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THE COMMUNITY AND NATIONAL LAW REGULATION ON PUBLIC PROCUREMENT – CIVIL LAW ELEMENTS WITHIN THE PROVISIONS RELATED TO THE PUBLIC PROCUREMENT CONTRACT

(Abstract of the PhD thesis)

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I. SUMMARY OF THE RESEARCH TASK, GOALS AND METHODS OF THE RESEARCH

During the realization of the common market the European Community had to face up with several challenges and difficulties. It took a long time to break down the barriers which balk the uniformity of the market. Nonetheless, there are some fields of regulation which still mean a kind of barrier. One of them, a non-tariff barrier is the public procurement which needs to be regulated on Community level in view of certain factors. To regulate the former mentioned field of law within national frames could have a restraintive effect on the competition and could endanger the operation of the common market. It could make possible for the Member States to introduce protectionist measures, which have negative effect on the functioning of the common market.

The European Community has already started to liquidate the barriers in the field of public orders to assure the participation of undertakings coming from other Member States. Nevertheless, the reform of the European procurement rules had already started before the eastern enlargement of the EU, but practically the new system was established only in 2004. However, the success of this reform can be judged just now, few years later.

The European Community has already started to liquidate the barriers in the field of public orders since the 1970s to assure the participation of undertakings coming from other Member States on contract award procedures announced by a given ministries, autonomies or other entities obliged to conduct such procedure.

Nevertheless, the reform of the European procurement rules had already started before the Eastern enlargement of the EU, but the new system was established only in 2004 practically. However, the success of this reform can be judged just now, few years later of the new legislation, since contract notice on public procurement, which exceeds certain thresholds, shall be published in all Member States.

At present there are two EC directives in effect, which contain the main provisions on the public procurement procedure. Directive 2004/17/EC (Service Directive) means the basis of those procurement procedures, of which subject is water, energy, transport or postal service. Directive 2004/18/EC entails the basic rules on procedures for the award of public work contracts, public supply contracts and public service contracts (“classical sector”). These directives keep the frames of the public procurement regulation, according to this the Member States – so does Hungary – work out their own national provisions.

The regulation of public procurement is extremely complicated and ramifying. It means a difficult work for all Member States, and it has effect on several other European politics, therefore the cooperation of the national law-makers is more important in this field, since the assuring of transparency and preventing corruption can not be reached without supranational cooperation.

Since the field of public procurement law is pretty large, I expressively narrow down my research: the public procurement contract as a mixed civil law contract is the heart of my dissertation. The course of the conclusion of the contract and the legal problems related to the contract (e.g. performance, amendment, persons participating in the performance of the contract, invalidity), mean questions, which gain their specialty from their position, since they exist on the border between the public and private law.

The public procurement contract is an exact, but complex question within the field of public procurement law. Therefore, it can be eligible to form the base of an independent research, scientific dissertation and scientific debate.

The main aim of the dissertation is the civil law examination and analysis of the public procurement contract. Since the appropriate theoretical foundation is also essential, therefore I introduce and work out in detail the current public procurement regulations of the EU and Hungary, and the case law of the Court of Justice of the European Union, the Hungarian Public Procurement Council and of different Hungarian courts.

The public procurement, the appropriate and transparent using of public money always stays in the core of debates. The actuality of the topic is evitable, in particular when we take into consideration that not only the European, but the national law-making also commenced towards the reform of the public procurement regulation. Public procurement is definitely compound; therefore the full examination of the topic is not possible, considering the complicated and changing character of the regulation. (The Hungarian Public Procurement Act (hereinafter HPPA) was amended more than thirty times, up to now.) However, the conclusion of public procurement contract is a fix and mostly unchanged element of the public procurement, but unfortunately only a few studies deal with this theme, albeit it raises several problems in the legal practice because of the application of general contract law provisions in the lack of special provisions on public procurement contract.

In the course of the examination of the public procurement contract, dealing with the preliminaries of the public procurement contract is essential. For this reason, I shortly sum up the evolution and development of the public procurement, both in the European Union and in the Hungarian system.

Comparative jurisprudence has a great role in the dissertation, not only in the historical and theoretical part of the work, but also in the examination of the public procurement contract. On the one hand, I compare the EU and the Hungarian rules, and on the other hand I concentrate on the dualist application of the public procurement and civil law provisions. Sometimes I examined the public procurement rules of the WTO or certain Member States of the EU like Germany, Slovakia, Poland and Romania.

In the course of closer examination of the public procurement contract, a comparison is made between the rules of HPPA and the Hungarian Civil Code (hereinafter HCC). Furthermore, I also referred to the new HCC, which is still in preparation. I also considered the preparation process and the available draft of the new HPPA, which is to be accepted during 2011; and I emphasized those elements, which are to be presumably changed.

Although the dissertation examines the public procurement law from a theoretical viewpoint, it was also essential to study the existing public procurement practice and legal cases related to the problems raised. In addition to this, I reviewed in details the judicial practice of the Court of the European Union (hereinafter Court) on in-house procurement, which I have supplemented with the fairly poor Hungarian cases. Considering the Hungarian legal practice I examined the decisions of the Public Procurement Arbitration Board (hereinafter PPAB) on the one hand, but I supported my statements with the judgments of the courts related to the public procurement contract – especially in the field of private law aspects – , on the other.

The dissertation can be divided into five main parts; within I worked up several chapters and subchapters. The first part functions as a theoretical foundation of the dissertation. Within this part, I explain the basic notions and types of public procurement procedure, and introduce the main goals and – normative and judicial – principles of the public procurement.

The second part concerns the regulation background. Following, I concentrate on the process of the public procurement, from the publishing of the contract notice, over the evaluation and choosing the winner, till the contract conclusion. This latter is examined in details in the fourth part of the dissertation.

The closing part of the work deals with the borderlands of the public procurement law, with special regard to the competition law and criminal law.

In my opinion, contrary to the resistance and the prejudices, which can be felt from the side of professionals, public procurement contract shall be examined, since it is such a special contract, which is based on private law, but gains its specialty from the pre-contractual phase

(contract award procedure), which also contains public law elements. Theoretically, the general rules of contract law regulated in the HCC can be applied, but the public procurement regulation contains such conditions, which make it clear, that public procurement contract and the provisions concerning it can not be put unanimously neither under the scope of private law, nor of public law, since they rather lay on the border of the mentioned two fields of law.

II. SUMMARY OF THE RESEARCH RESULTS AND THE UTILIZATION POSSIBILITIES OF THEM

Regarding the goals, which I have already outlined in the introduction of the thesis, the *public procurement contract* as a contract *existing on the border of the public and private law*, but which *has basically private law nature*, stands in the focus of my examination. In the course of the examination of the certain elements of the contract, I hold it important not only to substantiate theoretically and historically the thesis, but place the public procurement within the public and private law system.

In the first part of my thesis I defined the public procurement law as a field of law, which has relative independence. The "cross-seated" nature of this field of law is beyond dispute, since it has public law elements (e.g. provisions on public procurement procedure, remedies of the PPAB, possibility to oblige the party to pay fine in the case of infringement of law, etc.) and private law features (e.g. the way of contract conclusion, amendment and performance of the contract, guarantees, invalidity, etc.) at the same time. From another point of view, *public procurement procedure is a preliminary, pre-contractual phase of the public procurement contract as a private law contract, a special method of contract conclusion*, a type of competitive procedure, which is nominated in a single act, namely in the Hungarian Public Procurement Act (HPPA).

Within the frames of the chapter, in which I intended to substantiate theoretically the examination of the public procurement contract, after a short review of the elemental taxonomic placing, I surveyed the *goals* and *principles* (e.g. publicity, transparency, equal treatment and equality of opportunities, national treatment and fair competition) of the public procurement, which appear both in the European and national regulation and in legal practice.

Determination and examination of the *principle of fair competition* is fairly important, especially, that it appropriates the relation between the public procurement and the competition law, i.e. the possibility of evaluating the acts of the parties of public procurement legal relation and the application of fine. The detailed examination and explanation of this question was placed in the closing chapter of the dissertation.

In my thesis, I examined the scope of the potential subjects of the public procurement (contracting authorities and tenderers), subject matter of the procurement (public supply, public works, public works concessions and public services, except for service concession) and the types of the procedure. With this examination I intended to review shortly those

elements, which appear later as elements of the public procurement contract (contracting parties, subject matter of the contract). The concept of "*a body governed by public law*", which is a type of contracting authority, was examined under the judicial practice of the Court), e.g. BFI and Strohal cases. Within this explanation I also made clear the content of the most important element of the former mentioned concept, namely the "*non industrial or commercial character*".

Within the short introduction of the types of the public procurement procedure, it was important to examine in detail the *competitive dialogue* and *framework agreement*, since these are relatively new legal institutions in the current system of the public procurement and therefore have no considerable Hungarian practice. However, the existing practice in some other Member States was useful in the course of drafting my consequences.

The introduction of the current regulation of the public procurement goes along a double line: after a short historical review I dealt with the provisions of the European public procurement directives (2004/17/EC and 2004/18/EC) and the HPPA. I mentioned that the *European regulation system* has *dichotom character*, i.e. it contains separated provisions on the procurements of the classical sector and the public services.

Within the frames of the regulation concerned public procurement I paid special attention to such procurement fields like deference procurement, the so called *green procurement* and the *public private partnerships* (hereinafter PPPs). The examination of this letter is justified by the fact, that public procurement and PPPs are in close relation, since public procurement procedure is an essential, preliminary element of the PPP contract. As a final consequence, it is worth to notice, that "the sun of the PPP is setting", since problems arise from time to time not only at European, but also at national level, especially if we think of the negative experiences of the last few years.

In the third main chapter of my dissertation I divided the public procurement procedure into phases and I dealt in details with the contract conclusion as a closing moment of this process. The private law aspect were primary during the whole examination of a given phases of the procedure. Accordingly I declared that the public procurement procedure starts with the "contract notice", which only in part can be made common with the "call for proposal" as a private law legal institution. The "request to participate" is also known in the Hungarian law, but accordingly to its goal, it significantly departs from the contract notice, since a request to participate intends to designate the potential tenderers of the future public procurement procedure.

Related to the contract notice I also dealt with the *in-house procurement*, which is nowadays one of the most frequented questions of the public procurement. In-house procurement means those kinds of *procurements, when the contracting parties concludes their contract without publishing prior a contract notice* and therefore without proceeding a contract award procedure. In the course of the examination of in-house procurement I reviewed the judicial practice of the Court (e.g. Teckal, Stadt Halle, Coname, Parking Brixen, Carbotermo, Tragsa, etc. cases) and the Hungarian Public Procurement Arbitration Board (hereinafter PPAB). I mentioned that the related Hungarian practice is fairly poor, since only two cases are known (D. 344/15/2010. és D. 554/4/2010.) up to the present.

Nevertheless I declared that the current regulation of the in-house procurement is not appropriate at all from private law viewpoint, since we experience many times situations, which are seemingly lawful, but in fact shall be deemed as abuse of right. Moreover, the in-house procurement is handled as an exception from the obligation to publish the contract notice, but from my point of view this solution is totally incorrect from the aspect of legal dogmatic. Considering that the parties in question have no separated intention, in the lack of real consent we can not talk about a contract in private law aspect.

According to the concept of an offer, I distinguished the offer as to private law and public procurement law. The private law notion of an offer means a statement, which clearly renders the intention of the party to conclude a contract, extends on the essential questions of the contract and contains determined terms. Contrary to the former, an offer under public procurement law is a statement submitted by the tenderer until the deadline, which is determined in the contract notice, which complies with the requirements, determined in the contract notice and the documentation by the contracting authority, and which renders to contract conclusion. There is a further essential difference between the above mentioned two legal institutions from the viewpoint of legal effect. Under the private law, if the content of the offer comply with the content of the call for proposal, the consent – and therefore the contract itself – comes into being. In the public procurement law the same content of the given statements can not result in the establishment of the contract, since the contract conclusion keeps a separate phase of the public procurement procedure.

Related to the offer I also dealt with the *tender submitted jointly* or *consortial tender*, which is a frequent way of the offer. I emphasized, that consortial tender means the tender submitted by the coordinative civil law company, which is regulated in the Hungarian Civil Code (hereinafter HCC), when a special obligation comes into existence between the tenderers of the given public procurement procedure. The establishment of the consortium

always shall be based on objective economical reasons, since in the lack of these kinds of reasons the consortial tender can restrict the fair competition and therefore can affect legal consequences in competition law.

The *evaluation of the tenders* submitted is also an important element of the public procurement procedure, since the tenderer, with whom the contracting authority will conclude the contract is chosen in this phase of the procedure. The contracting authority can make its decision under either the viewpoint of *lowest price* or the *most economical advantageous tender*. According to the evaluation criteria of lowest price the *problematic of abnormally low tender* appears which problem can not be solved without appropriate legal regulation.

The conclusion of the public procurement contract is the last phase of the public procurement procedure, which can only be concluded as a result of a successful contract award procedure. However, the contract conclusion can also be examined on its own, since it is an independent part of the procedure, where in contrary to the public law elements (e.g. procedural elements, supplementing missing information, declaring the success or fail of the procedure) the existence of private law features is dominant. I also mentioned, that albeit the public procurement contract is a private law contract and – under the paragraph (4) of the Article 306/A of the HPPA – the provisions of the HCC are applicable, we can not totally consider the contract as independent from the pre-contractual phase, namely the contract award procedure, since all of the contract elements (e.g. subjects, object, contract terms, etc.) can only be examined with regard to these former phases.

Related to the conclusion of the public procurement contract I examined the *principle of contract freedom and its limitations*, since this classical private law principle suffers grave restrictions, when the law-maker prescribes cogency in the case of public procurement contract and it results almost in the total elimination of the contract freedom.

After the examination of the contract freedom, I review the public procurement contract step by step and systematically, with the continuous comparison of the HPPA and the HCC. The examination of given provisions was fairly important and supported our former declared hypothesis: the public procurement contract has private law character.

At the beginning of the chapter, which concerns the public procurement contract, I examined the subject, the – direct and indirect – object and the content of the contract, then I collected those characteristics of the amendment, performance and invalidity of the contract, which departs from the provisions of the HCC. According to the performance of the contract I made a special emphasis on the existence of the "*special purpose company*", which arises several further private law questions, because it undertakes rights and obligations. I intended

to answer these questions with regard to the provisions of the HPPA, but from private law viewpoint.

Within the *persons, who take part in the performance of the contract*, I made clear the concept of "*subcontractor*" and "*organization providing resources*", and I mentioned that the concept of the former is not the same from private law and public procurement law aspect.

Subcontractor in private law means a person, who takes part in the performance of the work contract and shoulder to produce partial result. As to the public procurement law, subcontractor is an organization or person, which or who participates in a direct manner in the performance of the contract involved by the tenderer.

According to the *amendment of the contract*, I examined the *normative prerequisites* (1. circumstance arose after contract conclusion, 2. a cause, which is unforeseeable, 3. violation of a material and legitimate interest, 4. inevitability) of the amendment and I declared, that these prerequisites are similar to the conditions laid down by the HCC in the provision, which concerns the amendment by court. It is also essential, that for the purposes of the HPPA the possibilities of contract amendment is narrower compared to the HCC, since under Article 303 of the HPPA parties can only amend parts of the contract drawn up on the basis of the invitation, the terms and conditions of the tender documentation and the contents of the tender.

Related to the *invalidity of contract* I compared the *grounds of invalidity* under the HCC and the HPPA, then I examined in detail grounds of invalidity of public procurement contract and the – administrative and judicial – process on declaring the invalidity of contracts. I set out, that there is only one paragraph in the HPPA, which refer to the HCC. This paragraph is placed within the provisions on invalidity of the contract. In connection with the invalidity of contract I pointed out several problems in the used terminology and content provisions. Subsequently I make some recommendations related to these problems.

The *remedies related to the public procurement* are placed in a single chapter in my dissertation. These remedies – just like the public procurement contract – have *dual nature*, since *they have public law and private law characteristics at the same time*. As to the HPPA, remedies connected with the public procurement fall within the competence of the PPAB. However, the HPPA states that with disregard to some exceptions, in the legal debates related to the public procurement contract and other private law claims related to the public procurement procedure courts have the right to proceed. I worded some critic against the aforementioned solution of the HPPA, as legal disputes arising from the amendment or performance of the contract violating the provisions of HPPA fall within the competence of

PPAB, albeit these questions have strong private law character. From my point of view it would be desired, that similarly to the case of other private law claims not the PPAB, but the court would have the right to proceed.

Within the topic of public procurement contract I also examined *the system of contract guarantees*, within I differed between the *contract guarantee*, the *performance guarantee* and *guarantee for good performance*. I made a clear distinction between the advance (deposit) and contract guarantee and I worded the existing similarities and differences, e.g. the fact, that in the case of contract guarantee there is no contract yet (contrary to the advance, where a contract already exists). It means that the advance assures the performance of the contract, while the contract guarantee intends to assure the conclusion of the contract. As a result of the former mentioned comparison it is clear, that a contract guarantee under HPPA is a special type of guarantee, which appears in the pre-contractual phase of the public procurement contract and in spite of the existing similarities can not be identified at all with none of the known private law collateral obligations, which intent to assure the contract.

When I scrutinized the performance guarantee and guarantee for good performance, regulated in the HPPA, I discovered some similarities compared the forfeit, which is regulated by private law. However, there is also an essential difference between the mentioned legal institutions: the related provisions of the HPPA uses the expression “a reason arising from his sphere of interest”, which means that the imputation of the party shall not be examined, contrary to the forfeit under HCC, which is always bound to imputation.

In the *closing chapter* of my thesis I deal with *competition law* and *criminal law* as *“borderlands” of the public procurement law*, since some – typically injurious – conducts, which appear in the public procurement, can go over the borders of the public procurement law, to the former mentioned fields of law. I nominated the field of *law of cartels* as the main connection point between the public procurement law and competition law, since the agreements between tenderers, or between the tenderers and contracting authority can severely distort the fair competition, which serves the transparency of the way of using public money in the public procurement. After the examination of those acts appear in the course of the public procurement procedure, which can be evaluated from competition law viewpoint, I declared that infringements of competition law occurred in the side of the contracting party mostly appear in the preliminary phase of the public procurement procedure or in the course of publishing the contract notice. Unlawful conducts by tenderers – according to the meaning – are typical in large numbers in the phase of tendering.

In the field of criminal law I analyzed the "*anticompetitive agreements regarding public procurement procedures or concession procedures*" regulated in the Article 296/B of the Hungarian Criminal Code and I dealt with the forms of corruption in the public procurement, then I introduced the applicable legal consequences as to the HPPA, i.e. declaring of the invalidity of the contract award procedure and the exclusion of the effected tenderer.

The dissertation has big significance not only because of the fact, that the related Hungarian literature is fairly poor, but only a few professionals deal with the Hungarian public procurement regulation, these works are mostly carried out from governmental – and therefore strongly political – viewpoint.

Nevertheless, two doctoral theses have been already born in the last few years in the topic of public procurement. *Tünde Tátrai* in her dissertation titled "*Public procurement as a special type of purchasing activity and its potentials for development in Hungary*" studied the public procurement from economical viewpoint as a special purchasing method. The dissertation of *Csaba Farkas*, titled "*Offer and evaluation of offers in the open public procurement procedures*" based on private law approach, but he narrows his examination to submitting the offer and its evaluation, therefore with the analysis of the public procurement contract I can give further results in the field of public procurement research.

However, the course of research was particularly difficult, since the public procurement law – contrary to the approach of other EU Member States – does not form a separated field of law in Hungary. Knowledge on public procurement law is not tough in general in Hungarian law faculties within academic frames; sometimes the law of public procurement is placed within the course of commercial law or financial law, but at some other faculties of law it is only an alternative course. The lack of uniform teaching of this field of law results in the situation, that a legal debate related to the public procurement law mean an enormous and difficult work for most of legal professionals.

The dissertation scrutinized the public procurement from a new, private law aspect, which can affect some changes in the education system of public procurement law. However, the most important field, where there is a possibility to use the results laid down in the dissertation, is the legislation, since in 2011 presumably a new public procurement act to be born. All of my research, results and statements can be useful in the course of the working up of the new regulation, because I not only made a critical analysis of the existing Hungarian regulation, but also examined several elements of other EU Member States, which elements can serve as a sample during the legislation (e.g. implementation of private law principles into

the public procurement regulation, establishing an authoritative register similar to the German „*Korruptionsregister*", transformation of the public procurement remedy system, etc.)

III. RECOMMENDATIONS DE LEGE FERENDA

I. Recommendations regarding the general regulation of the public procurement

The first group of my recommendations related to the regulation of the public procurement concerns the general regulation, although I know that the existing Hungarian regulation is strongly influenced by the European public procurement directives. In spite of this fact I think that there is a possibility for an overall transformation of the public procurement regulation in such a way, which is conformity with the European requirements and can be fit into the frames designed by the EU directives.

1. In my opinion, the dualist system of the European regulation can be transposed to national level; it means a creation of such a normative system, in which the regulation on the procurement of the classical sector and the public services is separated. However, the Hungarian law-maker made a distinction between the former two groups, but both types of procurement are regulated in the same act. The HPPA has an overall regulating nature, all of the procurement rules are pressed in a single act apart from the subject matter of the procurement, the contracting authority or the thresholds. Nevertheless, the detailed rules on specific design contest procedure were not placed in this act, but are regulated in a separate legal act (governmental regulation), which is not conform in all aspects with the HPPA.

From my point of view, a new public procurement act shall be created, which is shorter and more compact compared to the current HPPA, which contains 407 paragraphs. The creation of such a new act is justified by the fact, that the existing law on public procurement – which has been amended lesser or greater several times up to the present since the time, it came into effect – is not easy to survey, since the amendments took whole chapters out of the system of the HPPA, with regard to the legal harmonization and the goals on making the public procurement regulation more transparent and simpler. The continuous amendments in no way serve the transparency of the regulation in the long run, therefore the law maker shall endeavor to create such a regulation, which is proved to be durable in comparison with the possibilities of the public procurement. However, this goal can be reached only in the case, when only the most important, the relatively durable frames (e.g. principles, basic notions, contract award criteria, system of organs, process of PPAB) will be fixed in the HPPA, according to the experiences of the last fifteen years. By the way, the German law-maker also applies this solution, since the system of public procurement is divided not only horizontally, but also vertically. The fourth part of the German Act against Unfair Competition contains the

general provisions on the procurement, while the sector-specific rules are regulated in lower level.

The detailed rules of certain types of public procurement procedure and the sector-specific rules can be regulated on the level of governmental decree. Such a regulating solution would be contrary to the logic of the former and operating HPPA, but from my point of view, the Hungarian public procurement system has no roots dating back such a long time, which can be proved the high-level regulation in a single legal act.

2. According to the opinion of foreign professors, the operating Hungarian HPPA is an act, which can serve as a sample for other Central-East-European Member States in the course of shaping up of their public procurement regulation system. In my opinion, from the point of view of the European law-maker the HPPA seems to be not only appropriate, but expressly good, since the Hungarian law-maker in all cases entirely fulfilled the obligation of implementation of public procurement rules, which was designed by the European directives. However, a question arises: this intention to comply with the requirements of the EU in all circumstances could have led to such solutions, which generate problems during the common application of some other laws (e.g. Civil Code, Act against Unfair Competition, Act on Concession, etc.).

2.a. From my point of view, the Hungarian law-maker could not have the EU requirements in view, but beside the harmonization of EU and Hungarian law, the "horizontal law harmonization" also shall be taken into consideration, i.e. those provisions, legal solutions, which are transposed into the Hungarian law according to the EU directives, shall be in conformity also with other Hungarian rules. There is an appropriate example in the HPPA, namely, the regulation of the invalidity of public procurement contract. According to the provision of the Directive 2007/66/EC, a new Article was placed into the HPPA, which is fully complied with the European requirements, but hardly can be handled within the Hungarian contract law system.

2.b. However, compared to the former examined question it is less important, but worth to deal with the paragraph of the HPPA, which refer to the European law. I think, in the case of a national rule, moreover which has European relation (i.e. in the case of exceeding the community thresholds), it is not affordable to refer to the rules of the EU disregard those amendments, which were introduced by the Lisbon Treaty. According to this, I recommend to amend the text of the HPPA with regard to the new terminology, which was designed by the Lisbon Treaty, e.g. using of European Union instead of European Community.

Within the terminological amendments, I also recommend the use of TFEU (EUMSz.) instead of EEC Treaty (EKSz.), when a paragraph refers to the European law. I also suggest to the Hungarian law-maker to refer to the correct Articles, according to the renumeration, in the following way:

- using of Article 101 of TFEU instead of Article 81 of the EEC Treaty, in the Article 61 paragraph (1) point b) of the HPPA;
- using of Article 346 of TFEU instead of Article 296 of the EEC Treaty, in the Article 29 point b) of the HPPA;

II. Recommendations to the pre-contractual phase of the public procurement contract

As I mentioned several times in my dissertation, public procurement procedure is a preliminary, pre-contractual phase of the public procurement contract, since the conduct of this procedure is motivated by the fact, that later the parties conduct a contract. In this phase, the tenders submit their offers to the contracting authority, which evaluates them and if it is necessary, decides over the exclusion of certain tenderers. Related to these legal conducts, the followings are worth to consider:

1. The HPPA does not contain such an elemental definition, like offer or contract notice, albeit as Article 4 of the HPPA the tenderer is a person, who submits a tender in a contract award procedure. However, in my opinion, this notion can not be interpreted in the lack of defining the offer.

Therefore, it is very important to define the notion of contact notice and offer submitted in a public procurement procedure, with special regard to the fact, that the notion of the civil law offer and the notion of the offer submitted in a public procurement procedure are not identical. To determine normatively both of the former mentioned legal institutions is also proved by the fact that the new Hungarian Civil Code (hereinafter HCC), which is in making yet, is going to contain provisions on the contract conclusion under competitive procedure in a single chapter, which are not regulated in a single act (e.g. HPPA). Within these provisions the Hungarian lawmaker would determine the notion of contract notice.

From my point of view, it is not only important, but also essential to create the harmony between the provisions of HPPA as *lex specialis* and the provisions on contracts conclusion under competitive procedure of the new HCC. Therefore, I recommend to work out the notion

of contract notice and offer, with special regard on the codification process of the new HCC, in the following way:

> *„contract notice: an unilateral statement submitted by the contracting authority, which content is legally determined, and in which the contracting authority ask one or more person or organisation (hereinafter tenderer) to submit their offer, which complies with the content of the contract notice, and the contracting authority gives a term for this act.*
>
> *offer: an unilateral statement submitted by the tenderer until the deadline, which is determined in the contract notice, which complies with the requirements, determined in the contract notice and the documentation by the contracting authority, and which render to contract conclusion."*

This way of determining the notion of contract notice and offer would make it unambiguous, that the offer always intent to conclude a contract, therefore the offer and the application to participate as a similar legal institution are not identical.

2. Beside the notion of contract notice and offer, it would be also worth to determine the notion of a tender contains abnormally low consideration, albeit neither the Directive 2004/18/EC contains such a notion. However, both the former mentioned Directive and the HPPA talk about the abnormally low nature of the consideration disregarding, that the deviation is also possible to the other direction, i.e. a consideration also can be abnormally high.

2.a. During the working out of this notion, I recommend to take the judicial practice of the Court of the European Union into account (e.g. judgments in the jointed Lombardini-Mantovani or in the Alfonso, Furlanis and Genova cases). As to these judgments, a tender shall be considered abnormal (and not abnormally low!), if it excessively deviates from the average remuneration determined in the other tenders submitted. Albeit this standpoint, i.e. the comparison of the given price and the average remuneration is known and used in the Hungarian public procurement practice, I think the normative determination would be worth.

In the course of the creation of the notion of a tender containing abnormally low consideration, in my opinion the results of the activity of the Working Group on ALT (existing within the frames of the European Commission) also shall be considered, since the Working Group requires simultaneously the abnormally measure of the consideration and the

lack of appropriate explanation on the cause of this deviation in the course of appointing such a situation.

Upon the above, the notion of a tender containing abnormally low consideration could be worded in the following manner:

> *„a tender contains abnormally low consideration: an offer, in which the consideration excessively deviates in any direction from the average remuneration determined in the other tenders submitted, and the tenderer can not give an appropriate explanation on the cause of this deviation."*

2.b. Related to the *tender containing abnormally low consideration* the determination of fixed rates also thought-provoking, since it has happened many times, that the contracting authority did not declare the tender invalid (and therefore unsuccessful), although the measure of deviation from the average price was more, than 50 %.

In these cases it would be a guarantee, if the HPPA would determine fixed rates. If a tender would exceed these limits (e.g. 30 % and 50 %), the contracting authority shall request an explanation and in the lack of appropriate explanation the declaration of abnormally law consideration shall always be compulsory declared. Albeit the determination of fixed rates would constrain the regulation into rigid frames, but this rigidity could be softened by the juridical discretion.

With the maintenance of my recommendation, I think that considering the current public procurement practice, there is no real chance to form these kinds of fixed rates, since there are also significant deviations within the dispute settlement practice of the PPAB, but the former mentioned modification can not be achieved in the lack of a uniform practice of the PPAB. However, the juridical adjudication on the objective value-disproportionality, the method of correction could be a great base and the legal institution *laesio enormis* (originated in the Roman law) also can be a good guideline in the course of developing a uniform practice.

3. According to the *in-house procurements* I recommend the law-maker to nominate either the European or the Hungarian terminology, since it is known and received in both level, and the HPPA contains rules on it.

4. Articles 60-61 of the HPPA determine in detail those grounds, under which the contracting authority shall exclude the tenderer from the contract awarding process without discretion on the one hand or have discretion right on the other. Related to this provision, I

recommend the *partial transformation of the system of grounds of exclusion* and to make it more logical considering the following points of view:

4.a. Albeit in the case of the most serious conducts (e.g. crimes committed as an activity of organized crime, bribery, money laundering) the exclusion of the affected tenderer is compulsory under the HPPA, in the case of conducts, which violate Article 11 of the Act against Unfair Competition or Article 101 of TFEU, the contracting authority has the right to decide over the exclusion. Both of the referred articles related to the anticompetitive agreements, which is a crime on its own, if it is committed in the course of a public procurement procedure.

Therefore, I recommend to make compulsory the exclusion of the affected tenderer in the case of declaring its participation in an anticompetitive agreement. The realization of this can be made in two ways:

- point b) of the paragraph (1) of Article 61 of the HPPA concerned on the anticompetitive agreements set out from those grounds, under which contracting authority can decide over the exclusion (relative grounds of exclusion), or

- "anticompetitive agreements regarding public procurement procedures or concession procedure" shall be inserted into the grounds regulated in paragraph (1) of Article 60 of the HPPA, under which there is no discretion right, i.e. the exclusion of the affected tenderer is compulsory (absolute grounds of exclusion).

4.b. Furthermore, I recommend nominating the violation of competition law within the relative ground of exclusion in the following manner:

> *„ The contracting authority may stipulate in the contract notice that the following tenderers, subcontractors they intend to employ for more than 10% of the contract value, or organizations providing resources and subcontractors as defined in points (d)-(e) are excluded from the procedure, who*
>
> *[…]*
>
> *(b) who have committed an offence and have been issued a pecuniary penalty in the final and enforceable decision of the Hungarian Competition Authority – delivered within the previous five years —, or in the event of, the court review of the decision of the Hungarian Competition Authority, by a pecuniary penalty and a judgment which has the force of res judicata, excluding the conducts, which infringe the Article 11 of the Act against Unfair Competition, as well as the Article 101 of the Treaty on the Functioning of the European Union."*

4.c. In my dissertation I mentioned, that according to the current public procurement practice *there is a relatively big willingness towards the remedies*, albeit most of the remedy claims are unjustified. However, the HPPA contains not any sort of sanction for the case of launching a remedy process without (legal) ground, which has dissuasive effect for the participants of the public procurement procedure against these kinds of unjustified processes. In order to decrease the number of unjustified remedy processes I recommend introducing a procedural fine. However, a procedural fine would not be sufficient on its own, therefore in the case, when the PPAB or court declare the launching of a remedy process without (legal) ground and impose (procedural) fine, this decision shall keep a (relative) ground for exclusion, regulated in Article 61 of the HPPA.

5. In addition to the grounds for exclusion, in order to facilitate the inquiry of the contracting authority, *I recommend to establish such an authentic register, which would contain the list of all tenderers* (natural persons, as well as legal persons), *which stays under the scope of any lasting ground of exclusion* (e.g. judgment on accomplishment certain crime, infringement of competition law provisions, etc.)

The so called "*Korruptionsregister*", which is known in the German public procurement regulation (albeit only in a few Lands like North Rhine-Westphalia and Berlin use) keeps on filing those natural and legal persons, which and who were affected in bribery or other similar crime, and the judgment on the affection has the force of *res iudicata*.

In contrary to the German model, in my opinion this register shall not only contain the conducts ,which are qualified as crimes, but shall be extended to all negative conducts, which have to be examined within a several years' standing term (e.g. failing the payment obligation towards a subcontractor, providing false data in an earlier contract award procedure, etc.)

The introduction of such an authentic register, similar to the German model, would have several advantages. On the one hand, in the case of procurements, which exceed certain thresholds, the contracting authority would have the right (or obligation) to control the tenderer. On the other hand, because of its authentic character, the register would make for the tenderers easier to certify that they are not subject to the effect of the excluding provisions regulated in Articles 60-61 of the HPPA. The records would be kept by an organization (e.g. PPAB), who could give a certification like testimonial on the fact, that the given tenderer does not occur in the register.

III. Recommendations to the regulation of public procurement contract

According to the regulation of the public procurement contract, the most important recommendation is to *make the HPPA and the HCC coherent*. My examinations concerning certain elements of the public procurement contract support the private law nature of the contract. The application of these originally private law legal institutions in the field of public procurements can not lead to disregard the private law provisions of these phenomena.

1. The most efficient tool of creating the harmony between the HPPA and the HCC would be the statement of the *lex specialis* and *lex generalis* relationship between the two norms, which also would make clear the "behind nature" of the HCC. Nonetheless, the operating HPPA professedly states this, when in paragraph (6) of Article 306/A says, that "*otherwise, the provisions of the HCC shall be applied regarding the contracts concluded pursuant to a contract award procedure*." However, this solution can not be sufficient from several viewpoints:

- The current text of the HPPA contains the expression "otherwise". More punctual and from legal viewpoint more accurate would be, if the act contained, that following phrase: "issues other than regulated in this Act".

- The statement of the "hinter nature" of the HCC can not deemed appropriate in the existing way, since HPPA contains it within the provisions concerning amendment and performance of the public procurement contract. In my opinion, such a statement shall appear at the first mention of the public procurement contract and shall not be hidden between other provisions.

- Thirdly, the "hinter nature" of the HCC – even if it appears among other provisions – shall be worded at least in a single Article, since in its current place, as the last paragraph of the Article, which concerns the invalidity of the public procurement contract, it suggests, that only in the case of invalidity the HCC can be applicable, but in the case of other legal issues related to the contract not.

Upon the former mentioned arguments, I think that it would be desired to declare at the first mention of the public procurement contract the following:

"The provisions of the HCC shall be applied in all issues other than regulated in this Act."

2. The existing rules related to the public procurement contract are not uniform, since the provisions on contract conclusion (Article 99 and 99/A) can be found in the Title 3 of the HPPA, within the rules on open procedure, while the provisions on amendment and performance of the contract are placed in the Title 46 of the HPPA.

2.a. Since not only the open procedure, but regularly all procedure also end with the conclusion of the contract, I recommend to unify the provisions on public procurement contract in such a way, that all of these provisions would be placed in a single title (called e.g. "Public procurement contract"), among certain elements like contract conclusion, dismissal from the obligation of contract conclusion, amendment and performance of the contract, invalidity of contract would be regulated.

2.b. Furthermore, *I recommend to define punctually and normatively the notion of public procurement contract*, since the operating HPPA – contrary to Directive 2004/18/EC – does not contain it at all, the notion in question altogether can be deduced from the notion of public procurement procedure. (As to paragraph (2) of Article 2 is a contract award procedure that entities, defined as contracting authorities, are obliged to carry out in order to conclude contracts for pecuniary interest with a view to realize purchases of specific subject and value.) With deduction from this notion, we can define the public procurement contract in the following way:

> *„Public procurement contract is a contract for pecuniary interest, which is to be concluded between the contracting authority and the winner chosen by the contracting authority, as a result of a successful contract award procedure."*

Beyond defining the public procurement contract, in my point of view it is not important to place this notion within the single title on public procurement contract, which is to be created. In my opinion, placing it among the definitions would mean the clearest situation.

2.c. As a result of the defining of the public procurement contract, *I also recommend the terminological unification within the frames of the HPPA*, since currently the text of the HPPA contains several expressions (e.g. "public procurement contract", "contract under public procurement provisions") in order to nominate this contract. This terminological duality is to be balked; therefore I recommend the only use of the expression "public procurement contract".

2.d. Beyond creating the general definition of the public procurement contract, the maintenance of the complicated and detailed regulation on the existing types of contracts

(public supply, public works and public services) is also problematic. The European Commission has also noticed this problem and asks in its Green Paper (published in January 2011), if the current structure of the EU's public procurement directives is appropriate with special regard to the contracts with mixed nature. Answering this question, I think that the scope of subject-matters of the current directives is well-structured; the triple division of the public procurement contract is maintainable. Nevertheless, whereas the normative notion of the public supply and public service contract is clear, the definition of public work contract is overly complicated and hardly understandable not only in the EU, but also in national level.

Therefore, I recommend the simplification of the notion public work contract by all means, which could be the following with regard to the former defined notion of public procurement contract:

„(1) Public work contract is a public procurement contract, which object is the ordering and the reception of the execution or the execution and design of works , from the part of the contracting authority.

(2) For the purposes of paragraph (1) the following types of work shall be deemed as public work:

a) activities listed in Annex 1 of this Act,

b) any kind of execution or execution and design of any construction, included, when the work is not executed by the contractor."

With the wording of the above mentioned notion the definition of public work contract would be simplier, since the object of the contract would be in general the works related to construction activity, while the exact notion of the "works related to construction activity" could be determined in a single paragraph.

2.e. Related to the public work contract I recommend not only to state the "hinter nature" of the HCC, but also to place a new paragraph into the provisions on public work contract in the following manner:

„(3) If a public work contract includes the design of work at the same time, in the course of determining the content of the contract the provisions on design contracts (Article 408-411) of the HCC also shall be applied."

4. Related to the *amendment of the public procurement contract* I submit two recommendations:

4.a. In my point of view, the prerequisites in Article 303 of the HPPA, which are created under Article 241 (amendment by court) of HCC, shall be supplemented with another condition, namely the inevitability. In the chapter on the amendment of public procurement contract I have already dealt with the normative prerequisites of the amendment, and I stated my anxieties existing against the current text of Article 303 of the HPPA. These queries can be shortly summarized in the following:

- Article 303 of the HPPA receives as prerequisites the conditions regulated in Article 99/A of the HPPA, which concern the exceptional dismissal from the obligation of contract conclusion. Nonetheless, in the case of the latter legal institution the law-maker requires not only the unforeseeability, but the inevitability of the emergence of circumstance. From this point of view, the evaluation of the emergence of the same circumstance depends not only on the time of emergence (before or after contract conclusion), but on inevitability. It is problematic, that considering the above why the law-maker does not require the inevitability in the case of amendment the contract. Therefore I recommend to make the two referred article of the HPPA coherent.

- From another point of view, Article 303 and 99/A of HPPA received those pre-conditions, which are laid down in Article 241 of HCC. However, the new HCC, which is still in force, would also supply the former mentioned conditions with the inevitability, which solution would have special significance according to the referred Articles of the HPPA. Under this reasoning, I keep it important to file the condition inevitability into the HPPA, since it is also necessary with regard to the codification process of the new HPPA.

4.b. In addition to the amendment of the contract the process of the PPAB needs further consideration. As I have mentioned before, it is illogical, that questions which have unanimously private law character (like amendment and performance of the contract) fall within the competence of the PPAB and are exclusions from the provision, which declares the general competence of the court.

Therefore I suggest making the procedure of the court exclusive in all those legal debates, which have close connection to the public procurement contract. At the same time, the PPAB would have no competence to make a decision in those cases, which have stronger private law nature.

5. The problems raised in connection with the *invalidity of contract* could be done away by smaller modifications, more exacting, more diligent and more deliberated law-making.

5.a. In the case of *de-facto* contracts (i.e. contracts, which are concluded without prior contract notice) it is undoubted, that they shall be invalid. Under paragraph (2) of Article 306/A of the HPPA a contract, which is concluded with the unlawful bypass of the contract award procedure shall be deemed null.

The in-house procurements also can be deemed de-facto contracts from the viewpoint of the bypass of the contract award procedure, but this question is more problematic, since we can not talk about validity or invalidity, producing or not producing legal effect with regard to the fact, that the contract does not exist from private law aspect.

Anyway, this problematic shall be absolved, but the sole declaration of nullity of the public procurement contract is not sufficient, since under Article 2/A of the HPPA in-house procurement do not fall within the scope of public procurement contracts.

In order to make the application of Article 306/A of the HPPA easier, I suggest to nominate the in-house procurement as an exclusion under the scope of the HPPA, already at the beginning of the act. In this case the original text of Article 306/A would stay unchanged, but would be clear, that de-facto contract does not include the in-house procurements.

5.b. In addition to the invalidity of public procurement contract I recommend unifying the terminology used by the lawmaker. Under Directive 2006/66/EC in the case of certain infringements the declaration of the invalidity of the contract is compulsory. However, the national law-makers had the right to judge, if the invalidity has *ex nunc* or *ex tunc* character.

The existing text of the HPPA is inconsistent, when Article 306/A uses the invalidity and nullity as synonym concepts, which solution is not only incorrect, but definitely has to be correct with regard to private law aspects. In accordance with this, I think that the Hungarian law-maker shall decide, if the grounds of invalidity regulated in the HPPA effects the voidability or nullity of the contract. Under paragraph (1) and (2) of Article 306/A it is presumable, that the law-maker intended to use the graver form of the invalidity, therefore I suggest to use in paragraph (3) of the referred article the following expression: "*contrary to paragraph (2) a contract shall not be deemed null, if (...)*".

Furthermore, *I recommend to use the private law terminology in all those cases, when the HPPA applies legal institutions having private law character*, and the using of private law terminology – considering the similarities of the legal institutions in question – is possible (e.g. in the case of partial invalidity).

5.c. After the examination I made in connection with the invalidity of the public procurement contract, I have an opinion, that the current Hungarian regulation of public

procurement is not only complicated, but hardly comprehensible, therefore law-maker shall make it clear, if grounds of invalidity regulated in the HCC also can cause invalidity of the public procurement contract or not. Albeit a few grounds of invalidity (e.g. legal incapacity of the contracting party because of infancy) *mutatis mutandis* fall outside our examinations, but it would be worth, if the law-maker would order this problematic with inserting into the HPPA the following provision:

> *„Causes other than regulated in this Article, included the grounds the invalidity regulated in the HCC also lead to the invalidity of the public procurement contract."*

It is worth to mention, that the reference to the HCC affects the distinction between the two categories of invalidity, therefore it also makes the terminological unification necessary.

5.d. Under paragraph (1) of Article 237 of the HPPA, in the case of invalidity the situation existing before contract conclusion shall be restored (*in integrum restitutio*). However, the application of this legal institution arises several – and serious – problems for the courts. The system of reasons is multifold. On the one hand, the public procurement contracts (e.g. service contract) are irreversible; therefore restoring the original situation is conceptually excluded. On the other hand, before the court declares the invalidity of the contract, the PPAB shall declare the violation of law, i.e. when the case get to the phase of application of the legal consequences, restoring the original situation is either no possible or could be made only contrary to the principle of rationality with much higher costs (e.g. the demolition of an existing establishment).

In 2006, the Public Procurement Monitoring and Reform Committee has rendered about the fact, that there was not any case, where the court could restore the original situation in the case of declaring the invalidity of the given contract. By this time, the question has become more complicated, since pursuant to 1/2010. (VI. 28.) Opinion of the Civil Department of the Hungarian Supreme Court restoring the original situation can be made only in kind, i.e. with paying the equivalent in money can not be solved the problem.

Upon this reasoning, it is important to create the transparent and applicable system of legal-consequences for the cases of invalidity of contract, which system can solve the uncertainties and difficulties arising in this field.

5.e. I recommend setting out and inserting the existing paragraph (6) of Article 306/A of the HPPA, which refers to the HCC, into the chapter to be created on the public procurement contract. The current place of this referring provision is misleading, since it seems to be applicable only for the provisions on invalidity of contract. I recommend the transferring of

this provision in order to make clear in general the “hinter nature” of the HCC according to the public procurement contract.

6. In the field of *contract guarantees*, *it is* also *desired to harmonize the provisions of the HPPA and the HCC*, with regard to the fact, that the general rules on contract guarantees are regulated in detail in the HCC. I think that there is no obstacle to create such special guarantees in the case of public procurement contract, which are unknown form the point of view of the HCC. Nevertheless, in the course of the creation of these guarantees it is important to take the duality of the regulation into consideration, in particular in the case of guarantees similar to forfeit. It is important, since these kinds of guarantees can not unambiguously deemed as forfeit, since they are always independent form the imputation and have objective nature.

Related to the regulation of contract guarantees, I recommend to determine only the possibility of stipulate performance guarantee or guarantee for good performance within Article 53/A, which concerns the content of the tender guarantee. The detailed rules of both the above mentioned guarantees shall be regulated in the chapter on public procurement contract, which I have recommended to be created.

7. As a consequence of the public procurement practice of the EU and Directive 2007/66/EC, the *standstill period* got into the provisions of the HPPA. With this new provision, the law-maker intended to improve the efficiency of the enforcement of the right to remedy of the injured party, incurred in the course of the contract award procedure. As to the paragraph (3) and (4) of Article 99 of the HPPA, the public procurement contract can not be concluded valid during the standstill period. Nevertheless, the PPAB can allow the conclusion of the contract, but only in the case, if it is justified by extremely important interest allowing no delay or the protection of public interest, and the benefits exceed the drawbacks of the conclusion of the contract (paragraph (4) of Article 332 of the HPPA).

In my opinion, the maintenance of the above mentioned paragraph is justified from the viewpoint of contract conclusion moratorium, i.e. contracting authority can get a dismissal from the compulsory waiting period between the publishing of the results and the contract conclusion. However, the placing of this legal institution within the HPPA is incorrect, therefore I recommend to take this provision out from its current place (from the scope of interim measures) and put it into the provisions concerned on the contracts conclusion moratorium, but with reference to the interim measure nature of this legal institution, in the following manner:

„Article 332 (2) As an interim measure, the Public Procurement Arbitration Board shall

(…)

d) exceptionally allow the conclusion of the contract under Article (…) of this Act."

IV. Recommendations on the public procurement remedy system

The public procurement remedy system – just like the whole public procurement procedure included the contract conclusion – *has a dual, namely a public law and private law nature at the same time*, which appears not only in the system of authorities (PPAB and courts) which proceeds in the remedy procedures, but also in the regulation and in the case of the applicable legal consequences (e.g. fine, invalidity and compensation).

After a detailed examination of the public procurement remedy system, I got to the conclusion, that maybe the most sensitive point of this system are those provisions on the invalidity of the contract, which was formerly several times recommended to be amended. However, the rules on compensation claims related to the public procurement procedure, is also problematic. The main reason of the problematic nature of these two fields is the fact, that basically both questions are a civil law question, but the HPPA contains special public procurement provisions on them.

1. Related to the invalidity – and unfortunately only within these rules – the HPPA contains a provision (paragraph (6) of Article 306/A), which refers to the HCC. Nevertheless, in the case of compensation the law-maker does not apply the same solution, albeit the HPPA does not exclude the applicability of the compensation rules of the HCC, and this question is also indisputable in the judicial practice.

1.a. Therefore, it is necessary to declare, that the application of the legal consequences as to the HPPA does not exclude the applicability of paragraph (2) of Article 200 of the HCC in the case of those contracts, which were concluded in spite of the infringement of the public procurement rules. This shall be also stated in the case of compensation claims.

1.b. The existing law contains the case, if tenderer only claims from the contracting authority the reimbursement of the costs (damages) occurred in the preparation of the tender and in relation to the participation in the contract award procedure (Art. 351 of the HPPA). The proof of the simultaneous conditions laid down in the former referred article of the HPPA (1. violation of a legislative provision, 2. real chance of winning the contract, 3. adversely

affect of the violation on the chance winning the contract) is sufficient for the enforcement of such claim.

In my opinion, all of these circumstances, which are sufficient as to the HPPA, shall be interpreted quite the contrary: these requirements appear as extra conditions compared to the prerequisites, which are prescribed by the HCC (1. emergence of damage, 2. unlawfulness, 3. imputation and 4. causal link). Therefore, a claim of compensation (related to the public procurement procedure) can only be enforced, if the injured party can prove the circumstances as to the HPPA, over the conditions required by the HCC.

The examination of imputation is also problematic. Imputation is one of the essential elements of the civil law general compensation formation under HCC, while the HPPA does not contain such a notion, moreover it does not refer to the regard or disregard of imputation, i.e. it is not clear, if imputation shall be evaluated or not in the course of the enforcement of this claim.

In my point of view, in the case of claims related to the public procurement procedure, it would be an appropriate solution, if Article 351 of the HPPA would contain the followings:

> *"If tenderers only claim the reimbursement of their costs (damages) ocurred in the preparation of a tender and in relation to their participation in a contract award procedure from the contracting authority, beyond the circumstances laid down in the HCC, the injured party shall prove for the enforcement of such claim, that (...)"*

This amendment of Article 351 of the HPPA would not only make clear, that the examination of the prerequisites as to the HCC (included the imputation) is also necessary, but also would absolve the existing uncertainties. However, in my point of view, the best solution would be the recommendation under III/1., i.e. if the HPPA would state the "behind nature" of the HCC.

2. Related to the start of a remedy procedure a solution is worthy of consideration, which is well-known and used in several Member States in the EU. It is the automatic suspending effect of the launching of the remedy procedure, which means, that the suspension of the ongoing contract award procedure shall not be ordered as interim measure by the PPAB (point a) of paragraph (2) of Article 332 of the HPPA), but the launching of a remedy procedure would have a suspending effect on its own. (It is worth to notice, that at the time of implementation of Directive 2007/66/EC the automatic suspension was intended to introduce, but finally – due to a cause, which is unknown – it was not filed into the HPPA).

3. According to the public procurement remedy system, the most debates were generated by the question on the dual remedy system or the modification of it. As I have mentioned before, professionals, who identify the public procurement contract as a public administrative contract, take a stand by the side of public administration remedies (exclusive nature of the procedure of the PPAB). Nevertheless, from the viewpoint of the private law, the exclusive juridical procedure would be appropriate.

In my opinion, the possibilities to absolve the problems of the existing remedy system are twofold:

a) the maintenance of the existing (dual) remedy system with lesser or greater amendments, or
b) the overall and radical reform of the remedy system.

In my point of view, maintaining the existing remedy system is only possible, if the scope of authority of the PPAB and the court is going to mark off clearly, and the law-maker would not allow for an administrative entity to make a decision in a case (e.g. amendment and performance of contract), which has unanimously private law nature.

I think, from the two possible ways, the overall reform would be a more effective solution, which would supervise the whole remedy system.

I agree with those professional opinions, which recommend making the juridical way exclusive in the field of public procurement. Nevertheless, I do not think, that this solution can be executed by inserting the public procurement into the existing frames of the Hungarian juridical system. Although the abolishment of the exclusive scope of authority of the Metropolitan Court of Budapest resulted the decrease of the work of the mentioned court, and the measure of the juridical work became more proportional, but with the elimination of the procedure of the PPAB the number of public procurement cases going to the courts would significantly increase.

Beyond the viewpoint of the increase of the measure of the juridical work, the lack of public procurement special knowledge can be another viewpoint, since the public procurement knowledge does not absolutely keep a part of the knowledge, which is necessary and can be expected in the course of juridical activity.

In consideration of the former mentioned arguments and counter-arguments, I got to the consequence, that the best way to transform the public procurement remedy system can be solved by the establishment of a totally new juridical body. Contrary to those opinions, which place the public procurement jurisdiction within the public administrative jurisdiction, I agree with the former published governmental recommendation, which would establish a separate

Public Procurement Arbitration Court. Establishing such an arbitration court would have several advantages, which can be shortly summarized in the following manner:

- Proceeding in a public procurement case requires special public procurement knowledge at high level, which would be assured in the case of an arbitration court contrary to the members of a normal, ordinary court.
- By establishing such an arbitration court the duality of the processing authorities would be eliminated, but it would not increase the measure of juridical work of ordinary courts, at the same time.
- Launching the procedure of an arbitration court is always based on the decision of the parties, i.e. using this way of dispute settlement is voluntary. It is undoubted, that the costs are basically higher compared to the procedural costs of an ordinary court, but the amount of costs could have dissuasive effect against those parties, who launch a procedure without foundation.
- One of the most asserted argument, which arises against the existing public procurement remedy system, the lack of rapidity, since these kinds of procedures can drag for a long time, for several years as well, which greatly runs counter to the interest to rapid procedure of the parties. A procedure of an arbitration court would be a relatively fast procedure compared to both the procedure of PPAB and courts; therefore it would be an important point of view in the course of the reform of the existing public procurement remedy system.

While writing down my dissertation, I intended to point at the fact, that the regulation of public procurement can not be purely shaped up upon public law viewpoints, but the private law nature of the public procurement contract – as I supported it – requires to take the provisions of private law provisions into consideration and to harmonize the twofold regulation. In my opinion, both the deficiencies appeared in the regulation, which were identified by myself, both the *de lege ferenda* recommendations, which were worded after summarizing the dissertation, are appropriate to be used in practice and to bring a stronger private law approach into the basically public law provisions of the HPPA in the course of the creation of the new HPPA.

V. CATHALOGUE OF THE PUBLICATIONS FROM THE SUBJECT MATTER OF THE DISSERTATION

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