Institutional Conflicts in EU Funded Public Procurement

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Abstract

Several institutions oversee the lawfulness of public procurements at the EU and national level. In general, the legality of acts during public procurement are decided by review bodies appointed at the national level. In some cases, an infringement procedure may be conducted by the European Commission against Member States. Once the procurement involves EU funds, additional control mechanisms are superimposed on the standard public procurement review procedures. The competences of ordinary institutions overseeing public procurements and cohesion policy institutions often overlap, leading to conflict. Cohesion policy institutions can determine the legality of public procurement procedures through their own account, without having recourse to a court procedure or any review body, while having the power to impose financial corrections. In practice the interpretation of the rules by the various institutions can be in conflict and often there is no official hierarchy in determining which conclusion is correct.

The paper explores in detail the institutional competences and conflicts inherent in the rules on the use of EU cohesion policy funds and public procurement. These are presented both from the EU perspective and also from the national perspective, using the Hungarian institutional system as an example. It is shown how national legislation may be designed to alleviate such problems in EU funded public procurements.

In the context of EU funded procurements the Commission is a powerful institution and its audit findings must in many cases be accepted as an authentic interpretation of EU public procurement law. National review bodies and other control institutions should pay more attention to audit experiences in order to ensure that Member States avoid financial corrections as far as possible. If there are conflicts in the interpretation of the public procurement rules between audit authorities and review bodies, contracting authorities can find themselves in a difficult situation, in which they risk losing EU funds even when they manage to convince the national review bodies of the legality of their actions.

Key words: Public procurement, Cohesion Policy, ex ante control, audit

1. INTRODUCTION

Public procurement has received very detailed regulation at the EU level with the latest set of directives being adopted in 2014.[2] EU Member States need to transpose the directives into their national law and they often supplement these with additional regulation. EU level rules of public procurement have the principal role of ensuring the smooth functioning of the internal market in government contracts. Therefore the rules contain detailed procedures with a goal of providing transparent and non-discriminatory procedures for the award of public contracts in all Member States. At the same time public procurement regulation has gained importance in the use of the EU Structural and Investment Funds (ESI Funds), as it is believed that public procurement procedures can make sure that EU funds can be spent by public authorities effectively and efficiently. Public procurement has also been described as one of the primary tools for controlling of the efficiency of public spending (Poljičak, 2017).

Besides ensuring that the public procurement directives have been correctly transposed into national laws, a key issue with public procurement has become the enforcement of the rules. In the context of procurement funded from the ESI Funds a number of institutions have been set up to oversee the correct implementation of the funds, including the rules on public procurement. Such institutions exist both at the EU level and at the Member State level. These institutions aim to make sure that irregularities are prevented in the use of funds, or at least they are detected in time, in order to avoid financial corrections, as costs related to a public procurement tendered against

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[2] Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU

the law cannot be considered eligible (Bureš, 2017). This is especially important since the incorrect application of the public procurement rules is the principal cause of irregularities in the implementation of EU funds (Soós and Nyikos, 2020).

The control of public procurement procedures can take various forms, such as ex ante or ex post controls and checks based on a selected sample. Ex ante controls can often be the most effective way to prevent irregularities, although they increase administrative burden (Di Cristina, 2014). Control and audit procedures are carried out both by national bodies and the EU institutions. Besides these, EU law provides for review procedures to be mandatorily available for all public procurement procedures in the Member States, so that remedies can be sought in case of breach of the public procurement rules. These are applicable regardless of the source of funding of the procurement.

As there are a number of institutions whose task is to oversee the compliance with the public procurement rules, the possibility also arises that these institutions disagree on the legality of certain actions in public procurement procedures. Without a formal hierarchy between these institutions, it may not be apparent which of them has the final say on whether a contracting authority has complied with the rules or not. This can cause much inconvenience for public buyers, who might struggle to know which institutions' interpretation of the law they should follow in a particular case.

The purpose of this paper is to identify and analyse the relevant institutions involved in checking the lawfulness of public procurement in the context of the use of the ESI Funds and see where their competences conflict at the EU and Member State level. Special focus is devoted to the case of Hungary, where institutional conflicts are especially acute, although similar issues will be identified from other countries, as apparent from the relevant literature. Finally, some possible solutions to the institutional conflicts are suggested.

2. METHODOLOGY

The research is primarily based on an analysis of the roles and competences of institutions, as provided by current EU and national legislation in force in the 2014-2020 programming period and the legislative proposals for the use of EU funds in 2021-2027. The analysis provides an overview of institutional competences and powers of the relevant institutions and bodies. Furthermore, the relevant judgments of the EU courts and the Hungarian review body are explored. The international perspective is looked at using scientific articles from the relevant literature in order to see what issues arise with respect to controls and audits in EU funded public procurement across the EU Member States.

3. INSTITUTIONS OVERSEEING EU FUNDED PUBLIC PROCUREMENT

3.1 EU-level institutions

3.1.1 The European Commission

The ESI funds are implemented through the so called shared management method,[3] so as regards the implementation of funds the primary functions at the EU level are assigned to the European Commission. The main functions of the institutions in the 2014-2020 programming period are regulated by Regulation 1303/2013/EU[4], which is referred to as the Common Provisions Regulation (CPR). According to Article 75 of the CPR the Commission must satisfy itself that the EU Member States have set up the management and control systems designed to supervise the implementation of ESI Funds and that these systems function effectively during the implementation of programs. In order to check this, the Commission conducts regular audit missions,

[3] Where the Commission implements the budget under so called "shared management", tasks relating to budget are delegated to Member States.

[4] Regulation (EU) No. 1303/2013 of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Regulation (EC) No. 1083/2006 [2013] OJ L347/320

as part of which it also checks a sample of individual projects to see whether the rules for using EU funds have been complied with.

Commission audits in many cases involve checking compliance with the rules and principles of public procurement. The procedures to be audited are selected randomly using a pre-defined sampling method. If the Commission finds that irregularities have been committed, i.e. that there has been a breach of the public procurement rules or principles, it applies financial corrections with respect to the Member State involved. Through this procedure a part or the whole of the EU support is withdrawn from the project. Under Article 145 of the CPR if the Member State accepts the correction proposed by the Commission, then the amount of funding concerned can be used for other projects. However, if the Commission finds a number of similar irregularities in the audited sample of projects, it may conclude that the whole system is not working properly, and it may impose a horizontal flat rate correction affecting all projects on which the audit sample was based. This could be a very burdensome sanction for the Member State.

It may be questioned on what basis the Commission determines whether certain conduct during a public procurement procedure was unlawful. A simple answer would be that the public procurement directives, the internal market principles in the Treaty of the Functioning of the European Union (TFEU) and their interpretation by the Court of Justice of the European Union (CJEU) are taken into consideration. While there are always relatively simple cases to decide, the public procurement directives contain a number of rules where difficulties of interpretation arise, so it is not always easy to determine whether a condition or conduct in public procurement was lawful or not. Lawfulness may also be decided on the basis of general principles, rather than on an express provision of the directive. For example, for the use of EU funds the principle of sound financial management, laid down in Article 33 of Regulation 2018/1046/EU, EURATOM (Financial Regulation)[5], is often referred to by auditing institutions. In terms of public procurement this principle allows the Commission some discretion as to determine the legality of actions during public procurement procedures, as it can conclude that despite not having breached the express provision of the directives, the beneficiary has not carried out the procurement efficiently (e.g. the price obtained is excessive).

It should be emphasized that the Commission can determine on its own during its audits whether specific conduct was lawful, it does not need to take the Member State before the Court of Justice or have recourse to the review bodies and the courts of the Member States. The main sanction the Commission has available is the power to impose financial corrections against the Member States, which is a very powerful measure that is usually not available to ordinary review bodies. The latter institution, as provided by Directive 89/665/EEC[6] may impose fines, order injunctions or under certain circumstances declare the contract ineffective, but usually has no power to withdraw funds from a project.

Formally under the CPR the Commission does not at as a "judge", but it merely checks whether the management and control systems of the Member States are working properly. Member States must be given the chance to make observations on the draft audit report and if they are still not satisfied with the outcome, request a hearing from the Commission. Final decisions of the Commission are also reviewable by the General Court and the CJEU. However, Member States may be deterred from litigation due to the rule that they can only use funds for other projects in case of an agreement with the Commission on the amount of corrections and the fact that court procedures may take a number of years, during which the fate of large amounts of funding can be uncertain. So mostly Member States have little choice but to accept the assessment of the Commission and use the funds for other projects.

The Commission also does not have an unrestricted discretion as to the amount of financial corrections to be imposed. The CPR only determines the general principles of corrections. The Commission must take into account the individual circumstances of each case and the principle of proportionality, so it must assess the nature and gravity of irregularities and the financial implications to the EU budget. For public procurement

[5] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] OJ L 193/1

[6] Council Directive 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

irregularities corrections are determined based on the Guidelines for financial corrections.[7] Under these Guidelines financial corrections between 5% and 100% are applicable, depending on the rule breached by the contracting authority. While the Guidelines provide a transparent solution for determining the rate of corrections, it is not always easy to decide whether certain conduct falls under the factual situations provided in the Guidelines (e.g. when a selection criterion can be deemed discriminative). This is not surprising, since it would be impossible to have exact rules for all possible forms of conduct, however this means that the institution carrying out the audit has the task of assessing the legality of the exact situation or conduct in light of the general provisions of the Guidelines. As already mentioned, this is done without having recourse to an independent body, such as a court or a review body.
Another issue is that audit reports of the Commission are not public, so it is not possible to follow exactly the practice of the Commission on determining breaches of public procurement law.[8] For example we do not know in what situations a breach of the rules was established by the auditors in other Member States. Studying the judgments of the General Court or the Court of Justice on appeals against Commission decisions might be of some help, but so far there have only been a few of such cases and they only cover a small fraction of possible scenarios. Therefore Member State authorities will mainly be limited to take advice from published Commission guidance documents and studying their own Government's audit experiences, as long as these are made available to them.

3.1.2 The European Court of Auditors

While it is the European Commission that has the most direct influence on Member States' spending of the ESI Funds, the European Court of Auditors also carries out audits of the projects in the Member States. According to Article 285 TFEU its role is to carry out the Union's audit, i.e. to check whether the spending of EU funds are done in a lawful manner. This may involve checking whether public procurement rules have been complied with during the spending of ESI Funds. The European Court of auditors – just like the Commission – controls whether the management and control systems are working properly in the Member States. According to Article 129 of the Financial Regulation, all person or body that receives EU funds must fully cooperate in the protection of the EU's financial interests and grant the necessary rights and access inter alia to the European Court of Auditors.
Regarding controls carried out by the European Court of Auditors and its reports, it is worth mentioning that their outcome – similarly to the Commission – does not depend on the conclusions of Member State review bodies or the proving of the illegality of conduct during public procurement procedures before any other body. However it is an important difference from the Commission that the European Court of Auditors does not have legal powers, but it can only make recommendations in its reports for the beneficiaries of EU funding. This does not mean that Court of Auditors' reports have no weight in the use of funds, since it is often the case the Commission makes audit findings against Member States and imposes financial corrections based on these reports. This can relate to individual projects or the whole system of implementation of the funds.

3.1.3 The European Anti-Fraud Office (OLAF)

Another important institution for protecting the EU's financial interests is OLAF, which operates within the organisation of the European Commission. As suggested by its name, the role of OLAF is to investigate cases of suspected fraud against the EU budget, therefore the scope of its powers is more limited than those of the Commission. The tasks of OLAF include the investigation of fraud, corruption, serious misconduct by EU civil servants and supporting the Commission in the development and implementation of policies for preventing and uncovering cases of fraud.
Its role is also limited with respect to EU funded public procurements, since it only deals with cases where fraud is suspected during an audit or due to receiving such notification. Fraud essentially arises where a serious breach of the law is deliberate. According to EU level data only a small portion of public procurement irregularities is deemed to be fraudulent (Soós and Nyikos, 2020).

[7] 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.
[8] In contrast to this, decisions of the Commission concerning breaches of competition law and state aid are published.

The powers of OLAF are also limited compared to the Commission. It does not have official powers to impose sanctions. It essentially carries out fact finding work, as a result of which it produces a report. The sanctioning of illegal conduct is left to Member State institutions, especially the prosecution and criminal courts.

3.2 National level institutions

Since ESI Funds are implemented through shared management the control of the lawful use of funds is not only the role of the EU institutions, but also of the Member States. This is logical, since the Commission or other institutions do not have large administrative capacities in all EU Member States. So under the rules of the CPR Member States must set up and maintain management and control systems of their own to check the proper use of EU funds. As long as an EU funded project involves one or more public procurement procedures then Member States are also responsible for checking these. Proper public procurement procedures are also important as they can serve as a proof that goods and services are procured according to the "market price".

Controls are assigned to a number of institutions at the national (Member State) level. These usually operate in parallel with the system of remedies and other mechanisms, such as EU infringement procedures. As regards ESI funds Article 123 of the CPR determines which basic institutions should be set up by the Member States for the control of the use of funds. In the institutional system a key role is assigned to the managing authority whose main task is the implementation of operational programmes. As part of this it prepares calls for proposals, carries out the selection of beneficiaries and checks the implementation of projects. Controls implemented by the managing authority have an important role also in the control of public procurement procedures and especially in overseeing the proper application of the public procurement rules. In case of a suspicion of breach of the rules the managing authority carries out an irregularity procedure, as a result of which financial corrections may be imposed on the beneficiary. The CPR does not contain any rules on whether the establishment of an irregularity by the managing authority should be confirmed by any independent body, such as the review body or a court. However due to the need for specialized knowledge, the control of public procurement procedures may be assigned to specialised institutions that are independent from the managing authority, as is the case in Hungary and Romania, for example.

An important role in uncovering and investigating irregularities is also played by audit authorities, whose appointment is also compulsory under the CPR. The role of audit authorities is similar to that of the Commission for the use of EU funds, since they check whether the management and control systems in the Member State are working properly. The audit authority also carries out system audits through a random selection of projects. It can also produce a report with findings on the workings of the system and may propose financial corrections, without the intervention of any other body. Naturally the competence of the audit authority also extends to checking public procurement procedures funded from the ESI Funds. While the audit authority works independently from the European Commission, often the Commission bases its findings on the irregularities discovered by the audit authority. Nevertheless the Commission can also overrule these findings and substitute its own assessment on the working of national systems, including public procurement practices. Therefore it is possible that the managing authority and the audit authority approves a certain practice in public procurement, while the Commission still finds it unlawful and imposes financial corrections on the Member State.

Besides the controls related to ESI funds, review procedures must be available for public procurement procedures in every EU Member States, regardless of whether the procedure is funded from EU funds or not. The basic requirements of review procedures are regulated by Directive 89/665/EEC (as amended by Directive 2007/66/EC). The directive sets out the basic requirements of review procedures including the powers of review bodies and the sanctions that can be imposed on contracting authorities, such as fines and in certain cases ineffectiveness of the contract. It is notable that these systems of remedies operate independently of the audit systems of EU funds and in particular EU law is silent on the relationship between the two systems. Therefore, such regulation is left to the national law of the Member States.

In an earlier version of the CPR[9] it was stated expressly that for operations using EU funds, the rules on the award of public contracts must be respected, however the current rules in force do not contain such a provision.

[9] Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, Article 12.

Reference to the workings of public procurement system is made in the context of ex ante conditionalities and for 2021-2027 the enabling conditions. The rules do not determine which body have to power to declare a conduct during the public procurement procedure unlawful. So the regulation of this relationship is up to the Member States, although they must respect the basic EU principles and the provisions of Directive 89/665/EEC.

3.3 Special institutional set-up in Hungary

In Hungary public procurements funded from the ESI Funds are subject to a very strict control system. A special feature of the system is that virtually all such procedures are controlled either before or after the procedure has taken place. Lower value public procurements (procurement of goods or services below the EU thresholds, works contracts below HUF 300 million[10]) are controlled ex post by the managing authority, who can start an irregularity procedure and impose final corrections in line with the Commission Guidelines on Financial Corrections.[11] For procurement above these values an even stricter ex ante control and control built in the procedure is applicable. For such cases the managing authority only checks the eligibility and technical aspects of the procurement, while for checking public procurement law aspects, a specialized institution, the Department for Public Procurement Control (DPPC) of the Prime Minister's Office is responsible. The DPPC issues a certificate of quality control that allows the beneficiary to launch the public procurement procedure and at the end of the procedure a closing certificate permitting the conclusion of the contract.[12] In the absence of a supportive certificate at both stages of the process the beneficiary cannot claim payment from the EU grant to cover expenses incurred. So it must restart the public procurement procedure or restore its legality, in case that is still possible.

While the situation with the powers of the control institutions seems clear-cut, the relationship with the review body, namely the Public Procurement Arbitration Board (PPAB) is not so straightforward, as there is no formal hierarchy between these different bodies. The conflicts are most notable with respect to the DPPC and PPAB. When the PPAB hears a case during the public procurement procedure itself then the DPPC must stay 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 to do so. Even if this is the case, there is no guarantee that the DPPC will not find another irregularity in the procedure and it checks all aspects, while the Arbitration Board only bases its decisions on the claims made before it.

Conflicts may also arise when the final decision in the public procurement procedure has been made and the beneficiary receives a non-supportive certificate due to some irregularity in the procedure. Officially there is no remedy available against the DPPC certificate. Nevertheless, the beneficiary may launch a review against its own procedure before the PPAB. The PPAB is not bound by the assessment of the DPPC, so it may come to a different conclusion on the conduct of the beneficiary, e.g. that no irregularity occurred in the procedure. In such a case the DPPC is not obliged to reverse its finding and issue a supportive certificate, still leaving the beneficiary unable to claim funding for its project. The beneficiary may try to persuade the managing authority to launch an irregularity procedure and as a result impose a financial correction and still obtain some of the funding. Theoretically this is possible under the legislation, although the managing authority may be reluctant to start infringement proceedings once the DPPC had already issued a non-supportive certificate. It must be mentioned that this possible scenario in not very common in practice, as non-supportive closing certificates are only issued in a minority of cases (Nyikos and Soós, 2018). However, for the few cases this can cause much inconvenience for beneficiaries, especially private beneficiaries subject to the public procurement rules or local authorities, who may not be able to obtain sufficient funding from alternative sources to finance their projects.

The reverse scenario may also be possible, i.e. that the DPPC checks the procedure and does not find any irregularities, but then a review is requested by some interested person (e.g. a competitor) 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

[10] The EU threshold for goods and services are €139,000 for central government and €214,000 for other institutions. HUF 300 million is approximately €839,000.

[11] See above, f.n. 7

[12] Or the entry into force of the contract if the beneficiary chooses to conclude the contract before the DPPC issues the certificate.

an amendment to the Public Procurement Act[13], 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, a finding of an irregularity and other sanctions, such as invalidating the result of the procedure, is still possible.
The situation is less complicated in case the public procurement procedure is only subject to an ex post control carried out by the managing authority. In such a case if the managing authority finds an irregularity, it launches a separate irregularity procedure, as a result of which it can conclude that the beneficiary is eligible for funding, although a financial correction needs to be made. According to the regulation the managing authority should initiate an ex officio review procedure before the PPAB, in order to confirm the breach of public procurement law, although this is not always done, as the managing authority might miss the time limit for initiating such a procedure.[14] However if a review is made then, the managing authority must close the irregularity procedure based on the PPAB decision. Unlike in the case of the DPPC certificates, the result of the irregularity procedure can be appealed with the relevant government department and ultimately judicial review can be sought at the courts as well.
Even though such a sophisticated system exists in Hungary for discovering irregularities in public procurement procedures, which can be considered rather strict compared to other systems in Europe (Nyikos and Soós, 2018), neither the audit authority, nor the European Commission are obliged to follow these findings. So it may be the case that a beneficiary's procurement procedure is cleared by all control institutions at the national level, but still deemed unlawful by the Commission. Although in these cases the financial correction is made against the Member State, it may try to recover these funds from the actual beneficiary. So this means that national control institutions should be careful to use the Commission's standards as far as possible when checking public procurement procedures.

3.4 Case study on institutional conflicts

Regarding the Hungarian institutional system, the overlapping competences of institutions can be illustrated by Decision No. D.453/9/2019 of the PPAB. In this case the contracting authority was a private beneficiary who fell under the public procurement rules due to having received a grant from the Economic Development and Innovation Operational Programme. The procurement concerned the purchase of specialized machinery for an innovation project. After the publication of the contract notice, one potential tenderer indicated to the contracting authority that the technical specifications of the procurement contained a criterion, which was impossible to be satisfied by any economic operators. After that the contracting authority modified the contract notice and removed the criterion in question.
When the DPPC checked the procedure, it issued a non-supportive certificate as in its opinion the modification of the contract notice was unlawful. In its reasoning it stated that substantial modification of contract notices is unlawful when it fundamentally affects the ability of economic operators to submit a tender for the procurement. The beneficiary did not agree, and it sought a review with the PPAB against its own public procurement. Contrary to the DPPC's assessment, the Arbitration Board declared that the modification of the contract notice was lawful, as the removal of the impossible criterion from the technical specifications amounted only to a small correction of the documents and not a substantial change.
In the absence of a hierarchy between the two institutions, the DPPC did not have to change its certificate, but instead it sought an appeal against the decision through the courts (as an interested party to the case). At the time of writing the case is pending at the Hungarian Supreme Court (Kúria). In the meantime the contracting authority does not fulfil the pre-condition for obtaining EU funding, i.e. the supportive certificate from the DPPC. It is not known whether the managing authority will take the DPPC certificate as being overruled, or whether it will wait until the contracting authority starts litigation in order to oblige it to make the grant payment.
This case illustrates that in the absence of a clear division of competences, conflicting decision can be made by different bodies, making the situation for beneficiaries uncertain. It is also a difficult situation for the managing authority as it faces a dilemma: make the payment to the beneficiary and risk a negative audit finding from the Commission or refuse payment, but then risk further litigation in the national courts.

[13] Act CXLIII of 2015 on Public Procurement.
[14] It is currently 90 days from having become aware of the infringement, although before 1 February 2021 the time limit was only 60 days.

4. INTERNATIONAL EXPERIENCES

It is apparent from the literature that a number of Member States had issues with public procurement in the use of EU funds, especially in Central and Eastern Europe. In many cases the problems occur due to non-compliance with the existing rules rather than the fact that the legal provisions are too complex (Weber and Witkos, 2013). Commission auditors with respect to Romania emphasized that the problem is not the lack of legislation, but rather the limpness of implementation of the rules (Baciu, 2013). Long and complicated procurement procedures, as well as the difficult process of project administration have caused difficulties for the use of EU funds also in Lithuania (Dumčiuvienèa and Adomynienèb, 2014).

A number of authors also mention the difficulties related to the institutional system. Bachtler and Ferry (2015) point to the fact that performance and accountability are difficult to manage in cohesion policy, where authority is diffused both horizontally and vertically between levels of government and between government and non-state actors. It is also a problem that cohesion policy carries an inherent risk since its programmes are delivered by numerous organizations and systems, and involve very large numbers of diverse projects, while there are three levels of government, each with its own view on how things should be done (Nyikos and Tátrai, 2013). It has been expected in Bulgaria that ex ante controls would minimise the risk of financial losses in the use of EU funds, but controls have been very labour intensive, and the small number of checks have only produced negligible results (Pavlova, 2017). Specific reference to institutional conflicts can be found in the literature on Romania, where it has also been experienced that different interpretation by different institutions involved in the control of public procurements generated delays in the contract awarding process (Zaman and Cristea, 2011). One of the major problems seems to be 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 (Lupăncescu, 2017). Vasile and Mihai (2015) have also referred to the constant changes of government and continuous conflicts between state institutions as a barrier to the absorption process. It also seems that in Romania unstable and unclear public procurement legislation and large numbers of institutions overseeing the management of Structural Funds, with lots of bureaucracy and paperwork have caused difficulties (Neamtu and Dragos, 2014).

On the other hand, other authors emphasize the non-sanction nature of financial corrections and accept that from the perspective of cohesion policy they are a matter of eligibility of costs, rather than a decision concerning the interpretation of public procurement law. According to Panaitescu and Cucu (2018) in the event of non-compliance with the public procurement rules, administrative measures are taken by applying financial corrections affecting the budget of the contracting authority. Bureš (2017) also pointed out that the audit report does not state an administrative offence or a penalty for breaching the tendering rules, but it rather states the eligible and ineligible expenditures. It has also been mentioned that the lack of understanding of the of the principles of public procurement or their misinterpretation can jeopardise the eligibility of project costs (Šostar and Marukić, 2017). However, 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 (Nyikos and Kondor, 2019).

Despite the way EU legislation is phrased, it cannot be denied the control and audit authorities do have to provide an independent interpretation of the public procurement rules and principles and their interpretation has an important bearing on the financing of projects. It is submitted that more coherence is needed between how different institutions interpret the law, in order to increase legal certainty and help the lawful absorption of ESI funds across EU Member States.

5. POSSIBLE SOLUTIONS

It was shown above that EU funded public procurements are subject to controls by several national and EU bodies and the division of the functions of these bodies are not always clear, and there is also overlap between their competences. For example, EU level regulation does not provide for a clear hierarchy between public procurement review bodies and management and control institutions. This may often be the case also in national

legislation, as is the case in Hungary, for example. However due to the principle of supremacy the findings of the Commission take precedence over the opinion of Member State bodies.

Due to the two distinct sets of legal areas existing in parallel, i.e. public procurement law and the cohesion policy rules, it is not easy to find a good solution to the overlapping competence issue. It could be the solution at the EU level if the Court of Justice or another independent tribunal would always have to make the decision on the financial corrections, although the increase in the caseload could lead to capacity problems for the Court. A more efficient solution might be to oblige the Commission to rely on the findings of national public procurement control bodies during its audits, and the Commission would only check if there have been any manifest errors of assessment. The control bodies would be accredited by the Commission in advance. EU regulation could define common standards for public procurement control bodies, although a very strict system – as in Hungary – would not be compulsory for Member States. In a similar manner the taking into account of the decisions of review bodies in the procurements subject to the audit could also be made mandatory for Commission auditors. However, this issue is unlikely to be resolved in the near future, since the new CPR proposal[15] for the 2021-2027 period does not contain any provisions for public procurement controls and only defines the competences of management and control institutions in general terms.

The room for manoeuvre for defining competencies of institutions with respect to each other is wider at the 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, the possibility of appealing against the findings of the control body to the review body could be stipulated 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. The same could apply to audit authorities. While the problems exist to varying degrees in different Member States; for example in Hungary there is the need to clarify the relationship between the DPPC and the Arbitration Board.

Such a system could only work effectively if there was a closer cooperation between the different bodies on what standards they need to apply when they assess the lawfulness of public procurement procedures. For example in the case of Hungary, the DPPC is normally unaware of previous findings in Commission audits, therefore is only left with the letter of the law, the public procurement directives and a few cases of the EU Court of Justice to base its decisions on. It is often thought that "audit experiences" are key in the proper assessment of public procurement procedures, while these are usually not made public in the Member States. On the part of the Commission, it could also provide more guidance on audit standards, based on audit experiences in all Member States. This could serve as a basis for national control bodies and audit authorities in their assessment of public procurement cases. A possibility to obtain a Commission opinion on procurement procedures is also being launched at EU level, which could also be made use of in EU funded projects (European Commission, 2015).

However, to deal with the problems of interpreting the public procurement rules, beneficiaries also need to play their part, ideally with the help of national authorities. There are many authors who refer to the importance of planning and project management skills for EU funded projects and public procurement. In particular, the front-end of a project is the critical area that forms the basis for its success or failure (Bloomfield, 2019). It has also been emphasized that the success of a project depends not so much on technical skills but rather on the bidder's skills in project management (Kaczorowska, 2014). In Hungary in EU-funded procedures a special public procurement consultant must be involved, whose task is to ensure the necessary expert knowledge (Soós and Nyikos, 2020). So the provision of the necessary skills and expertise for the entire project, including public procurement procedures seems to be an important part of the solution.

6. CONCLUSION

Public procurement procedures form an important part of projects funded from the ESI Funds, when the beneficiary is a contracting authority receiving an EU subsidy. While the non-compliance with the public procurement rules is the most common form of irregularity in the use of EU funds, often it is not "black and

[15] Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument. COM/2018/375 final

white" whether a particular conduct during a tendering procedure is in line with the procurement rules and principles. Usually a number of institutions assess compliance with EU funded public procurement, especially in Central and Eastern European countries, as the remedies systems and the management and control system of EU funds exist in parallel. At the EU level the relationship between audit bodies and review bodies providing remedies have not been defined, which could cause conflicts between institutions.

In sum, it would be important to provide for more clarity on the relationship between the different bodies assessing the lawfulness of procurement procedures. Besides this, the better definition of audit aspects could significantly contribute to a solution. Of course, the education and professionalization of contracting authorities is also an important aspect, coupled with a change of approach to the application of the rules from one based on a strict adherence to the word of the law to one that focuses also on compliance with the principles and goals of public procurement.

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