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**THE QUESTION OF UNLAWFUL STATE AID IN AWARDING A
CONTRACT IN THE NEGOTIATED PROCEDURE WITHOUT
PRIOR PUBLICATION TO CONTRACT SERVICES**

Bachelor Thesis

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Tallinn 2017

I hereby declare that I am the sole author
of this Bachelor Thesis and it has
not been presented to any other
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“ “ 2017

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“ “ 2017

Accepted for examination “ “ 2017

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Abbreviations

CJEU - Court of Justice of the European Union

ECJ - European Court of Justice

TFEU - Treaty on the Functioning of the European Union

Introduction

“Already in 1956, the authors of the Spaak Report¹, which prepared the ground for the 1957 EEC Treaty, saw the need to control the extent to which the individual member states of the future European Community would be able to financially support their firms.”¹ “The authors of the Spaak Report saw State aid control as an integral part of the European Union competition policy and a natural companion to the rules governing the internal market.”² Aforementioned exemplifies, how important are rules which govern internal market in order to ensure fair competition. Rules of State aid are vested in Articles 107-109 in the Treaty on the Functioning of the European Union³ (hereinafter TFEU). “There are four conditions before something is classified as aid under Article 107. These are cumulative: all must be fulfilled before the Member State’s measure is caught by Article 107.”⁴

According to a report prepared by the Estonian Ministry of Finance, in 2015 (in the classical sector) negotiated procedure without prior publication was used in 443 occasions, the total amount of 137,510,076 euros.⁵ Remarkable is the fact that aforementioned public resource (which was in 2015 12% of GDP) has been used in rather restrictive proceedings.⁶ The abovementioned raises the question whether the use of a negotiated procurement procedure without prior publication – regardless, if such procedures are in accordance with Directive on public procurement and repealing Directive 2004/18/EC⁷ (hereinafter Directive 2014/24/EU) and Member State legislation – prevents the application of the State aid rules and is considered compatible with internal market.

European Court of Justice (hereinafter ECJ) has stated that the application of one Treaty provision does not certainly rule out the application of another Treaty provision to the same

¹ Vedouden, V. EU State Aid Control: The Quest for Effectiveness. *European State Aid Law Quarterly* 2015, 14 (4), p 495.

² *Ibid.*

³ Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012.

⁴ Craig, P., Grainn, P. *EU Text, Cases and Materials*, Fifth Edition. Oxford, Oxford University Press 2011, p 1088.

⁵ Ministry of Finance. Public Procurement overview (policy making, consultancy and training activities, public and administrative supervision, the public procurement register and statistical overview) 2016.

www.riigihanked.riik.ee/lr1/c/document_library/get_file?p_l_id=216043&folderId=518320&name=DLFE-36902.pdf (05.03.2017), p 82.

⁶ *Ibid.*

⁷ OJ L 94, 28.3.2014.

measure.⁸ Aforementioned indicates that conducting procurement procedures in accordance with legislation in force, does not rule out application of Treaty provisions on governing State aid. The relationship between State aid regulation and public procurement regulation has lately been elaborated in the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union.⁹ The latter states that “if the sale and purchase of assets, goods and services (or other comparable transactions) are carried out following a competitive, transparent, non-discriminatory and unconditional tender procedure, it can be presumed that those transactions are in line with market conditions.”¹⁰ Regardless of aforementioned clarification, Commission emphasises that in fact, “if a Member State decides to provide support, for public policy reasons, to a certain activity and tenders out, for example, the amount of funding provided – in such a situation a tender can only minimise the amount granted but cannot exclude an advantage.”¹¹ Hence, it is apparent that conducting the public procurement procedure does not always preclude granting unlawful state aid.

Granting an advantage criterion was conceptualised by the ECJ in *Altmark*¹² judgement, which in turn spurred the discussion of public procurement procedures role in State aid law. “However, in public procurement law there has not been a similar place for discussion of State aid law implications. It seems from the Directive 2014/24/EU on public procurement like the legislator had sense of immunity to state aid law.”¹³ “The lack of clarity concerning the interaction creates legal uncertainty regarding the relationship between State aid law and public procurement law.”¹⁴ Considerable time has elapsed since the *Altmark* judgement, and four criteria laid down by the ECJ have been operative. However, the fact, that criteria in question contains a number of vague phrases, has in practice had the effect of preventing the ruling from increasing the level of legal certainty.¹⁵ From aforementioned derives the purpose of given thesis – to determine whether conducting tender procedure to contract services (on the example of the negotiated procedure without prior publication) in accordance with the Directive 2014/24/EU, may constitute unlawful State aid. **The hypothesis of given thesis is that in certain cases awarding**

⁸ ECJ 22.03.1977, C-74/76, *Ianelli*, p 9.

⁹ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016/C 262/01.

¹⁰ *Ibid*, p 89.

¹¹ *Ibid*.

¹² ECJ 24.07.2003, C-280/00, *Altmark*.

¹³ Olykke, G.S. The Notice on the Notion of State Aid and Public Procurement Law. *European State Aid Law Quarterly* 2016, 15 (4), p 509.

¹⁴ *Ibid*.

¹⁵ Renzulli, A. Services of General Economic Interest: The Post-Altmark Scenario. *European Public Law* 2008, 14 (3), p 404.

a contract in the negotiated procedure without prior publication may constitute State aid within the meaning of the Article 107(1) of TFEU.

According to the Directive 2014/24/EU, the negotiated procurement procedure without prior publication may be used in rather limited circumstances.¹⁶ Regardless of that, the author of given thesis deems necessary to emphasise that aforementioned does not preclude the risk of granting unlawful State aid while conducting a negotiated procedure without prior publication – irrespective whether the procurement procedure is conducted in accordance with the Directive 2014/24/EU and the Member State legislation.

Given thesis focuses on the analysis of the negotiated procedure without prior publication which is regulated by Directive 2014/24/EU. In order to find out whether the aforementioned procurement procedure involves granting unlawful State aid, the author analyses interaction between public procurement regulations and State aid rules, and whether and when granting an unlawful State aid criteria are met. Based on the abovementioned, given thesis is structured as follows: In first chapter, the author gives an overview of legal framework of the public procurement and State aid in the European Union and Member State level, and how State aid rules interact with public procurement regulations. In the second chapter, the author analyses whether the use of negotiated procurement procedure without prior publication constitutes granting unlawful State aid. The third chapter of given thesis provides an overview of whether the existing regulations in the European Union and Member State level (on the example of Estonia) need further legal certainty on interaction between public procurement regulations and State aid rules.

In order to provide answer to posed research questions and make subsequent conclusions, the author uses qualitative (exploratory) research methodology, including: analysis and comparison of academic articles, scrutinizing European Union and Member State (on the example of Estonia) legislation. The thesis focuses mainly on the relevant case law of Court of Justice of the European Union (hereinafter CJEU) and on academic articles on public procurement regulations and state aid rules. To a lesser extent, the author relies on the Commission decisions and guidelines.

¹⁶ 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. OJ L 94, 28.3.2014, recital 50.

1. Legal framework of State aid and public procurement and interaction

1.1. Legal framework of public procurements

One of the main goals of the European Union is to develop a single market. According to the Directive 2014/24/EU recital 1 “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, 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”¹⁷ – named principles are provided in § 3 of Public Procurement Act¹⁸ (§ 3 in draft act) in force.

“Designing public procurement regulations, the legislator decided not to be too intrusive in the Member States legal system and used Directive as a legal instrument,”¹⁹ thereby allowing Member States to transpose the directives into national legislation more flexible, taking into account the specific needs of every Member State. The legal basis of public procurement is regulated by Directive 2014/24/EU, Directive 2014/23/EU²⁰ on the award of concession contracts and by Directive 2014/25/EU²¹ on procurement by entities operating in the water, energy, transport and postal services sectors. Use of the negotiated procedure without prior publication is regulated by Directive 2014/24/EU. All three aforementioned directives will be transposed into Estonian national legislation with Public Procurement Act.

Negotiated procurement procedure without prior publication is governed by Article 32 of the Directive 2014/24/EU. According to aforementioned article, the use of negotiated procedure without prior publication in order to contract services is permissible in limited circumstances. In Estonian legislation the negotiated procurement procedure without prior publication is governed by the Public Procurement Act § 28 (in draft act § 49).

¹⁷ European Parliament, Council of the European Union, *supra* nota 16, recital 1.

¹⁸ Public Procurement Act, RT I, 25.10.2016, 20.

¹⁹ Firlor, M., Lager, F. Public Procurement Issues in the European Union. *European Business Law Review* 2010, 21 (3), p 399.

²⁰ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. OJ L 94, 28.3.2014.

²¹ 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. OJ L 94, 28.3.2014.

1.2. Legal framework of State Aid

“State aid law as a part of the European competition law is intended to contribute to the fulfilment of the internal market, namely the four freedoms.”²² The rules of State Aid are vested in Articles 107-109 of the TFEU. According to Article 107(1) of the TFEU lays down the following:

“if not 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.”²³

In addition to the above, the concept of State aid has been defined in the CJEU case law as follows: “First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition”²⁴ Aforementioned criteria are cumulative, which means that assessed measure has to meet all abovementioned criteria.

1.2.1. Intervention by the State or through State resources

State aid rules apply only to measures that are granted directly or indirectly through State resources.²⁵ In order to assess whether the measure, in accordance with the TFEU, is incompatible with the internal market – it has to be examined whether measure granted derives from State resources. The concept of "public funds" includes all public funds such as, resources of intra state entities (decentralised, federated, regional or other),²⁶ and in some cases resources of private entities.²⁷ Insofar as the given thesis analyses the possibility of granting unlawful state aid while conducting the negotiated procedure without prior publication to contract services –

²² Staviczky, P. Cumulation of State Aid. *European State Aid Law Quarterly* 2015, 2015 (1), p117.

²³ The Member States, *supra* nota 3, article 107(1).

²⁴ ECJ 24.07.2003, C-280/00, *Altmark*, p 75.

²⁵ ECJ 13.03.2001, C-379/98, *Preussen Elektra*, p 58.

²⁶ ECJ 14.10.1987, C-248/84, *German v Commission*, p 17.

²⁷ ECJ 02.07.1974, C-173/73, *Italy v Commission*, p 16; ECJ 17.07.2008, C-206/06, *Essent Netwerk Noord and Others*, p 58–74.

measures that are granted directly or indirectly through State resources, could merely be financial aid.

Persons who are obliged to follow the procedure provided in Public Procurement Act and therefore directives (Contracting Authorities) are listed in Public Procurement Act § 10 (in draft act § 5). According to the explanatory memorandum of Public Procurement draft act, “contracting authorities are: state, local government, any other public legal persons and institutions, and foundations, companies and non-profit association established or controlled by previously mentioned persons.”²⁸ Defining local governments, public legal persons and government agencies as Contracting Authorities is unambiguous – for example § 39(1) of Government of Republic Act²⁹ states that governmental authorities are financed from the state budget. Furthermore, Government of Republic Act § 39(3) lists as governmental authorities: ministries, the Estonian Defence Forces, the Government Office and county governments as well as executive agencies and inspectorates and their local authorities with authority to exercise executive power.

According to the explanatory memorandum of Public Procurement draft act prerequisite for defining other private legal persons as contracting authorities is funding from the state, local governments or public legal persons or institutions and public interest in persons activities.³⁰ Foregoing is supported by ECJ case law. ECJ has stated in *University of Cambridge*³¹ that rather, it is analogous to the dependency that exists in normal commercial relationships formed by reciprocal contracts freely negotiated between the contracting parties and therefore do not fall within the concept of public financing. In *Bayerischer Rundfunk and Others*³² ECJ ruled that financing which is brought into being by a measure of the State, is guaranteed by the State and is secured by methods of charging and collection which fall within public authority powers, satisfies the condition of financing by the State for the purposes of application of the Community rules on the awarding of public contracts. It can be concluded from abovementioned case law that if the charitable organizations at the disposal of those funds were paid out without a specific

²⁸ Karindi-Kask, E., Sõrm, M., Kaarna, K., Antonov, M., Mesilane, K. Explanatory memorandum of Public Procurement Draft Act. www.riigikogu.ee/tegevus/eelnoud/eelnou/ecbd5b61-734c-41b1-bff5-a54f285bce53/Riigihangete%20seadus/ (05.03.2017), p 25.

²⁹ Government of the Republic Act, RT I, 22.06.2016, 31.

³⁰ Karindi-Kask, Sõrm, Kaarna, Antonov, Mesilane, *supra* nota 27, p 25.

³¹ ECJ 03.10.200, C-380/98, *University of Cambridge*, p 25.

³² ECJ 13.12.2007, C-337/06, *Bayerischer Rundfunk and Others*, p 48.

contract in return, criterion of financed by the state is fulfilled, therefore such organizations should follow the procedure provided in Directive 2014/24/EU.

Based on the above, and given the fact that a person has identified itself as contracting authority it can be concluded, that award of public contract based on a previously conducted public procurement procedures is almost exclusively considered as measure that is granted directly or indirectly through State resources.

1.2.2. Granting an advantage

A public measure constitutes State aid when it satisfies all of the criteria in Article 107(1) of TFEU. “One of these criteria is the conferment of an advantage to one or more undertakings. Advantage means a benefit that could not have been obtained under normal market conditions or in the absence of the intervention by the aid granting authority.”³³ “Article 107(1) of TFEU applies to aid in any form and the concept of aid is rather wide. It includes any advantage of a monetary nature conferred by the State, or State resources that would not have otherwise been enjoyed by the recipient. Named advantages encompass not only grants actually given by the State, but also anything owed to the State, which latter fails to collect or receive (such as taxes, social security payments etc.).”³⁴

ECJ has stated that “in order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage, which it would not have obtained under normal market conditions.”³⁵ In order to assess whether the recipient undertaking receives an advantage the CJEU have developed the market economy investor principle “to assess whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question. To assess whether the same measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as shareholder – to the exclusion of those linked to its situation as public authority – are to be taken into account.”³⁶ To determine

³³ Nicolaidis, P. The Concept of Advantage in State Aid and Public Procurement and the Application of Public Procurement Rules to Minimise Advantage in the New GBER. *European State Aid Law Quarterly* 2015, p 143.

³⁴ *Ibid*, p 144

³⁵ ECJ 11.07.1996, C-39/94, *SFEI and Others*, p 60.

³⁶ ECJ 05.06.2012, C-124/10, *Commission v EDF*, p 79.

whether the private investor would make an equivalent transaction State must be set in private investor position.

1.2.3. The selective nature of the measure

For a measure to constitute State aid it must be selective – therefore the measure must favour certain undertakings and/or the production of certain goods.³⁷ “The distinction between general and selective measures is paramount in European Union State aid law, since measures that are deemed generally applicable are not selective and, thus, do not constitute State aid.”³⁸ If measure is not generally applicable, it can be either materially or regionally selective.³⁹

It might seem that assessing whether measure is selective or general in its nature is rather straightforward; however *CETM vs Commission*⁴⁰ exemplifies how unclear the boundaries can be between selective and general measures. It follows from given ruling that a measure which at first sight does not distinguish between undertakings and is intended to an indefinite number of beneficiaries, can still be caught by the State aid prohibition.⁴¹ “Although in ECJ case law we can find many examples of measures finally considered as selective, it appears to be very difficult to find any measures directly named by the Court as general and for that reason being outside the scope of Article 107(1) TFEU.”⁴² However, evaluation whether award of a contract is in negotiated procedure without prior publication is general or selective measure should not be difficult, since contract is awarded to one person in very restrictive procedures.

In order to assess whether a measure is selective, comparison must be conducted between undertakings to which a particular measure applies and the rest of undertakings subject to the

³⁷ Nicolaidis, P., Rusu, I. E. The Concept of Selectivity: An Ever Wider Scope. *European State Aid Law Quarterly* 2012, 2012 (4), p 791.

³⁸ Romariz, C. Revisiting Material Selectivity in EU State Aid Law – Or „The Ghost of Yet-To-Come“. *European State Aid Law Quarterly* 2014, 2014 (1), p 40.

³⁹ Kurcz, B. Vallindas, D. Can General Measure Be Selective? Some Thoughts on the Interpretation of a State Aid Definition. *Common Market Law Review* 2008, 45 (1), p 161.

⁴⁰ The General Court 29.09.2000, T- 55/99, *CETM v Commission*.

⁴¹ Romariz, C. Revisiting Material Selectivity in EU State Aid Law – Or „The Ghost of Yet-To-Come“. *European State Aid Law Quarterly* 2014, 2014 (1), p 41.

⁴² Kurcz, B. Vallindas, D. Can General Measure Be Selective? Some Thoughts on the Interpretation of a State Aid Definition. *Common Market Law Review* 2008, 45 (1), p 160.

same reference framework.⁴³ Commission Notice on the notion of State aid states “that the reference system is composed of a consistent set of rules that generally apply – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective. Typically, those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subjected to it and the technicalities of the functioning of the system.”⁴⁴

“If the measures promote certain undertakings or the production of certain goods compared to other undertakings, which are the intrinsic reference system given the objectives of a comparable factual and legal situation, it is an optional measure. Nor can, according to Union case-law, Member States rely on external policy objectives, such as regional, environmental or industrial policy objectives, in order to justify the different treatment of undertakings.”⁴⁵

1.2.4. Distortion of competition

The General Court has stated that it is necessary to reject the restrictive interpretation that only aid having an actual effect on trade between Member States and distorting competition is covered by this provision.⁴⁶ It is sufficient to meet the criterion, if there is a risk that trade between Member States is affected. Furthermore, ECJ has stated in that regard that, “it is not necessary that the beneficiary undertakings are themselves involved in intra-Community trade. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced.”⁴⁷

The European Commission is, however, in many cases, found that certain activities have only local effect and therefore such activities do not affect trade between Member States. Such cases are for example, information and communication platform to solve the problem of unemployment and social conflicts predetermined in very small local area⁴⁸ or hospitals and

⁴³ Bousin, J., Piernas. J. Developments in the Notion of Selectivity. *European State Aid Law Quarterly* 2008, 2008 (4), p 634.

⁴⁴ European Commission, *supra* nota 9, p 133.

⁴⁵ ECJ 18.07.2013, C-6/12, *P*, p 27.

⁴⁶ EGC 15.06.2000, T-298/97, *Alzetta*, p 76.

⁴⁷ ECJ 14.01.2015, C-518/13, *Eventech*, p 67.

⁴⁸ Commission decision SA.33149. OJ C 188, 05.06.2015.

other health care facilities that provide traditional medical services to the local population, and probably do not attract investment or customers from other Member States.⁴⁹

Aside from the Commission's decisions mentioned in preceding paragraph, the last two elements (distortion of competition/effects on trade) of criteria laid down on TFEU Article 107(1) are usually easily met and Commission's decisions that some activities do not affect trade between Member States is rather exception than rule. The General Court stated in *CBI vs Commission* that “it should be pointed out that, although the conditions stated in the *Altmark* judgement and in the SGEI package concern all sectors of the economy without distinction, their application must take into account the specific nature of the sector in question.”⁵⁰ All Commission's decisions mentioned in preceding paragraph have social nature. If contracting authority uses negotiated procedure without prior publication the aim is usually not to contract social services or services of social nature. For aforementioned services, Directive provides other measures⁵¹. Interaction between public procurement regulations and State aid rules

“In the context of public contracts, the relationship between competition law and the public procurement rules is one of interdependence: neither body of rules would be complete without the other, and neither would be able fully to achieve the aims of the European Union's internal market policy on its own.”⁵² “In contrast with the State aid rules, the Community's rules on public procurement do not look at the State's behaviour as investor or creditor, but more at that as purchaser of goods and/or services.”⁵³ Irrespective of that, the ECJ has stated that “the award of a public contract can be found to be State aid if it is not in the form of a normal commercial transaction.”⁵⁴

Aforementioned means that if conduct of the tender process has been in compliance with the Directive 2014/24/EU and Member State legislation, and if contracting authority is convinced that successful tenderer has provided market price – State aid rules do not apply. However,

⁴⁹ Commission decisions SA.34576 OJ C 73, 13.03.2013; SA.37432. OJ C 203, 19.06.2015; SA.37904 and SA.38035 OJ C 188, 05.06.2015.

⁵⁰ The General Court 07.11.2012, T-137/10, *CBI vs Commission*, p 85.

⁵¹ European Parliament, Council of the European Union, *supra* nota (17), articles 74-77.

⁵² Kennedy-Loest, C., Thomas, C., Farley, M. EU Public Procurement and Competition Law: The Yin and Yang of the Legal World. *Competition Law International* 2011, 7 (2), p 77.

⁵³ Bartosch, A. The Relationship Between public Procurement and State Aid Surveillance – The Thoughtest Standart Appllies? *Common Market Law Review* 2002, p 552.

⁵⁴ Baudouin, H. Defence Procurement: The Most effective Way to Grant Illegal State Aid and Get Away With it... or is it? *Common Market Law review* 2009, p 192.

considering that the negotiated procurement procedure without prior publication is one of the most restrictive procurement procedures – where contracting authority is allowed to enter into tender procedure with one undertaking – it is not necessarily always guaranteed that successful tenderer provides the market price. In addition to the above, it is not always possible to determine market price while contracting services in the negotiated procedure without prior publication – for example services related to exclusive rights.

As stated before in given thesis (chapter 1.2.1), that conducting a public procurement procedures almost exclusively constitutes as measure that is granted directly or indirectly through State resources and given the fact that in the negotiated procurement procedure without prior publication does not guarantee normal commercial transaction. In addition, negotiated procedure without prior publication is extremely restrictive procedure and in its nature selective. Aforementioned indicates that compliance with State aid rules must be assessed.

2. Granting unlawful State aid in the process of negotiated procurement procedure without prior publication

2.1. Granting unlawful State aid in the negotiated procedure without prior publication using legal basis of Article 32(2)(a) of Directive

Two of the four cumulative State aid criteria – “intervention by the State or through State resources” and “selective nature of the measure” – are easily met while using the negotiated procedure without prior publication. Due to the fact that award of a contract in public procurement procedures almost exclusively constitutes as measure that is granted directly or indirectly through State resources (previously elaborated in chapter 1.2.1) and taking into consideration that the negotiated procedure without prior publication is one of the most restrictive type of procurement, means, that “this procedure allows contract awards within the scope of the directive, but almost as freely as outside its scope.”⁵⁵

In the light of aforementioned, given thesis focuses in particular on other two cumulative State aid criteria (“granting an advantage“ and “distortion of competition“). The author of given thesis deems necessary to emphasise, that there is always a possibility that Contracting Authority uses rather restrictive measures in order to favour certain undertakings – irrespective of that, given thesis analyses the use of the negotiated procedure without prior publication rather from the perspective of diligent Contracting Authority.

In order to examine whether conducting the negotiated procedure without prior publication, in case “where no tenders or no suitable tender or no request to participate or no suitable request to participate have been submitted in response to an open procedure or restrictive procedure,”⁵⁶ as per the Directive, constitutes granting unlawful state aid – previously conducted procurement procedure must be evaluated. If the previously conducted procurement procedure is carried out in accordance with the rules laid down in the Directive 2014/24/EU and national legislation, i.e. “if the sale and purchase of assets, goods and services (or other comparable transactions) are carried out following a competitive, transparent, non-discriminatory and unconditional tender procedure in line with the principles of the TFEU on public procurement, it can be presumed that

⁵⁵ Trybus, M. Case C-337/05, *Commission v. Italy (Augusta and Augusta Bell Helicopters)*, judgement of the Court (Grand Chamber) of 8 April 2008, not yet reported; and Case C-175/06, *Commission v. Italy*, judgement of the Court (Second Chamber) of 2 October 2008, not yet reported. *Common Market Law Review* 2009, 46 (3), p 981.

⁵⁶ European Parliament, Council of the European Union, *supra* nota 16, Article 32 (2)(a).

those transactions are in line with market conditions.”⁵⁷ and therefore the risk of granting an unlawful state aid is eliminated.

The reasons why “no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted, in response to an open procedure or a restrictive procedure,”⁵⁸ as per the Directive, may vary. If contracting authority, by stipulating technical specifications and/or qualification requirements, has created situation why “no tenders or no suitable tenders or no requests to participated or no suitable requests to participate have been submitted”⁵⁹ as per the Directive – the risk of granting an unlawful State aid is high.

Aforementioned situation may occur, if contracting authority has established, in relation to the purpose of the public procurement, disproportionate qualification requirements – such as disproportionately high net sales requirement compared to expected value of the services contract or disproportionally high requirements for managerial staff and persons responsible for providing services. If the aforementioned infringement is detected, it is quite likely, considering the logical sequence laid down in Directive 2014/24/EU Article 32(2)(a) of carrying out the negotiated procedure without prior publication, that infringement which favours certain undertakings is passed on to the negotiated procurement without prior publication.

The reason, why “no tenders or no suitable tenders or no request to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure”⁶⁰ as per the Directive may be caused by other objective circumstances, which Contracting Authority could not foresee. For example, if the contracting authority establishes shorter deadline for execution of services (due to the need required by the Contracting Authority), placing persons interested in participation in the procurement procedure in a situation where they do not have sufficient resources to submit suitable tenders.

In aforementioned cases, it cannot be unequivocally concluded that the contracting authority has carried out procurement procedure contrary to the rules laid down in the Directive 2014/24/EU and/or by national legislation. Such needs may not always be foreseen, even by diligent contracting authority, or may be related to the eligibility period of structural funds.

⁵⁷ European Commission, *supra* nota 9, p 89.

⁵⁸ European Parliament, Council of the European Union, *supra* nota 16, Article 32 (2)(a).

⁵⁹ European Parliament, Council of the European Union, *supra* nota 16, Article 32 (2)(a).

⁶⁰ European parliament, Council of the European Union, *supra* nota 16, Article 32(2)(a).

Notwithstanding the good intentions of contracting authority – award of a contract in the negotiated procedure without prior publication may constitute as granting unlawful State aid.

If qualification requirements and/or technical description, established by Contracting Authority favours or gives advantage to certain undertakings – disproportionately restricting requirements has excluded potential tenderers – the advantage criterion is met. Thus, by award of a contract, successful tenderer receives an advantage which it would not have received under normal market conditions.

Aforementioned leaves us with last cumulative State aid criterion – distortion of competition, which is connected with third criterion, granting an advantage. “Compatible aid must be proportional and must not cause undue distortion of competition; aid that is granted in the context of a defective tender is unlikely to fulfil these two requirements.”⁶¹ Aforementioned means, if contracting authority conducts negotiated procedure without prior publication and establishes disproportionately restrictive qualification requirements or technical specification, two out of four State aid criteria “granting an advantage” and “distortion of competition” are met – hence, it is likely that measure constitutes State aid within the meaning of the Article 107(1) of TFEU.

It must be addressed that Article 32(2)(a) allows to contract services using negotiated procedure without prior publication only if initial conditions of the contract are not substantially altered. Estonian Ministry of Finance has previously elaborated that the use of the negotiated procedure without prior publication under Public Procurement Act § 28(2)(1) is allowed only if initial conditions of the contract are not substantially altered, meaning that the alterations which will determine its character and nature are not altered – in particular, alterations of technical specifications. Aforementioned alterations may significantly restrict competition on the market and are therefore inconsistent with general principles of Public Procurement Act.⁶²

⁶¹ Nicolaidis, P., Schoenmaekers, S. Public Procurement, Public Private Partnerships and State Aid Rules: A Symbiotic Relationship. *European Procurement & Public, Private Partnership Law Review* 2014. 9 (1), p 66

⁶² Estonian Ministry of Finance. Frequently Asked Questions section 2017. www.riigihanked.riik.ee/lr1/web/guest/korduma-kippuvad-kusimused (27.04.2017), p 32.

2.2. Granting unlawful State aid in the negotiated procedure without prior publication using legal basis of Article 32 (2)(b)(i) of Directive

Directive 2014/24/EU Article 32 (2)(b)(i) allows the use of the negotiated procedure without prior publication if “the services can be supplied only by a particular economic operator for the aim of the procurement is the creation or acquisition of a unique art or artistic performance.”⁶³ In addition to the Public Procurement Act, procurement of art work is in Estonian national legislation regulated by Commission of Artworks Act.⁶⁴ Aforementioned means that Public Procurement Act is considered as general Act and Commission of Artworks Act as specific Act. Commission of Artworks Act does not give legal definition of artworks, however it can be deduced from scope of application of act that procurement of artistic performance is not governed by Commission of Artworks Act.

Irrespective to the fact that Directive 2014/24/EU allows for Contracting Authority to use the negotiated procedure without prior publication, Commission of Artworks Act § 3(1) states that commissioning of a work of art is carried out by an open competition. Persons who are obliged to follow rules laid down in Commission of Artworks Act are listed in § 2. Commission of Artworks Act does not refer to the Public Procurement Act, and open competition is carried out by the Administrative Procedure Act⁶⁵. Rules provided in Commission of Artwork Act for the open competition are more transparent and pro-competitive, from rules laid down in Directive 2014/24/EU and Public Procurement Act for the negotiated procedure without prior competition. For example, according to the § 3¹ (1) of Commission of Artwork Act in order to start a competition for the commissioning of a work of art, the contracting authority shall publish the notice of competition on its webpage; § 3¹ (3) states that the term of the competition for commissioning of a work of art may not be shorter than 50 calendar days – none of aforementioned rules apply to the negotiated procedure without prior publication. Which is why adopting such special regulation is welcomed, as it ensures effective use of the existing competition. Taking into consideration abovementioned, it can be concluded that, if the commission of artwork is carried out in accordance with the rules laid down in the Commission of Artworks Act, four cumulative State aid criteria are not satisfied and therefore unlawful State aid is not granted.

⁶³ European Parliament, Council of the European Union, *supra* nota 16, Article 32 (2)(b)(i).

⁶⁴ Commissioning of Artworks Act. RT I, 23.03.2015, 112

⁶⁵ Administrative Procedure Act. RT I, 25.10.2016, 5

If the negotiated procedure without prior publication is used for ordering artistic performance, it must be examined if four cumulative State aid criteria are met. As stated before in given thesis, two State aid criteria “intervention by the State or through State resources” and “selective nature of the measure” are easily met. This applies also in case of ordering artistic services. If more than one tenderer participates in negotiated procedure without prior publication, then risk of granting unlawful state aid is lower. Due to the fact, that to some extent procurement procedure is opened to competition and market price can be achieved.

Irrespective of whether contracting authority conducted open procurement procedure or not, it can be still possible that the beneficiary undertaking is remunerated at market rates and on market terms.⁶⁶ Which means that one State aid criteria is not met, and measure does not constitute State aid within the meaning of the Article 107 (1) TFEU. However, if beneficiary undertaking is not remunerated at market rate, then measure constitutes granting an advantage, and if undertaking receives an advantage it is rather likely that measure distorts competition – which means, that Contracting Authority grants unlawful State aid.

2.3. Granting unlawful State aid in the negotiated procedure without prior publication using legal basis of Article 32 (2)(b)(ii) of Directive

According to a report⁶⁷ prepared by the Estonian Ministry of Finance, in 2014 (in the classic sector) negotiated procedure without prior publication was used on 156 occasions due to the fact that the works, supplies or services could be supplied only by a particular economic operator or because competition is absent for technical reasons. For example in *Spain v Commission*⁶⁸ it was explained, when contracting authority can successfully rely on Article 32 (2)(b)(ii) of Directive 2014/24/EU and award their supply contracts by negotiated procedure, without prior publication, when for technical reasons the products supplied may be manufactured or delivered only by a particular supplier. The General Court emphasised in aforementioned case that if the contracting authority wishes to use the before mentioned procedure, the contracting authority has the obligation to investigate whether there are undertakings who are capable of responding to the

⁶⁶ Nicolaidis, P., Rusu, I. E. Competitive Selection of Undertakings and State Aid: Why and When Does It Not Eliminate Advantage? Public Procurement & Public Private Partnership Law Review 2012. 7 (1), p 5.

⁶⁷ Ministry of Finance, *supra* nota 5, p 59.

⁶⁸ The General Court 15.01.2013 T-54/11, *Spain v Commission*

call for tender under the same conditions, or under better conditions than the successful undertaking.⁶⁹

For example, in abovementioned case contracting authority justified the choice of a particular undertaking – due to the technical specificity of the disputed contracts linked to the implementation of the system and the migration of data, since it was awarded contracts in the phases previous to Phase IV-1 and that, therefore, it already possesses extensive knowledge of the existing local databases. The General Court held that it does not show that the undertaking was the only one who could possess such knowledge and that the other undertakings would not have been capable to acquire such knowledge and it cannot be ruled out that if contracting authority had conducted a thorough search, it would have been able to find undertakings who would have been capable to provide the appropriate service. In the light of aforementioned case-law, it is evident that reasoning, why the use of negotiated procedure without prior publication because competition is absent for technical reasons, is justified is rather complex.

Technical reasons could result in any situation, where certain object can be repaired only (due to the technical reasons) by the manufacturer (for example, situations in which the using other than manufacturer services constitutes losing the manufacturer's warranty).⁷⁰

From above stated case law, it can unambiguously concluded that conducting the negotiated procedure without prior publication, when for technical reasons the products supplied may be manufactured or delivered only by a particular supplier, is rather difficult to meet – if not impossible. It also draws attention to the fact, that the use of such a restrictive procurement procedure is allowed in exceptional cases, and if contracting authority wishes to use such a restrictive measure, it has to be fully convinced that due to technical reasons the products supplied may be manufactured or delivered, truly, only by a particular supplier.

Considering aforementioned, it is evident that two State aid criteria – “intervention by the State or through State resources” and “selective nature of the measure” – are met. Measure in question is in its nature intensely restrictive. Directive 2014/24/EU⁷¹ allows using measure only if

⁶⁹ The General Court 15.01.2013 T-54/11, *Spain v Commission*, p 53.

⁷⁰ Minumets, D., Kulm, P. Riigihangete õigus. Tallinn, Kirjastus Juura 2014, p 466.

⁷¹ European Parliament, Council of the European Union, *supra* nota 16, Article 32 (2)(b)(ii).

services are supplied by a particular economic operator. Hence, if the legal basis is selective – criteria of selectivity is met.

However, in author's opinion assessing if criterion of granting an advantage is met, is not that obvious. It has to be assessed if certain operator – for example, the manufacturer who has granted a warranty for the product and carries out urgent repairs, receives an advantage. In order to conduct such analysis, the concept of the guarantee has to be explained. If one person provides guarantee, the guarantor (person who is the manufacturer of the product or the seller of the subject of a contract of sale), assumes an obligation (guarantee) before an obligee, to ensure that during the guarantee period the object of sales contract meets the certain characteristics.⁷² Firstly, if the purchase of such goods or services was carried out following a competitive, transparent, non-discriminatory and unconditional tender procedure, i.e. in accordance with the Directive 2014/24/EU and national legislation, advantage criteria is not met. Secondly, guarantor cannot guarantee to ensure that the object of sales contract meets the certain characteristics if other person has carried out repairs. If however, preceding procurement procedure was not carried out following competitive tender procedure – criteria of an advantage is met – since, infringement is passed on to the negotiated procedure without prior publication. If criterion of granting an advantage is met, it is rather likely that criterion of distortion of competition is met as well.

2.4. Granting unlawful State aid in the negotiated procedure without prior publication using legal basis of Article 32 (2) (b)(iii) of Directive

According to a report prepared by the Estonian Ministry of Finance, in 2014 (in the classic sector) negotiated procedure without prior publication was used on 77 occasions, since supplies or services can be supplied only by a particular economic operator for the protection of exclusive rights, including intellectual property rights.⁷³

⁷² Varul, P., Kull, I., Kõve, V., Käerdi, M. Võlaõigusseadus I. Kommenteeritud väljaanne. Tallinn, Kirjastus Juura, 2006, p 524.

⁷³ Ministry of Finance. Summary of the Public Procurement field (policy making, consultancy and training activities, public and administrative supervision, the public procurement register and statistical overview 2015. www.riigihanked.riik.ee/lr1/c/document_library/get_file?p_l_id=216043&folderId=518320&name=DLFE-34832.pdf (05.03.2017), p 59.

2.4.1. Unlawful State aid in negotiated procedure without prior publication if services can be supplied only by a particular economic operator due to the protection of exclusive rights

Firstly, the legal definition and framework of exclusive rights needs to be clarified in order to conduct in depth analysis on whether the use of negotiated procedure without prior publication – if services can be supplied by particular economic operator, due to exclusive rights – may be considered incompatible with internal market. “Exclusive or special rights often consist principally of a permission to engage in a certain (economic) activity.”⁷⁴ Directive 2014/24/EU itself does not give a legal definition on referred content, it merely states that the Directive 2014/24/EU should not be applied to the award of contracts where “a contracting authority or an association of contracting authorities are the sole source for a particular service, in respect of the provision of which it enjoys an exclusive right pursuant to laws, regulations or published administrative provisions which are compatible with the TFEU.”⁷⁵ Nor does the Directive 2014/24/EU include specification in which circumstances exclusive rights are granted in accordance with the TFEU. However, in practice compliance with aforementioned should be assessed prior to the granting of exclusive rights.

European Commission has explained that “the published law, regulation or administrative provision must be compatible with the relevant rules of the Treaty, in particular Articles 49 and 56 of the TFEU and the rules and principles that flow from these articles. These rules and principles include non-discrimination, transparency, proportionality, mutual recognition and the protection of the rights of individuals.”⁷⁶ If granting an exclusive right has been in accordance with principles of non-discrimination, transparency and proportionality – and compatibility with the Treaty has been assessed prior to the acquisition of exclusive rights – it can be deemed that an advantage criteria is not met. Aforementioned indicates that measure is compatible with the internal market and is not considered State aid within the meaning of the Article 107 (1).

If however, process of granting an exclusive right has not been in compliance with relevant rules of TFEU, the risk of granting unlawful state aid is present. It should be emphasised, that in such circumstances contracting authority does not have any alternative. In particular, when

⁷⁴ Drijber, B. J, Stergiou, H. Public Procurement Law and Internal Market Law. *Common Market Law Review* 2009. 46 (3), p 823

⁷⁵ European Parliament, Council of the European Union, *supra* nota 16, recital 30.

⁷⁶ Commission staff working paper concerning the application of EU public procurement law to relations between contracting authorities (public-public cooperation) SEC (2011) 1169 final.
www.ec.europa.eu/internal_market/publicprocurement/docs/public_public_cooperation/sec2011_1169_en.pdf (05.03.2017), p 20.

contracting authority is forced to award a contract to a person, because person in question owns exclusive right to provide certain services or/and in certain area. Aforementioned indicates that, if infringement is present in process of granting exclusive rights, it will pass on to the negotiated procedure without prior publication – regardless of diligent contracting authority efforts to avoid such infringement.

2.4.2. Granting unlawful State aid in negotiated procedure without prior publication if services can be supplied only by a particular economic operator due to the protection of intellectual property rights

“Intellectual property is not only rights, it is also about investment and commercialization and different parties use their own terminology based upon their own understanding of intellectual property. For economists, intellectual property constitutes, first and foremost, an asset.”⁷⁷ Considering that for undertakings intellectual property is foremost an asset, it is understandable why contracting authorities use the negotiated procedure without prior publication rather often. Aforementioned is often derived from the necessity to procure services, which only particular undertaking can provide due to the protection of intellectual property rights – in such circumstances, the contracting authority can once again be found in impasse.

In previously described situations three out of four State aid criteria are met – i.e. “intervention by the State or through State resources”, “selective nature of the measure” and “granting an advantage” – if contracting authority awards a contract. As the reason why two first State aid criteria are easily met is explained previously in given thesis. The author of give thesis gives an overview why granting an advantage is, in case of protecting intellectual property right (on the example of purchasing computer program support service), met.

According to the Copyright Act⁷⁸ § 4(3)(3) works in which copyright subsists are computer programs that shall be protected as literary works. Protection applies to the expression in any form of a computer program. Aforementioned means that, an author shall enjoy the exclusive right to use the author’s work in any manner, to authorise or prohibit the use of the work in a similar manner by other persons and to receive income from such use of the author’s work.⁷⁹

⁷⁷ Kelli, A., Pisuke, H. Intellectual Property in an Innovation-based Economy. Review of Central and Eastern European Law 2008. 33 (2), p 230.

⁷⁸ Copyright Act. RT I, 31.12.2016, 20

⁷⁹ *Ibid*, § 13(1).

Irrespective of the fact that some computer programs are essential for contracting authority to operate – an advantage is still granted. That is because, only person who has right to use author's works (i.e. authorise the use of the work or receive income from such use) is allowed to provide services in question and is qualified to propose tender if procurement procedure is conducted. Contracting authority in aforementioned occasion grants an advantage by making a decision to use certain computer programme. In author's opinion, in some cases, it is possible to consider alternative options. For example if contracting authority needs document management program – obviously in such cases there is a market for such software - irrespective of that, contracting authority should consider alternative options. If document management program in need could be purchased via tender procedure where it is possible to make tenders for pre-existing software or provide software development services (which will culminate in the creation of the program needed).

Last but not least, is assessment whether the fourth State aid criteria is met. Measure does not constitute a State aid, just because the undertaking receives an advantage. Whether measure constituted State aid depends rather on whether such help would lead to a concrete or potential distortion of competition. Aforementioned would occur only if the measure strengthened the competitive position of the undertaking in other ranges, i.e. outside the field where the measure exerts its effect.⁸⁰ Considering the fact that in cases where no person, other than one who has the right to provide certain services (due to the intellectual property rights), cannot provide service in question – can there be competition at all? In author's opinion, competition as such could occur only if there are alternatives to services in need. If however, there are no alternatives or existing alternatives would not help to achieve the aim of procurement, then contracting authority could rely on the fact that there is no competition. Author of given thesis stresses, that if there is no competition, i.e. only one person can provide certain services, distortion of competition criteria is not met. Therefore, measure is not State aid within the meaning of the Article 107 (1) TFEU.

Assessing, whether award of a contract in negotiated procedure without prior publication is compatible with European Union State aid rules, interesting collision of intellectual property rights and State aid rules occurs. On the one hand, State aid rules protect competitors, on the

⁸⁰ Kirschbaum, R. Aspects of the Meaning of Distortion of Competition in State Aid Law in Case of State Measures in the Public Interest. *European State Aid Law Quarterly* 2004, 2004 (1), p 36.

other hand, it is difficult to imagine a situation where the European Commission or the CJEU finds that an undertaking has received unlawful State aid – merely due to the fact that contracting authority has used extremely restrictive procedure to contract services which cannot be provided, due to the protection of intellectual property rights, by any other undertaking – and it must be recovered.

2.5. Granting unlawful State aid in the negotiated procedure without prior publication using legal basis of Article 32(2)(c) of Directive

It must be emphasised that, irrespective of the fact that the Article 32(2)(c) allows award of a contract by contracting authority to one undertaking, it does not signify that contracting authority has obligation to present tender invitation to one undertaking. The provision in question is not as restrictive provision as, for example, Article 32(2)(b)(iii), where the contracting authority is placed in a forced situation with rather limited discretion.

Analysing the content of the Article 32(2)(c), it can be concluded, that the use of negotiated procedure without prior publication is allowed under provision in question if “extreme urgency brought about by events unforeseeable occurs and if the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.”⁸¹ In legal literature, on change of public contracts, events which are considered as not attributable to the contracting authority is for example the situation where either party could not influence or prevent circumstance which causing the change of public contract. For example, if there is a need to extend the deadline for execution of works, it is considered objective only if the need occurs due to third party (i.e., a fact which is not subject to either party).⁸² The fact that legislator has specified that “such extreme cases shall not in any event be attributable to the contracting authority”⁸³ as per The Directive, restrains contracting authority and might prevent to some extent the use of negotiated procedure without prior publication.

⁸¹ European Parliament, Council of the European Union, *supra* nota 16, article 32 (2)(c).

⁸² Minumets, Kulm, *supra* nota 64, p 486.

⁸³ European Parliament, Council of the European Union, *supra* nota 16, article 32 (2)(c).

From the perspective of a diligent contracting authority, Article 32(2)(c) gives an opportunity to contract services in case of extreme urgency without complying with the time limits for the open or restricted procedures. However, it also allows not as diligent contracting authorities to award a contract, without conducting open procurement procedure, rather freely. Aforementioned places competitors in disadvantage, since later on it is rather complicated to disprove whether it was indeed extreme urgency brought by events unforeseeable or not.

If the aim and necessity of contracting authority is to avoid – due to the extreme urgency brought by events unforeseeable – time limits for the open or restricted procedures, then effective use of the existing competition is still possible to ensure. If the existing competition is ensured, market price can be achieved – which means that State aid criteria “giving an advantage” and “distortion of competition” are not met. Therefore, there is no State aid within the meaning of the Article 107(1) TFEU.

2.6. Granting unlawful State aid in the negotiated procedure without prior publication using legal basis of Article 32(3)(d) of Directive

According to the Article 32(3)(d) the negotiated procedure without prior publication may be used “for the purchase services on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency procedures, an arrangement with creditors, or a similar procedure under national laws or regulations”⁸⁴ – Directive 2014/24/EU does not give any indications about the nature of such services or whether it is in even possible to purchase services under named conditions.

It can be presumed that in case of using negotiated procedure without prior publication in the event provided in Article 32(3)(d) – there is market for the services. As far it is not specified which services fall under the named Article, it could be for example cleaning services. In described cases two first state aid criteria are met – interference from state resources and selective nature of the measure. Assessing whether measure gives an advantage is not as clear.

⁸⁴ European Parliament, Council of the European Union, *supra* nota 16, article 32 (3)(d).

Directive 2014/24/EU⁸⁵ states that use of negotiated procedure without prior publication is allowed if “services are contracted from an undertaking which is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure” – question arises whether undertaking in such circumstances could get an advantage, since such undertaking has to be in a process of winding up its business activities. Even more, it is highly unlikely that liquidator in an insolvency procedure can or would provide services in question. In author’s opinion legislator idea behind provision in question is vague. It is understandable and clear when it comes to the purchase of supplies.

Nevertheless, in compliance with the European Union State aid rules has to be assessed. Taking into consideration that, services are contracted from an undertaking “which is definitively winding up its business activities, or the liquidator in an insolvency procedure”⁸⁶ as per the Directive – obtaining an advantage cannot be detected. If advantage is not granted, it is likely that there is no effect on trade between Member States.

2.7. Granting an unlawful State aid in the negotiated procedure without prior publication using legal basis of Article 32(4) of Directive

The negotiated procedure without prior publication under the Article 32 (4) may be considered one of the safest measure to not grant unlawful State aid, since aforementioned Article states that “the use of negotiated procedure without prior publication is permitted only if the contract concerned follows a design contest organised in accordance with the Directive 2014/24/EU and is to be awarded, under the rules provided for the design contest, to the winner or one of the winners of the design contest.”⁸⁷ Aforementioned indicates that design contest must be carried out prior conducting negotiated procedure without prior publication.

Rules governing design contests are laid down in the Article 78 in Directive 2014/24/EU and in Chapter 4 in Public Procurement Act. Design contest does not constitute obtaining a definitive solution; it constitutes merely obtaining an idea or design. In order to obtain a definitive solution, contracting authority must conduct further tender procedure.⁸⁸ According to the Public

⁸⁵ European Parliament, Council of the European Union, *supra* nota 16, article 32 (3)(d).

⁸⁶ European parliament, Council of the European Union, *supra* nota 16, article 32 (3)(d).

⁸⁷ European Parliament, Council of the European Union, *supra* nota 16, article 32 (4).

⁸⁸ Minumets, Kulm, *supra* nota 64, p 67.

Procurement Act § 80(1) in order to start a design contest, the contracting authority will submit an invitation to the design contest to the register. Public Procurement Act § 80 (3) states, that the contracting authority may restrict the number of participants by establishing clear and non-discriminatory criteria for selection of participants. The number of invited participants must be sufficient to ensure competition.

Aforementioned shows unequivocally, that design contest must be conducted in a competitive, transparent and non-discriminatory tender procedure in order to ensure competition. Hence, if contracting authority conducts tender procedure following aforementioned principles and tender procedure is conducted in accordance of Directive 2014/24/EU and Public Procurement Act, none of the cumulative State aid criteria are met and therefore measure does not constitute as State aid within the meaning of the Article 107(1) TFEU.

If again, contracting authority has, for example conducted design competition in a way which is contrary to Public Procurement Act and/or Directive 2014/24/EU the risk of granting unlawful state aid is high. Moreover, contracting authority cannot rely on a mere fact that design competition has been conducted. If the existence of State aid is assessed in the negotiated procedure without prior publication which is conducted under the legal bases of the Article 32(4) – previously conducted design contest must be assessed. Generally it can be concluded that using the negotiated procedure without prior publication under the legal bases of the Article 32(4) does not constitute unlawful State aid within the meaning of the Article 107(1) TFEU.

2.8. Granting an unlawful State aid in the negotiated procedure without prior publication using legal basis of Article 32(5) of Directive

“The negotiated procedure without prior publication maybe used for new services consisting in the repetition of similar services entrusted to the economic operator to which the same contracting authority awarded an original contract, provided that such services are in conformity with a basic project for which the original contract was awarded pursuant to a procedure in accordance with Article 26(1). The basic project shall indicate the extent of possible additional services and the conditions under which they will be awarded”⁸⁹ It is rather likely that contract terms of a services contracts with long duration period may need adjusting and reviewing. According to the explanatory memorandum of Public Procurement Draft Act “services are

⁸⁹ European Parliament, Council of the European Union, *supra* nota 16, article 32(5).

allowed for a certain degree of change in terms of the assumption that the new services are in line with the original project. Services may be envisaged, for example, the repetition of the same building cleaning services, which may be agreed with the new prices.”⁹⁰

In its nature it is not revolutionary provision, since in *Succhi di Frutta*⁹¹ it was found that if Contracting Authority should wish to be able to amend some conditions, such amendments could be made to the contract without a new tendering procedure being initiated, if the contract documents provided for the possibility of adjusting certain conditions, after the contract had been awarded and fixed the detailed rules for the application of that possibility. It is unambiguous that, aforementioned amendments cannot be arbitrary, and culminate in a situation where Contracting Authority – in order to avoid rules laid down in Directive and/or national legislation. Furthermore, a contract may be amended if the modification has relatively low value and modification does not alter the overall nature of the contract.⁹²

Based on the above, it can be concluded that conducting negotiated procedure without prior publication under the Article 32(5) does not constitute granting unlawful state aid, since procurement procedure, which preceded negotiated procedure without prior publication, indicates the extent of possible additional services and the conditions under which they will be awarded. Hence, equal treatment is guaranteed to all tenderers, including potential tenderers. Therefore, one of four cumulative state aid criteria – granting an advantage – is not met, which means that measure is not State aid within the meaning of the Article 107 (1) TFEU.

⁹⁰ Karindi-Kask, Sõrm, Kaarna. Antonov, Mesilane, supra nota 27, p 68.

⁹¹ ECJ 29.04.2004, C-496/99, *Succhi di Frutta*, p 118.

⁹² Simovart. M., A. Hankelepingute lubatud ja keelatud muudatused uute riigihankedirektiivide ülevõtmise järel. *Juridica* 2016, 1, p 53.

3. Shortcomings of regulations in force and the need for legal clarity

As given thesis has previously shown that evaluating whether measure constitutes as aid under TFEU 107(1) is not always as simple and straightforward as it might seem – especially considering that negotiated procedure without prior publication is extremely restrictive procedure and it is rather easy to reach a conclusion that awarding a contract in aforementioned procedures constitutes as aid under TFEU 107(1). It is evident that there is a legal uncertainty, whether or not State aid rules and public procurement regulations interact – hence, it is important that shortcomings of regulations in force are addressed. Aforementioned raises the question whether there is a need to specify or clarify legislation in force or is there a need to produce more explicit legislation in the European Union level to bring clarity into public procurement and State aid interaction.

3.4. Nebulous Rules applicable at the European Union level

Public procurement law is regulated by directives and thus transposed into legislation of the Member States – the state aid rules, on the other hand, are regulated at the European Union level only. To a great extent, public procurement directives codify the CJEU case law.⁹³ Notwithstanding the foregoing, one might take a position that, in general, the public procurement law is regulated by directives quite clearly and unambiguously, and a person exercising the law should not feel ambiguous in so far as the Directive 2014/24/EU makes rather clear in case of negotiated procedure without prior publication, what are the cases when this exceptional procurement procedure can be used.

In Author's opinion, the same does not apply to the legislation regulating the state aid – because State aid rules are rather complicated legal framework and while evaluating measure compliance with State aid rules, legal clarity is found rather from the case-law than from the legislation in force. State aid rules has been criticized strongly, according to legal literature “It seems to be generally agreed that even the latest 2012 State Aid Modernisation paper is inadequate and disappointing, and that the entire State aid policy needs a more radical reform than has yet been envisaged of ficially.”⁹⁴

⁹³ Härginen. K, Simovart. M., A. Uued riigihankedirektiivid: kas revolutsioon või redaktsioon? *Juridica* 2013, 9, p 627.

⁹⁴ Lang, J., T. EU State Aid Rules - The Need for Substantive Reform. *European State Aid Law Quarterly* 2014, 2014 (3), p 440.

Assessment of compatibility of the measure with the state aid rules is generally difficult because each measure must be assessed separately and the legislation in force does not provide *expressis verbis* answers which measures are incompatible with the State aid rules. In addition to the above, the estimator of the measure should be able to grasp a complex maze of the state aid legislation. The above mentioned has European Commission itself, within the framework of the modernization of state aid, stated as well. The European Commission estimates that, in the course of time, the state aid rules have become a complicated legal framework, and it is possible to clarify and simplify them, to increase their binding nature and update their evaluation process. The terms of state aid are subject to better clarification, and horizontal and substantive rules to consolidate.⁹⁵ As for the goals in question, the latter – clarification of the state aid notion – is achieved.

The Public Procurement Directive applies to public procurement with estimated value excl. VAT equal to the thresholds laid down in Article 4 of the Directive 2014/24/EU. According to the aforementioned article, in the event of procurement contracts of services concluded by central government entities, the limit in question amounts to 134,000 euros. As for the procurements with the estimated value under the threshold provided in the Directive 2014/24/EU, one might wonder whether the cross-border impact is relevant. Particularly given that pursuant to recital 3 of the Commission's *de minimis* regulation⁹⁶, an aid granted in small volumes (200,000 euros in the last three years) does not impact competition and trade between the Member States.

The legal literature has previously stated that even small amounts of unlawful state aid can have an effect on trade and be contrary to state aid rules. “Thus the Notice on the notion of State aid is also important for the award of public contracts below the public procurement directives’ thresholds and creation of genuine competition is important for award of at least all contracts with cross-border interest (which definitively would have effect on trade in the sense of art.107(1) TFEU).”⁹⁷

⁹⁵ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and of the Regions. EU State Aid Modernisation (SAM). COM/2012/0209 final, p 8.

⁹⁶ 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. OJ L 352,24.12.2013.

⁹⁷ Olykke, G., S. Commission Notice on the notion of state aid as referred to in article 107(1) TFEU - is the conduct of a public procurement procedure sufficient to eliminate the risk of granting state aid? Public Procurement Law Review 2016. 2016 (5), p 212.

The above is also confirmed by the case-law of the ECJ, pursuant to which, in some cases, the public procurement with estimated value below the international threshold could have a cross-border impact. Indeed, the ECJ has held that the mere fact that the directives on public procurement do not set out a special and strict procedure for public procurement contracts with values below the thresholds does not mean that the latter would remain outside the scope of Community law.⁹⁸ Based on the above, it can be asserted that the estimated value of a procurement contract has no importance – the only importance lies in the fact whether the service procurable has any cross-border impact or not.

The Recital 50 in the Directive 2014/24/EU states that a negotiated procedure without prior publication may be used in very exceptional circumstances.⁹⁹ Notwithstanding the above, the Directive 2014/24/EU did not set out that the conduct of negotiated procedure without prior publication could result in the granting unlawful state aid, or that the contracting authority would have any obligation to examine the consistency of the measure with State aid rules. Moreover, the Directive 2014/24/EU does not indicate that public procurement law could be related to state aid rules at all. Pursuant to Article 1(4), “the Directive shall not affect the freedom of Member States to determine, in compliance with Union law, the services to be considered to be of general economic interest, how those services should be organised and financed in compliance with the state aid rules, and what specific obligations should be applied to them.”¹⁰⁰ Rather, it is evident from the above-mentioned provision, as if the application of state aid rules precludes the application of the Public Procurement Directive, and vice versa.

Hereby, it should be emphasised that one of the general principles of public procurement is an effective use of the existing competition. Both the Directive 2014/24/EU and the national legislation is the collection of rules established for the contracting authority, aimed at transparent and pro-competitive usage of public funds. It can therefore be assumed that the legislator is fully aware that, if the use of public funds involves distortion of competition, the contracting authority is required to verify the measure’s compliance with the state aid rules.

As regards the concurrent application of State aid rules and public procurement regulations, only clarity of current legislation gives, that it is unclear. This is exemplified by the contradiction of

⁹⁸ ECJ 03.12.2001, C-59/00, *Vestergaard*, p 19-21; ECJ 20.10.2005, C-264/03, *Commission vs France*, p 33; ECJ 21.02.2008, C-412/04, *Commission vs Italy*, p 65-66

⁹⁹ Minumets, Kulm, *supra* nota 64, p 466.

¹⁰⁰ European Parliament, Council of the European Union, *supra* nota 16, article 1(4).

the ceiling of *de minimis* aid and the thresholds of procurement within the scope of the Directive 2014/24/EU, as well as by CJEU case-law contradicting *de minimis* regulation. Insofar as given thesis examines whether award of a contract in negotiated procedure without prior publication to contract services may constitute granting unlawful state aid, the Author believes that legal clarity would enhance if the Public Procurement Directive has a corresponding reference or if the legislator lays down an obligation to the contracting authority to assess compliance with the state aid rules under a conduct of negotiated procedure with prior publication. In addition to the above, legal clarity would be created by guidelines for the contracting authority prepared by the European Commission in order to assist the contracting authority to check under procurement planning process to check whether the measure is consistent with the European Union state aid rules. Aforementioned is particularly true when it comes to restrictive procurement procedures, such as negotiated procedure without prior publications, or in-house transaction.

3.5. Inarticulate legal framework at the Member State level (on the example of Estonia)

Pursuant to the Government of the Republic Act¹⁰¹ § 59 (1), the area of government of the Ministry of Justice shall include the competition policy drafting and the organisation of competition supervision. Pursuant to the Competition Act¹⁰² § 49¹(1), regulating the co-operation with European Commission as regards supervision and on-site inspections, the Ministry of Finance shall provide assistance, if necessary, to the European Commission as regards supervision over the state aid and on-site inspections. Although, pursuant to the Government of the Republic Act and the Regulation No. 27 of the Minister of Justice "Statutes of the Competition Authority"¹⁰³, the competition-related issues fall within the competence with the Ministry of Justice and the Competition Authority, respectively, then as for the state aid and competition law issues, certain activities fall within the competence of the Ministry of Finance. In addition to the above, both the Government of the Republic Act, § 65 (1) as well as Regulation of the Government of the Republic No. 177 "Statute of the Ministry of Finance"¹⁰⁴ § 6(1) states that any advice and coordination related to state aid are in the area of government of the Ministry of Finance. Since the state aid is within the scope of application of competition law, then such division of competences could be confusing. For instance, this is due to the fact that,

¹⁰¹ Government of the Republic Act. RT I, 22.06.2016, 3.

¹⁰² Competition Act. RT I, 30.12.2014, 15.

¹⁰³ Regulation No. 27 of the Minister of Justice "Statutes of the Competition Authority". RT I, 24.01.2017, 15.

¹⁰⁴ Regulation of the Government of the Republic No. 177 "Statute of the Ministry of Finance". RT I, 10.07.2015, 2

pursuant to the Statutes of the Competition Authority¹⁰⁵, the Authority shall deal with the competitive situation analysis; provide proposals and recommendations to improve competitive situations and advice to parties. It remains unclear what is the role of the Competition Authority with respect to state aid issues. As for public procurement law, both the Government of the Republic Act and the Statutes of the Ministry of Finance set out that it is the topic within the area of government of the latter. In addition to the above, the Public Procurement Act unambiguously states that administrative supervision of the public procurement is within the competence of the Ministry of Justice.

The Public Procurement Directive is a regulation ensuring competition and within the exclusive competence of the European Union,¹⁰⁶ which is why a Member State has no competence to prepare additional rules in the field of public procurement. Negotiated procedures without prior publication are governed by the Public Procurement Act § 28, setting out the use of principles for the procedure. This is not a substantive provision – it rather repeats the provisions of the Directive 2014/24/EU, with the regulation of compliance assessment of the measure with the state aid rules.

In Estonian national law, the granting of state aid is regulated by the Competition Act, Chapter 6. In particular, this Chapter describes the notion of state aid, grantor of state aid, economic services of general interest, *de minimis* aid, aid covered by block exemption. Essentially, they are fairly unsubstantiated provisions, largely based on and refer to the relevant EU legislation. The Public Procurement Act deals with state aid, alike the Directive 2014/24/EU, only in the context of an unreasonably low cost. Thus, in national law, the legislator has neither substantiated nor rendered possible to require a contracting authority to assess the possible state aid supplemented by a procurement contract resulting from a negotiated procedure without prior publication in the Procurement Act.

There are not always reasonable and necessary nor possible to adjust the level of all legislation – the state aid rules, in particular, the implementation would be enough to guide the material. Among such guidance materials, one can find the State Aid Handbook¹⁰⁷ prepared by the Ministry of Finance. Essentially, it is a rather superficial guidance material which primarily deals

¹⁰⁵ Regulation No. 27 of the Minister of Justice "Statutes of the Competition Authority". RT I, 24.01.2017, 15. § 13 (6)

¹⁰⁶ Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012, article 3(1)(b).

¹⁰⁷ Estonian Ministry of Finance. State Aid Handbook 2016. www.fin.ee/riigiabi (27.04.2017).

with state aid basics - such as the notion of state aid, duties of the grantor, exemptions to general granting prohibition and references to the relevant European Union legislation. At the same time, the guide in question helps to grasp the challenging state aid rules of the European Union and gives a brief overview of the applicable legislation. The last two pages of the guidance material include the relations between public procurement law and state aid rules; it becomes evident how little, in fact, the relations between public procurement law and state aid rules have been discussed.

Although pursuant to legislation in force, the authorities are prohibited to grant State aid (except for exceptions to the general prohibition of State aid), the provision of corresponding obligation in the Public Procurement Act would help to draw the contracting authority's attention to it. In the Author's opinion, additional clarity would be achieved if the contracting authority is given specific guidance on how to prevent the granting of State aid in the procurement procedure.

According to the legislation in force, a contracting authority has an opportunity to reject the abnormally low tender if a contracting authority identifies that such cost is due to the fact that the tenderer has been granted state aid – however, there is no guidance on how contracting authority should identify aforementioned. Moreover, how should a contracting authority under a negotiated procedure without prior publication identify whether the service is provided under normal market conditions? It is clear, that everything cannot be regulated at the legislative level, which makes it even more important that the competent authorities would prepare a guidance material to assist contracting authorities in assessing the compatibility of the measure.

Conclusion

The aim of given thesis was to determine whether awarding a contract in the negotiated procedure without prior publication to contract services may involve granting unlawful state aid. The principles for a negotiated procedure without prior publication are regulated by the Public Procurement Directive, which will be transposed into Estonian national legislation by the Public Procurement Act. Prohibition of state aid is set out in the TFEU Articles 107-109; provisions governing State aid are regulated in Estonian national legislation by the Competition Act, Chapter 6.

Given thesis has revealed that a awarding a contract as a result of a negotiated procedure without prior publication may involve granting an unlawful State aid. Hereby, it is important to point out that, according to the principles set out in the Article 32 of the Directive 2014/24/EU, the risks to grant state aid under a negotiated procedure without prior publication are different. For example, the procedure conducted pursuant to the Article 32(2)(a) of the Directive 2014/24/EU has lower risk to grant unlawful state aid than in the event of other procedures conducted on the basis of the Article 32, because negotiated procedure without prior publication shall be preceded by an open or restricted procurement procedure – in the event of open and restricted procedures, all parties interested in entering tenders can submit a tender or request and the information that a contracting authority wishes to contract for a particular service, is available to all market participants. In the event of a procurement procedure conducted pursuant to the Article 32(2)(b)(iii) of the Directive 2014/24/EU, it cannot always be assumed that the award of the contract ends with the granting of unlawful state aid, as For example, services which can be supplied only by a particular economic operator due to the protection of intellectual property rights.

ECJ has previously repeatedly held that the provisions enabling a negotiated procedure without prior publication shall be always interpreted restrictively; thus, in case of doubt, a contracting authority should rather use other, more transparent and competitive procurement procedures. Aforementioned would prevent a situation where a contracting authority uses extremely restrictive procurement procedures in a situation where the market is actually open for service or there are alternative solutions to achieve the purpose of the procurement. In cases connected with the protection of exclusive rights or intellectual property rights, the selection of a more

transparent and competitive procurement procedure would not enhance the effective use of competition – in so far as no other tenderer could legally provide needed service. Nor is always possible to conduct an open procedure if “reasons for extreme urgency brought about by event unforeseeable by the contracting authority occur and, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with”¹⁰⁸ as per the Directive. Author of given thesis states that it is important that the contracting authority has opportunity to use negotiated procedure without prior publication if such exceptional circumstances occur. It is in fact extremely restrictive procurement procedure; however restriction of contracting authority’s discretion by not providing an exemption in exceptional cases would not be justified as well – especially given that cases listed in Directive 2014/24/EU Article 32 are rather exceptional.

In Authors opinion that there are several reasons why the contracting authorities do not assess whether the measure is in compliance with State aid rules while conducting negotiated procedure without prior publication. The first and the main reason is that the contracting authorities are unaware that a conduct of the public procurement procedure does not preclude the application of State aid rules.

The reason for the aforementioned misconception may particularly arise from unclear rules, both at the European Union level as well as national level. For example, the Public Procurement Act sets out state aid in one section only – Section 48 – and that in the context of abnormally low tender. Another reason may be a tight time schedule associated with a procurement procedure. The above is also illustrated by the fact that one principle of the conduct of a negotiated procedure without prior publication is the urgency for a contracting authority proceeding from unforeseeable circumstances, which does not enable to meet time limits for open or restricted procedures or competitive procedures.

Despite the fact that the negotiated procedure without prior publication does not always constitute granting unlawful State aid, the contracting authority should use named procedure cautiously. Every measures compatibility with the European Union State aid rules, should be evaluated separately. Measures which seem harmless at first might constitute aid within the meaning of the Article 107(1) TFEU. Aforementioned measure could be, award of a contract in

¹⁰⁸ European parliament, Council of the European Union, *supra* nota 16, article 32 (2)(c).

negotiated procedure without prior publication which is conducted under the legal basis of Article 32(2)(a) of Directive 2014/24/EU. It suffices merely that the contracting authority has provided disproportionately restrictive qualification requirements and/or technical specification.

In the event of a potential risk to grant state aid under a negotiated procedure without prior publication, a contracting authority has the opportunity to declare the procurement procedure invalid in the event of a justified need, at the contracting authority's own initiative – pursuant to Public procurement Act § 29 (3)(6). Public Procurement Act also provides an opportunity to reject the tender if the cost of the tender is abnormally low because the tenderer has been granted state aid. The use of the latter, in the event of a negotiated procedure without prior publication, may become complicated due to the specific characteristics of a type of procedure. Especially if the services can be provided by a single undertaking for technical or exclusivity protection cases – in such a situation, a contracting authority is unable to establish a market price, since the procured service may not be provided in the market at all.

It is evident that the state aid rules are complex and subject to change, and there is hope that in the course of modernisation of State aid, the rules will be clarified; in the form of a notice of the notion of State aid, the process has already begun. As stated before, pursuant to legislation in force, the authorities are prohibited to grant State aid (except for exceptions to the general prohibition of State aid), the provision of corresponding obligation in the Public Procurement Act would help to draw the contracting authority's attention to it. In the Author's opinion, additional clarity would be achieved if the contracting authority is given specific guidance on how to prevent the granting of State aid in the procurement procedure. Moreover, legal clarity is required for the relations between public procurement law and state aid rules – if the state aid rules remain as complex as they are, the best way to avoid potential unlawful state aid as a result of awarding a contract in negotiated procedure without prior publication is to raise the awareness of contracting authorities and undertakings about the European Union state aid rules. In addition to the above, it would help to avoid granting unlawful state aid if the process of submission of notice on state aid to the European Commission would not be as time-consuming as it is.

Väljakuulutamisetä läbirääkimistega hankemenetluse tulemusena sõlmitud teenuste hankelepinguga kaasnev ebaseaduslik riigiabi

Resümee

Käesoleva bakalaureusetöö eesmärgiks oli välja selgitada, kas väljakuulutamisetä läbirääkimistega hankemenetluse läbiviimise tulemusena sõlmitud teenuse hankelepinguga võib kaasneda ebaseadusliku riigiabi andmist Euroopa Liidu Toimimise Lepingu artikli 107(1) tähenduses. Töö hüpotees oli järgmine: teenuste tellimiseks väljakuulutamisetä läbirääkimistega hankemenetluse tulemusena sõlmitud hankelepinguga võib teatud juhtudel kaasneda ebaseadusliku riigiabi andmine

Töö autor kasutab, käesoleva bakalaureusetööga püstitatud küsimusele vastamiseks, peamiselt kvalitatiiivset uurimismetoodikat, mis hõlmab: akadeemiliste artiklite analüüsi ja võrdlust, EL ja Eesti siseriiklike asjakohaste õigusaktide analüüsi ja võrdlust ja senist praktikat erinevates EL liikmesriikides. Töö autor keskendub esiti asjakohasele Euroopa Kohtu praktikale ja Euroopa Liidu riigihangete ja riigiabi õigust puudutavale õiguskirjandusele. Vähemal määral tugineb autor Euroopa Komisjoni otsustele.

Käesoleva töö tulemusena on ilmnenu, et väljakuulutamisetä läbirääkimistega hankemenetluse läbiviimise tulemusena sõlmitud hankelepinguga võib kaasneda ebaseadusliku riigiabi andmine. Siinjuures on oluline rõhutada, et Direktiivi artiklis 32 sätestatud alustel läbiviidava väljakuulutamisetä läbirääkimistega hankemenetlusega kaasneda võib riigiabi andmise oht on ei ole alati sarnane. Näiteks direktiivi artikli 32(2)(a) alusel läbiviidud menetlusel on ebaseadusliku riigiabi andmise oht madalam kui teiste direktiivi artiklis 32 lubatud alustel läbiviidud menetluse puhul, sest väljakuulutamisetä läbirääkimistega menetlusele eelneb avatud või piiratud hankemenetlus – avatud ja piiratud menetluse puhul võivad kõik hankemenetluses osalemisest huvitatud isikud esitada pakkumuse või taotluse ning teave, et hankija soovib teatud teenust tellida on kõigile turuosalistele kättesaadav. Ka direktiivi artikli 32(2)(b)(iii) alusel läbiviidud menetluse puhul ei saa alati üheselt eeldada, et hankelepingu sõlmimine päädib ebaseadusliku riigiabi andmisega, sest ainuõiguste kaitsega seotud juhtudel ei saa olla mõju liikmesriikide vahelisele konkurentsile ja kaubandusele. Seda eelkõige seetõttu, et näiteks intellektuaalomandi kaitsega seotud teenuste puhul ei saagi ükski teine isik teenust osutada, mistõttu puudub hangitavale teenusele konkurents.

Autori hinnangul on mitmeid põhjusi, miks hankemenetluse läbiviimisel hankijad ei hinda riigiabi andmise võimalusi. Esimeseks ja põhilisemaks põhjuseks võib pidada hankijate teadmatust, et riigihankemenetluse läbiviimine ei välista riigiabireeglite kohaldamist. Eelnimetatud eksiarvamuse põhjuseks võib eelkõige pidada ebaselgete reeglite olemasaolu nii Euroopa Liidu õigusaktide kui ka siseriiklikul tasandil. Teiseks põhjuseks võib lugeda hankemenetlusega kaasnevat pingelist ajakava.

On selge, et riigiabireeglistik on keeruline ja vajab muutmist ning võib loota, et riigiabi moderniseerimise käigus muutuvad reeglid selgemaks – riigiabi mõiste teatise näol on Euroopa Komisjon eeltooduga juba alustanud. Lisaks vajab õigusselgust riigihankeõiguse ja riigiabi reeglite suhestumine – senikaua kui riigiabi reeglistik püsib sama keerulisena, on parim viis väljakuulutamisetähtaegade läbirääkimistega hankemenetlusega kaasneda võiva ebaseadusliku riigiabi vältimiseks nii hankijate kui ka ettevõtjate teadlikuse tõstmine Euroopa Liidu riigiabireeglistikust.

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