

Supervisory Mechanisms in Responsible Public Procurement in Hungary

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1. Negotiated procedures without prior publication
2. Notice control
3. Contract control (+ capacity control)
4. Legal review

1. Negotiated procedures without prior publication

- Constantly decreasing number (and value) of procedures

2018: 329 procedures (from 10361)

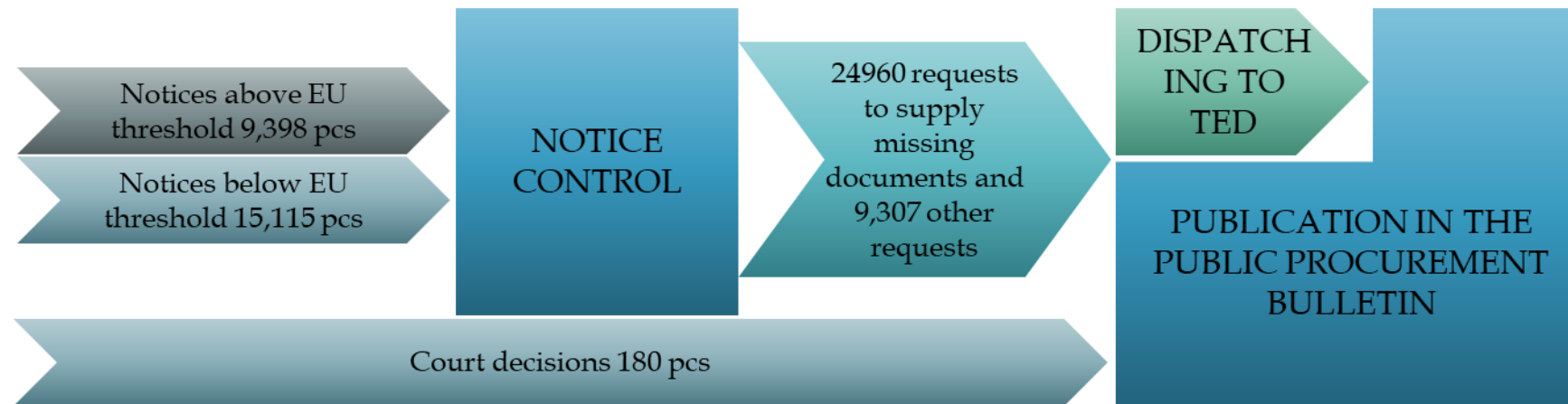
Above EU threshold: 4,8% (1,6% in value)

Below EU threshold: 1% (0,9% in value)

- 8 case became reviewed (by Arbitration Board)

2. Notice control

The process of notice control



Notice forms:

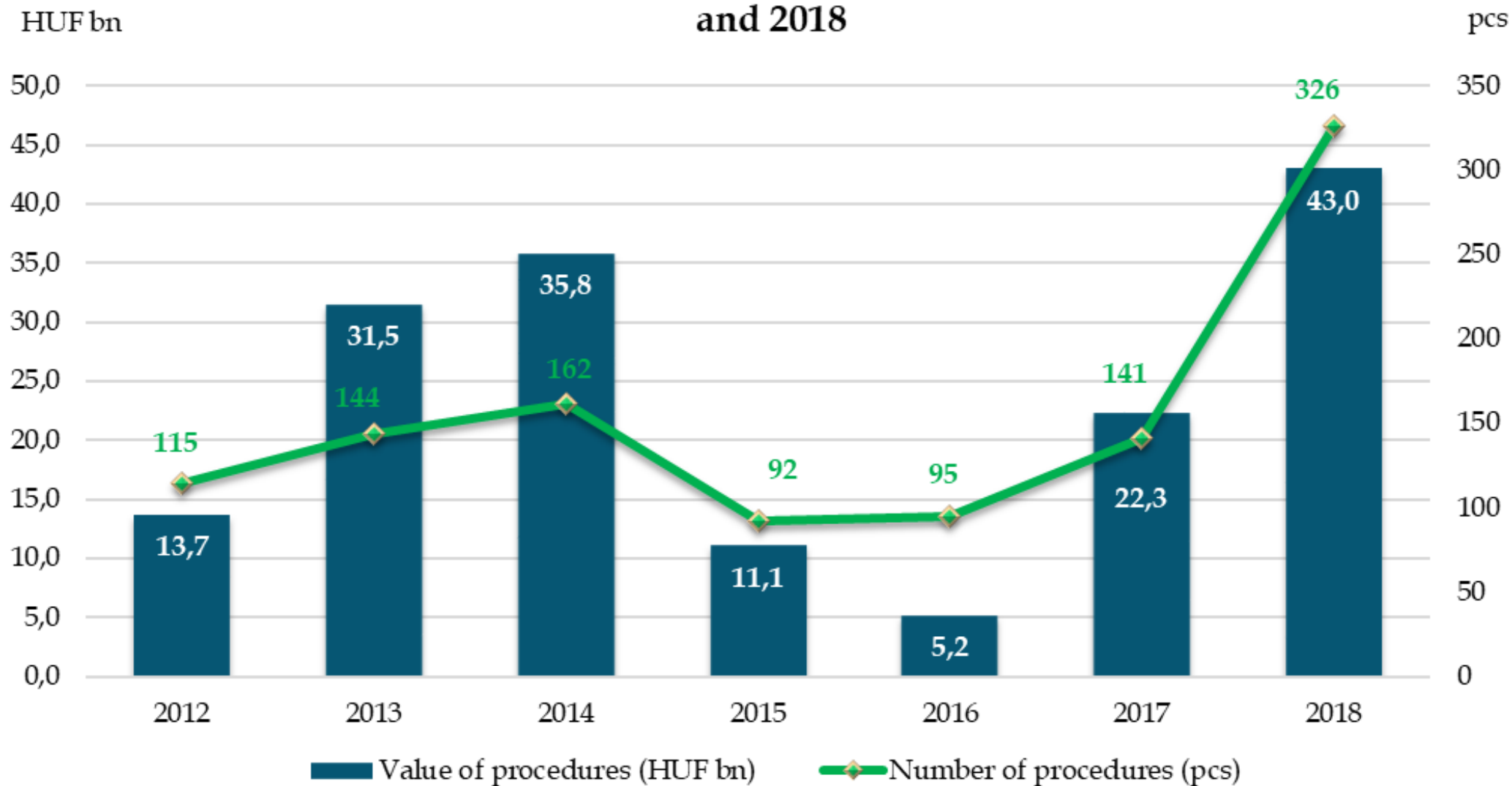
- ❖ In the beginning of a procedure
- ❖ During the procedure: modifications
- ❖ **After closing the procedure - on successful and fulfilled procurements**
 - **data statistically processed**
- **Data on social aspect appear only in public procurements below EU threshold.**

Application of social aspects in the closing notifications:

Social aspects could have been appeared in the successful procedure among:

- Condition of a contract
- Contract award criteria
- Part of the technical specifications
- Suitability requirements
- Reserved contracts for sheltered workplaces

Number and value of procedures applying social criteria between 2012 and 2018



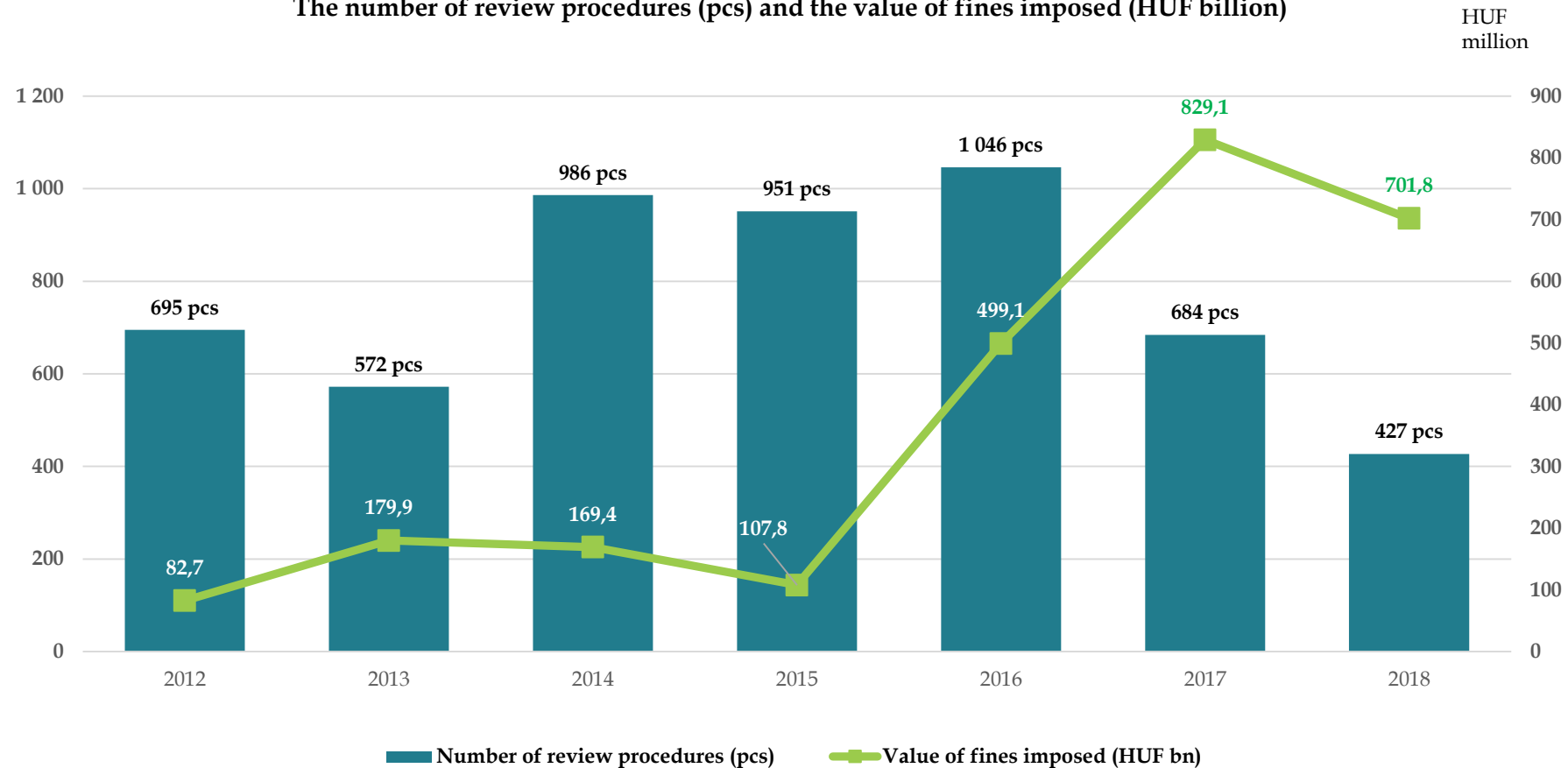
3. Contract control

- Performance of public contracts: whether the performance complies with the contract
- Amendments of public contracts: whether the amendments has legal ground upon the PPA
 - Both cases social criteria – if any - are controlled.
- Legal consequences: in case of breaching the PPA, the President opens a legal review proceeding before the Public Procurement Arbitration Board
 - 40 cases were initiated ex officio before the Arbitration Board

- Notifications of public interest
In 20 cases from 77 notifications legal review procedure was opened
- Self-cleaning
From 12 submitted request PP Authority approved in 10 cases that the tenderer is reliable despite of the existing exclusion ground.
- There is no specific social approach in these supervisory mechanisms.

4. Legal review

The number of review procedures (pcs) and the value of fines imposed (HUF billion)



200 substantial legal review (from 427 initiated cases) ended up with statement of infringement
91 supervisory case before court – 24 decision - 22 dismissed the appeals against the Board

Under Article 132 of the PPA, a **social criterion**, in particular, shall be

- a) involvement in the fulfilment of the relevant contract of an organisation specified in Article 33 (*sheltered workshops*)
- b) **employment** of *job-seekers, disabled workers, unemployed people or prisoners*;
- c) **employment of persons in part-time jobs**, who are recipients of any *child care benefit* set out in the act on family benefits during the receipt of such payments or subsequent to the ending of such payments, and employment of persons who are recipients of *maternity care benefit and child care fee* after the end of such payment;
- d) stipulation of **measures for ensuring the implementation** of the *principle of equal treatment*;
- e) (...) provision of **training for the skills needed for the performance** for *unemployed or young people* participating in the performance.

Employment by an **accredited employer**,

- the employer shall ensure a transit or permanent employment and
- as a minimum **30%** of its employees qualifies to be **persons with reduced ability to work** pursuant to Article 22 of Act CXCI of 2011,

or

- employer established with the primal aim of employing **disadvantaged workers**.

List of sheltered workshops are available from the website of the Authority.



CAs may or, if the Government provides so, shall reserve the right to participate in a pp procedure for organizations qualifying as **sheltered workshop**, provided more than 30 % of their employees are disadvantaged or disabled workers, furthermore, for **developmental employers**, provided more than 30% of their employees are involved in developmental employment. CAs may or, if the Government provides so, shall require that the public contract be performed in the framework of a job creation programme, provided at least 30% of the persons employed during the performance of the contract are disadvantaged, disabled or handicapped workers (**sheltered employment programmes**).

CASE STUDY – employment of prisoners

Subject matter: Disposable sterile non-woven surgical textiles

Contract award criterion: Employment of prisoners as qualitative aspect – 30%

➤ **Preliminary dispute settlement**

➤ **Decision:** lawful / employment of prisoners can be a social aspect under the Article 76. § (1)/

Legal arguments of the tenderers:

- Contract award criterion is arbitrary, unjustifiable – CA prescribes a criteria which is able to meet itself strongly advantageous
- Against the competition, exclusive – against the principles
- Criteria applied is not related to the subject matter of the public procurement

Legal arguments of the CA

- As a central body his responsibility is to fulfill the sectoral policy, promoting the employment of prisoners, and the supply of the subject matter is his task according to a Gov Decree.
- Was not a suitability criteria, not excluded other economic operators.
- Is analogic with the employment of the disadvantaged workers or reduced ability workers.
- Others also have the possibility to employ prisoners.

contract award criterion: employment of prisoners as qualitative aspect – 30%

Decision of the PP Arbitration Board:

- Needs a systematic approach, which was introduced with the new PP directives: a shift from equal opportunities to sustainable, social and innovative approach
- 2014/24/EU Directive Preamble 97.: award criteria should be related to any phase of the lifecycle and should contain social or environmental considerations even if these are not strictly related to the merit of a PP contract
- Article 67: MEAT + award criteria should be related to any phase of the lifecycle
- Transposed into national law: Article 76
- Law on law enforcement changed: main objective is employment of prisoners
- Doesn't hurt equal opportunities: each EO has the opportunity
- Related to the subject matter of the procurement
- Tenders were comparable upon objective criteria

CASE STUDY – employment of prisoners



Before the court of first instance

reasoning of the tenderers: the weigh (30%) excluded the others, unequal opportunities

Court of first instance:

- Call for competition was unlawful concerning the 30% weigh of the employment of prisoners criteria
- Employment of prisoners cannot be regarded as a social criterion

Curia of Hungary

- PPA contains that employment of prisoners is a social criterion (Article 132)
Under Article 132 employment of prisoners is applicable as social condition
 - Suitability of the 30% wasn't argued, just employment of prisoners as a criterion
 - Doesn't hurt equal opportunities: each EO has the opportunity to employ prisoners
 - Related to the subject matter of the procurement
- Employment of prisoners is not unlawful, not breaches Article 76

as technical specification

- Hungarian regulations require accessibility by persons with disabilities and design suitable for all users.
- In 2017, it has become mandatory to take the criteria of universal design into account in invitations to tender for the public procurement of works.

- **Preparation of the procedure**
- **Defintion of contractual requirements** - technical specifications, labels
- **Selection of suppliers** - exclusion grounds, accessibility requirements
- **Award of contracts**

Invalidity of the tender

Award criteria (shift to MEAT)

The criteria representing the best price-quality ratio may, in particular, relate to quality, technical merit, aesthetic and functional characteristics, accessibility for all users, **employment of disabled workers and other social**, environmental and innovative **characteristics**...

- **Contract performance**

The contracting authority may *set special conditions for the performance of the contract*, in particular, conditions related to **social** and environmental considerations as well as incentives for innovation. Reference to such contract terms shall be made in the notice launching the procedure... (132. § (1))

Thank you for the attention!