PRO PUBLICO BONO – Public Administration, 2024/2, 119–146. • DOI: 10.32575/ppb.2024.2.7

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ALTERNATIVE DISPUTE RESOLUTION IN PUBLIC PROCUREMENT FOCUSING ON HUNGARY

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In public procurement frameworks, bidding, contracting and performing contracts is notoriously more challenging than the bidding, contracting and performance of private contracts. The strict procedures of public procurement do not tolerate mistakes and reduce the possibility of compromise if conflicts arise.

This study examines whether the resolution of disputes arising in public procurement procedures with the use of alternative dispute resolution (ADR) methods can be integrated into the strict system of public procurement regulation. It also investigates whether the use of ADR can be justified in public procurement disputes at all, and whether it can handle them effectively. During our investigation, we reviewed the so-called preliminary dispute settlement (PDS) scheme, a special institution of Hungarian public procurement law. Although this mechanism is not a form of dispute resolution in the classical sense, since it does not involve consultation and does not result in compromise at all, the PDS process, as a widely used, quick and simple electronic procedure is an accepted formula in Hungary for settling public procurement procedure conflicts.

Keywords:
public procurement, public contract, alternative dispute resolution, ADR, preliminary dispute settlement, arbitration, conciliation

INTRODUCTION

Conflict is a natural part of everyday life and human relationships. Various academic disciplines have formulated many definitions of conflict and assessed conflict in various ways.[1] The sociology of law[2] deals with those conflicts where legal means are employed and when violations of rights and interests turn into legal disputes.[3]

The area of public procurement involves many types of conflicts that arise at different levels. The transposition of EU directive legislation and the exercise of law in the constantly changing and evolving interpretation of the law can make resolving these conflicts particularly challenging. The correct interpretation of legislation and the implementation of jurisprudence in accordance with the basic principles are fraught with many difficulties. Contracting authorities may conflict with bodies carrying out various aspects of public procurement, while economic actors may not agree with the procedural and substantive (contractual, professional) conditions imposed by contracting authorities. All of this generates numerous public procurement conflicts.

Public contracts are in fact private acts of public administration, whereby the state or public purchaser does not act in a position of power, but as a private legal entity, on an equal footing with the other contracting party. Moreover, they apply their acts in combination (specialised activity, unilateral act as award, followed by private law contracting).[4] This creates an interesting dichotomy while reinforcing the mixed regulatory nature of public procurement. The conflicts which may arise during the contract performance phase and their handling are determined by the regulation underlying all public procurement legislation: the Hungarian Civil Code (hereinafter: Civil Code) and a number of substantive rules related to the subject matter of the public procurement. For example, in the case of a construction contract, the provisions of the Civil Code relating to the contract to produce works and the rules of construction law apply. Against this background, different forms of ADR could be considered at this stage, either in the form of formalised and legally settled ADR arrangements or arbitration as determined by the contracting parties. At this point, therefore, the conflict resolution goes beyond the framework for public procurement procedures.[5]

The rules governing the settlement of disputes relating to this stage of the public procurement procedure can be found in public procurement law, but the review of these decisions is subject to the rules of civil procedure and administrative procedure.

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1 Glavanits–Wellmann 2020.

2 "Sociology of law – a science dealing with the functioning of law (e.g. conflict management), the actual effects of law on individual behaviour and social processes, and the determinants of law as a social phenomenon. Some of the research is based on jurisprudence, while others seek answers to the questions of sociology (using empirical methods)." See: www.hunfi.hu/nyiri/enc/1enciklopedia/fogalmi/jog/jogszociologia.htm

3 Pokol 2002.

4 Magyary 1942: 588.

5 Boros 2021b: 8.

In terms of the outcome of public procurement, the aim is to fulfil the procurement needs of a contracting authority (state, municipal or other organisation operating from public funds qualifying as a contracting authority) in order to perform public tasks. It is a process concerned with efficiently spending public money within a controlled framework.[6] In the field of public procurement, conflict situations arising from differences of interests can occur at three points. First of all, conflicts may arise when determining the public procurement need, and in the process of concretising the related source and content, i.e. during the planning and preparation phase of public procurements. In organisations engaged in budget management, this is a system of processes that overlaps greatly with budget planning, which is not covered by this study.[7] On the other hand, conflicts may also arise at any other point in the procedure, between the contracting authority and any economic or other actor with an interest in the procedure, i.e. from the launch of the procedure until its conclusion by the announcement of results and, optimally, by the conclusion of a contract. The third type of conflict situation may arise after the completion of the procedure, during the performance process of the contract concluded as a result of the public procurement procedure. Our investigation focuses on conflicts between contracting authorities and bidders, but also discusses alternative dispute resolution options related to public procurement audits.

Forms of alternative dispute resolution

At the heart of alternative dispute resolution (ADR) is third-party neutrality, which helps disputants select, design and conduct processes designed to help the parties find a mutually acceptable solution to disputes between them. ADR procedures range from simple proposals for solutions to direct solutions and are much more flexible than traditional, formalised court and authority procedures.[8]

Various forms of ADR have emerged from the resolution of consumer disputes related to different sectors. The importance of this issue is demonstrated by the fact that in financial markets, for example, reports by the World Bank (2012) and the European Parliament (2014) have suggested that limited consumer protection in parts of the financial sector exacerbated the global financial crisis.[9]

Alternative approaches to dispute resolution can be found in many areas of international literature. Lee et al.[10] describe alternative solutions for settling disputes in the

6 Pfeffer 2018.

7 The examination of dispute resolution at the planning stage goes beyond the scope of this article, but its importance must be emphasised, see, for example, Magyary 1942: 460–480.

8 Lock 2007.

9 Gaganis et al. 2020.

10 Lee et al. 2016.

construction industry, highlighting arbitration,[11] business dispute resolution between parties,[12] mediation,[13] the ADR advisory system,[14] the use of a Dispute Review Board,[15] and the Mini Trial.[16] Some authors have also pointed out that ADR procedures, especially arbitration, despite its many advantages[17] are still marginalised in contrast to formalised lawsuits.[18] Contrasting trends are reported in literature on public procurement with Radinova, for example, providing evidence suggesting that the majority of suppliers prefer to resolve procurement conflicts with purchasers through out-of-court negotiations, and only 31% of respondents resort to legal proceedings.[19]

The latest literature also addresses the issue of Electronic[20] and Online Dispute Resolution (ODR), which is based on the "information technology and telecommunications via the Internet (collectively referred to as 'online technology'), which are used for alternative dispute resolution".[21] According to Lavi (2016), "the full spectrum of alternatives to out-of-court resolution of disputes, implemented while using communication and other technological means, especially the Internet".[22]

Since the 1980s, the EU has encouraged Member States to introduce mediation procedures as widely as possible at the judicial stage of disputes or as an alternative way of settling disputes.[23]

However, this is a less explored issue in the field of public procurement: based on an analysis of the Web of Science database, we found a total of 1,423 studies on the search term alternative dispute resolution. These can be classified by discipline as follows, based on the first ten records (Table 1).

Based on our analysis of the Web of Science database, only two studies have been conducted so far that contain both the keywords "alternative dispute resolution" and "public procurement".[24]

In Hungary, the framework for mediation is Act LV of 2002 on Mediation Activities (Kvtv.), which was created with the aim of facilitating the out-of-court settlement of civil law and administrative law disputes.[25]

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11 El-Adaway et al. 2009.
12 Lu–Liu 2014; Yiu–Lee 2011; Murtoaro–Kujala 2007.
13 Qu–Cheung 2013.
14 Cheung–Yeung 1998.
15 Ndekugri et al. 2014.
16 Stipanowich–Henderson 1993.
17 Drahozal 2004; Eisenberg et al. 2008; Hagedoorn–Hesen 2009.
18 Hylton 2005; Stipanowich 2015.
19 Rodionova 2021.
20 Beebeejaun–Face 2022.
21 Hörnle 2003: 27.
22 Ojiako et al. 2018.
23 See the European Commission's Green Paper of 2002 and Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.
24 Dragoş, 2011; Rodionova 2021.
25 Act LV of 2002, Art. 1 (1).

Table 1: Web of Science records in different research areas on the search term alternative dispute resolution

Research Areas	Record Count	% of 1,423
Government Law	748	52.57
Business Economics	241	16.94
Social Sciences Other Topics	95	6.68
Engineering	66	4.64
Environmental Sciences Ecology	63	4.43
International Relations	62	4.36
Psychology	55	3.87
Public Administration	55	3.87
Education, Educational Research	43	3.02
Family Studies	40	2.81

Source: Web of Science

It is widely recognised that mediation is most used in family and labour law cases. For reasons of economy of procedure and time, the literature supports the wider dissemination of mediation into other fields and emphasises its advantages.[26] Some studies call for judges themselves to refer cases before them to mediation, either at their discretion or on a mandatory basis in certain types of cases. Mediation contributes to the success of the procedure and compliance with the law by involving the stakeholders. In addition to high-level, advanced public administration systems, the socialisation, acceptance, and transparency of public administration decisions can be increased by mediation, and this type of ADR can thus also become a mean of increasing efficiency and publicity.[27] In view of these positives, its dissemination in as many areas as possible should be supported. The question arises as to whether mediation is justified in public procurement disputes or whether another ADR approach is more appropriate.

Settlement of public procurement disputes

During the performance phase of public contracts, various ADR methods may be used from country to country, usually in order to avoid lengthier and more costly legal proceedings. These are typically optional (e.g. United Kingdom).[28] Sometimes court litigation has to be preceded by mandatory conciliation (e.g. in Romania), which also applies to public contracts. While Dragoș noted in 2011 the reluctance of contracting authorities to use conciliation for

[26] Blohorn-Brenneur – Nagy 2021: 132.
[27] Hohmann 2019: 6.
[28] Trybus 2011.

fear of an audit by the Court of Auditors, which itself does not support the use of similar alternative means in public administration,[29] Mihaela V. Cărăuşan's 2018 study suggests that the time has come in Romania when alternative dispute resolution will no longer be the exception but the rule, as it has become mandatory for works contracts to recourse to arbitration.[30] In the early 2010s, Lithuania also experienced uncertainty in this area: a decision by the Supreme Court led to a setback to the acceptance of public contract arbitration when it ruled that public contracts cannot be awarded through arbitration.[31] Portugal has a long tradition of arbitration, and the challenge for them is to ensure compliance with EU directives, transparency and publicity.[32] The international FIDIC contractual system, widely used in the construction sector, with its dispute prevention and settlement mechanism, through the so-called Dispute Avoidance/Adjudication Board (DAB), aims to prevent parties from reaching the level of dispute.[33]

The lack of research and studies is mentioned in the literature as an obstacle to the development of ADR. This is due to the confidentiality of the settlements reached in the course of ADR and the need to fulfil confidentiality requirements. Miller argues that while various forms of ADR are widespread internationally and are preferred for resolving contractual disputes between businesses and central governments in Canada, the United States and the United Kingdom, the applicability of the ADR to public procurement litigation is questionable. Miller also notes that when a case involving a public procurement procedure goes to court, months of litigation can cost a great deal of public money. In his opinion, this could become a thing of the past if forward-looking public procurement professionals embrace and institutionalise the use of ADR.[34]

Member States of the European Union are responsible for resolving disputes arising in public procurement procedures under the Government Procurement Agreement (GPA), UNCITRAL and EU public procurement directives. These documents contain the right to legal remedy and the mandatory possibility of judicial review, but they do not oblige or expressly refer to arbitration. In addition to these rules of international and EU law, the public law rules of the Member States are free to determine their own systems of bodies for public procurement review and the criteria that would give rise to judicial review.

In international cases, in the case of large-scale cross-border contracts and concessions, foreign bidders face greater difficulties than domestic firms, while at the same time they may distrust national regulations and institutions, as well as public procurement review bodies. This may necessitate greater use of international arbitration. Some authors, such as Miller, argue that arbitration may already have a place in the contract award process, and

[29] Dragoş 2011.
[30] Cărăuşan 2018.
[31] Audzevičius–Daujot 2012.
[32] Mimoso–Anjos 2019.
[33] Ledger 2017.
[34] Miller 2006.

would be an innovative way of resolving this trust problem. The question is how this can be integrated into the structure of the EU and the Member States.

In January 2021, the International Chamber of Commerce (ICC) Arbitration Rules for International Affairs entered into force, seeking to provide a neutral framework for resolving cross-border disputes. The organisation, which represents 45 million companies worldwide, continued to conduct arbitration in a port concession case involving public procurement prior to the entry into force of this Policy.[35]

The biggest challenge to incorporating arbitration into the procurement process is the challenge of speed. In the case of an unlawfully awarded contract, in the tenderer's view, it is in the tenderer's primary interest to stop the contracting process in order to buy time to prove itself right, and, where appropriate, to bring about a situation where the procurement procedure can be declared successful or repeated. This is because it is not possible to restore the original conditions with regard to the already fulfilled contractual elements, so the business opportunity is lost. If the search for arbitration starts only when an infringement is detected, the form and conditions of the applicable procedure are established, and the temporal implications of this make it impossible to remedy the law effectively from a business point of view in public procurement contexts.

It can be seen from the above that arbitration as a form of ADR enjoys support from academics internationally and primarily in "Anglo-Saxon" legal systems: it has a role to play in resolving public procurement and tender disputes, and this role may increase. However, in order for the potential of arbitration to develop further, public law should take this into account and arbitration tribunals should develop their own set of rules for the specific structure of public procurement.

AIM AND METHODOLOGY OF THE RESEARCH

This study aims to provide an overview of potential applications of ADR in public procurement, focusing on domestic applications. Among other things, Miller's earlier article argued for the use of mediation and the introduction of new forms of alternative dispute resolution in public procurement, primarily for the benefit of foreign bidders of internationally available tenders.[36] We were interested in determining whether a particular Hungarian method of ADR in public procurement, the preliminary dispute settlement (PDS) procedure, fulfils its purpose or whether it is necessary to introduce additional measures to ensure effective legal protection.

First, we examined whether the legal institution of PDS could be regarded as an alternative dispute resolution tool for public administration. Our hypothesis (Hypothesis 1) is that

[35] Jenkins–Forster 2021.
[36] Miller 2006.

PDS in public procurement can be regarded as an alternative means of administrative legal protection.

Our second hypothesis (Hypothesis 2) is that the legal institution of PDS is suitable for remedying most of the infringements occurring during public procurement procedures.

Our third hypothesis (Hypothesis 3) is that the current Hungarian public procurement legislation does not require the inclusion of an additional alternative dispute resolution solution.

A range of different research methods were used to investigate each hypothesis. In the first half of our study, descriptive and historical methods were applied. In the framework of a literature review, we examined and analysed the results of current research into alternative dispute resolution. We examined the system of administrative dispute resolution mechanisms using a descriptive methodology, and then reviewed the alternative dispute resolution mechanisms used in public procurement historically. Our first hypothesis was confirmed by the literature research results.

In support of our second and third hypotheses, as a primary research method, we conducted an in-depth interview and focus group-based research with highly experienced public procurement experts. In the focus group, we involved nine experts who are familiar with and represent the policy, authority, contracting and bidding aspects in order to become familiar with their views and acquire a more nuanced picture of the topic. It was not possible to organise a moderated discussion at the same time in the focus group, instead we received answers to our questions during an in-depth, iterative professional discussion, and beyond that, the respondents also provided valuable comments and discussion points.[37] To test the second hypothesis, i.e. whether PDS is suitable for remedying most of the infringements occurring during public procurement procedures, we asked the interviewees the following two questions, the second of which clearly goes into greater detail than the first question. (Question 1: Do you consider that PDS is an effective and good solution for preventing public procurement disputes from the point of view of contracting authorities and/or tenderers? Question 2: At what stage of PP is PDS the most useful and effective solution? At the application/bidding stage or against the summary announcing the results of the procedure?) The aggregate answers and the comments raised during the discussion are described in the fourth chapter of this study dealing with the second hypothesis. To examine the third hypothesis, i.e. whether the current Hungarian public procurement legislation requires the inclusion of an additional ADR solution from among the public procurement remedies, we formulated questions that deal with specific important stages or legal institutions of the public procurement procedure. (Question 3: Due to the crisis phenomena of previous years, the modification of public contracts became a priority issue and a great challenge for operators. In this context, would you suggest the use of an alternative dispute resolution solution that would be able to bring the parties' positions into convergence with the involvement of an independent actor in order to prepare an

[37] Boncz 2015: 43; Babbie 2001: 315–348.

agreement between the parties (in compliance with public procurement rules)? Question 4: Do you envisage including an alternative dispute resolution mechanism in the area of public procurement control? Question 5: Would you propose introducing other means of dispute resolution in the area of public procurement or changing the current prior dispute resolution mechanism? If so, how? Question 6: Do you have knowledge of practices from other areas of law, or perhaps foreign experience in alternative dispute resolution solutions that could be considered in the field of public procurement?) The responses received are summarised in the fifth chapter.

In addition, during the analysis of our second hypothesis, statistical data collection was performed as an additional primary method. There is no readymade statistical analysis available that can be used directly for this research, so we examined the procurement remedies of the last three years (2020–2022) in detail, using the publicly available database of decisions of the Public Procurement Arbitration Board.[38] Since the search functions do not contain a direct indication of whether the PDS process took place prior to arbitration, we narrowed down our results by means of a search word test. Direct research cannot be carried out on the total number and occurrence of PDS processes, as a search function is not available in the Electronic Public Procurement System where the uploading of documents relating to PDS is mandatory and public. Unfortunately, no data is available either that would indicate the number of cases in which PDS resolved the alleged or actual impairment in such a way as to avoid arbitration redress. Therefore, we individually formed a set of investigations on the procedures that fell within our scope and filtered out the procedures involved in PDS individually. We tried to cross check the rates derived from the occurrence data with in-depth interview responses. To verify our third hypothesis, we also used in-depth interview answers.

In connection with our second and third hypotheses, we conducted national and international literature research as a secondary research method.

REGULATED CORRESPONDENCE OR REAL DISPUTE RESOLUTION?

To describe the special legal institution of Hungarian public procurement law, PDS, it is first necessary to place it in the context of the wider legal system.

In Hungary, the resolution of disputes related to public contracts is a matter of administrative appeal or is settled in court, depending on the subject matter of the dispute and the claim to be asserted. The administrative route falls within the competence of the Public Procurement Arbitration Board, whose rules of procedure are contained in the Hungarian Public Procurement Act (Kbt.). Civil law claims related to violations of public procurement legislation and public contracts fall within the jurisdiction of the court, except for the declaration of nullity based on infringement pursuant to Section 137 of

[38] See: https://dontobizottsag.kozbeszerzes.hu/dontobizottsagi-hatarozatok/

the Kbt. In many cases, disputes related to public procurement contracts are completely independent of public procurement rules since these are civil law contracts, where the rules of the Civil Code apply. Occasionally, the provisions of the Kbt. deviate from the rules of the Civil Code and are considered special cases. Both public procurement and civil law disputes may arise in respect of these.[39]

Hungarian public procurement law has experience with two legal institutions involving alternative dispute resolution. One is conciliation, the legal basis for which has been repealed, and the other is the PDS that is currently in place.

The 2003 Public Procurement Act in force in Hungary introduced conciliation and special conciliation procedures[40] during the transposition of Directive 92/13/EEC to prevent disputes and relieve the burden on the Arbitration Board. The purpose of the conciliation procedure was to attempt to settle disputes between the contracting authority and the tenderer or other interested party by agreement.[41] The explanatory memorandum of the former public procurement act introducing that legal institution rightly pointed out that conciliation does not mean conciliation in the classical sense of the word, since public procurement disputes and public procurement violations cannot be remedied by parties by trying to reach some kind of *agreement*. A public procurement dispute is a multi-party dispute: it also affects other economic operators, candidates and tenderers interested in the procedure. Therefore, if a compromise can be reached during conciliation, this may directly entail a conflict with another actor outside the conciliation procedure and result in a new legal dispute.

The main difference between the former conciliation procedure and the current PDS was that it involved external, independent and neutral persons, i.e. a conciliator appointed jointly by the parties or, in the absence of agreement on this, a three-member conciliation chamber. It was hoped that its operation would be able to convince the parties whether or not the disputed situation was indeed unlawful and, by means of legal and professional arguments, this could cause the tenderer to withdraw its request to initiate a review or for the contracting authority to recognise and remedy the infringing measure or decision itself. However, the institution of conciliation did not live up to expectations, so it was repealed in 2009.[42]

The PDS process stipulated in Section 80 of the current Act on Public Procurement is now a commonly used alternative dispute resolution tool for public procurements in Hungary.[43] The purpose of PDS is to provide the contracting authority with a quick and

[39] Várhomoki-Molnár – Kéri 2021: 6–7.

[40] Former Kbt., Sections 352–368 and 369–371.

[41] Former Kbt., Section 352 (2).

[42] In current Hungarian law, conciliation board proceedings appear in a completely different area, namely the out-of-court settlement of consumer disputes between consumers and businesses. See Antal 2022: 54–55.

[43] Boros 2020: 28; Hubai 2021.

effective opportunity to remedy the infringement caused by it on its own initiative, thereby relieving the burden on public procurement review bodies.[44]

At the time of its introduction in Hungary, PDS was mandatory: the tenderer could only submit an appeal against the decision of the contracting authority to the Public Procurement Arbitration Board after attempting to reach a resolution through PDS.[45] Later, PDS became optional, but at the same time its legal basis was extended.[46] It was possible not only against the outcome of the procedure, but also against any other procedural act of the contracting authority considered to be unlawful and against any document of the procedure considered to be infringing.[47]

According to the interpretation of the Curia of Hungary, the legal institution of PDS is not a mean of legal remedy. (Accordingly, it is not included in the Kbt.'s chapter on appeals.)[48] In PDS, there is no real and simultaneous exchange of arguments. "Its aim cannot be summed up indisputably in the provision of an opportunity for agreement before referral to the Arbitration Board and, on the other hand, in preparing the appeal procedure before the Arbitration Board by recording the positions of the parties."[49] This is still conducted in written form. In fact, there is a one-off, written back-and-forth communication in a PDS procedure in which the initiator argues his case, and the contracting authority responds and/or takes action. The initiating party shall indicate the element of the document or procedural act created during the public procurement that is considered unlawful and its proposal for avoiding or correcting the infringement. If the contracting authority detects the unlawful nature of its act on this basis, it is entitled to remedy it within a limited time limit and by the procedural acts of Kbt. There is no possibility to present pros and cons, nor to *reach consensus:* the former is excluded due to the rapid conclusion of dispute resolution, and the latter cannot be interpreted within the rules of the Kbt. The infringement alleged in the request for PDS cannot be remedied by compromise or agreement between the parties. This is excluded by mandatory public procurement regulations and public procurement principles. The arguments of the applicant shall either be accepted by the contracting authority and the requisite action thus taken, or it shall not be accepted, leaving its previous acts unchanged. There is no intermediate solution. If the applicant considers that the infringement persists, he or she may seek redress.[50]

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44 The technique of preliminary dispute settlement was introduced by Act CVIII of 2008 amending Act CXXIX of 2003 on Public Procurement and has been in force since 1 January 2010. The precedent and reason for its transposition into Hungarian law is that Directive 2007/66/EC of the European Parliament and of the Council inserted in the two review directives (89/665/EEC and 92/13/EEC) a provision according to which Member States may require the person affected by an infringement to seek review first before the contracting authority.

45 Act CVIII of 2008, Sections 96/A and 96/B.

46 Act CVIII of 2008, Section 96/A.

47 Act LXXXVIII of 2010.

48 BH2016. 50. [25], Kfv. IV. 37.642/2013.

49 BH2016. 50. [25] This follows also from Section 324 (2) of the Kbt., which was in force then.

50 Boros 2021a.

Instead of involving an independent, external party in the conciliation process, PDS entrusts the settlement to the contracting authority and the initiator: it leaves the presentation of an argument exclusively to the latter and the decision to the contracting authority alone. Therefore, the dispute is not *resolved* but merely *settled* by the current form of alternative dispute resolution prior to resorting to the appeal procedure of the Kbt. in force. Any remaining prejudice may be remedied by appeal before the Public Procurement Arbitration Board, depending on the decision of the party that alleges injury to its rights and legitimate interests.

The question arises whether, on the basis of the above, the PDS procedure can be regarded as an ADR measure at all. To answer this question, we reviewed the system of administrative control mechanisms.

Public administration influences the behaviour of legal entities in the exercise of public authority and intervenes in the specific life and legal relations of legal entities outside the organisation of public administration. This position of power requires the presence of control under the rule of law,[51] which primarily means the legal remedy laid down in the Rome Convention and provided for in the Hungarian Fundamental Law (the country's constitution),[52] but on the other hand it has a much broader scope. "Public administration control refers to all procedures during which the activities of a public administration body are examined, evaluated and, in some cases, influenced by an administrative or other body."[53] From this broader perspective, the control of public administration can be viewed in terms of institutional forums, or outside institutions, or otherwise internal (within the system of public administrations) or external control (outside the organisational system). Institutional control can be politically oriented or law-enforced. Judicial control may take the form either of legal remedies or alternative forms, which means all control mechanisms which do not involve legal redress against an administrative decision. An alternative form of control mechanisms against public administration in Hungary is the ombudsman procedure, prosecutorial control of the legality of public administration, and additional private judicial legal protection in addition to administrative judicial protection. This also includes any settlement reached outside administrative proceedings and approved by the court, as well as mediation proceedings under the Hungarian Code of Administrative Court Procedure.[54] Another important range of *alternative control* tools are ADR tools, an umbrella term which includes the out-of-court resolution of conflicts between two or more parties, in particular arbitration, mediation, and conciliation.[55]

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51 Magyary 1941: 624.

52 The Rome Convention on the Protection of Human Rights and Fundamental Freedoms Convention of 4 November 1950 Article 13e. The Convention was promulgated by Act XXXI of 1993. Fundamental Law of Hungary, Article XXVIII (7): "Everyone shall have the right to appeal against judicial, administrative or other administrative decisions which prejudice his or her right or legitimate interest."

53 Boros 2019: 7.

54 Act I of 2017 on the Code of Administrative Court Procedure.

55 Glavanits–Wellmann 2020.

Specialists in various areas of law (e.g. labour law, criminal law, civil law) and other social sciences – as described elsewhere in the "Forms of alternative dispute resolution" chapter – consider mutual *agreement* reached through *joint negotiations* to be a distinguishing feature of ADR forms. ADR thus differs sharply from the redress resulting from a decision made by an external authority, which necessarily leads to a negative or losing outcome for one party.[56] This interpretation of ADR does not think in terms of a *win-lose* pair but aims to create a *win-win* situation.[57]

Based on our literature review – regarding our first hypothesis – we came to the following conclusion: Public procurement is one of the manifestations of public administration operation and implementation, thus its placement in administrative law is not disputed. Even if a private law contract is concluded as a result of procedural rules, it is done so in a way that is strongly influenced by administrative aspects. It is indisputable that the PDS procedure aiming to avoid the need for administrative acts can be regarded as an alternative form of administrative legal protection, even if it does not fully possess the main characteristics usually associated with ADR (involvement of an independent third party, negotiation, consensus) in the literature outside administrative law. Knowledge of both public administration literature and studies of other sciences provides numerous clues and broadens one's horizons when thinking about the resolution of public procurement disputes.

A SUCCESSFUL ALTERNATIVE INSTRUMENT: PRELIMINARY DISPUTE SETTLEMENT

In Hungarian public procurement practice, statistical data are not available on the number, proportion and success of PDS procedures.[58] Moreover, it is difficult to state what can be considered success in a conflict situation. Avoiding review proceedings before the Public Procurement Arbitration Board? To accept the applicant's position and remedy it at the discretion of the contracting authority? Is the PDS even capable of remedying infringements of public procurement rights and preventing redress disputes? This is what we are trying to answer in verifying our second hypothesis.

To answer this question, we conducted a statistical analysis based on data available from the Electronic Public Procurement System (EKR) and the website of the Public Procurement Arbitration Board, as well as other relevant information available to us. In connection with the foregoing, it was necessary to take it on trust that contracting authorities publish information on PDS on the PDS interface in accordance with the rules applicable to them, and we assumed that the search functions would work properly on the interfaces.

[56] Kovács 2008: 18.
[57] Kovács 2008: 21.
[58] Hubai 2021.

Table 2: The average share of review procedures for successful public procurement procedures, 2020–2022

	2022	2021	2020	Average over the previous three years
Number of successful procurement procedures (pcs)*	7,894	7,676	7,431	
Number of appeals before the Public Procurement Arbitration Board (pcs) **	529	533	545	
Share of procedures subject to redress in terms of number of successful procedures (%)	6.70	6.94	7.33	6.99
Number of PDS previous appeal cases (pcs) **	146	183	187	
Share of PDS antecedent redress cases per case of appeal (%)	27.60	34.33	34.31	32.08
Share of redress cases with PDS history in terms of number of successful procedures (%)	1.85	2.38	2.52	2.25

Source: Közbeszerzési Hatóság 2021

Based on the data from the previous three years, the average share of review procedures for successful public procurement procedures is 7% (Table 2).[59]

About one third of the procurements subject to review procedures before the Public Procurement Arbitration Board in the previous three calendar years involved PDS procedures. It is not certain that the legal basis of the PDS is the same as the legal basis for the remedy, nor should it be concluded that these cases are initiated after and because of the failure of the party who has infringed his right. It should also be added that the PDS is of real relevance only in arbitration proceedings initiated on application, since those entitled to bring an ex officio appeal cannot initiate PDS, and vice versa.[60] In this sense, the above picture is further complicated by the division of appeals on application and ex officio. The relevant data for 2022 cannot be extracted from the website of the Public Procurement Authority, but information from the previous year is available from the Authority's annual accounts.[61] Based on the 2019–2021 data, the proportion of appeal procedures initiated on application is on average 43%.

It was not possible to collate data on the total number of PDS processes, as the search functions of currently available databases are not suitable for this. Nevertheless, we wanted to gain an overview of the prevalence of PDS, therefore, in line with our research areas focusing on construction economics, we formed a non-representative set of public procurement procedures related to construction works and engineering services that fell

[59] It should be noted that an appeal procedure may also relate to an unsuccessful procurement procedure, but no aggregated public data is available for the latter.

[60] Kbt. Section 80 (1) and 152 (1).

[61] Közbeszerzési Hatóság 2021.

within our scope of the previous three calendar years. In the set of 180, we found that PDSs were involved in 22% of the proceedings. 7% of dispute settlements were directed against summaries establishing the outcome of the procedure, while the remainder were against the alleged infringing content of the invitation or documentation, or concerned a procedural act of the contracting authority that was deemed to be infringing.

While Public Procurement Arbitration Board decisions are challenged and taken to administrative litigation at a rate of 11–14%, in proceedings previously subject to PDS, this proportion is only between 6% and 8% in the previous three calendar years. Here, too, we did not carry out a detailed examination of the legal bases, i.e. it cannot be said whether PDS, then appeal, and finally litigation have the same legal bases, but these ratios are telling.

The results of this primary research can by no means be considered representative, but the above sample suggests that the majority of applicants are satisfied with or accept the outcome of the PDS and do not feel it necessary to resort to further legal remedies. The uncertainty resulting from the lack of representativeness of the empirical research is reduced by the answers received during the in-depth interview research. The experts interviewed generally consider the legal institution of PDS to be adequate and effective. They cite its low cost and speed as advantages. From the point of view of contracting authorities, it was considered an advantage that minor errors and irregularities can be quickly remedied without major delays and negative consequences resulting from redress sanctions.

From both the point of view of the contracting authority and the tenderer, it is also an important aspect that contracting authorities that do not necessarily have direct and up-to-date market knowledge can be provided with information at this point through the arguments and suggestions of economic operators that they may not have possessed even with careful preparation (e.g. partial information provided in the scope of the fulfilment of the conditions indicated in the reference requirement or the justification of an abnormally low price). However, they still have the opportunity to apply the provisions of the Kbt. to correct the requirements or decisions concerned by appropriate means. However, this intervention is limited. The other side of the coin is when economic operators appear in their PDS requests with the need for procurement or their own tailoring of the suitability and contractual conditions, controversially citing equal opportunities. In order to ensure competition, these requests should be treated with caution and consideration. According to the now established interpretation, although still controversial in professional circles, such modification during the procedure may also be anti-competitive, and only a new public procurement procedure can provide a legitimate solution.[62] In summary, the basic requirement of all this is proper preparation and the existence of professional and market knowledge, which is expected on the side of the contracting authority. Tenderers are equally strongly expected to use PDS at the appropriate time and for the right purpose. Different legal institutions are used for different purposes in public procurement procedures, so

[62] Kbt. Section 55 (6).

requests for supplementary information, access to the file or, in some cases, redress may be the only way forward.

Another criticism of the system is that, in the experience of some of the respondents, contracting authorities may give a mechanical response without a proper examination of the merits or arguments, or they may, despite agreeing with the tenderers' suggestions, not choose to amend the contract notice or to launch a new procedure due to lack of time.

In the cluster we examined, PDS requests were rejected in the majority of cases, with only 13% of requests for PDS being upheld by contracting authorities. In the opinion of the experts consulted, who were economic operators in many cases, even if they do not agree with the reply received, do not seek redress. This is due to resource-saving considerations (so as not to incur procedural costs or the costs of legal representation, as well as the time required for the preparation of legal remedies) and concerns about the loss of confidence of contracting authorities. In particular, economic operators that already have (or intend to have) contractual relations with the contracting authorities concerned fear that applying PDS as a remedy may exclude potential business opportunities in the future. In our opinion, this concern cannot be justified in the regulated and objective world of public procurement, but it does arise.

We also found that although chambers and professional representative organisations were also granted the right to request PDS,[63] they typically do not make use of this opportunity, even though they have a wide range of market knowledge, so their insight and advocacy could achieve improved results in broadening competition.

In summary, the research supported our second hypothesis from every point of view, confirming that the legal institution of PDS fulfils the expectations placed on it as an alternative dispute resolution tool. Case law makes extensive use of this specific form of ADR, which is unique and specific even at EU level, and which has already proven its worth. Apart from proposing improvements to certain small technical details, respondents agreed that its current regulation does not require significant legislative intervention or amendment.

EXAMINING THE RAISON D'ÊTRE OF ADDITIONAL ADR MEASURES

After examining the effectiveness of PDS, which is the only ADR tool currently available, the question arises as to whether other ADR techniques could be justified at other stages of public procurement on other legal bases. We selected the most problematic stages of public procurement, i.e. those which are most challenging for professionals for various reasons: disputes built into the process or arising from ex-post procurement audits; the problem of amending public contracts; and monitoring the performance of public contracts. During our in-depth interviews, we sought to answer whether the introduction of various alternative dispute resolution techniques is justified at these points.

[63] Kbt. Section 80 (1) b).

In Hungary, the domestic control system for public procurement is very complex. Without describing the entire control system in detail, the Directorate-General for European Aid Audit (EUTAF) and the system of audits carried out within the organisational system of the Prime Minister's Office should be highlighted.[64] If EUTAF detects an infringement of public procurement law in the course of its tasks, it is entitled to initiate an *ex officio* review procedure in accordance with the rules of Section 152 of the Kbt. The subjects of the in-depth interviews agreed that the most serious problem arise both in public procurement procedures and in the control of contract amendments if the legal remedy is not initiated for any reason, typically due to the limitation period under the Kbt. In that case, EUTAF's finding of infringement is left without a public procurement remedy, which is ultimately contrary to the principle of the rule of law. Other serious problems identified included the time required for the checks built into the process and the unpredictability of findings. The control mechanisms of these two audit bodies are different, but essentially, they are document-based. In the case of EUTAF, additional means of proof appear, but oral communication of this is not typical in practice. As irregularity procedures, which can have serious financial consequences, focus on procedural steps that have already taken place, the related alternative dispute resolution mechanism cannot be understood. At the same time, the respondents would consider it important to clarify the concerns raised by the auditors through more effective communication between the parties, and it is also essential to have uniform and clear jurisprudence and for there to be familiarity with the issues.

Due to the crises of previous years, the modification of public procurement contracts became a priority issue, and this posed a great challenge to public procurement operators. It is known that the modification of public procurement is only possible under very strict conditions, and if the conditions set out in Section 141 of the Kbt. are not met, contracts can only be concluded with the modified conditions through a new public procurement procedure. The contract amendment process may require assistance in two stages: the establishment of a consensus and its justification and support for public procurement. Typically, the difficulty is not connected to reaching consensus between the contracting parties, although assessing the extent of price increases and inflationary effects due to crisis phenomena and the impact of the obstacles thus arising on meeting the deadline is by no means a simple process, but requires continuous learning and adaptation.[65] To the question of whether the legal basis and scope of the contract amendment could be assisted by preparation by an independent mediator or otherwise, the experts' response was not entirely uniform. The problem may also depend on the preparedness of the public

[64] EUTAF is the central office responsible for carrying out audit authority functions pursuant to Regulation (EU) No. 1303/2013. Its audit authority covers audits related to budgetary support provided by the European Union and other international sources, as well as procurements implemented in connection with these.

[65] The Prime Minister's Office shows the preparation process for the application and interpretation of law announcement on the application of legal provisions on the amendment of public contracts in the context of the coronavirus emergency (Prime Minister's Office, 29 April 2020), and then amending works contracts No. 13/2023 (I. 24.) Government Decree and, on the basis of its authorisation, Decree 4/2023 (II. 23.) CCM Regulation.

procurement professional, the contracting authority and the winning economic operator. It is a problem if a public procurement professional only defines the circumstances giving rise to the modification of the contract under public procurement law, but does not judge it professionally, which be subject to further legal control in a quality assurance process, and thus the contract amendment process may be blocked or protracted. This is made more difficult by caution related to the quality assurance of EU-funded public procurement, as irregular contract changes result in financial corrections. On the contracting authority's side, these contract amendment processes may be blocked either out of caution or due to lack of sufficient funds.

On the winner's side, the drafting of contract amendments is greatly hampered by the lack of documentation of work processes and supplier/subcontractor offers, which also calls into question the public procurement preparedness of economic operators. Proof of change of circumstances, unforeseeability and causality can only be provided by written documents. A well-prepared and diligent contractor with public procurement skills should be prepared for similar situations and should not expect the other party to enter a contract amendment process at its own risk without them.

While public procurement consultants (3 interviewees out of 9) saw the need to accelerate the quality assurance process and also make it predictable by a clear legal interpretation, and one of them also suggested a kind of mediation, the actors of the public procurement authority and the market (5 interviewees out of 9) preferred to improve the public procurement preparedness and prudence of economic operators. These answers suggest that it would be helpful to develop a kind of exemplar for the application of the law, which, in addition to the general regulation, would present concrete practical examples for the fulfilment, justification and assessment of the conditions related to contract amendment. From the perspective of the contracting authority, it is important that the public procurement consultant is also involved in the performance phase of public procurements, if required, while he must also be competent against professional arguments.

In our conversations, we also touched upon the possibility of mediation-based approaches. The articles in the academic literature emphasising the importance of mediation assume that conflicts are also caused by differences of opinion, different value systems, misunderstandings, or emotional charges, which means that the visible conflict that grows into a legal dispute is "only the tip of the iceberg".[66]

Different interests and different economic needs – i.e. market acquisition or business acquisition purposes – obviously arise during a public procurement procedure, which can then lead to a PDS procedure. This may be the case if, in the opinion of the economic operator, the contracting authority imposes unduly stringent qualification requirements which restrict competition, or if it imposes evaluation criteria which cannot be objectively assessed or are not relevant to the subject-matter of the contract. This may also be the case if it announces a tenderer as the winner whose ability to perform is doubted by the other,

[66] Blohorn-Brenneur – Nagy 2021: 20.

underperforming tenderer. However, these cannot be regarded as primarily emotionally-charged reasons, even if the requesting party may be emotionally charged.

When it comes to conflicts arising from misunderstandings in public procurement, mediation can be equated with neither a means of mediation nor a role for the PDS. The public procurement procedure does not specify a cooperation obligation similar to the contracting and performance process of the Civil Code.[67] Independent public procurement legal institutions were established to deal with problems of interpretation of the contents of public procurement notices and documentation, namely supplementary information and requests for information.[68] In the interests of ensuring real competition, transparency and controllability, these are carried out simultaneously towards all economic operators, in a documented, regulated procedure, contrary to the general cooperation rule of the Civil Code.

Mediation, as an alternative dispute resolution format, requires the involvement of a third, independent party in the dispute. Its task is to identify the individual interests of the parties in as much detail as possible and to suggest the most suitable compromise for satisfying both parties. It is obvious that this personal, trust-based procedure cannot be used in the necessarily restrictive public procurement procedure. Although the previous conciliation procedure involved a third party in the dispute, the task of the conciliator was not primarily to identify the interests of the parties and reach the best possible agreement, but to provide information within the legal framework provided by public procurement and to guide the contracting authority to the lawful procedure, as well as to persuade the tenderer to accept the legal decision, in order to avoid burdening the Public Procurement Arbitration Board with unnecessary work. While private legal relations can offer a much wider scope for settling conflicting interests, since financial, behavioural and even personality issues can be included in the scope of the agreement, such flexibility is incompatible with the public procurement procedure. Indeed, "[a] dispute which concerns only the interpretation of the law cannot be resolved by mediation, but only (by) the judge".[69]

The raison d'être of mediation being built into the quality control process is also questioned by its time requirements. Difficulties arise when selecting a suitably prepared third party to be involved. According to some proposals, professional organisations covered by the procurement would be able to provide this type of mediation.

It is clear that, according to Hungarian legislation, none of the conflict resolution methods (negotiation between the parties, mediation and arbitration)[70] known to sociology of law and intended to replace formal judicial procedures can be used in conflicts arising during public procurement procedures. Overall, the consensual procedure is not a logical option in disputes arising during the procurement procedure. Neither the PDS, nor the former legal

[67] Civil Code, Section 6:62.
[68] Kbt. Sections 56 and 71.
[69] Blohorn-Brenneur – Nagy 2021: 35.
[70] Pokol 2002; Antal 2022: 51.

institution called conciliation, nor the review procedure before the Public Procurement Arbitration Board can be regarded as such a procedure, and in our opinion, it could not be successfully established with any other legal institution in the public procurement regulatory system currently known and applied in Hungary.

Regarding the contract performance phase after the public procurement procedure, the official "control" (i.e. monitoring of compliance) of public procurements is also worth mentioning. Hungarian legislation uniquely regulates the monitoring of the performance of public procurements, integrating this "control" into an administrative procedure, which also applies to the subsequent control of amendments to public procurement contracts. [71] The Hungarian Act on General Public Administration Procedures (Ákr.)[72] allows the use of means of proof, but the tools of alternative dispute resolution do not fit into its rules of procedure – experts interviewed from the authority side clearly agreed on this during the in-depth interviews. At the same time, other experts interviewed argued that it is necessary to incorporate some form of negotiation into the audit procedure in order for the parties to exchange pros and cons in more detail, even with the aim of reaching a kind of settlement. Furthermore, two objections may be put forward: on the one hand, the alleged infringement in the context of the contract audit of the Public Procurement Authority is necessarily followed by a review procedure conducted by the Public Procurement Arbitration Board in a regulated manner. On the other hand, the supervision of public procurement is not intended to remedy or resolve the dispute between the parties – as there is typically no such dispute between the contracting authority and the tenderer side – but in fact protects outsiders from the point of view of the orderly spending of public funds, and does justice to everyone other than the public procurement contract with its findings.

During our conversations, we also examined the period of performance of public procurement contracts and the possibility of handling disputes between the parties. Such disputes do not constitute a public procurement dispute, but a civil law dispute, but one which proceeds in a peculiar way, due to the difficult circumstances arising from the use of public funds. In contrast to the slower and more costly judicial path, respondents voted in favour of arbitration, which would entail the very rarely used arbitration procedure of the FIDIC system. It was also proposed to develop the Certification of Performance Expert Body (TSZSZ) as an existing institution for this task, in relation to public procurement contracts in the construction economy. This requires strengthening the professional weight of the TSZSZ, expanding its current list of experts in an appropriate direction, raising awareness among experts, and developing an appropriate procedural system. (In the case of other public procurement objects, a similar expert body could perform this conciliatory task.)

[71] Government Decree 308/2015 (X. 27.).

[72] Act CL of 2016 on General Public Administration Procedures.

SUMMARY AND RECOMMENDATIONS

The Hungarian domestic public procurement review system fully complies with the EU directive regulation,[73] which was confirmed by the 2017 REFIT report of the European Commission of the European Union.[74] The effectiveness of the public procurement review system is also confirmed by statistical data.

Public procurement experts generally have a positive opinion about the PDS procedure specifically designed in Hungarian public procurement law, as well as about the arbitration appeal mechanism. The PDS is widely used, although this mechanism is not a dispute settlement mechanism in the classical sense, since it does not involve consultation and does not result in a compromise. However, the quick written exchange of positions typically produces an acceptable result for those concerned.

Public procurement experts have unanimous confidence in the operation of the Public Procurement Arbitration Board. This trust of economic operators is greatly contributed to by the fact that, in addition to the public procurement and law arbitrators, experts in the field of public procurement, which is the essence of public procurement processes, are also present among the expert commissioners acting in the three-member committee, and they represent the aspects and characteristics of the profession. [75]

The aim of this study was to examine the suitability of ADR approaches in the field of public procurement. The starting point was the definition in legal terms of the special legal institution of Hungarian public procurement law, PDS. Based on our literature research, we concluded that PDS can be classed as an alternative administrative control tool, and although it does not possess all the typical features of an ADR procedure (negotiation between parties involving an independent party, leading to a mutually acceptable compromise), it may be regarded as such on the basis of our statistical data collection and the results of interviews conducted in the research. Our hypothesis, that PDS is generally capable of preventing public procurement remedies and resolving emerging legal conflicts, appears to have been validated. Furthermore, our empirical and in-depth interview-based research indicate that public procurement regulations in Hungary leave very limited scope for various ADR techniques. The final conclusion of our study is that the transformation and modification of this well-functioning system is not justified in Hungary at present.

At the same time, improvement, development and continuous renewal are always desirable and necessary.

[73] Boros–Kovács 2017.

[74] European Commission 2017.

[75] The effectiveness of the arbitration procedure is demonstrated by the proper conduct of proceedings within statutory time limits and by the very low number of challenge figures. In litigation against arbitration decisions, judgments of an altering nature are not typical at all, but instead very few refer to new proceedings, exceeding 90% proportional upholding judgments, which also confirm the raison d'être and mature professionalism of this particular administrative procedure.

The need for forms of alternative dispute resolution arises in the preparatory phase of EU-funded public procurement procedures and in connection with the preparatory and quality assurance phases of contract amendments. This may not necessarily take the form of a method involving an independent organisational formation but instead may involve a mechanism built into the procedural order – professional dialogue, confrontation of positions and prevention of debate – which would thus increase the predictability and efficiency of quality control processes.

When dealing with contract amendment requests, a mediation approach that takes into account the criteria of the contracting authority and the successful tenderer while at the same time being adaptable to market conditions can be considered. Such a form of mediation which could work effectively if its position is also accepted by quality control bodies.

In all cases, professionalism and the existence of technical-professional and market knowledge on the subject of public procurement are the key requirements, the strengthening of which is expected. The process of public procurement requires qualified specialists and purchasers. The requirement of this professionalism was emphasised by Magyary in connection with the rational and economical operation of public administration, even at the stage of determining needs.[76] Whatever stage of public procurement, a dispute can only be resolved successfully and effectively if the parties are able to clearly state their pros and cons and use the appropriate means with precise knowledge of the legal environment. By developing the competences of public procurement experts, it is possible to ensure that they have the knowledge and communication skills necessary for avoiding and managing disputes. A similar set of competences is required for persons acting in ADR procedures. A well-prepared professional who is sensitive to the arguments of both parties, understands them and is aware of professional regulations and market conditions in addition to the system of public procurement rules may be able to handle conflicts related to public procurement in a manner which can lead to acceptable compromises even at the points where the need for this has been highlighted above. Competence in conflict resolution and mediation is already expected of public procurement professionals, and it is also important to emphasise this in their training, further training and generally as an expectation of public procurement professionals.[77] Diaz draws attention to the requirement of independence, while the importance of professionalism was emphasised by all our in-depth interviewees.[78]

The creation of new ADR entities seems unnecessary in Hungary, since merely increasing the number of organisations is not a guarantee of professionalism or efficiency.

Public procurement professionals advocate a uniform and knowable interpretation of the law, which itself contrasts with the actual public procurement legal environment, which despite its ostensibly stable and permanent framework based on the background of the directive is nevertheless constantly evolving and changing in detail.

[76] Magyary 1942: 504–506.
[77] European Commission 2020. ProcurComp EU.
[78] Diaz 2022.

In line with international trends, the use of arbitration or other forms of alternative dispute resolution during the performance phase of contracts in civil claims is, in our view, also valid for public contracts. The traditions of this are narrower in Hungary, but globalisation will certainly bring about progress in this field as well to which digitalisation tools can also contribute.

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