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## AUDITS AND REMEDIES IN EU-FUNDED PUBLIC PROCUREMENT<sup>1</sup>

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*In general, the legality of actions carried out during public procurement is decided by review bodies appointed at the national level. When the procurement involves EU funds, monitoring the legality of such procedures also involves a system of audits and other controls as part of the management and control of funds, involving specialised institutions. The interaction between the two systems is not regulated at the EU level and regulation by Member States is also incomplete in certain cases, leading to friction between the decisions of review bodies and auditors. This article explores in detail institutional competences in EU-funded public procurement and examines how the system of audits and other controls interacts with traditional review procedures at the EU and national level. These are presented both from the EU perspective and from the national perspective, using the Hungarian institutional system as an example. The article analyses the issues arising from overlapping institutional competences and proposes certain possible solutions to deal with these issues.*

**KEYWORDS:**

public procurement, EU funds, cohesion policy, EU audits, remedies

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## INTRODUCTION

The effective application and enforcement of the public procurement rules are key aspects of the use of EU funds<sup>2</sup> and taxpayers' money in EU Member States. In order to ensure that the rules are followed properly, various mechanisms exist for the detection and sanctioning of infringements. Primarily, all EU Member States must ensure that they operate a system of remedies, allowing an effective and efficient review of the decisions taken by public authorities (contracting authorities) while applying public procurement law. This can be done through specialised review bodies or through the court system, and such bodies and courts have the task of interpreting and applying EU rules on public procurement and national laws transposing such rules. Where EU funds are involved, a number of other control mechanisms exist to check the legality of procurements in the overall context of the management and control systems of EU funds. This essentially involves three levels of controls. Firstly, the managing authorities<sup>3</sup> check operations in order to prevent, detect and correct any irregularities. Secondly, national audit authorities are responsible for checking the system as a whole, i.e. determining whether management and control systems are working properly and whether irregularities are duly detected. Thirdly, the European Commission also carries out frequent audits to see whether the national systems for monitoring the use of EU funds are working properly and effectively. These may be supplemented by occasional checks by the European Court of Auditors and specialised national control bodies may also be used.

The review bodies (including the courts) and control institutions all need to refer to and interpret public procurement law in order to decide whether an infringement has occurred. If an infringement is found by the review bodies, the decision of the contracting authority or, in some cases, the signed contract may be affected and damages may be awarded, or a fine may be imposed. In the context of auditing EU funds, funding can be withdrawn from the contract, or from the Member State concerned. However, the relationship between review bodies and control institutions is not defined at the EU level, leading to the possibility of conflicting interpretations of public procurement law. In addition, during audits or other monitoring of the use of EU funds, the first instance interpretation of the law and the imposition of sanctions are usually carried out by bureaucratic institutions, rather than independent and well-established courts or review bodies.

In this article, the main research question concerns the respective roles of public procurement review systems, audits and other controls in ensuring the legality of the implementation of EU funds. This issue is of utmost importance both for national authorities applying the rules and also for the wider debate on how control systems should

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<sup>2</sup> In this article the term "EU funds" refers to the European Structural and Investment Funds, although the issues discussed are partly relevant also to other funds implemented by the Member States, such as the Recovery and Resilience Facility.

<sup>3</sup> A managing authority is the body responsible for the implementation of EU-funded programs such as publishing calls for application, selecting beneficiaries and verifying fulfilment with programme conditions.

be designed at the EU and the national level in the field of public procurement. In order to explore this question, the nature and legal background of the public procurement remedies system and of EU audits will be explored, including an analysis of how the system of audits is related to traditional review procedures in EU Member States using funds from the EU budget. These are presented first from an EU perspective and then from the national perspective, using the Hungarian institutional system as an example of a specific Member State's approach. Where appropriate, other examples, taken from the relevant literature on public procurement and EU funds, are also discussed.

## METHODOLOGY

The method used in this article is legal analysis of and commentary on current EU and Hungarian national legislation in force concerning public procurement remedies and the use of EU funds in the current 2021–2027 programming period. Some reference is also made to EU funds legislation for the 2014–2020 programming period. Furthermore, research is undertaken into institutional competences and powers, and some relevant judgments of the EU courts and the Hungarian review body are also explored. Where appropriate, the literature concerning the approach towards remedies, audits and financial corrections at the EU institutions and in different EU Member States will be reviewed.

## CONTROL OF LEGALITY IN PUBLIC PROCUREMENT

### *Procedure to challenge legality of public procurement under EU law*

EU law prescribes a system of remedies to be implemented by EU Member States. Regarding remedies and review procedures, Directive 89/665/EEC, as amended by Directive 2007/66/EC<sup>4</sup> (hereinafter: the Remedies Directive) lays down only the basic requirements without the intention of achieving anywhere near a full harmonisation of the rules on remedies. The Remedies Directive states that, in the context of the EU public procurement rules, reviews against decisions taken by contracting authorities should be effective and available as rapidly as possible, in accordance with the conditions set out by the Directive.<sup>5</sup> Review procedures concerning public procurement must be available to any person having or having had an interest in obtaining a particular contract and who has been or risks being

<sup>4</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (referred to as the “Remedies Directive” throughout the article). For utilities, a separate directive, namely Council Directive 92/13/EEC is applicable and has essentially the same rules as the general Remedies Directive.

<sup>5</sup> Article 1(1) Remedies Directive.

harmful by an alleged infringement of the public procurement rules.<sup>6</sup> Other key elements of the Remedies Directive include the right to obtain interim measures, the setting aside of unlawful decisions, the possibility of awarding damages and the effective enforcement of decisions made by review bodies.<sup>7</sup> In order to increase the effectiveness of the remedies systems, rules on the so-called standstill period are also provided, as well as on minimum time limits and, importantly, in the most serious cases, the ineffectiveness of the contract or alternative penalties.<sup>8</sup>

As long as they take into account the fundamental rules laid down in the Remedies Directive, Member States are free to organise the system of remedies as they see fit, i.e. they regulate the application of the public procurement rules in a decentralised dimension.<sup>9</sup> Member States may, in particular, set up specialised bodies to carry out the review or they can use existing institutions instead. Some member States have chosen to implement the remedies system through their court system, such as in civil courts or administrative courts (e.g. Austria, France), while in others existing non-judicial administrative bodies carry out this function (e.g. Germany, Poland, Hungary) whereas some countries mandate their competition authority to supervise public procurements (e.g. Sweden).<sup>10</sup>

National review systems therefore provide a chance for aggrieved economic operators to obtain remedies against a contracting authority which has infringed public procurement law. In certain cases they may also go on to win the contract, following the review procedure. Interestingly, the Remedies Directive does not explicitly mention actions brought by national institutions, such as audit bodies. Nevertheless, public procurement review systems may also provide a platform for such *ex officio* procedures.

The review system serves both to provide remedies for economic operators who have been or might be harmed by the breach of public procurement law, and also to act as a deterrent against the unlawful actions of contracting authorities. The main sanction before the conclusion of the contract is the quashing of the contracting authorities' decisions and possibly the award of damages to the economic operators affected. Sometimes a fine may also be imposed on the contracting authority, or in rare cases on economic operators. Once the contract is concluded it may be declared ineffective, but only in the most serious cases, i.e. when the contract was not advertised, is unlawful, or if the standstill period was breached. The threat of ineffectiveness provides a deterrent factor in the award of public contracts in breach of the relevant Directives.<sup>11</sup> However, it is up to the Member States whether they provide for the cancellation of contracts retrospectively (*ex tunc*) or prospectively (*ex nunc*).<sup>12</sup>

<sup>6</sup> Article 1(3) Remedies Directive.

<sup>7</sup> Article 2(1), (8) and (9) Remedies Directive.

<sup>8</sup> Articles 2a-2e Remedies Directive.

<sup>9</sup> BOVIS 2012: 195–202.

<sup>10</sup> TÁTRAI–VÖRÖSMARTY 2020: 143–161.

<sup>11</sup> BOVIS 2012.

<sup>12</sup> Article 2d(1) Remedies Directive.

It is important to highlight that review systems are independent of the way in which a particular contract is funded, i.e. whether only purely national funds or EU funds are involved. Therefore, under the Remedies Directive, reviews must be available also for public procurements funded from EU funds, both to interested economic operators and to other bodies that have the right to challenge the legality of contracting authorities' behaviour *ex officio* under national law. Equally, sanctions imposed on the contracting authority (if any) do not necessarily depend on the way the procurement is funded either, unless there are special provisions to this effect under national law. For example, a contracting authority may find itself to be the recipient of a fine, besides losing some of the EU funding it has been awarded due to an infringement of the public procurement rules.

In the opinion of a number of authors, the original 1989 Remedies Directive was not very effective at deterring unlawful practice, but the introduction of the more detailed rules in the 2007 amendment, such as those on ineffectiveness and the standstill period have brought positive results.<sup>13</sup> Detailed rules concerning the effect of the annulment of the award procedure on the concluded contract had to be set down in legislation for reasons of legal certainty and this was also necessary to stop parties rushing to sign a contract.<sup>14</sup>

It seems that there are no major faults in the workings of the public procurement remedies systems as it stands at present. This is evident from the report of the European Commission which concluded that there were no major or urgent needs to amend the Remedies Directives; therefore, no amendment proposal was necessary. The Commission also found that first instance administrative review bodies are more effective than first instance judicial bodies in terms of the duration of procedures and the standards of review.<sup>15</sup> Nevertheless, some recommendations were made concerning the promotion of transparency and co-operation between first instance review bodies, the need for further guidance on some provisions of the Remedies Directive and also on the consistency of enforcement and monitoring.<sup>16</sup>

### ***The relevance of controls and audits of EU funds for public procurement***

When spending EU funds, an important principle is that the financial interests of the EU must be protected by both the Union institutions and the Member States when implementing EU-funded projects. In particular, funds must be utilised taking into account the principle of sound financial management, as required by the EU Financial Regulation.<sup>17</sup> The consistent interpretation by the European Commission and the Court of

<sup>13</sup> BOVIS 2012; CARANTA 2017: 75–98.

<sup>14</sup> CARANTA 2017.

<sup>15</sup> European Commission 2017.

<sup>16</sup> European Commission 2017.

<sup>17</sup> See Article 69 of Regulation (EU) 2021/1060 (CPR) and Article 33 of Regulation 2018/1046/EU, EURATOM (Financial Regulation).

Justice of the European Union (CJEU) has been that EU funds are spent efficiently and in accordance with the above-mentioned principles only if the EU public procurement rules are duly respected.

In Case C-465/10 *Chambre de Commerce*, the CJEU stated that since measures financed from the European Union budget had to be carried out in full compliance with the directives on public procurement, an infringement of these rules constituted an irregularity.<sup>18</sup> According to the CJEU in Case C-406/14 *Wroclaw*, an infringement must be considered to be an irregularity in so far as it is capable, as such, of having a budgetary impact and there is no requirement for the existence of a specific financial impact to be demonstrated.<sup>19</sup> The Court subsequently confirmed in the same case that a public procurement infringement constitutes an irregularity in so far as the possibility cannot be excluded that that failure will have an impact on the budget of the Funds.<sup>20</sup> The CJEU confirmed the above principles in Joined cases C-260/14 and C-261/14 *Județul Neamț and Județul Bacău*, adding that the breach of national law applicable to public contracts falling outside the scope of the EU directives also constitutes an irregularity.<sup>21</sup>

In order to check whether EU rules related to the use of funds are respected, the Common Provisions Regulation [Regulation (EU) 1060/2021] provides that Member States must establish a management and control system to check the legality and regularity of their expenditure of EU funds.<sup>22</sup> The decisions on the principal elements and nature of the management structure (centralised versus decentralised, the number of authorities, coordination function, etc.) fall under the Member States' responsibility.<sup>23</sup> The effective and efficient functioning of the control systems must be audited at the national level by Member State audit bodies and these bodies are in turn checked by the Commission on a regular basis through its audits.<sup>24</sup> At the EU level, the efficient financial management of EU funds and the successful implementation of projects are of key importance.<sup>25</sup> Public procurement is often a major focus of Commission audits since it has remained a major issue and a dominant source of irregularity to date.<sup>26</sup>

While the CPR does not refer explicitly to monitoring of public procurement procedures, due to their relationship with the principle of sound financial management, public procurement procedures must also be controlled as part of the management and control systems. At the Member State level these checks are usually carried out by managing authorities or specialised public procurement control institutions, whose work is checked

<sup>18</sup> Para 31 of the judgment.

<sup>19</sup> Para 44 of the judgment.

<sup>20</sup> Para 45 of the judgment.

<sup>21</sup> Para 43 of the judgment.

<sup>22</sup> Article 69 CPR. Similar rules were applicable for the 2014–2020 programming period according to Articles 72–74 of Regulation 1303/2013/EU.

<sup>23</sup> VÝROSTOVÁ–NŪIKOS 2023.

<sup>24</sup> Articles 70 and 77 CPR.

<sup>25</sup> NŪIKOS 2017.

<sup>26</sup> NŪIKOS et al. 2020.

by national audit authorities. Audits of the European Commission also often target public procurements funded by EU money. During such audits, Commission experts assess the Member State's compliance with the public procurement directives and EU law principles of their own account and present their findings in a report to the Member State concerned. If Commission auditors think that public procurement rules and principles have been infringed, the Commission has the power to impose financial sanctions in the form of financial corrections, which leads to funds being withdrawn from the Member State. The amount of correction is determined in accordance with the Guidelines on Financial Corrections.<sup>27</sup>

The Commission can impose the sanctions mentioned above without having recourse to a court or review body. Instead, Commission findings are final once the final audit report is sent to the Member States following the consideration of possible comments made by the Member State. In some cases, a hearing might also be held to discuss the findings.<sup>28</sup> The Commission can impose financial corrections regardless of whether the procedure was subject to a review or not at the national level. The CPR states, in a general manner, that the Commission shall take account of all information and observations submitted.<sup>29</sup> Therefore, it may take into account any review decision or controls made at the national level, but it is not bound to do so. Instead, should the Member State still contest the Commission's report, it may seek judicial review from the EU General Court under Article 263 of the Treaty on the Functioning of the European Union (TFEU). However, the disadvantage of doing this is that in certain cases funds may be permanently lost to the Member State. According to the CPR, funds subject to financial corrections may be reused by the Member State if it is able to reach an agreement with the Commission on the amount of the correction. However, this possibility does not exist if the expenditure contained in the accounts accepted is irregular and was not detected and reported by the Member State.<sup>30</sup> If financial corrections are implemented by the Member States, the CPR states that support from the funds may be reused by the Member States within the programme, except for operations that were the subject of that correction, or for operations affected by a systemic irregularity.<sup>31</sup> The old CPR (Regulation 1303/2013/EU) applicable to the 2014–2020 programming period provided for the possibility of re-using funds in a similar manner, but a permanent reduction of the level of support was referred to where a serious deficiency in the effective functioning of the management and control systems was detected.<sup>32</sup> So while judicial review is available against the Commission decisions, in absence of an agreement with the Commission, Member States risk losing some of the funds permanently.

<sup>27</sup> Commission Decision of 14.5.2019 laying down the guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement C(2019) 3452 final.

<sup>28</sup> Article 104(3) CPR.

<sup>29</sup> Article 104(4) 2nd subparagraph.

<sup>30</sup> Article 104(4) 3rd subparagraph.

<sup>31</sup> Article 103(3) CPR.

<sup>32</sup> Article 145(5) and (7) of Regulation 1303/2013/EU.

For this reason, the primary sanction that can be imposed for public procurement infringements in an audit report is a financial correction. While this can have serious consequences for Member States, EU law formally does not see it as a penalty in a strict sense, but rather as an administrative measure, resulting in a reallocation of EU funds from certain projects.

This state of affairs seems to be supported by several authors. Lungeanu stresses that the role of an auditor in the control of public procurements is to obtain a reasonable assurance that the management and control systems function effectively, and that certified expenditure is thus legal and regular.<sup>33</sup> According to Pavlova, the purpose of *ex ante* control of public procurements is to provide methodological assistance, and not to impose a penalty for violations.<sup>34</sup> Panaiteșcu and Cucu argue along similar lines that financial corrections for deviating from the public procurement rules are administrative measures that may affect the budget of the contracting authority.<sup>35</sup> According to Bureș, the audit report does not charge Member States with an administrative offense, nor does it impose a sentence or penalty in the case of the breach of rules related to tendering public procurements, but instead it merely states the amount of eligible and ineligible expenditures.<sup>36</sup> Šostar and Marukić also refer to a possible jeopardy to the eligibility of project costs in case of a misunderstanding of public procurement principles.<sup>37</sup>

This kind of view of the nature of financial corrections seems to be confirmed by the General Court and CJEU jurisprudence. In case T-384/10 *Spain v Commission* the Court stated that once the Commission discovers the existence of an infringement of Union provisions in payments effected by a Member State, it is required to correct the accounts presented by that Member State.<sup>38</sup> It also confirmed that the purpose of the sanctions arising from financial corrections is to restore a situation where 100% of the expenditure declared for co-financing from the (ESI Funds) is in line with the applicable Union rules.<sup>39</sup> The CJEU took the same approach in its judgment on cases C-260/14 and C-261/14 *Județul Neamț and Județul Bacău* by stating that the purpose of the financial corrections which Member States are required to make if they detect irregularities is to secure the withdrawal of an advantage improperly received.<sup>40</sup>

Despite the fact that financial corrections for problems such as the breach of the public procurement rules are not deemed punitive in nature, they can have serious consequences for Member States, as these funds will often be missing from the state budget. Dimulescu, Pop and Doroftei remind us that the consequences of suspending funds might be that governments have to continue to support the programmes financially either from the state

<sup>33</sup> LUNGEANU 2012: 108–117.

<sup>34</sup> PAVLOVA 2017: 20–30.

<sup>35</sup> PANAITESCU–CUCU 2018: 383–391.

<sup>36</sup> BUREȘ 2017: 22–26.

<sup>37</sup> ŠOSTAR–MARUKIĆ 2017: 99–113.

<sup>38</sup> Para 136 of the judgment.

<sup>39</sup> Para 138 of the judgment.

<sup>40</sup> Para 49 of the judgment.

budget, or by contracting loans from the international financial market, thus increasing the state deficit.<sup>41</sup> In fact, many audits take place once projects are ongoing or when they have already been completed; therefore, their cancellation due to the withdrawal of EU funds is not an option. In addition, while funds withdrawn for a breach of the public procurement rules may in theory be recovered from beneficiaries, if they are funded by the state budget, the withdrawal will have little practical effect, as the funds recovered will again need to be replaced by state funds, unless the institution has enough financial reserves to bear the financial correction. Thus, it is no surprise that Member States may also view financial corrections as a *de facto* penalty.

### ***Issues about the relationship between remedies and audits***

As discussed above, the relationship between the systems of remedies in public procurement and the audit of EU funds is not regulated at EU level. The nature of the two procedures differs in a number of ways. While reviews are usually decided by judicial or quasi-judicial bodies (depending on the national implementation of the Remedies Directive), audits are carried out by bureaucratic institutions. Reviews may take place during the public procurement process before the contract is signed, while audits are usually conducted once the contract has already been signed and its execution has already begun or even after it is completed. The sanctions of reviews most often affect the decision of the contracting authority and in some serious cases the contract itself, but fines or awards of damages are also possible. On the other hand, audit decisions are deemed administrative measures affecting only the funding from the EU budget to be provided to assist the completion of the contract.

Regarding the relationship between the two procedures, the Commission during its audits is not bound by any decisions taken by a national review body. The Commission's assessment of a public procurement irregularity does not depend on whether a procurement decision was challenged at the national level or not nor, if there was a challenge, on what the review body or the courts decided. The Commission may, however, rely on the national audit body's assessment of certain public procurements, although it can also choose to take a different approach.

One problem is that there is nothing to prevent the same public procurement being sanctioned at multiple levels, i.e. despite being dealt with through the review system (e.g. decision of the contracting authority might be quashed or a fine might be imposed), financial corrections may also be imposed at the EU level subsequently (provided that some other irregularity is found that was not sanctioned effectively by the review system). Another problem that may arise is that there may be conflicting interpretations of the public procurement rules. Approval of a public procurement procedure by a national body in

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<sup>41</sup> DIMULESCU et al. 2013: 101–123.

a review procedure or other control procedure is no defence against Commission findings in a subsequent audit. While, as discussed above, theoretically under Article 104(4) of the CPR the Commission shall take into account all information and observations submitted when deciding on financial corrections, it is by no means bound by any of the decisions taken at the national level. Another problem is that the audit reports of the Commission are not public and Member States are naturally reluctant to publish them. This means that review bodies or courts are not able to take their content into account and follow the Commission's interpretation of the law. It is different if the content of a report is subject to litigation before the EU Courts; however, this is rarely the case, as Member States are incentivised by the CPR rules to agree with the Commission on the amount of financial corrections, in order to avoid permanent losses of funds. From the point of view of contracting authorities, another problem may arise, namely that they wish to keep their public procurement procedures as simple as possible, e.g. by avoiding using quality award criteria or green public procurement. In fact, it has been observed that Commission audits have contributed to the rising rigidity of implementation, which leads to more focus being placed on procedures rather than on the underlying content during the implementation of projects.<sup>42</sup>

Conflicts between different institutions' assessments can also arise at the national level in the context of the implementation of EU funds, especially if the relationship between them is not regulated properly. For example, in Hungary the same public procurement law issue may be interpreted differently by the *ex ante* control body and the review body. While the *ex ante* control body may declare a solution during a public procurement procedure unlawful, thus denying a project EU funding, the review body may disagree and refuse to find any infringement of the rules.<sup>43</sup> However, without a possibility for the review body to overrule the decision of the control body, funding might still not be available to the contracting authority concerned.<sup>44</sup>

Reference to conflicting decisions by different institutions and bodies can also be found in the Romanian literature, where different interpretation by different institutions involved in the control of public procurements has generated delays in the contract awarding process.<sup>45</sup> It seems to be a particular problem that delays are caused by the way in which procurement law is interpreted by contracting authorities, the regulator and the authorities responsible for the verification, control, enforcement and audit and, despite a number of checks along the way, the responsibility for procurement decisions still rests with the contracting authority or the beneficiary of the project.<sup>46</sup>

<sup>42</sup> NYIKOS-KONDOR 2019: 113–134.

<sup>43</sup> See the example of PPAB Decision No. D.453/9/2019 below.

<sup>44</sup> The Hungarian example is further discussed below.

<sup>45</sup> ZAMAN-CRISTEA 2011: 60–71.

<sup>46</sup> LUPĂNCESCU 2017: 120–125.

## NATIONAL IMPLEMENTATION – AN EXAMPLE FROM HUNGARY

In Hungary, strict control and audit systems exist for EU-funded public procurements, besides the traditional review systems. When a public procurement is funded from EU funds (including the European Structural and Investment Funds and the Recovery and Resilience Facility), mandatory *ex ante* and *ex post* controls are in place.<sup>47</sup> If the estimated value of a public procurement exceeds the EU thresholds, or, in the case of work contracts or works concessions it exceeds HUF 300 million, then the managing authority and the Department of Public Procurement Control (hereinafter: DPPC) of the Prime Minister's Office must check the documents before the procedure is launched, after which the DPPC also checks the actions of the contracting authority during the procedure. The contracting authority, which in this case is also a beneficiary, must obtain supporting certificates from the DPPC in order to be able to launch and then conclude the procedure, and to finally be able to access EU funding to cover the costs of the contract. If the procedures do not reach the required thresholds, all documents created during the public procurement procedure are controlled *ex post* by the managing authority.<sup>48</sup>

During this process the managing authorities and the DPPC must interpret and apply public procurement law. Since the DPPC specialises in checking EU-funded procurements, it has access to the relevant audit reports, it does not primarily take into account the past decisions of the review body and the courts, but the views of the Commission in the course of past audits of public procurements. Interestingly, while the legislation applicable to 2014–2020 referred to a control of the legality of public procurements, the 2021–2027 legislation states that the DPPC carries out “eligibility control” of public procurement procedures. The aim of this was not to fundamentally change the content of controls, it was merely a change of terminology in order to indicate that besides the express legal provisions, the DPPC also takes into account “audit” aspects, i.e. the interpretation of EU law provisions during Commission audits.

Despite the presence of such strict control processes, EU-funded public procurements in Hungary may also be subject to the traditional review procedures. In Hungary first instance reviews are carried out by a specialised body, the Public Procurement Arbitration Board (PPAB), whose decisions are subject to judicial review by the courts. In Hungarian legislation there is no official hierarchy between the PPAB and control institutions. Their relationship is only partially regulated. If there is a review during the public procurement procedure itself then, in case of *ex post* control, the managing authority must take into account the decision of the review body. Consequently, if the PPAB finds an infringement related to a specific action of the contracting authority, then the managing authority must accept that assessment and determine the result of the controls accordingly. However, it is not prevented from finding other infringements that are not subject to the PPAB procedure.

<sup>47</sup> Chapter IX of Government Decree 256/2021 (V. 18.) on the Rules of the Use of Funds from Certain European Union Funds in the 2021–2027 Programming Period.

<sup>48</sup> NYÍKOS–Soós 2018: 133–156.

The same applies if no infringement has been found during the remedies procedure. Clearance of the procedure during *ex post* control does not make the procedure immune from a challenge *ex officio* by the Public Procurement Authority, although in practice the Authority is likely to be reluctant to bring cases in such situations. The managing authority, following an *ex post* control procedure, may also initiate an *ex officio* procedure within the scope of a so-called “irregularity procedure”, although it is not bound to do so.

The situation is more complicated with respect to the DPPC and PPAB. When the PPAB hears a case during the public procurement procedure itself, then the DPPC must pause its control procedure until a decision has been made. The DPPC will usually follow the decision of the PPAB, although it is not officially bound by the decision of the review. Even if this is the case, there is no guarantee that the DPPC will not find another irregularity in the procedure as it checks all aspects, while the Arbitration Board only bases its decisions on the claims made before it.

Issues may also arise when the final decision in the public procurement procedure has already been made and the beneficiary receives a non-supportive certificate due to having breached the public procurement rules. Officially no remedy is available against the DPPC certificate. If the beneficiary nevertheless completes the procedure and signs the contract, then it will not be eligible for any funding from EU funds. It also risks facing an *ex officio* challenge at the review body, although since the DPPC sees itself as exercising a preventive function, it is usually reluctant to go to the review body. Challenges more frequently originate from managing authorities, although they mostly happen in *ex post* controls. Some beneficiaries may try to get round a negative certificate from the DPPC by launching a review against their own procedure (which is also possible) in the hope of obtaining a resolution that in fact no infringement occurred. This happened for example in Decision No. D.453/9/2019 of the PPAB. In this case the contracting authority was a private beneficiary which came under the public procurement rules due to having received a grant from the Economic Development and Innovation Operational Programme. The PPAB ruled that, contrary to the opinion of the DPPC, the amendment of the call for tenders containing a condition that was impossible to satisfy in practice was not unlawful. In this case the DPPC refused to change its opinion, despite a contrary decision by the PPAB. Therefore, no funding could be granted to the beneficiary from EU funds.

The above scenario, however, is not very common in practice, as non-supportive closing certificates are only issued in a minority of cases.<sup>49</sup> Conflicting decisions are an especial problem for private beneficiaries subject to the public procurement rules<sup>50</sup> or local authorities, which may not be able to obtain sufficient funding from alternative sources to finance their projects. On the other hand, public beneficiaries may be able to receive alternative funding more easily for their projects from national sources, especially if the

<sup>49</sup> ΝΥΙΚΟΣ–ΣΟΪΣ 2018: 133–156.

<sup>50</sup> Private beneficiaries receiving certain amounts of financial support were required to use public procurement procedures during the implementation of their projects. However, that provision is no longer in force since 19 December 2019, so the issues affecting private beneficiaries are now less significant.

realisation of those projects is strategically important for the government. In such cases EU funds are often simply replaced by national funds and the project can still be executed.<sup>51</sup>

The reverse scenario may also be possible, i.e. that the DPPC does not find any irregularities, but then a review is requested and the PPAB finds that some action has been unlawful during the public procurement procedure. The finding may even relate to actions that have been requested by the DPPC during the procedure. This issue has been partially dealt with by an amendment to the Public Procurement Act,<sup>52</sup> which prohibits the PPAB from imposing a fine on a contracting authority for actions that were carried out following a request from the DPPC. However, finding an irregularity and the imposition of other sanctions, such as invalidating the result of the procedure, is still possible.<sup>53</sup> Furthermore, according to Hungarian public procurement law, the PPAB, when imposing a fine, must take into account the possibility of other sanctions, such as the withdrawal of funding from the contracting authority, when setting the amount of fine.<sup>54</sup> This does not mean, however, that no fines can be imposed on the contracting authority.

Finally, it must be mentioned that, despite the DPPC taking into account past audit findings, the national audit body (Directorate General for Audit of European Funds) or the Commission might still disagree with the DPPC on the legal interpretation of certain aspects of public procurement law and impose financial corrections later on in connection with procedures cleared by the DPPC.

It can be seen, then, that in Hungary several authorities take part in the control of EU-funded procurements (managing authority and DPPC, PPAB, Public Procurement Authority, national audit body and the European Commission), which are not subject to an official hierarchy. Conflicting decisions and varying interpretations of the law can cause inconvenience to contracting authorities and ultimately to the Member State, making it difficult to know which approaches and actions are lawful and which may be disapproved of by the national bodies and ultimately by the European Commission auditors.

## A POSSIBLE WAY FORWARD

No significant changes were introduced in the approach of the 2021–2027 legislation with respect to the audits of public procurement. The “supremacy” of Commission audits continues to prevail, and Member States will have to accept the Commission’s assessment, as contained in final audit reports, or possibly launch a challenge before the EU Courts. All EU Member States will thus continue to have to steer a careful path between remedies and audits, and between the national and supranational bodies responsible for checking the lawful use of EU funds.

<sup>51</sup> Soós 2019: 46–54.

<sup>52</sup> Section 165(7c) of Act CXLIII of 2015 on Public Procurement.

<sup>53</sup> Soós 2020.

<sup>54</sup> Section 165(11)(f) of Act CXLIII of 2015 on Public Procurement.

While there is no obvious solution to the conflicts which may arise between review bodies and auditors, and national and EU level controls, certain measures might be considered that can alleviate the problems to a certain extent. At the national level, the content of audit reports could be made public (even in an anonymous manner) in order to show how public procurement law is interpreted by Commission auditors and the national audit body. However, governments may be reluctant to proceed with this solution, since they might find that publishing the results of audits is politically sensitive, as they reveal the amount of financial corrections imposed on the Member States. An alternative approach could be to share audit reports with the review bodies, which could then consider using the approach of auditors in their decisions on certain legal questions. If this approach is still not viable, then extensive guidance on specific legal questions, including anonymous case studies, using auditors' interpretation of the law could provide a reasonable alternative. This is already done by the Commission to some extent in its Guidance for Practitioners,<sup>55</sup> although additional guidance at the national level, specific to national public procurement law, could be very useful for contracting authorities and tenderers. Putting controls in place that are specific to EU-funded public procurements is also a viable option. This is already applied in Hungary, as described above, although the relationship of these controls with review procedures could be better defined.

At Member State level, it can be expressly stipulated that the review body always has the final word concerning the legality of EU-funded public procurement procedures, as well as any other public procurement procedure. Alternatively, appeals against the findings of a national control body to the review body could be permitted, or the legislation could provide that the findings of the control body would need to be confirmed by the review body for it to be effective.

At the EU level, the Commission could be obliged to take the Member State to the General Court or the CJEU, before financial corrections are imposed. This is already the case for imposing fines in the context of infringement procedures for general breaches of EU law. However, this could only be implemented in the longer term and the Commission would probably be reluctant to accept this, as it could reduce the effectiveness of audits monitoring the efficient use of EU funds. Currently, financial corrections provide a greater incentive for contracting authorities and Member State to comply with the public procurement rules than remedy procedures or the threat of infringement procedures under Article 258 TFEU.

More reliance of Commission auditors on national bodies, including review and control bodies could also be a way forward. The CPR already provides for what are known as enhanced proportionate arrangements under certain conditions, whereby the Commission limits its own audits to a review of the work of the audit authority, unless available information suggests a serious deficiency in the work of the audit authority.<sup>56</sup> The same could apply to specialised control bodies checking public procurement procedures.

<sup>55</sup> European Commission, Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds. February 2018.

<sup>56</sup> Articles 83–84 CPR.

However, this might also not be acceptable to the Commission as it would probably not wish to rely purely on national systems (remedies or other control systems) for interpreting public procurement law. In addition, for certain Member States, enhanced proportionate arrangements are currently not a practicable option as it requires taking part in enhanced cooperation on the establishment of the European Public Prosecutor's Office.

Since currently there is not necessarily a clear-cut way to manage the relationship between different control systems, such as remedies and audits, the best advice to contracting authorities is to take into account EU principles as far as possible, along with ensuring that there are detailed legal provisions, when conducting their EU-funded public procurement procedures. All parties should also take extra care when making their decisions and thoroughly justify them in writing.<sup>57</sup> Contracting authorities should also plan their procurement procedures carefully and use all the available guidance and expert advice, to find the best lawful solutions to satisfy their procurement needs during the implementation of EU-funded projects.

## CONCLUSION

The relationship between ordinary public procurement remedies, audits of EU-funded public procurements and other control procedures remains largely undefined at the EU level. In the context of EU-funded procurements, the Commission is a powerful institution and in many cases its audit findings must be accepted as an authentic interpretation of EU public procurement law, regardless of any national level review procedure. Judicial review before the EU courts is available against Commission findings, although under the CPR rules the Member States are under an incentive to agree to financial corrections proposed by the Commission. While financial corrections can have serious budgetary implications for Member States, officially they are not deemed as sanctions, but only administrative measures connected to the eligibility of project expenditures.

At the national level, review bodies play a prominent role in determining the legality of public procurement procedures, in accordance with the Remedies Directive. Their interactions with the management and control systems of EU funds are up to the Member States to determine in their national law. As the Hungarian example shows, the roles of these institutions can overlap and conflicting decisions can pose challenges to contracting authorities. It is therefore in the interest of Member States to clearly define the boundaries of institutional competences in their laws, as far as they can. With respect to EU audits, Member States should also find a way to channel the Commission's interpretation of EU public procurement law into national practices.

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<sup>57</sup> NYIKOS 2012.

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