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# Protection of competition in public procurement procedures

**Abstract**
A violation of the principle of competitiveness in procedures of public procurement, in the form of a "fraudelant tender", represents an aspect of restrictive agreeing, which forms the largest violation of the principle of free market competition, i.e. since the existence of intention is presumed, it is forbidden, and its consequence is nullity.

The subject of this paper is the protection of effective competition in public procurement procedures, observed through the prism of legislative solutions of community law, and the law of the Republic of Serbia. The scope of analysis includes three separate issues. The first issue is the legal nature of a restrictive agreement, which is used for the division of the sources of the procurement. The second aspect is based on the analysis of the specific form of the agreement, which often includes restrictive practices rather than restrictive laws. The third segment is related to the investigation of the effects of different measures to be used, in terms of prevention or in terms of sanction, in order to limit the unwanted effects of distortion of effective competition.

The protection of the principle of effective competition in procedures of public procuring is carried out in two basic segments: as a system of preventive measures, and by sanctions for the violation of competition. Although it has undoubtedly greater importance, a corpus of preventive measures are applied in a materially lesser extent in business practice, and that is why a directly opposite direction of behavior is a road sign for providing an adequate legal answer to a wide practice of prohibited, agreed upon, participation of bidders in proceedings of public procuring, the harmful consequences of which, in a business/legal sense and the widest social sense, are enormous.

**Key words**
Bid rigging, Cartel Agreement, Effective Competition Enforcement, Leniency, Competition Protection Measure

## 1. Restrictive agreements in public procurement procedures

Absolute competition is a striving ideal which is never reached permanently. Therefore, competition rules are directed towards achieving effective competition, as a legal standard that was established through compromise between the ideal of full competition and a lower threshold of market power expression under which it could not go without jeopardizing the principles of freedom of association and increase of business efficiency

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because. “Freedom is the right to do anything that the law allows”.[2]

The most severe violation of the principle of free market competition are restrictive agreements - the existence of intent is assumed, they are prohibited *per se*, their result is a nullity; the purpose or the effect is violation of competition.[3]

In community law, the fact of separation of the purpose and the effect of the restrictive agreements, in their very basic definition of Article 101 (1) of UFEU, consequently means the absence of the implementation of the obligations of the European Commission to analyze the actual produced effects of the restrictive agreement in a particular market, in a particular space-time framework, and the impact that it has or might have on effective competition. The most severe forms of cartel agreements (*hard-core restriction*), which have the determination of prices or division of markets in their essence, are a category of restrictive agreements to the end, and are sanctioned regardless of whether they have produced negative effects in terms of violation of competition. The stated principle of “self-sufficient existence”, regardless of the legal consequences of restrictive agreements, is also regulated by the legal system of the Republic of Serbia.

Restrictive collaboration is accomplished in two basic forms: through restrictive agreements and restrictive practices.[4] It may have different forms, which assume the existence of the act (contracts, decisions), or it is of an informal - legal character (gentlemen's agreement, concerted practice and recommendations).[5] Under restrictive agreements, the highest level of social hazard, and at the same time the highest level of legal complexity, which consequently means proving[6] and prosecuting, is portrayed through cartel agreements. Cartels are subcategories of horizontal agreements resulting from the express or tacit consent of competitors, and they have two essential elements: exclusion of mutual competition relation and harmonization of important elements of the business. In terms of the form of cartel agreements, the most important aspect is harmonized behavior of

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[2] *Montesquieu* "The Spirit of the Laws".

[3] Article 10, Paragraph 1 of the Law on Protection of Competition of the Republic of Serbia (Official Gazette of RS no.51/09), hereinafter referred to as the Law. In previously existing Law on Protection of Competition (Official Gazette no. 79/05), unlawfulness of restrictive agreement is set in a wider manner, in the sense that it prohibited acts that have, or may have, as their object or effect harming competition through its prevention, restriction or violation (Article 7, Paragraph 1)

[4] See: R. Wilberforce, Campbell A, Elles N, The Law of Restrictive Trade Practices nad Monopolies, London, 1957., p.204

[5] In Law of the United States, contracts, combinations and conspiracies represent an elementary form of restrictive agreement.

[6] For different models of assessment and qualifications of "border" restrictive behavior, see: K. Hylton , Antitrust Law, Economic Theory and Common Law Evolution , Boston, 2003., p.89

undertakings - market participants. These forms of agreement have no basis in any legal transaction or act, and therefore create a moral obligation for their participants; UFEU (Article 101) the term "concerted practice" is used for them.

One of the most important forms of restrictive agreement in modern European business practice is an agreement to share the source of procurement, more precisely the market. "Render Rigging", more precisely "Bid Rigging" is a legal situation that occurs in a public procurement procedure in which the procuring entity and the bidder, in other words the tenderers agree with the goal of eliminating competition, thus determining a higher price of the work than it would be in the case if the effect of the principles of competitiveness was not limited, at the expense of budget funds or the assets of citizens as taxpayers.

A regulated public procurement system provides the conditions for free and nondiscriminatory competitive game between bidders as participants in the tender, that is in the public procurement process, which results in a rational and economical use of public funds.[7] At the same time, according to effects they produce, the most serious violation of the competition in terms of value are found in public procurement procedures. There are two basic models of illegal behavior that result in a violation of the principle of competition in the bidding process. In the first case, the procuring entity and bidder appear as subjects( rarely: more than one), and the basic method is to prescribe the tender conditions and criteria that rationally result in minimization or elimination of other bidders in the process. The second model refers to a situation of mutual agreement between the bidders on how to participate and on the outcome of the proceedings, which by their nature represents a form of restrictive, cartel agreement.[8]

The public procurement procedure is based on the following major principles: legal certainty, which means both fair and legal regulation of conditions of the tender, while still respecting established procedures of the process; free competition, which refers to the obligation of the procuring entity to enables the participation of a large number of bidders in the process, as well as their obligation not to enter in mutual agreements relating to agreed appearance in the process; transparency, which means publicity of the procedure, with timely and complete information to all stakeholders about its essential elements; equality among bidders at all stages, which is the obligation of the procuring entity; and efficiency, meaning that the procuring entity is

[7] The most important participation in public procurement procedures in the 2012, over 50%, in Serbia, have public institutions in the areas of health, education and culture.

[8] *Ezrachi A: „EU Competition Law", Oxford* 2010, *p.*110

obligated to acquire goods, works or services of appropriate quality by the lower price and with minimal costs.

Public procurement procedures, as seen from the aspect of the principle of competition, are classified into three groups: standard procurement of goods and services, in which the price appears as a sole criteria of decision-making process; public works with great value, when the procedure is carried out in two stages: in the first, qualification of bidders is conditioned with competence and minimum financial potential, on the basis of criteria that are clearly and precisely defined, while in the second stage, the final decision on the conclusion of the contract is based on the bid price (delivered in sealed envelopes); specific, highly specialized consulting services, so that the tender procedure is conducted on the basis of criteria that are primarily related to the competence and professional experience.

According to specificity of the cases, public procurement procedures are prepared and implemented within one of the stated categories, with expressed tendency of multimodal encouragement of participation of a large number of bidders and the introduction of the electronic auction model.

## 2. Violation of competition by bidders and purchaser agreement

It is the legal obligation of the procuring entity to take all reasonable actions necessary in the implementation of the public procurement procedure in order to obtain the highest possible level of competition. In that sense, the procuring entity is responsible for regulating tender conditions for participation and criteria for evaluation of applications, in a way that primarily allows the participation of a significant number of mutually independent bidders, and then an equal starting position and treatment in the procurement process.

The behavior of the procuring entity that has the purpose or the effect is disabling any bidder to participate in the procurement process, especially by carelessly prescribing and using discriminatory tender conditions, and by abusing its powers in the negotiation procedure is not allowed.[9] Cases of agreed and unauthorized stipulation of tender criteria, as measures used to appraise, compare, and finally, evaluate the offers - that lead to restriction or elimination of competition on the side of the bidders, and in which as the main actor appears the procuring entity - are sanctioned in the field of corruption action.

The most common instruments used in “Bid Rigging” refer to implementation of technical specifications of the favored bidder in the tender criteria, then prescribing the mandatory reference for

[9] Article 10, the Law on Public Procurement of the Republic of Serbia (Official Gazette of RS no.124/12)

the bidders that are not logically related to the procurement, as well as specifying quality criteria that is subjectively and discretionally evaluated.

Given the frequent lack of legal precision, as is the case in the legal system of the Republic of Serbia, in terms of obligation of the procuring entity to prescribe the tender criteria that relate to its business needs, but at the same time allowing the effective competitiveness on the bidders side, on one side, and the objective difficulties of proving in cases of abuse of this power (either in terms of unjustified use or in terms of discriminatory use of conditions), on the other side, starting from the enormous importance that this segment of the tender process and the process of the behavior of the procuring entity has for protection of the principle of free competition - it needs to be closely regulated with the bylaws. In this sense, it would be expedient, in the field of preventive action, to regulatory establish the inability to prescribe terms and conditions that are objectively not meet by a a majority of potential bidders in the relevant (relevant or geographic); also, is it unacceptable to prescribe terms that imply action of a third party, whose appearance represent its discretional right (especially in the case if this entity could appear as a bidder in the procedure). On the other hand, in a case where the number of tender procedures that are conducted by the same procuring entity, over time, the public procurement contract is concluded with the same bidder, an obligation to report as well as the institutional response (in the Republic of Serbia: Public Procurement Office) in terms of spot control of procurement procedures that are carried out, should be predicted.

As the regulations for public procurement (in the case of the Republic of Serbia) clearly define the concept of acceptable offers: meeting the requirement of timeliness, which procuring entity did not rejected because of significant deficiencies, which is appropriate, which does not limit or condition the rights of the procuring entity or obligation of the bidder and which does not exceed the estimated value of public procurement - it is of great importance to analogously determine the framework in which the procuring entity's invitation to submit offers should be made, primarily in terms of stipulating criteria, in order to enable equal starting positions of all candidates in the tendering process. It is of essential important that the accuracy of a legislative solution in terms of prohibition of negotiation on any price aspect after the opening of the offers; negotiations with the bidders may be conducted solely for the purpose of clarification or amendment of the offer, provided that it does not result in discrimination or a violation of the principles of competition - viewed from the perspective of the tender process as a whole.

In terms of the most complex consequences, from the aspect of the principles of competition, the use of a legal model of

centralized procurement is of particular importance, and it involves integrated implementation of a great number of procurements by the side of a special body of centralized public procurements, in open and restrictive procedures, through two legal modalities: in order for this subject to conclude a draft agreement, that is to award a contract for goods, works or services that are intended for procuring entity, or directly obtains the goods or services for the procuring entity's needs.[10]

A bivalent model of centralized public procurement involves undisputed contribution to rationalization, and in that sense, to the efficiency of the tender process, but on the other hand it necessarily leads to reduction of the number of bidders, that is to an increase of concentration on the supply side and limitation of competition in the field of participants in the proceedings. In fact, due to the established scale of the procurements, for small scale undertakings it is nearly impossible to independently participate in the proceedings of centralized public procurement. The modality to which the bidders with less market power in this situation recourse is binding in order to submit a joint offer[11], however, this consistently opens another field of potential violations of the principles of effective competition in tender procedures. In that sense, the rational solution is a legal requirement of the body for the centralized public procurement to, whenever it is reasonably possible, shape the public procurement according to parties, which opens the door for participation of a larger number of smaller market participants in the tender process.

On the other hand, in the legal system of the Republic of Serbia, a legal obligation of the procuring entity is to file an application to the Commission of the Protection of Competition on the conclusion of the agreement that for the subcontractor, a person who is not initially specified in the offer by the supplier, is engaged, and it is the bidder who participated in the procurement process as its competitor. This solution is justified in the business practices because restrictive agreements in public procurement procedures often appear in the form of subcontracting agreements, by which the execution of certain parts of the contract is entrusted to bidders who were previously rivals in the bidding process in public procurement (and its only real purpose is the distribution of unreasonable gained profit), and in fact all of them are the participants in a restrictive agreement, which necessarily qualifies the legal situation as *fraus legis*.

A significant importance for the protection of the principles of competition is enheld by the segment of the planning of the

[10] Article 48, Paragraph 1 of the Law on Public Procurement

[11] Joint offer is submitted by a group of bidders, by concluding an agreement with each other, on one hand, and with the procuring entity, on the other hand, they commit to the execution of public procurement, with legal determined unlimited liability for the obligations towards procuring entity.

tender process, with previous mandatory implementation of market research by the Public Procurement Office, with the goal of creating and implementing a public procurement which will in addition to the requirements concerning the transparency and integrity of the procurement, also prevent the occurrence of prohibited agreements between bidders. The procuring entity is obligated to reject the offer and file a report on the case to the competent authorities in situations that contain elements of corrupt activity, money laundering, organized crime and fraud.[12]

**3. Violation of the principles of competition through mutual agreement between the bidders**

"Rigged offers" (Bid Rigging ) represent the legal situation in which bidders by mutual agreement eliminate competition in the public procurement process, which obstructs the free and fair pricing of the procedure. Such unauthorized, secret agreements can inflict serious damage to procuring entity's resources, and to budget resources and at the same time minimize the benefits of an open and competitive market in public procurement procedures. The significance of the principle of competition in public procurement is of primary importance not only from the aspect of competition rules, but also for the widest social interest aspect.

Potential bidders in a single tender process replace the natural state of mutual competition with the secret agreement which will, by protecting their individual interests, at the same time result in a higher price of the underlying business, in a limited and controlled portfolio which implicates unfavorable conditions for procuring entity's procurement and deterring other bidders from participating in the proceedings due to the assumption of the existence of the relevant association.

Given the high value of the work and high presence of the model of public procurement in the modern business environment, participants on relevant, or geographic market often recourse to illegal joint participation in a public tender, concluding an agreement on the agreed performance[13], with the main dual goal which involves price maximization and minimization of quality of the goods or services which are the subject of the tender process. Gained revenue, which was unlawfully acquired by concluding contracts in the tendering process, participants distribute among each according to previously defined rules, as a rule, on the form and value. The most common forms of "Bid Rigging" are achieved through the payment of the part of the profits by the selected bidder to other members of the agreement, then through the "compensation payments" which include giving compensating to

[12] *UNCITRAL Model Law on Public Procurement* (2011), *Art.*12

[13] Sullivan T., Hovenkamp H.: "Antitrust Law, Policy nad Procedure: Cases, Materials, Problems", V ed., San Francisco, 2003.,p. 56

bidders who have submitted offers of higher value (overlay offers), and concluding fictitious contracts for consulting services.

There are different strategies[14] that bidders approach while agreeing with each other in order to achieve better results and to violate the free competition, which are often applied combined, and as most important ones there are: simulated competition is the most common form which is manifested through the mutual agreement of the participants: to submit applications that contain the bid price that is higher than the offered price in the offer of bidder whose victory is targeted, or that a competitor provides such conditions that are impossible to accept, or that a competitor submits an application containing special conditions that are known to be unacceptable for the procuring entity; refrain from bidding strategy represents the agreement among the competitors that implies that one or more of them refrains from applying on the tender or withdraw previously submitted application, in order for the targeted participant to win; bid rotation represents an agreement by which participants continuously participate in the tender, provided that they, according to agreement, take turns in winning; market division involves shaping of the market by competitors and the agreement not to compete with each other in relation to particular customers or in certain geographic areas.

There is a certain number of rational indicators that indicate a higher degree of probability of existence of "arranged offers"[15]: participation of a small number of bidders, the high concentration of the relevant market, predictable and steady stream of the public sector demand which includes public procurement procedure, the repeated bidding process, homogeneous production or service on the side of bidders which facilitates agreement on the structure of the common price policy, the low level of substitution for the offer subject.[16] A special indicator of the existence of potential danger in the form of "Bid Rigging" is the performance of business associations, which are participants in a specific and relevant geographic market, and which are connected by a common commercial interests, according to which "under the umbrella" of associating, secret, restrictive agreements on harmonized occurrence are concluded and implemented.[17]

An important legal instrument to limit or prevent "Bid Rigging" situations is the statement of the bidder, as a mandatory part of the tender documents, that the tender is submitted independently, without any form of consultation with other bidders

[14] *Lemley G, Leslie C: „"Antitrust",X ed, Thomson*, 2004, *p.*75

[15] Instruction for detection of "Bid Rigging" in the public procurement procedure (Commission for Protection of Competition of the Republic of Serbia, 2011, www.kzk.gov.rs)

[16] *OECD – Guidelines for fighting bid rigging in public procurement (www.oecd.org/competition)*

[17] Instructions for the application of the competition rules on associations of undertakings (2011), issued by the Commission for Protection of Competition of the Republic of Serbia (www.kzk.gov.rs).

or interested parties. In order to minimize the degree of "Bid Rigging" in the domestic business and legal practice, of great importance are operations of the procuring entity in terms of rejection of the offer made by a consortium that includes elements of cartelization of the market as well as preventing the bargaining during negotiations with a narrow list of candidates. [18]

Due to the different forms that can take, a in practice the written one will be the exception rather than the rule, while the opposite applies to the presence of "gentlemen's agreement" in the field of antitrust negotiation in public procurement - detection and proving of restrictive agreements has proven to be a very complex task. Therefore, from the legal system of the U.S. to European Union , and from European Union to Serbian legislation ( 2005), comes the institute for the release from ( part of ) sanctions of participants of restrictive agreement, who informs about the existence of the same or submits adequate evidence before or during the implementation of the test procedure ( Leniency ) derived from the application of the rules of reason, pragmatism and efficiency within the domain of the restricted, primarily cartel negotiation, as the most complex and most blatant aspect of violation of effective competition. *Leniency* has a special significance in the field of bidder's agreement in the public procurement procedure. The public interest is placed in front of the request for fairness and appropriateness of sanctioning of illegal behavior of one of the participants of the agreement, to which immunity is given, and the sentence is reduced in exchange for information and evidence about the cartel agreement.

In order for undertakings which concluded with a restrictive agreement to be exempt from obligation of paying a monetary amount for measures of competition, four conditions must be cumulatively fulfilled: that the undertaking reported the agreement on which the Commission for Protection of Competition had no knowledge, or did not have enough evidence to initiate the procedure; to prove and deliver, or indicate the source or place of finding; that the undertaking does not appear as initiator and organizer of the restrictive agreements; that the undertaking did not force or encourage other market participants in restrictive agreements.[19] Besides the option of releasing[20] from the obligation of paying a monetary amount for measures of competition, the participant of the restrictive agreement who does not meet all the requirements in the proceedings may submit a

[18] United Nations Conference on Trade and Development, "Expert analysis of competition policy: Serbia", New York and Geneva, 2011, p.88

[19] Article 2 of the Decree on conditions for the release of the obligation of payment of the monetary amount on measures of competition (Official Gazette of the Republic of Serbia no. 50/10).

[20] Exemption from legal sanctions is applicable to both corporate, and personal immunity.

request for reduction of commitments, in which a positive response is reasonably expected if the relevant entity did not initiate or organize the conclusion and implementation of the restrictive agreement and, if it did not force, or encouraged other participants in the conclusion and implementation of agreements.

On the other hand, market participants may conclude agreements for joint action in the public procurement process, which by its characteristics fits the legal definition of a restrictive agreement, and ask the Commission for Protection of Competition for exemption from the general prohibition regime, for a specified period, not exceeding eight years. Conditions which provide a basis for individual exemption from the prohibition, in the business practice are most often find in consortium agreement in order to participate in the bidding process, refer to the contribution to the promotion of economic growth, promoting economic and technological progress with the contribution to improving the situation of the consumers, if the respective agreement does not impose unreasonable restrictions to other market participants , and does not preclude effective competition on (the part of) the relevant market.

**4. Measure for protection of effective competition**

Violation of the principle of competition in the public procurement process is accomplished through an agreement between the procuring entity and the bidder represents a corrupt activity, while the concerted behavior of the bidder, as a form of cartel agreements qualifies as the violation of competition and is further processed and sanctioned in accordance with the provision of the Law on Protection of Competition.[21] A set of measures to minimize the likelihood of creating a situation of illegal agreement in the tendering process must be carefully balanced between the requirements for the protection of the principles of competition and the transparency of public procurement.

In the area of ”Bid rigging”, which includes an agreement between the procuring entity and the bidder, the most important preventive measure is related to the preparation and external control of tender criteria.[22] They must not be discriminatory

[21] "Bid Rigging" represents a form of restrictive agreement, in which a criminal liability is foreseen for the responsible person in an undertaking that by concluding and illegal agreement causes market disturbance or puts the stated legal entity in a privileged position compared in relation to other market participants, which consistently means achieving material benefit or harming other market participants and consumers, see Art. 232 of the Criminal Code (Official Gazette of RS no.111/09).

[22] Conditions of the tender should clearly present the criteria of evaluation of offers, in order to ensure the widest participation of bidders. It is important to avoid preferential treatment of certain groups of bidders, especially those with whom cooperation was previously established, and whose tender contracts are in force (*incumbent*), which directly affects the willingness of competitors to participate in the proceedings. The criteria should be broadly set regarding the

designed, and emphasis should be placed on the aspects of functioning, more precisely the expected result in the implementation of the tender process, and not to offer modalities that lead to it.

When it comes to "Bid rigging" cases, that are achieved through the agreement among bidders in the tendering process, the most important preventive measures carried out by the procuring entity are as follows: pre-testing of the marker of the products or services in order for it to suit customer needs as well as potential bidders of the same, according to which the tender procedure is planned and especially criteria for evaluation of the offers and award of contracts are carefully prescribed; taking actions in the preparatory stage of the process in order to increase the number of potential "credible offers" , primarily through the regulation of conditions which will not unreasonably restrict competition, but rather encourage small-scale participants to take participation in the process; organization of tender procedures so that communication between participants is minimized (of particular importance are twostage forms of decision-making in the tendering process: public procurement including negotiation process, a model of the draft agreement); avoidance of concluding contracts with two or more bidders who submitted identical offers, by distribution of contractual obligations.

According to Serbian law, it is in jurisdiction of the Commission for Protection of the Competition in the cases of revealing of "Bid Rigging", to impose sanctions and remove the effects of violations of competition. By the Decision of the Commission for Protection of the Competition, a measure of protection of competition in the form of fines of up to 10% of the total annual income realized in the previous business year is imposed, the amount of the measure is determined depending on the intent, severity, of appeared consequences and depending on the of violation of competition. If the violation occurs as a result of the joint actions of market participants, the responsibility for payment of the measure is solidary.[23]

In the process of public procurements, a special importance for the protection of the principles of competition is bidders obligation to make the declaration about the independent offer, as well as confirmation that the submitted offer in the tender process is independent without mutual agreement with interested parties;

required business experience, so that the small-scale business entities are encouraged the to submit applications.

[23] Behavioral measures are aimed at eliminating the violation of competition, or to prevent the occurrence of the same or similar violation, by giving the order for certain behavior or by prohibiting certain behavior. If a substantial risk of repeating the same or similar violation is found as a result of the structure of market participants, the Commission may impose a structural measure with the goal of changing in that structure in order to eliminate such hazards.

the responsibility of the bidder in case the of submitting of false offer is of misdemeanor nature; on the side of the procuring entity, t obligation to notify the competent authority for protection of competition in the case of doubtin the veracity of statements about an independent offer is established.

In Serbian legislation, a significant sanction for the violation of competition in the public procurement procedure is the inability for the offer of the legal entity to be accepted in any subsequent tender process', in the three years after the decision made by the Commission for Protection of Competition on establishing the violation. It is obvious that the above stated measures has not only the character of a "negative reference", but it also has the nature of additional sanctions to the bidder, to whom a measure for protection of competition is imposed due to stated behavior.

**5. Instead of the Conclusion**

The idea of competition may can be best seen as a mosaic of images of the arena in a a soccer game, through Darwin's theory of evolution in which the toughest survive, and Plato's theory about the country ruled by cunning. It is the same situation in the market, players with different economic power and morals of corporate codes fight for work and profits. Competition represents a special legally regulated dynamic system in which economic entities act in the market guided by their own initiative, in order to achieve certain business interests, which when faced with the aspirations of other participants, are necessary qualify as competitive, so they further develop in certain prescribed principles and regulations, and every deviation from them will be treated as a violation of competition.

"Tender Rigging", more precisely "Bid Rigging" is a legal situation that occurs in a public procurement procedure in which the procuring entity, and the bidder, or bidders, should agree on the goal of eliminating competition, thus determining a higher price of work than it would be in the case if the effect of the principle of competition was not limited to, at the expense of budget funds and assets of citizens as taxpayers. The above stated cases of consensual behavior in the tendering process represent a form of restrictive agreements, and represent the most severe violation of the principle of free market competition - the existence of intent is assumed, they are prohibited *per se*, their result is a nullity; the purpose or the effect is violation of competition.

The strengthening of the competitiveness in the public procurement procedure is achieved primarily through a standardization of procedures and documentation, and through a rising of the level of transparency of the procedure. On the other hand, the public procurement procedure should be adapted to the specifics of each individual case, and the subject of the public procurement.

In terms of legal measures that are applied, the protection of the principle of effective competition in public procurement procedures is conducted in two segments: through a system of preventive measures and through sanctions for violation of competition. In a situation of "Tender Rigging" the emphasis is on the preparatory phase of criteria design, so that it does not lead to the distortion of effective competition, as in the case of agreed bidder behaviors ( "Bid rigging" ), establishing unlawful negotiation with the aim of eliminating competition is of dominant importance.

The system of preventive measures that should result in minimizing the probability of violation of public procurement procedures is carried out in two stages. For the cases of violation of the principles of competition by agreement between the procuring entity and the bidder in the tender process as the most important matter occurs the preventive action in the sense of the previous control criteria for evaluation and acceptance of the offer resulting in the conclusion of the contract in tender procedure, since they consequently and directly affect the presence and effectiveness of competition in the relevant procedure. Conditions should be clearly defined and comprehensive, with no discriminatory effect. The primary role in detecting a situation of "Bid Rigging" have offer applicants who may evaluate the required criteria as irrational or unusual considering the real purpose and subject of the procurement, knowing the specifics of the relevant market , and who submit the request for protection of rights. It is also possible, that a bidder as a participant in an agreement provides information about its existence and in that manner provides for itself an exemption from the imposition of sanctions; it is much less likely that this type of application is filed by the procuring entity of the procurement. Also, it is suitable to establish the obligation of prior notification of the tender conditions stipulated by the procuring entity to independent experts responsible body for carrying out the public procurement procedure.

When it comes to cases of " Bid Rigging", or potential violations of the principles of competition, through an agreement of the bidders in the tendering process, the scope of preventive measures that can and should be taken is much wider. The primary control role is in the hands of purchaser: in the event of suspicion of unauthorized negotiation, the procuring entity in the second degree submits an application and the subject to the to the competent regulatory bodies for public procurement and protection of competition (in the legal system of the Republic of Serbia those are Public Procurement Office and the Commission for Protection Competition), with the situation that in the third level, the case can be finalized in the court. In this legal situation, it is possible that information about the existence of the agreement is submitted by

one of the participants, with the aim of achieving immunity from sanctions for restrictive agreements. The most important measures which the procuring entity implements in the preparation procedure of the public procurement, in order to minimize the risk of "Bid Rigging" refers to: a careful and timely preparation of the tender process primarily in terms of gathering information on the extent and structure, planning of the process with the goal of maximizing the number of valid offers, creating an environment that will process communication between participants to a reasonable minimum and making objective rules of circumstantial evidence and procedure in cases of reasonable doubt about the "Bid Rigging". The procuring entity reserves the authority that the contract in tender process is not concluded if it is suspected that the result of bidding is not the result of effective competition.

On the other hand, the system of sanctions is twofold. For situations of violation of the principle of competition through agreement between the procuring entity and the bidder in the tender procedure, the rules in the domain of corrupt activity will be applied. When it comes to cases of potential violations of the principles of competition by agreement between the procuring entity and the bidder in the tendering process, it is qualified as prohibited restrictive agreement, which consequently leads to further prosecution by the Commission for Protection of Competition and imposition of the measures for protection of competition.

The key changes introduced by the new Serbian regulation in the field of public procurement in 2012 are the following: compliance with the European Union directives, clearer specification of the subject of public procurement of works, reduction of the number of exceptions to the application of the Public procurement law, more complete and simpler definition of the contracting authority, mechanisms for the prevention of conflicts of interest and corruption in public procurement, partial centralization of procurements and de minimis public procurement is regulated in a way that allows transparency of procedure and competition.

Competition rules are nowhere so explicitly present as in public procurement procedures and, paradoxically, the tendency to circumvent them is not as pronounced in any other field. At the same time, the tendency of agreed violation of the principles of competition in tender procedures of great value is present in areas where it produces the most serious social, and even moral consequences. The monitoring of the timely and full implementation of the rules on the protection of the principles of competition in public procurement procedures, and their further refinement, as well as agreed effective cooperation of the competent institution is one of the most important tasks of the competition policy of the countries in the Balkan region. The

main role of competition law, in that sense, is to maximise consumer welfare.[24]

[24] Whish R, Bailey D, Competition Law, Oxford-New York, 2012, 1