bacon, *European Union Law of State Aid* (2nd edn, Oxford University Press 2013) 9.

¹⁵ *ibid*

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ *ibid*

¹⁹ Paul Craig, Grainger de Burca, *EU Law: Text, Cases, and Materials* (5th edn Oxford University Press 2011) 1088

²⁰ Although, 'The jurisprudence of the European Court has not yet provided a consistent and comprehensive interpretation of the conditions for State aid (...)' Kelyn Bacon, *European Union Law of State Aid* (2nd edn, Oxford University Press 2013) 20.

- (a) intervention by the State or through State resources,²¹
- (b) the recipient has an advantage²² on a selective basis;²³
- (c) the measure must distort or threaten to distort competition and;²⁴
- (d) be likely to affect trade between Member States.²⁵

In the following sections, each of these conditions is going to be considered in details.

2.1. State resources and imputability to the State

Even though it is not explicitly stated in the Article 107(1) TFEU, in the case *PreussenElektra* the Court of Justice of the European Union (hereinafter: the Court) clarified that no matter if the aid is granted directly by the State, or indirectly through State resources, measure must always be imputable to the State in order to constitute State aid.²⁶ The authors point out that this is a great example how the Court goes directly contrary to the wording of the Treaties in order to achieve other valuable goals. The authors agree with the Court that in order to constitute State aid, the measure should be both imputable to the State and it should have an effect on State resources. But at the same time, the authors believe that it is absurd that in (EU) law 'or' means 'and', so there should be less similar examples in the future of such judicial activism because it goes directly against the wording of the Treaties.

2.1.1. State resources

Formulation '(...) aid granted by a Member State or through State resources' within Article 107(1) is very broad, so there is first the notion of 'Member State' which includes both central, regional and local bodies, whatever their legal status and description may be,²⁷ and the notion 'State resources' which refers to any institution or body from the public sector.²⁸ As a consequence of such a broad definition of 'Member States' and their 'State resources', State aid rules have a broad impact.

It is important to add that the characteristic of funds which can be source of aid is that they are constantly under public control, and therefore available to the competent national authorities for their disposal.²⁹ Otherwise, the condition 'imputability to the State' cannot be fulfilled.

On the other hand, EU resources - and by that EU funding - do not constitute State resources until they come under the control of a Member State.³⁰

²¹ Case 379/98 *PreussenElektra* EU:C:2001:160, para 58.

²² As some form of economic advantage, see case 39/94 *SFEI and Others* EU:C:1996:285, para 60; 280/00 *Altmark* EU:C:2003:415, para 83-4.

²³ Case 200/97 *Ecotrade* EU:C:1998:579, para 40; 106-107/09 *Commission v Gibraltar* EU:C:2011:732, para 74.

²⁴ Case 248/84 *Germany v Commission* EU:C:1987:437, para 18.

²⁵ Case 372/97 *Italy v Commission* EU:C:2004:234, para 44; 148/04 *Unicredito Italiano* EU:C:2005:774, para 55.

²⁶ In the *PreussenElektra* case electricity distributors had to buy annually a certain amount of electricity from 'green' sources, the Court eventually ruled out State aid. See more for procedures which appear before the Court of Justice of the European Union: Koen, Lenaerts; Ignace, Maselis; Kathleen, Gutman, *EU Procedural Law*, (1st edn, OUP 2014).

²⁷ Case 248/84 *Germany v Commission* EU:C:1987:437, para 17.

²⁸ 'In applying article 92 regard must primarily be had to the effects of the aid on the undertakings or producers favoured and not the status of the institutions entrusted with the distribution and administration of the aid.' Case 78/76 *Steinike und Weinling v Germany* EU:1977:52, para 21.

²⁹ Case 83/98 *France v Ladbroke Racing and Commission* EU:C:2000:248, para 50.

³⁰ Decision in Case N156/2006 *South Yorkshire digital region broadband project* (22 November 2006) para 29; Decision in Case SA.34056 *Cable Car for London* (27 June 2012) para 40.

2.1.2. Direct and indirect effects

It can be concluded from the previous chapter that the above distinction serves to bring within the definition both aids granted directly by the States and ones granted indirectly, by public or private bodies established by the State.³¹ Common ground is that the aid must have a budgetary consequence for the State, meaning it must entail a financial burden for the State.³² The paper will specify certain forms of measures which have been found to constitute State aid in the interest of making it clear that the burden on State resources does not need to be actual, immediate or material.

The most straightforward type of measure that would constitute direct grant would be a subsidy or other positive transfer such as capital investment and injections,³³ loans on preferential interest terms,³⁴ interest-free loans,³⁵ etc., while indirect financial measure can be waiver of public debts,³⁶ or the informal tolerance of persistent non-payment of taxes, charges and other debts,³⁷ etc. Payments for public services,³⁸ different environmental obligations,³⁹ and various tax related exemptions, reductions or special regimes have under certain circumstances been found by the Court of Justice of the EU to constitute grant of aid.⁴⁰ It is important to mention that State guarantees are to be considered as indirect aids, including implied guarantees, when they enable its recipient to obtain more favourable credit terms than what it would have obtained on its own merits alone and therefore, ease the pressure on its budget and therefore strengthening its financial position.⁴¹ It is a common belief that such State aid rules are useful to MSs which have an excuse not to have a toxic guarantee for public undertakings for which they are sometimes forced by their political motivations. The authors believe that it might be also good for the undertakings not to receive State aid, because they will be forced to 'sink or swim', earlier rather than later. Otherwise, without the strict EU State aid rules, the undertakings would be dependent on aid from MSs which would have a complete discretion on choosing the timing and the amount of aid.

³¹ Leigh Hancher, Tom Ottervanger, Piet Jan Slot, *E.C. State Aids* (2 edn, Sweet and Maxwell 1999) 26.

³² Financial burden can be in the form either of expenditure or of reduced revenue; Case 82/77 *Openbaar Ministerie v Van Tiggele* EU:C:1977:205, Opinion of Advocate General (hereinafter: AG) Capotorti, pg 52.

³³ Case 323/82 *Intermills v Commission* EU:C:1984:345; 305/89 *Italy v Commission* ('Alfa Romeo') EU:C:1991:142.

³⁴ Case 57/86 *Greece v Commission* EU:C:1988:284; 15/98 and 105/99 *Italian Republic and Sardegna Lines v Commission* EU:C:2000:570.

³⁵ Case 214/95 *Vlaamse Gewest v Commission* EU:T:1998:77.

³⁶ Case 200/97 *Ecotrade* EU:C:1998:579, para 43.

³⁷ Case 480/98 *Spain v Commission* ('Magesa') EU:C:2000:559; 36/99 *Lenzing* EU:T:2004:312.

³⁸ Case 280/00 *Altmark* EU:C:2003:415.

³⁹ E.g. Case 279/08 *Commission v Netherlands* EU:C:2011:551; Decision 2007/580/EC *Slovenian green electricity scheme* [2007] OJ L219/9, paras 66-74.

⁴⁰ E.g. Case 387/92 *Banco Exterior de Espana* EU:C:1994:100; 346-348/99 *Diputacion Foral de Alva v Commission* EU:T:2002:259; 81/10 *France Telecom v Commission* EU:C:2011:811.

⁴¹ Case 154/10 *France v Commission* EU:T:2012:452. An example of a guarantee and how it can confer an advantage can be seen in the Bouygues case. The facts of that case are the following: 'In December 2001, France Télécom was in great financial difficulties. It experienced share price losses and a downgrading of its credit rating. On 12 July 2002, the French minister for economic affairs made the following statement: 'The State shareholder will behave like a prudent investor and would take appropriate steps if France Télécom were to face any difficulties ... I repeat, if France Télécom were to face any financing problems, which is not the case today, the State would take whatever decisions were necessary to overcome them.' This statement prevented France Télécom's rating from being downgraded to junk status. Rating agencies quoted the statement of the French authorities and this was decisive for their decision to maintain an investment rating for the company. As a consequence, the price for France Télécom shares soared.' See more: European Commission 'State aid: Commission welcomes Court judgment on French State intervention in France Télécom' (Press release, 19 March 2013) <http://europa.eu/rapid/press-release_MEMO-13-237_en.htm> accessed 3 March 2015.

2.1.3. Imputability to the state

In determining whether a measure is imputable to the State, one must take into consideration the context of the case which characterizes specific measures. This criterion is particularly important in order to establish the existence of State aid granted by public undertakings and where the State implements legislation adopted by the EU.⁴²

Aid emanating from exercising legislative power is 'necessarily imputable to the State'.⁴³ However, when the aid is granted by public or private bodies established or appointed by State to administer the aid the answer is often less clear cut. Some of the most important circumstances are the way in which the undertaking is established and its legal status (subject to public law or company law), its integration into the structures of the public administration and the degree of supervision and management of the body by the public authorities, i.e. its ability to make decisions without taking into account requirements of public authorities.⁴⁴

By contrast, a measure is not imputable to the State when it constitutes transposition or application of EU law, since the State has no discretion in the matter.⁴⁵

By having the condition of 'imputability to the State', the scope of State aid rules is limited only to the distortions of competition produced from the Member States because the underlying logic is that Member States could be a too powerful economic operator on the market and by its dominant status they can produce a lot of negative effects with their aids. As a counter-argument to that logic the authors point out to undertakings such as Walmart (an American multinational retail corporation) which has bigger revenue than Norway, or Chevron (American multinational energy corporation) which has bigger revenue than the Czech Republic.⁴⁶ The justification of limiting the prohibition of aid to Member States is debatable, but outside the topic of this paper.

2.2. Economic advantage and selectivity

To explain the second condition that a measure must fulfil to be characterized as State aid, the authors will first explain who is or can be recipient of the aid, second, what is considered as an economic advantage, and third, when is the aid given selectively.

Article 107(1) refers to 'undertakings' as recipients, and in the sphere of competition law the concept of an undertaking covers every entity engaged in an economic activity, and any activity consisting in offering **goods and services on a given market is an economic activity**.⁴⁷ Status of an entity under national law or the way in which it is financed is of no importance, so no-profit-making entities can also be recognized as potential recipi-

⁴² Phedon Nicolaidis, Mihalis Kekelekis, Maria Kleis, *State Aid Policy in the European Community: Principles and Practice* (2nd edn, Kluwer Law international 2008) 12.

⁴³ Case 358/94 *Air France v Commission* EU:T:1996:194, para 59. See more : Conor Quigley, *European State Aid Law and Policy* (2nd edn, Hart Publishing 2009) 13, 18.

⁴⁴ Broader in Bacon (n 7) 69; the Court in the Case 78/76 *Steinike und Weinling v Germany* EU:1977:52 stated that in applying Article 92 (now 107) the focus should be on the effects of the aid granted to favoured undertakings or producers, not to the status of the institutions which granted it.

⁴⁵ Conor Quigley, Anthony M Collins, *EC State Aid Law and Policy* (Hart publishing 2003) 17; case 351/02 *Deutsche Bahn v Commission* EU:T:2006:104, para 102.

⁴⁶ 'Corporations bigger than countries' <<http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?op=1>> accessed 22 April 2015.

⁴⁷ Case *Commission v Italy* EU:C:1998:303, para 36.

ents if they are on the market,⁴⁸ as well as private undertakings and public undertakings.⁴⁹ Of particular importance are entities carrying out services of general economic interest (hereinafter: SGEI).⁵⁰ To clarify key concepts of State aid in the field of SGEI, Commission adopted in 2011 a new instrument called Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, known as SGEI Communication,⁵¹ in which it gives guidance on how to separate economic activity from the noneconomic ones for four areas: social security, health care, education and exercise of public powers. The latter concept captures activities that are States' prerogatives, or are closely connected to them, for example army, police, air navigation safety and control, insofar as the State has not decided to introduce market mechanism in their organization.⁵²

An advantage that would fall within the scope of Article 107(1) must meet two conditions: (a) it must lead to an improvement in the economic and/or financial position of the undertaking,⁵³ and (b) such advantage would not have been received under 'normal market conditions'.⁵⁴

The relevant comparator for identifying 'improvement' constituting 'advantage' must be found by assessing the situation of competing undertakings in the Member State in question. Comparison of different Member States would be meaningless given the disparities between factual, legislative and economic situations in them.⁵⁵ As regards the other condition, there is distinction between States' role as a market participant and the one in which it exercises its sovereign or public functions. Relevant comparator for the first situation can be found in behaviour of the hypothetical private commercial actor, which is determined by reference to 'private investor and private creditor test'⁵⁶ principle which tries to establish whether the advantage received by the undertaking could have been obtained from a market economy operator which seeks to obtain a normal return and profit. On the other hand, that principle must be excluded when State acts as a public authority because its conduct then cannot be compared to that of an operator in a market economy.⁵⁷ Since an economic operator is guided by the profit, it would not invest in, for instance, museums if it's not profitable, while in contrast the State, as a public authority, has a public interest beyond mere profit to invest in museums and culture. Therefore, these two distinct moti-

⁴⁸ Case 222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* EU:C:2006:8 'the banking foundation must be regarded as an undertaking, in that it engages in an economic activity, notwithstanding the fact that the offer of goods or services is made without profit motive, since that offer will be in competition with that of profit-making operators.', para 123.

⁴⁹ Case 78/76 *Steinike und Weinling v Germany* EU:1977:52, para 18; 'Public undertakings are defined as any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.' Quigley, Collins (n 32) 24.

⁵⁰ 'Services of general economic interest (SGEI) are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. Examples are transport networks, postal services and social services.' Available at European Commission website <www.ec.europa.eu/competition/state_aid/overview/public_services_en.html> accessed 30 March 2015.

⁵¹ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C8, 11.01.2012, p. 4-14.

⁵² Nicola Pesaresi and others, *The SGEI Communication* <http://ec.europa.eu/competition/publications/cpn/2012_1_10_en.pdf> accessed 15 April 2015.

⁵³ Joined cases 399 and 401/10 *Bouygues and Bouygues Telecom v Commission* EU:C:2013:175.

⁵⁴ Case 39/94 *SFEI and Others* EU:C:1996:285, para 60; 267-279/08 *Region Nord-Pas-de-Calais v Commission* EU:T:2011:209, para 158.

⁵⁵ Bacon (n 7) 33.

⁵⁶ For broader discussion about different considerations, functions and aims between private investor and private creditor test see Bacon (n 7) 39-47.

⁵⁷ Case 196/04 *Ryanair v Commission* EU:T:2008:585, paras 84-5.

vations for investment should not be mixed and when the State acts as a public authority the private investor and private creditor test should not be applied.

Lastly, when the aid is given solely to an individual undertaking it is obviously selective, but this criterion serves in occasions when measure applies more broadly to multiple undertakings,⁵⁸ 'to distinguish those schemes that are regarded as State aid from measures whose differential impact is not caught by Article 107(1)'.⁵⁹ Even if the measure concerns a whole economic sector, like it was in the *Unicredito Italiano* case with the Italian banking sector, it could be selective in relation to other economic sectors.⁶⁰

In the *Adria-Wien Pipeline* judgement the Court stated that the test for selectivity consists of three steps: after identifying the objective of a certain measure a comparison between undertakings in a comparable legal and factual situation needs to be undertaken to see if the undertaking in question has been subject to differential treatment, and final step is to ascertain whether the measure is justified by the nature or general logic of the system.⁶¹ Some of the most common examples of justified measures are progressive rate of income or profit taxation, on the ground of redistributive aim pursued by the tax system,⁶² or lighter administrative and regulatory requirements on micro, small and medium-sized enterprises.⁶³

2.3. Distortion of competition

'Where State aid exists competition within the common market will inevitably be different from what it would have been had market forces remained the decisive factor.'⁶⁴ As explained in Article 107(1), when the aid distorts or threatens to distort competition, by that affecting trade between Member States, it will be incompatible with the internal market. The condition of distorting competition will be presented in this subchapter, and the condition of affecting trade in the following subchapter.

The basic way to detect a distortion of competition is to examine whether the aid strengthens the position of an undertaking in relation to its competitors in intra-community trade.⁶⁵ However, in order to establish that, it is not obligatory to do the evaluation of the position of the undertaking's competitors, nor is it necessary to establish existence of competing undertakings in the Member State in question, given that the measure may affect undertakings established in other States as well.⁶⁶ In addition to that, no actual effects or proof of distortion have to be presented, since it is sufficient to show that the

⁵⁸ The Court has emphasized on multiple occasions that State aid may exist regardless of the high number of benefiting undertakings, or the diversity, size or importance of the sectors to which those undertakings belong. Similarly, aid may concern a whole economic sector and still be covered by Article 107(1) of the Treaty. See 75/97 *Maribel bis/ter* EU:C:1999:311, para 32; 172/03 *Heiser* EU:C:2005:130, para 42.

⁵⁹ Bacon (n 7) 70.

⁶⁰ Case 66/02 *Italy v Commission* EU:C:2005:768, paras 95-98; 148/04 *Unicredito Italiano* EU:C:2005:774, paras 45-49.

⁶¹ Andrea Biondi, *State Aid Is Falling Down, Falling Down: An Analysis Of The Case-law On The Notion Of Aid*, 50 Common Market Law Review 1719.

⁶² Joined cases 92 and 103/00 *Territorio Historico de Alva v Commission* EU:T:2002:61, para 60.

⁶³ 'The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding 50 million euro, and/or an annual balance sheet total not exceeding 43 million euro.' Extract of Article 2 of the Annex of Recommendation 2003/361/EC. See Case 200/97 *Ecotrade* EU:C:1998:579, Opinion of AG Fennelly Opinion para 26.

⁶⁴ Hancher, Ottervanger, Slot (n 18) 36.

⁶⁵ Case 730/79 *Philip Morris v Commission* EU:C:1980:209, para 11.

⁶⁶ Case 72-73/91 *Sloman Neptun* EU:C:1992:130, Opinion of AG Darmon, Opinion para 61.

measure threatens to distort competition.⁶⁷ But, 'even if in certain cases the very circumstances in which aid is granted are sufficient (...) the Commission must at least set out those circumstances in the statement of reasons for its decision,'⁶⁸ or it risks annulment of its decision.

2.4. An effect on trade between member states

When a measure strengthens the position of an undertaking in relation to its competitors in intra-EU trade, it will affect trade between Member States. This condition will most probably be met where the undertaking is carrying on a cross-border activity,⁶⁹ where the sector affected is characterized by a substantial level of trade between States or where the sector has been liberalized at EU level (financial services, energy...)⁷⁰ But, even if the beneficiary undertaking is not involved in exporting its products or services, inter-State trade may still be affected, because domestic production may be maintained or increased thanks to aid granted, with the effect that the undertakings established in other Member States have less chance of exporting their products to the markets in the Member State granting the aid.⁷¹ Since the assessment of potential effects on trade is made on a *priori* characteristics of a measure, without the obligation to provide actual proof of effects, even if there is no actual trade between States at the time when the aid is granted, it is relevant to consider the foreseeable developments in EU trade.⁷²

After considerable struggle with the Court which insisted that even small amount of aid can distort competition and affect trade,⁷³ to increase transparency and legal certainty, the Commission has established thresholds up to which it believes that aid will not affect trade or competition. Commission adopted series of *de minimis* Regulations for different sectors, and under the general *de minimis* Regulation,⁷⁴ aid not exceeding a ceiling of EUR 200,000 (EUR 100,000 for undertakings active in the road transport sector) is deemed not to affect trade between Member States.⁷⁵

⁶⁷ Case 301/87 *France v Commission* EU:C:1990:67, para 33 ; This is important because of the Article 108 (3) TFEU saying that 'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.' The analysis of the effects on competition and trade must be made on a *priori* characteristics of the aid, irrelevant of the actual little competitive effect of a measure introduced in breach of States obligation to notify it. Saved otherwise, Member States who would comply with their obligation would be in worse position, which is of course unacceptable; See Bacon (n 7) 82-3, case 204 and 270/97 *EPAC v Commission* EU:T:2000:148, para 85.

⁶⁸ Joined cases 296 and 318/82 *Kingdom of the Netherlands and Leeuwarder Papierwarenfabriek BV v Commission* EU:C:1985:113, para 24.

⁶⁹ Decision in case SA.33952 (2012/NN) – *Germany, Climbing centres of Deutscher Alpenverein*, para 62; 256/97 *aDMT* EU:C:1999:332, para 29.

⁷⁰ Case 66/02 *Italy v Commission* EU:C:2005:768, para 119.

⁷¹ Case 102/87 *France v Commission* EU:C:1988:391, para 19; 280/00 *Altmark* EU:C:2003:415, paras 77-8.

⁷² Joined cases 447 and 449/93 *AITEC v Commission* EU:T:1995:130, para 139.

⁷³ Case 142/87 *Belgium v Commission* EU:C:1990:125, para 43.

⁷⁴ Last one replacing the preceding ones is Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid Text with EEA relevance [2013] OJ L 352/1.

⁷⁵ European Union: European Commission, Commission Staff Working Document: Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, 29 April 2013, SWD (2013) 53, available <http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf> accessed 15 March 2015.

In contrast, measures designed to fund local services have been deemed not likely to affect trade – annual subsidies for maintaining local swimming pools,⁷⁶ funding small local museums,⁷⁷ allowances aiming at the creation of facilities for relatively small local public hospitals...⁷⁸

It is worth to mention that even if all of the conditions for State aid are cumulatively fulfilled, it can still be compatible with the internal market if it falls within the scope of Article 107(2) and 107(3) TFEU.⁷⁹ In that case, such an aid is legal and allowed under EU law.

3. Overview of public procurements

Public procurement as process where a MS buys a big number of goods, works and services can be a potential means of giving illegal State aid, as is evident in a number of cases.⁸⁰ So when there is an infringement of public procurement rules, the problem could be even bigger, and that is the fact that not only there is an infringement of public procurement rules, but that there also might be an infringement of EU State aid rules. Such a possibility is an additional reason why the authors stress out the need of having knowledge of public procurement rules and its respect.

In this chapter, the principles of procurement that are governing the regulation through General and Utilities Directive will be mentioned. Then, the thresholds above which the directives are applicable on public contracts will be set out, following with the explanation of the notion of a contracting authority on one side and an economic operator on the other side. Basics of each of the public procurement procedures will be clarified, and at the end of the chapter there will be an elaboration of the specifications and the requirements that the contracting authorities are putting in different stages of the procurement procedure to define subject-matter of the contract.

3.1. Principles of public procurement

The main obligation of contracting authorities is to treat economic operators equally and without discrimination, acting in a transparent and proportionate manner. The design of the procurement cannot be made with the intention of excluding it from the scope of

⁷⁶ Commission Decision in case N258/2000 – Germany – *Leisure Pool Dorsten* [2001] OJ C172/16.

⁷⁷ Commission Decision in Case N630/2003 – Italy – *Local museums - Sardinia* [2005] OJ C27/3.

⁷⁸ Commission Decision in case N543/2001 – Ireland – *Capital allowances for hospitals* [2002] OJ C154/4.

⁷⁹ Art 107(2) TFEU The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point. Art 107(3) TFEU The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

⁸⁰ For instance see: Case 280/00 *Altmark* EU:C:2003:415.

General Directive or with the intention of artificially narrowing competition.⁸¹ Whilst more importance is given to social and environmental considerations, it is also stated that the Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions.⁸²

Contracts under certain financial thresholds are not captured by the Directive, so for them the general provisions of the TFEU are important, in particular the free movement of goods (Article 34), freedom of establishment (Article 49) and the freedom to provide services (Article 56), as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.⁸³

3.2. Thresholds

Scope of the 2014/24 Directive is limited to the contracts whose estimated value is equal or above specified financial thresholds. There are two reasons why the Directives are not applicable if the value of the contract falls below them. First, because of the inevitable cost in applying formal tendering procedures, their application is justified only where the benefits are likely to be bigger than these costs, because of that there are different thresholds for different contracts such as a public works contracts, public supply and service contracts, *etc*; second, the thresholds identify contracts for which there is likely to be competition from firms operating across borders.⁸⁴

Thresholds determined in Article 4 of the 2014/24 Directive are as follows:

- (a) EUR 5 186 000 for public works contracts;
- (b) EUR 134 000 for public supply and service contracts awarded by central government authorities and design contests⁸⁵ organised by such authorities;
- (c) EUR 207 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities;
- (d) EUR 750 000 for public service contracts for social and other specific services.

3.3. Contracting authorities and economic operators

The aim of the definition of contracting authority from the 2014/24 Directive is to capture all entities that are at risk of giving preference to national tenderers or applicants,⁸⁶

⁸¹ 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, Article 18 (1) of the 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 Text with EEA relevance 2014 OJ L94/65 (hereinafter: Directive 2014/24/EU).

⁸² Article 18 (2) of the Directive 2014/24/EU

⁸³ For broad discussion about general provisions of the TFEU including those concerned with State aid, undertakings with granted special rights and provisions prohibiting anti-competitive practices and a dominant market position, see Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, vol1 (3rd edn, Sweet & Maxwell, 2014) paras 4-05 - 4-119.

⁸⁴ Joined cases 147 and 148/06 *SECAP and Santoroso v Comuni di Torino* EU:C:2007:711 Opinion of AG Ruiz-Jarabo Colomer, para 23; Arrowsmith (n 69) paras 6-85.; see more for the significance of the threshold values: Simon Evers, Hjelmborg; Peter Stig jakobsen; Sune Troels, Poulsen, *Public Procurement Law - the EU directive on public contracts*, (1st edn, DJOF Publishing 2006) 137.

⁸⁵ "Design contests' are those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering (...) a plan or design selected by a jury after being put out to competition with or without the award of prizes', paragraph 21 of the Recital on the Directive 2014/24/EU

⁸⁶ Case 44/96 *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH* EU:C:1998:4, para 33; see more for the notion of the contracting authority: Christopher, Bovis, *EU Public Procurement Law*,

because of the possibility that they might be guided with considerations other than economic ones. But these entities, although not formally part of the State, manipulate with public funds in pursuit of public interest, so it is necessary to ensure that they are acting as much as possible along the 'value-for-money' principle.

There are three groups of entities mentioned in the Directive. The first are more traditional state entities, namely the State, regional and local authorities. The second group is widely designed to cover all entities which have some dependency on the State, named as 'bodies governed by public law'. The latter ones need to have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have a legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.⁸⁷

The third and final group consists of associations formed by one or more such authorities or one or more such bodies governed by public law.⁸⁸

On the other side of the procurement process, there are economic operators. They offer the execution of works, the supply of products or the provision of services on the market, and can be any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings.⁸⁹ They cannot be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate in case of the 'closed' procedure. But, contracting authorities may require groups of economic operators to assume a specific legal form once they have been awarded the contract, to the extent that such a change is necessary for the satisfactory performance of the contract.⁹⁰ Also, contracting authorities can impose certain criteria as requirements for participation, inasmuch as they are related and proportionate to the subject-matter of the contract. They are called criteria for qualitative selection and will be explained in the following subchapters.

3.4. Types of procedures

Contracting authorities must award public contracts by applying the national procedures that are in conformity with the Directive.⁹¹ There are few types of procedures available in the Directive.

The 'basic' ones are open and restricted procedure. In open procedures, 'any interested economic operator may submit a tender in response to a call for competition'⁹², and in the case of restricted procedures 'any economic operator may submit a request to participate (...) and only those economic operators invited to do so by the contracting author-

(2nd edn, Edward Elgar 2012) 286-333.

⁸⁷ Article 2 (4) of the Directive 2014/24/EU, the Court in the case 373/00 *Adolf Truley GmbH v Bestattung Wien GmbH* EU:C:2003:110 stated that 'Given the double objective of introducing competition and transparency, the concept of a body governed by public law must be interpreted as having a broad meaning.' para 43.

⁸⁸ Article 2 (1) of the Directive 2014/24/EU

⁸⁹ Article 2 (10) of the Directive 2014/24/EU

⁹⁰ Article 19 of the Directive 2014/24/EU

⁹¹ Article 26 (1) of the Directive 2014/24/EU

⁹² Article 27 of the Directive 2014/24/EU

ity following its assessment of the information provided may submit a tender.⁹³ According to Sue Arrowsmith, provisions of the aforementioned new Directive from 2014 need to be interpreted in a way that Member States cannot make any restrictions on when the two of these procedures (including other types of restricted procedure as well but with exclusion of the negotiated procedure without prior publication) are going to be available within national systems, for example limiting some to certain procuring entities, or to existence of certain circumstances.⁹⁴

Two other types that can be applied in limited number of situations are a competitive procedure with negotiation and a competitive dialogue. In a competitive procedure with negotiation, similar to restricted procedures, any economic operator may submit a request to participate in response to a call for competition, in which contracting authorities shall, *inter alia*, indicate minimum requirements to be met by all tenders. Likewise, only those economic operators invited by the contracting authority may submit an initial tender, and this is the difference from the restricted procedure, the basis for the subsequent negotiations to improve its content.⁹⁵ Slightly different, in the competitive dialogue, economic operators who have been invited after submitting their requirements to participate enter into a dialogue with the contracting authorities with the aim to identify and define the means best suited for satisfying their needs. They can discuss all aspects of the procurement during this dialogue.⁹⁶ These types of procedures can be chosen on limited grounds, for example, such as the one when the prior negotiations are crucial because of specific circumstances related to the nature, the complexity or the legal and financial make-up of the contract, or when the contracting authority cannot establish technical specifications with a sufficient precision.⁹⁷ Further details of a competitive procedure with negotiations and a competitive dialogue, as well as the risks of wider availability of these procedures due to the 2014/24 Directive, shall be discussed in the third part of this thesis.

The novelty of the above-mentioned new Directive from 2014 is an innovation partnership as a procedure possibility. When the contracting authority identifies that it cannot satisfy its needs with any of the existing solutions available at the market, it will set up innovative partnership with the aim to develop an innovative product, service or work and subsequently purchase the result. Submitting a request to participate is open to everyone, but only those economic operators invited by the contracting authority may submit research and innovation projects which will be further negotiated.⁹⁸ Possible traps hidden in innovative partnership, as a kind of public-private partnership and yet another possibility of restricted procedure, will also be examined in the third part of this thesis.

There is another type of a negotiated procedure, apart from the competitive procedure with negotiations. In a negotiated procedure without prior publication of a contract notice, contracting authorities do not have to advertise upcoming procurement process or hold any form of competition whatsoever, but may contact one (or more) providers. Naturally, because of that this procedure is permitted only in specific cases and circumstances, such as in cases of extreme urgency brought by unforeseeable events, further contracts with an existing provider, or where there is only one possible provider as in the case if the aim of the procurement is the creation or acquisition of a unique work of art.⁹⁹ As men-

⁹³ Article 28 (1) and (2) of the Directive 2014/24/EU

⁹⁴ See Arrowsmith (n 69) paras 7-07, 10-05.

⁹⁵ Article 29 of the Directive 2014/24/EU

⁹⁶ Article 30 of the Directive 2014/24/EU

⁹⁷ Article 26 (4) of the Directive 2014/24/EU

⁹⁸ Article 31 of the Directive 2014/24/EU

⁹⁹ The grounds for its use differ for works, services and supply contracts. For work, services and supply contracts grounds are a) only one possible provider; b) extreme urgency; c) further contracts with an existing provider; d)

tioned at the beginning of this chapter, availability of this procedure, due to the wording of the Directive, differs from all of the other ones. Instead of using formulation as for the other types of procedures ‘Member States *shall* provide that contracting authorities may apply’, which has to be interpreted in a way that Member States cannot restrict usage of these procedures to certain situations or to certain entities, by saying ‘Member States *may* provide that contracting authorities may apply’ the Directive indicates that the State may decline availability of a procedure altogether or make it available only in certain circumstances or to certain entities.

3.5. Requirements of the contracting authority

In the last part of the overview of the basic public procurement rules, requirements set by the contracting authorities who determine the subject-matter of the contract and other requirements leading to the award of the procurement contract will be clarified. In more details they will be scrutinized in the third part of this thesis, examining how versatile they can be in acquiring aims ‘added’ to the procured work, service or supply in question, such as environmental or social aims, and how far they can go to maintain a link to the subject-matter.

Technical specifications are the ones which lay down ‘the characteristics of a public works contract, service or supply,’¹⁰⁰ in that way depicting the subject-matter of the contract and outlining the needs of a contracting authority. They can be set by referring to performance or functional requirements or by reference to technical specifications and various national, European and international standards.¹⁰¹

Parallel set of ‘introductory’ requirements, this time aimed at economic operators, is called criterion for qualitative selection. A criterion for qualitative selection has two possibilities: a) it defines exclusion grounds and b) it is a selection criterion regarding economic and technical ability as requirements for participation. Exclusion of an economic operator from participation in a procurement procedure may be automatic as in the cases of participation in a criminal organisation, corruption or fraud,¹⁰² or subject to potential exclusion on request of the contracting authority or a Member State in case of bankruptcy, insolvency or grave professional misconduct.¹⁰³ On the other hand, the requirements for participation need to ensure ‘that a candidate or tenderer has legal and financial capacities and the technical and professional abilities to perform the contract.’¹⁰⁴

The first ‘competitive’ set of requirements is an array of award criteria. The base of the award criteria is the most economically advantageous tender. It is defined by various criteria each of which has different relative weighting, such as quality, aesthetic and functional characteristics, accessibility, social, environmental and innovative characteristics, qualification and experience of staff assigned to performing the determined contract, *etc.* Taken all that in consideration, the most economically advantageous tender is determined using a cost-effectiveness approach.¹⁰⁵

failure of prior open/restricted procedure. For supply contracts grounds are a) contracts for research, experimentation, study or development; b) commodity purchases; c) purchases on advantageous terms. For services contracts exclusively ground is prior design contest, Article 32 of the Directive 2014/24/EU

¹⁰⁰ Article 42 (1) of the Directive 2014/24/EU

¹⁰¹ Article 42 (3) of the Directive 2014/24/EU; see more for procedural requirements: Peter Trepte, *Public Procurement in the EU: A Practitioners’s Guide*, (2nd edn, OUP 2007) 481-529.

¹⁰² For full and detailed list see Article 57 of the Directive 2014/24/EU

¹⁰³ For a full and detailed list see Article 57 of the Directive 2014/24/EU

¹⁰⁴ Article 58 of the Directive 2014/24/EU

¹⁰⁵ Article 67 of the Directive 2014/24/EU; see more on the award procedures and criteria: Christopher Bovis, *EC Public Procurement: Case Law and Regulation* (1st edn, OUP 2006) 417-430.

The final and additional requirements that may be laid down by a contracting authority are 'special conditions relating to the performance of a contract.'¹⁰⁶ They need to be linked to the subject-matter and addressed in the call for competition or in the procurement documents.¹⁰⁷ Those conditions comprise economic, social, employment-related, environmental or innovation-related considerations.

4. Conclusion

The authors' goal with this paper was to give insight into the complex world of European Union's State aid and public procurement rules because State aid and public procurement are being more and more used for EU's ecological, social and economical goals. In conclusion, with an ever-growing usage of such procedures the authors believe that MSs need to be prudent in order not to violate the valuable rules of State aid and public procurement. Otherwise, if MSs would disregard the EU legal system of State aid and public procurement and take the logic of Niccolò Machiavelli and say that '*the goal justifies the means*',¹⁰⁸ such an approach might be useful for broader EU's goals, but, unfortunately, such logic would be flawed because the means are not justified.

¹⁰⁶ Article 70 of the Directive 2014/24/EU

¹⁰⁷ 'Procurement document' means any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure (...), technical specifications (...), information on generally applicable obligations and any additional documents', paragraph 13 of the Recital on the Directive 2014/24/EU

¹⁰⁸ Niccolò Machiavelli, *The Prince* (Bantam Dell, New York 1996) 122.

Pravila EU o državnim potporama i javnoj nabavi

Cilj autora ovog rada jest približiti kompleksni svijet pravila Europske unije na temu državnih potpora i javne nabave koja imaju rastuću važnost u europskom javnom pravu, u EU, kao i u Republici Hrvatskoj. U radu će se prvo obrazložiti četiri kumulativna uvjeta koja se moraju ispuniti kako bi se određena mjera smatrala nelegalnom državnom potporom. Nakon toga, autori će prezentirati najvažnija pravila, kriterije i uvjete procedure javne nabave. U razradi teme autori će obuhvatiti pravila EU na temu državnih potpora i javne nabave iz perspektive: a) primarnog zakonodavstva EU, tj., Ugovora EU; b) sekundarnog zakonodavstva; c) sudske prakse Suda pravde Europske unije; d) dokumenata Europske komisije i e) trenutačne akademske rasprave na tu temu. Nadalje, autori će izlagati vlastita mišljenja i stavove u odnosu na relevantna pravila i specifičnosti državnih potpora i javne nabave u EU.

Ključne riječi: državne potpore, javna nabava, državni resursi, pragovi, ograničeni postupci.