

The Compliance Control of Negotiated Procedures without Prior Publication in Practice – the Background of Decreasing Statistical Data

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Abstract

The compliance control of the application of negotiated procedures without prior publication is an activity of the Public Procurement Authority, where the Authority has a key role in influencing legal practice, furthermore, its option to initiate a review procedure has a considerable impact on drawing the borderline of the application of this procedure type. The number and ratio of negotiated procedures without prior publication has been lowering for years among the procedures launched by contracting authorities, likewise the transparency of Hungarian public procurements has markedly improved, which beside the legislation is also attributable to the fact that the Public Procurement Authority focuses in particular on ensuring the publicity of procedure documents and the decisions made as a result of the control. As the possibility offered

by negotiated procedures without prior publication is indispensable for the satisfaction of certain procurement needs, consequently, in addition to strict compliance control, the establishment of a consistent legal practice is also necessary to implement this procedure type in the spirit in which it was conceived. The overview of past years' legislative and practical tendencies in terms of negotiated procedures without prior publication presented by this article endeavours to analyse the background of decreasing statistical data and also to describe how the Public Procurement Authority ensures transparency during compliance control and how it supports practitioners in applying this procedure type in compliance with the provisions of the Public Procurement Act.

I. The basis of negotiated procedure without prior publication in the directives

In order to better understand the function, concept, history of this procedure type in the public procurement rules, furthermore, the role of the Public Procurement Authority concerning this procedure type, it is essential to provide a brief overview of EU public procurement law, especially the basis in the directives and the related case-law of the Court of Justice of the European Union. In Article 9 of Directive 71/305/EEC concerning the co-ordination of procedures for the award of public works

contracts (hereinafter: Directive 71/305), which entered into force on 30 July 1971, the European Economic Community laid down the circumstances under which the contracting authorities of the Member States may award contracts without applying the directive¹. The Court of Justice of the European Union (hereinafter: CJEU) stated in the case *Commission v Italian Republic* (C-199/85) concerning the applicability of Article 9 (b) and (d)² of the Directive that the provisions concerned

¹ Council Directive of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (71/305/EEC) Article 9: Authorities awarding contracts may award their works contracts (in certain cases laid down in the Directive) without applying the provisions of this Directive, except those of Article 10.

² Article 9 B) „When, for technical or artistic reasons or for reasons connected with the protection of exclusive rights the works may only be carried out by a particular contractor.” D) “in so far as is strictly necessary when, for reasons of extreme urgency brought by events unforeseen by the authorities awarding contracts, the time-limit laid down in other procedures cannot be kept”.

should be interpreted narrowly considering their exceptional nature.³ This opinion was reinforced by the CJEU in the case *Commission v Germany (C-318/94)*, in addition the judgement declared as principle that the contracting authority shall certify the fulfilment of all prerequisites stipulated by the legal basis of the procedure.⁴ The current practice of the compliance control of the Public Authority also shares this vision.⁵ Article 9 of Directive 71/305 can be regarded as the foundation of the subsequent control competence of the Member States, under which the Member States' bodies concerned have to pay special attention to contracts awarded pursuant to Article 9, as the European Commission requested an annual report on the number and total value of such contracts.⁶

The ensuing public procurement regulation and case-law of the EU consistently treated procedures without prior publication as exception, which procedure type may only be used narrowly due to the restricted transparency.⁷ Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/08/EC (hereinafter: Directive 2014/24/EU) currently in force states in its preamble that "in view of the detrimental effects on competition, negotiated procedure without prior

publication of a contract notice should be used only in very exceptional circumstances".⁸

II. The period prior to 1 November 2015 concerning the compliance control of negotiated procedures without prior publication

The procedure type accounts for lower and lower numbers in public procurement statistics year-by-year. The positive result is the outcome of a complex legislative, application and control activity, where the entry into force of Act CXLIII of 2015 on Public Procurement (hereinafter: PPA) on 1 November 2015 marks a significant milestone. In the followings it is necessary to briefly overview the preceding period as well, as the major part of the national "procedural order" and the tools of the compliance control were determined by the earlier public procurement regulation and the case-law of the Public Procurement Arbitration Board.

The institution of compliance control was first introduced by Act LX of 1999 on the Amendment of Act XL of 1995 on Public Procurements (hereinafter: PPA of 1995)⁹, which conferred control competence to the Public Procurement Arbitration Board. From the ensuing period Act CVIII of 2011 on Public

³ *Commission of the European Communities v Italian Republic: Failure to publish a notice of a public works contract. Case 199/85., ECLI:EU:C:1987:115.*

⁴ *Commission of the European Communities v Federal Republic of Germany. Failure to fulfil obligations - Public works contracts - Failure to publish a tender notice. Case C-318/94., ECLI:EU:C:1996:149.*

⁵ Briefing of the President of the Public Procurement Authority on the Stricter Control of Negotiated Procedures without Prior Publication. *Közbeszerzési Értesítő*, issue No. 72/2017, 8 May 2017.

⁶ (71/305/EEC) Article 9: Before the end of June of each year, Member States shall send the Commission a statement of the number and total value of contracts awarded in the preceding year on the basis of the present Article, at least as regards contracts awarded by States, Lander, regions, provinces or departments. Member States shall, as far as possible, classify the contracts awarded according to each of the cases cited in this Article.

⁷ In accordance with Article 28 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts public contracts shall be awarded in open or restricted procedure, while the contracting authority may apply negotiated procedure without prior publication "in the specific cases and circumstances referred to expressly in Article 31".

⁸ Recital (50) of Directive 2014/24/EU.

⁹ In line with Article 34 (2) of the act, Article 71/A of the PPA of 1995 is amended with the additional Article 71/B as follows: Upon launching the negotiated procedure without prior publication, the contract notice shall be forwarded - also via telefax - to the president of the Committee, furthermore, the information on the name, seat of the entities (persons) intended to be invited to tender and the circumstances justifying the application of the negotiated procedure. Article 36 (5) of the amendment act modified Article 79 (5) of the PPA of 1995, under which if upon the review of the documents forwarded concerning the launch of the negotiated procedure without prior publication, the president of the Committee states that there are reasonable grounds to assume an infringement of the principles or rules of the public procurement procedure, he initiates the ex officio procedure of the Committee by assigning the proceeding public procurement commissioners.

Procurements (hereinafter: PPA of 2011) also has to be mentioned as the antecedent of the current law in force. Its Article 94 included the legal bases concerning procedures above EU thresholds, which were established in compliance with the requirements set forth by Directive 2004/18/EC. In terms of procedures below EU thresholds, the PPA allowed contracting authorities to apply the procedure type in a wider range, as there were fourteen¹⁰ legal bases to justify to application of such procedure. Upon conducting negotiated procedures without prior publication below EU thresholds, the PPA of 2011 stipulated the application of the rules laid down in Part Two, with the deviations pursuant to Article 122.

The PPA of 2011 maintained the intention on controlling the exceptional feature of the procedure type,¹¹ thus under Article 100, on the day of launching the negotiated procedure without prior publication, the contracting authority was obliged to submit the tender notice to be controlled by the Public Procurement Arbitration Board, furthermore, also information on name, address (seat, residence) of the economic operator intended to be invited to tender, on the estimated value of the procurement, and also about the circumstances justifying the application of the negotiated procedure.

Where the fulfilment of the conditions justifying the application of the negotiated procedure without prior publication or the lawfulness of the invitation to tender could not be established with certainty, the president of the Public Procurement Arbitration Board requested – via telefax or electronically – the contracting authority to supply the necessary data within three days.

The president of the Public Procurement Arbitration Board, if he established during the review of the documents forwarded to the Public Procurement Arbitration Board concerning the launch of the negotiated procedure without prior publication that

there reasonable grounds to suspect the infringement of the principles or provisions of the legislation applicable to public procurement procedures, within fifteen days as of the receipt of the documents ex officio initiated the review procedure of the Public Procurement Arbitration Board, which is conducted at its discretion, namely whether a review procedure will be initiated. If the contracting authority failed to comply with the request for the supply of missing information, the president of the Public Procurement Arbitration Board decided on launching the review procedure based on the information available. Thus, under Article 141 (3)-(5) of the PPA of 2011, the president of the Public Procurement Arbitration Board had a power of discretion to launch the review procedure, meaning that the presentation of his justification was unnecessary in the application for review.¹² Then the contracting authority could withdraw its invitation during the procedure in line with the possibility provided by Article 44 (1) of the PPA of 2011. Naturally, if the contracting authority did not exercise its option of withdrawal, the initiation of the president of the Public Procurement Arbitration Board solely did not mean the automatic establishment of the infringement. During the review procedure the applicant could present the reasons and underlying documents, which in his opinion clarified the lawfulness of the application of the negotiated procedure without prior publication, so for example in 12,3% of the review procedures launched in 2012, the Public Procurement Arbitration Board established that no infringement was committed.¹³

In 2014 – in the last year of the PPA of 2011 being in force and so the relevant control practice based on it – the president of the Public Procurement Arbitration Board initiated ex officio in total 93 review procedures in terms

¹⁰ Dr. Kinga Kriston / Dr. Szilvia Petró: About the Experience of Controlling Negotiated Procedures without Prior Publication (online), *Közbeszerzési Szemle* issue No. 2013/10-11., Public procurement studies, articles. In Jogtár, Wolters Kluwer, <https://bit.ly/3qqyQTj> (Downloaded: 08. 02. 2021)

¹¹ Justification of the minister concerning draft law T/3502. (Act CVIII of 2011) p. 45. <https://bit.ly/3kWuIcy> (Downloaded: 08. 02. 2021)

¹² Dr. Kinga Kriston / Dr. Szilvia Petró: About the Experience of Controlling Negotiated Procedures without Prior Publication (online), *Közbeszerzési Szemle* issue No. 2013/10-11., Public procurement studies, articles. In Jogtár, Wolters Kluwer, <http://bit.ly/3qqyQTj> (Downloaded: 08. 02. 2021)

¹³ Op. cit.

of negotiated procedures without prior publication.¹⁴ In 2014 the president of the Public Procurement Arbitration Board was informed about the launch of negotiated procedure without prior publication in 965 cases in total, thus in 9,6% of the cases it was impossible to establish the full satisfaction of any of the conditions of the legal basis after the provision of information¹⁵.

III. Control of negotiated procedures without prior publication by the Public Procurement Authority

Prior to 1 November 2015, the Public Procurement Arbitration Board performed multiple tasks concerning the control of negotiated procedures without prior publication. On the one hand, the Arbitration Board performed ex-ante control of the existence of the legal basis of the procedure, respectively, if it initiated a review procedure in terms of the legal basis of the procedure, then decided on the substance of the infringement or about it not being committed. The European Commission expressed its concern over the operation of the system, as this way the ex-ante control and the ensuing review phase was concentrated at the same body.¹⁶ In order to ensure that the new public procurement act meets the expectations of the European Commission about compliance control more fully, the PPA of 2015 conferred the competence of compliance control on the Public Procurement Authority detached from the Public Procurement Arbitration Board in terms of its professional decisions. By taking over the new task, the Authority also had to face the expectations aiming to curb the application of the procedure type, considering that the EU expressed its concerns over the widespread application of it,¹⁷ as the competition of economic operators and the transparency of awarding contracts was restricted.

III. 1. The process of compliance control

In accordance with the previous practice, the contracting authority is obliged to submit the invitation to tender to the Public Procurement Authority on the day of launching the negotiated procedure without prior publication, along with information on the name, address (seat, residence) of the economic operators intended to be invited to tender, on the estimated value of the procurement, furthermore, on the circumstances justifying the application of the negotiated procedure. Such procedure shall only be conducted lawfully upon the compliance control of the president of the Public Procurement Authority.¹⁸ A novelty of the PPA was that the detailed decision of the Public Procurement Authority concerning the compliance control of procedures launched due to extreme urgency is being published on the homepage of the Public Procurement Authority. This step has considerably enhanced the transparency of negotiated procedures without prior publication launched for this reason.¹⁹

Upon establishing the compliance control practice of negotiated procedures without prior publication, the Public Procurement Authority – by considering the previous case-law of the Public Procurement Arbitration Board and Article 103 (1) of the PPA – requests contracting authorities to inform the president of the Public Procurement Authority on the day of launching the procedure. In its decision No. D.131/9/2013., the Public Procurement Arbitration Board laid down the followings in terms of the obligation to provide information: “In order to allow the president of the Arbitration Board to consider the lawfulness of the legal basis chosen, respectively, the invitation within the time limit open for carrying out the

¹⁴ Annual Report to the National Assembly on the Activities of the Public Procurement Authority of Hungary between 1 January and 31 December 2014, Furthermore, on the Experience of Review Procedure Cases. <https://bit.ly/38ovWYX> (Downloaded: 08. 02. 2021).

¹⁵ Annual Report to the National Assembly, Op.cit.

¹⁶ Justification of the legislator for the draft law concerning the public procurement act. In Jogtár. <http://bit.ly/3t2pRcr> (Downloaded: 08. 02. 2021).

¹⁷ Council Recommendation (of 14 July 2015) on the 2015 National Reform Programme of Hungary and delivering a Council opinion on the 2015 Convergence Programme of Hungary. (2015/C 272/20) <https://bit.ly/3bukvke> (Downloaded: 08. 02. 2021).

¹⁸ An exception to the obligation to provide information is the conduct of concession procurement procedure without prior publication under Part Four of the PPA, respectively, the conduct of a procedure launched pursuant to Article 115 (1) of the PPA, by applying the rules of negotiated procedure without prior publication.

¹⁹ Dr. Gabriella Szeiffert: The Rules of Negotiated Procedures without Prior Publication in Light of the Practice after 1 November 2015. In: Közbeszerzési Szemle issue No. 7/2016., p. 30.

compliance control, contracting authorities shall provide information on the circumstances justifying the application of negotiated procedure without prior publication by enabling the establishment of the fulfilment of the conditions set forth by the law. The requirement of proper exercise of rights also entails that contracting authorities shall provide detailed and justified information on the fulfilment of all conditions of the legal basis and shall present all relevant facts and circumstances. If contracting authorities intend to certify or support the fulfilment of certain conditions of the legal basis chosen with certificates at their disposal, such certificates are expected to be forwarded to the Arbitration Board, simultaneously with the provision of information.”²⁰

On the subject the briefing of the president of the Public Procurement Authority was published on 2 March 2016, in issue No. 26/2016 of the Public Procurement Bulletin, covering the control of negotiated procedures without prior publication, warning practitioners that they shall fulfil their obligation to provide information upon launching the procedure.

As in terms of the control, neither Act CXL of 2004 on Administrative Proceedings, nor Act CL of 2016 on the Code of General Administrative Procedure was applicable as background legislation, thus activities and administrative measures included there are not available for compliance control. Consequently, even after the entry into force of the new act, the control process takes place pursuant to special rules in accordance with the PPA.

If based on the documents submitted by the contracting authority the fulfilment of the conditions justifying the applicability of the negotiated procedure without prior publication or the lawfulness of the invitation to tender was unclear, the president of the Public Procurement Authority requested - via telefax or electronically - the contracting authority to supply the necessary data within three days.²¹

If the president of the Public Procurement Authority established upon the control of the documents submitted to him concerning the launch of the

negotiated procedure without prior publication that there are reasonable grounds to suspect the infringement of the provisions of the legislation applicable to public procurement and public procurement procedures, respectively, its basic principles, then he initiated the ex officio procedure of the Public Procurement Arbitration Board within ten days as of the receipt of the documents. The president of the Authority informed the contracting authority by indicating the infringement suspected by him, simultaneously with the submission of the application for the review procedure. If the contracting authority failed to submit the missing information, the president of the Public Procurement Authority decided on the initiation of the review procedure based on the data available.²²

The PPA also shortened the time limit available for the Authority's control. Pursuant to the previous act, it had 15 days to consider whether the circumstances presented by the contracting authority comply with all the conditions of the legal basis. As the result of the amendment entering into force on 1 November 2015, the Public Procurement Authority had a shorter time to control the reasoning and documents submitted. Naturally, purely the suspicion of infringement is ample to initiate the review procedure, so lengthy procedural time limits are unjustified, especially considering that under certain conditions contracting authorities need to satisfy their procurement needs as soon as possible, while a compliance control - although not preventing the conduct of the negotiated procedure without prior publication in absence of the initiation of the review procedure - might delay the reaction to the situation of extreme urgency. Nevertheless, the number of working days reduced due to bank holidays and weekends considerably increased the risk of preventing the Authority from making a sufficiently well-founded decision concerning the justification of the legal basis of the procedures. By its procedural acts and competency pursuant to the PPA, the Authority endeavours to clarify whether the legal basis concerned is justified in terms of all elements, circumstances of the procurement. If a request for the supply of missing information is

²⁰ Decision of the Public Procurement Arbitration Board No. D.131/9/2013.

²¹ Article 189 (2) of the PPA.

²² Article 189 (1) and (3) of the PPA.

issued, then in terms of the issues to be clarified, the Authority always strives to obtain the view of the contracting authorities, by allowing them to modify the invitation to tender or certain items, parts of the procurement documents in compliance with the PPA, and to certify the justification of the legal basis with further documents, reasoning in the given case. As the result of the amendment entered into force on 1 January 2017, the time limit open for the initiation of the review procedure was set in working days, thus ensuring possibility to fully consider the reasons for launching the procedure and its underlying documents, with more rounds of supply of missing information if necessary.

The Public Procurement Authority seeks to cooperate with practitioners during the compliance control, thus providing direction for contracting authorities with the request for the supply of missing information on how to adjust their procedure to comply with the applicable part of the PPA. Moreover, the Authority continuously publishes guidance, information and briefings covering up-to-date issues of the application of the law in order to support practitioners.

III.2. The presentation of no reasonable alternative as additional condition

The presentation of the legal basis all of negotiated procedures without prior publication stipulated by the PPA, furthermore, the related control experience goes beyond the present article, thus it is restricted to detail the conclusions reached during controlling negotiated procedures without prior publication launched by referring to the widely used legal basis under Article 98 (2) (c) of the PPA, as – considering the decrease reflected by the statistics – this is the most suitable to illustrate the efficiency of the control practice of the Public Procurement Authority.

The amendments of Directive 2014/24/EU concerning negotiated procedures without prior publication were

transposed into Hungarian legislation with Act CXLIII of 2015 on Public Procurements, which entered into force on 1 November 2015. Apart from the assignment of the Public Procurement Authority as control platform, a further major amendment is the addendum stipulating that the legal bases containing technical reasons and the protection of exclusive rights specified in Article 32 (2) (b) ii and iii of Directive 2014/24/EU may only be applied when no reasonable alternative or substitute exists for their fulfilment and the absence of competition is not the result of an artificial narrowing down of the parameters of the public procurement. Uniqueness is the intrinsic characteristic of works of art or artistic performance, thus in such cases supply by other economic operator cannot arise.

The PPA transposed the above provisions of the directive in Article 98 (2) (c) by setting forth that the contracting authority may apply negotiated procedure without prior publication in the exceptional case when the contract may only be awarded to a particular economic operator for technical reasons or for the protection of exclusive rights, provided that there is no reasonable alternative for the contracting authority to satisfy its procurement need and the absence of competition is not the result of the unjustified restriction of the subject of public procurement.

In 2016, the Public Procurement Authority was informed in 275²³ cases about intention to conduct negotiated procedure without prior publication pursuant to Article 98 (2) (c), in 2017 235²⁴, in 2018 211²⁵, in 2019 184²⁶ information letters under Article 103 (1) of the PPA were received with reference to the legal basis, which reflects a continuous decrease. The additional condition was laid down as of 1 November 2015, furthermore, the stricter approach of the relevant case-law may account for the drop in the reference to the legal basis. Indeed, during the compliance control it has to be certified that there is no reasonable alternative to

²³ Annual Report on the Activities of the Public Procurement Authority of Hungary between 1 January and 31 December 2016, p. 20. <https://bit.ly/3v8iLVP> (Downloaded: 08. 02. 2021).

²⁴ Annual Report to the National Assembly on the Activities of the Public Procurement Authority of Hungary between 1 January and 31 December 2017, p. 14. <https://bit.ly/38oAe2o> (Downloaded: 08. 02. 2021).

²⁵ Annual Report on the Activities of the Public Procurement Authority of Hungary between 1 January and 31 December 2018, p. 54. <https://bit.ly/3ehMmWS> (Downloaded: 08. 02. 2021).

²⁶ Annual Report to the National Assembly on the Activities of the Public Procurement Authority of Hungary between 1 January and 31 December 2019, p. 54. <https://bit.ly/38lR5Tq> (Downloaded: 08. 02. 2021).

satisfy the procurement need of the contracting authority. The legal basis may only be applied lawfully, if in terms of the contracting authority the alternative solution is unrealistic or is not feasible due to objective reasons. As a result of the control, decision can only be made if it can clearly be established based on the documents submitted that there is no other economic operator capable to perform the contract. The prerequisite that the contracting authority shall certify the conditions of the legal basis in terms of its entire procurement need, is in line with the previous judgement of the Court of Justice of the European Union²⁷, furthermore, in its decision No. D.602/6/2017 concerning the application of the legal basis under Article 98 (2) (c) of the PPA, the Public Procurement Arbitration Board also concluded that "pursuant to the binding provision of the PPA, as a general rule, contracting authorities shall conduct their public procurement procedures in accordance with procedures with publication ensuring the publicity of competition. The exceptionally applicable negotiated procedure without prior publication shall not be freely chosen by contracting authorities, it may be applied exclusively upon meeting the conditions exhaustively listed by the law. It is of key importance concerning all legal bases that all conditions of the legal basis chosen by the contracting authority has to be complied with in terms of the entire procurement, the failure to satisfy a condition converts the application of the legal basis concerned unlawful."

During the control the Public Procurement Authority examines concerning each negotiated procedure without prior publication referring to the legal basis under Article 98 (2) (c) of the PPA, whether all conditions of the legal basis are met in terms of the total quantity, respectively all items of the procurement. If it is found that by misusing a legal basis applicable for a part of its procurement need, the contracting authority also marks tasks concerning which the application of a

procedure type ensuring wider competition would be justified, then with the option of supplying missing information under the PPA, the Authority calls the contracting authority's attention to the infringement and urges it to conduct the procedure in line with the PPA, by also issuing warning of the ex officio initiation of a review procedure.

The success of the PPA and the relevant practice is demonstrated by the fact that while in the year 2014 referred to above 965 (in total) negotiated procedures without prior publication was launched, this number was just 275 in 2016.²⁸

In 2016 the president of the Public Procurement Authority initiated a review procedure in 46 cases, where there was reasonable ground to suspect the unlawful application of negotiated procedure without prior publication.

III.3. Broad transparency - Amendments entered into force on 1 January 2017

As regards the amendments entered into force on 1 January 2017, the PPA stipulates that all decisions - including detailed justification - of the Public Procurement Authority made as a result of the compliance control of negotiated procedures without prior publication shall be published at the homepage of the Authority, which is a crucial step towards ensuring transparency.²⁹ According to the practice prior to 1 November 2015, the Public Procurement Arbitration Board filed the documents of the procedures complying with the law submitted for control.³⁰ Thus concerning these procedures there was no publicly available document, which would have described the frameworks of this procedure type accepted by the controlling body. Available review decisions and court judgements supported practitioners and the wider public in obtaining information on the case-law of negotiated procedures without prior publication.

²⁷ Commission v Germany (C-318/94.) case.

²⁸ Annual Report on the Activities of the Public Procurement Authority of Hungary between 1 January and 31 December 2016, p. 20. <https://bit.ly/3v8iLVP> (Downloaded: 08. 02. 2021)

²⁹ Dr. Márta Várhomoki-Molnár: The Amendments of the PPA Entering into Force as of 1 January 2017. In: Közbeszerzési Szemle, Issues No.1-2/2017, pp. 2-11.

³⁰ Dr. Kinga Kriston / Dr. Szilvia Petró: About the experience of controlling negotiated procedures without prior publication (online), Közbeszerzési Szemle issue No. 2013/10-11., Public procurement studies, articles. In Jогtár, Wolters Kluwer, <https://bit.ly/3qqyQTj> (Downloaded: 08. 02. 2021)

As already referred to by the previous chapter, as a result of the amendment entered into force on 1 January 2017, the deadline for the initiation of review procedures was set in ten working days, thus ensuring the detailed control of the reasons of launching the procedure and the underlying documents, by several rounds of supply of missing information if necessary.

In accordance with the other amendment entered into force on the same day, upon applying a negotiated procedure without prior publication launched by referring to technical reasons or the protection of exclusive rights, the contracting authority shall publish a voluntary prior notice of transparency. This amendment aims at preventing contracting authorities from applying this legal basis in good faith, still unlawfully, as with the publication of the voluntary prior notice of transparency the contracting authority can inform the market – in advance – about its intentions, which in response can prevent the commitment of the bona fide infringement.³¹

Beside the publication of the decision of the president of the Public Procurement Authority, transparency was also promoted by that after 1 January 2017 the contracting authority was obliged to publish all documents forwarded to the Public Procurement Authority under Article 103 (1) of the PPA in the Public Procurement Database and also on its website on the day of launching the negotiated procedure without prior publication, as well as public procurement documents and the minutes drafted about the opening, after the opening of the tenders took place.³²

The obligation of the contracting authorities detailed above (publication on the website and in the Public Procurement Database) was strictly and consequently implemented by both the Public Procurement Authority and the Public Procurement Arbitration Board as a review platform.³³ As the foundation of this, the Public Procurement Arbitration Board stated in its decision

No. D.574/8/2017 the following: “In terms of negotiated procedures without prior publication, the PPA strives to implement transparency among others by obliging contracting authorities to publish the documents related to the procedure on their website. The PPA lays down no exception concerning this issue. As regards the publication obligation, the law clearly specifies that public procurement documents shall also be published on the website of the contracting authority. The Arbitration Board found that the contracting authority is registered by the Public Procurement Authority, it regularly conducts public procurement procedures since 2015, so considering this in the view of the Arbitration Board it shall not refer to not having a website as it should have set up an own website in order to conduct certain procedures. Based on the above, the Arbitration Board stated that the contracting authority violated Article 103 (6) of the PPA.”

From 2016 to 2017 the number of negotiated procedures without prior publication dropped by 45 %, which result is partly due to the amendment of the PPA detailed above and also to the result of the related compliance control. This meant in detail that while in 2016 the president of the Public Procurement Authority was informed 870 times, this number fell to 482 in 2017.³⁴

In 2017 the president of the Public Procurement Authority initiated a review procedure in 58 cases upon reasonable suspicion of unlawfully launched negotiated procedures without prior publication.³⁵

III.4. The introduction of electronic public procurement (EAA and EPPS)

The amendment of Act CCXXII of 2015 on the General Rules of Electronic Administration and Trust Services (hereinafter: EAA) entered into force on 1 January 2018. As the result of the amendment, pursuant to Article 9 (1) of the EEA, the Public Procurement Authority as an

³¹ Dr. Márta Várhomoki-Molnár: The Amendments of the PPA Entering into Force as of 1 January 2017. *Közbeszerzési Szemle* Issue No. 1-2/2017. pp. 2-11.

³² Op. cit.

³³ Dr. Petra Sutyinszki: Compliance Control of Negotiated Procedures without Prior Publication (online). *Közbeszerzési Szemle* issue No. 2018/5, In Jogtár, Wolters Kluwer, <http://bit.ly/3elwouT> (Downloaded: 08. 02. 2021).

³⁴ Annual Report to the National Assembly on the Activities of the Public Procurement Authority between 1 January and 31 December 2017. p. 14. <https://bit.ly/38oAe2o> (Downloaded: 08. 02. 2021).

³⁵ Op. cit.

administrative body qualifies as a public body obliged to ensure electronic administration. This meant that under Article 108 (1) and (5) the Public Procurement Authority is obliged to ensure the electronic handling of the cases in line with the EEA, furthermore, as of the day of entering into force of this amendment economic organisations proceeding as clients and the legal representatives of clients are likewise obliged to administer the cases electronically.³⁶

Because of the amendment described above, documents required - and to be submitted to the Public Procurement Authority - for the compliance control of negotiated procedures without prior publication had to be forwarded via the Office Gateway as of 1 January 2018, additionally, the information obligation also had to be fulfilled via the Office Gateway. For procedures outside of the EPPS, the Office Gateway is still the communication channel of compliance control.

As of 15 April 2018, the Electronic Public Procurement System (hereinafter: EPPS) annulled the application of the Office Gateway, as Article 21 (3) of the Government Decree No. 424/2017 on the Detailed Rules of Electronic Public Procurement set forth that in negotiated procedures without prior publication, the contracting authority shall fulfil its obligation under Article 103 (1) of the PPA via the EPPS. The Public Procurement Authority shall publish its decision pursuant to Article 103 (4) of the PPA in the EPPS. Instead of its website and the Public Procurement Database, the contracting authority shall publish the data specified in Article 103 (6) of the PPA in the EPPS. Out of the content of the information forwarded to the Public Procurement Authority, the information on the name, address (seat, residence) of economic operators intended to be invited to tender and information on the estimated value of the procurement is unnecessary to be published beforehand.

With the introduction of the EPPS, as the primary tool of electronic contact keeping, the practice of negotiated

procedures without prior publication became fully transparent, as at the heading "Procedures launched" the documents of public procurement procedures launched without a notice are accessible also without registration in the EPPS.

The number of negotiated procedures without prior publication launched fell to 273 in 2019, which means a 72% drop considering the 964 information letters sent to the Public Procurement Arbitration Board in 2014.

III.5. The impact of the legal basis applicable to the public procurement of public utilities on statistical data

Statistical data undoubtedly reflect also the impact that previously Government Decree No. 289/2011 on the Special Public Procurement Rules of the Public Procurement of Public Utilities enabled³⁷ public utilities to conduct negotiated procedures without prior publication under framework agreements. As the first and second phase of the framework agreement procedure is undividable, thus the rules prior to 1 November 2015 had to be applied even if the negotiated procedure without prior publication was initiated under the effect of the PPA. Considering that after the entry into force of the PPA public utilities could not initiate a procedure to award a framework agreement under Chapter XIV of the PPA, thus the duration, which is set in a maximum of four years by the law, of framework agreements concluded as the closing of the first phases launched earlier expired, consequently the number of negotiated procedures without prior publication launched by them decreased.

In accordance with the previous regulation contracting authorities had to possibility below EU thresholds to launch negotiated procedures without prior publication pursuant to special legal bases in addition to the general ones. The legal basis specified in Article 122 (7) of the PPA of 2011³⁸ also contributed to the number of negotiated procedures without prior publication

³⁶ Dr. Petra Sutyinszki: The Compliance Control of Negotiated Procedures without Prior Publication (online). *Közbeszerzési Szemle* issue No. 2018/5, In *Jogtár*, Wolters Kluwer, <https://bit.ly/3elwouT> (Downloaded: 08. 02. 2021).

³⁷ Pursuant to Article 11 (1) (d) of Government Decree No. 289/2011 on the Special Public Procurement Rules of the Public Procurement of Public Utilities, the contracting entity may apply negotiated procedure without prior publication if the contract is awarded based on a framework agreement concluded in a procedure under Chapter XIV of the PPA.

³⁸ The contracting authority may also launch a negotiated procedure without prior publication in the following cases:

launched before 2015 in the following way. In such cases, contracting authorities had no information obligation, nevertheless, in many cases they submitted the documents for control.³⁹ The fulfilment of the compliance conditions of the procedure was examined by the Public Procurement Arbitration Board in these cases as well. This option remained available even with the entering into force of the PPA. If despite the provisions of Article 115 (5) of the PPA, the contracting authority informed the Public Procurement Authority about launching the procedure, the Public Procurement Authority screened the documents submitted in this case as well, proceeding the same way as concerning other negotiated procedures without prior publication.⁴⁰ The contracting authority could not withdraw its application after submitting the information and the documents. A request for the supply of missing information could take place concerning the procedure, furthermore, in cases specified in Article 189 (1) of the PPA, the president of the Public Procurement Authority initiated the ex officio procedure of the Public Procurement Arbitration Board. In terms of concession procedures specified in Part Four of the PPA, the introductory provisions of the Part concerned do not refer to the obligation of applying the procedural acts under Part Two of the PPA, consequently, there is no information obligation in the

case of such procedures.⁴¹ The compliance control of concession procurement procedures submitted despite this was refused by the Public Procurement Authority.

IV. Closing and summary

In 2019 the president of the Public Procurement Authority initiated only 3 review procedures at the Public Procurement Arbitration Board. It can be stated by considering the data presented that the Public Procurement Authority managed to implement the intention declared both at EU and national level⁴², that in Hungary the high number of negotiated procedures without prior publication, which even exceeded EU average in some previous years, should be reduced. The ratio of such procedures dropped from 14% in 2015 to 9% in 2016, then fell even lower to 8% in 2017, namely below the critical reference value of 10 % applicable for the European Economic Area (EEA).⁴³ At the end of the decade it can be stated that in terms of the low numbers of the procedure type Hungary moved to the forefront of the EU, as compared to all procedures any legal basis was applied in 4,8% in 2018⁴⁴, and in just 6% in 2019.⁴⁵ Beside the shrinking number of negotiated procedures without prior publication, the control practice of the past years may also account for the low number of review procedures, as with the decisions, documents of the procedures published in the previous years and

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- a) the estimated value of the public supply or public service does not reach HUF twenty five million or the estimated value of public works does not reach HUF one hundred fifty million;
 - b) the exceptionally favourable conditions of the procurement are public, are accessible for anyone and exist only for a short period of time and the consideration is significantly lower than the market price, furthermore, the usage of such favourable conditions would fail upon the application of the procedure under this part;
 - c) the public procurement is conducted for a delegation.

³⁹ Dr. Kinga Kriston / Dr. Szilvia Petró: About the Experience of Controlling Negotiated Procedures without Prior Publication. (online), *Közbeszerzési Szemle* issue No. 2013/10-11., Public procurement studies, articles. In Jogtár, Wolters Kluwer, <https://bit.ly/3qqyQTj> (Downloaded: 08. 02. 2021).

⁴⁰ The Briefing of the President of the Public Procurement Authority on Controlling Negotiated Procedures without Prior Publication (KÉ Issue No. 2016/26, 2 March 2016).

⁴¹ Dr. Petra Sutyinszki: The Compliance Control of Negotiated Procedures without Prior Publication (online). *Közbeszerzési Szemle* issue No. 2018/5, In Jogtár, Wolters Kluwer, <https://bit.ly/3elwouT> (Downloaded: 08. 02. 2021).

⁴² Briefing of the President of the Public Procurement Authority on the Stricter Control of Negotiated Procedures without Prior Publication. *Közbeszerzési Értesítő*, issue No. 72/2017, 8 May 2017.

⁴³ 2018 European Semester: Country Report - Hungary; Brussels, 07. 03. 2018; SWD (2018) 215 final <https://bit.ly/3ck9tO1> (Downloaded: 08. 02. 2021).

⁴⁴ Annual Report to the National Assembly on the Activities of the Public Procurement Authority between 1 January and 31 December 2019. p.13.

<https://bit.ly/38pbmrh> (Downloaded: 2021.02.08.).

⁴⁵ Flash Report – Hungarian Public Procurements in Numbers, first half of 2020, p. 12. <https://bit.ly/3qtLHE7> (Downloaded: 08. 02. 2021).

with other supporting materials available for practitioners, it has become easier to determine when the application of this procedure type is lawful and also the procurement needs in case of which one should refrain from launching it. The restricted application of these procedures also entails wider space for other procedure types ensuring more competition. The introduction of the EPPS is an important milestone at the level of publicity concerning negotiated procedures without prior publication, as the documents of these

procedures are available for anyone free-of-charge, hence implementing the principles of transparency and publicity. The proper usage of such information may contribute in the future to the best practices of the procedure type. Indeed upon the fulfilment of certain conditions, negotiated procedures without prior publication may offer an efficient solution for contracting authorities, where the borders can be set by way of a strict, but consistent compliance control.