

UNIVERSITY OF PUBLIC SERVICE
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THESES OF THE PH. D. DISSERTATION

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**The organisational structure of the control of public procurement
procedures in Hungary, the possible way towards rationalisation**

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1. INTRODUCTION

In Hungary the history of modern era public procurements commenced in 1995. The entry into force of Act XL of 1995 on Public Procurements established the bases of the legal and institutional framework, which have been determining the practical application of public procurement law hitherto. Nevertheless, it has to be swiftly underlined that the origins of public procurement law go back even further: the legal history precedents of currently applied public procurement regulations were included in the provisions of the so-called *industry supporting acts* (Act III of 1907 on the development of the national industry and Act XXI of 1931 on industrial development) passed in the first decades of the 20th century, furthermore, in the related *Public Transportation Regulation*¹.

Since that, public procurement has evolved significantly, especially during the more than twenty five years having passed since the entry into force of the public procurement act of 1995, basically due to the accession of Hungary to the European Union and the entailing legal harmonisation obligation. Today public procurement law includes several thousand pages of European and national legislation, several hundred of European and national court judgements, several thousand public procurement arbitration board decisions and tens of thousands pages of studies, publications.

None the less, although public procurement law has not evolved into a separate branch of the law, it can still be said that public procurement law is considered to be part of public governance studies and within, a special area of legal sciences, which despite having several features of a branch of law, still cannot be identified as a separate branch of the law as the related conditions are not all fulfilled. By accepting the view of Zsolt Pfeffer, public procurement law is to be regarded as *an area of the law with relative independence* within financial law (Pfeffer, 2015.). Public procurement law is in very close contact with numerous other branches and areas of the law, consequently it is deemed to be an area of the law of mixed nature, in which public law elements dominate and in which procedural and substantive provisions on the conduct and monitoring of public procurement procedures are simultaneously included. In this respect, provisions on public procurement monitoring have especially become significant since the accession of Hungary to the European Union.

¹ Order No. 50.000/1934. K. M. on public transportation and on the obligation of national procurement

The economic policy significance of public procurements is outstanding everywhere. Managers of national economic policy and economic policy cannot ignore the enormous amount of assets pumped into the economy represented by public procurement and the public procurement market. This was especially obvious in the recently passed crisis periods, when the governmental crisis management measures considerably shaped the volume and breakdown of public procurements, irrespective of geographical, cultural or political differences between the states.

2. DESCRIPTION OF THE RESEARCH TOPIC AND THE RESEARCH

Different development funds provided for Hungary by the European Union are especially meaningful from the aspects of Hungary's integration towards the EU and from the point of view of its economic and cultural development. Funding sources provided during EU programming periods – currently the 2014-2020 and the 2021-2027 periods – affect almost all areas of social and economic life, the funding of the construction industry, agriculture, education, human resources development, transportation, culture, environmental protection, healthcare and the support of SMEs are to be underlined in this respect.

In the past period procurements realised by using EU funds considerably provided work and income to a wide range of economic operators – especially for those in the construction industry –, EU funds also allowed and continue to allow among others the saving of our national treasures, the refurbishment and development of public and railroads or even underground lines, and also the procurement of the related railway vehicles, trams and underground trains. It has to be stressed that apart from the investments of national importance mentioned above, EU funds are critical for small communities from the point of view of guaranteeing the funding of investments making every day life easier – like sewerage, street lighting, road reconstruction, development of tourism. One can encounter different investments and developments realised by using EU funds almost every day.

However, the considerable amount of funding is provided for Hungary – and for other Member States – by the European Union not without expectations and conditions. Streamlined, the prime requirement of the provision of development funds is that they have to be used and spent as a result of a transparent tendering procedure guaranteeing open competition and fair chances of economic operators, otherwise unlawfully spent funds are to be returned to the European Union or at best although they are not be repaid, but still cannot be spent as planned originally. The above mentioned competitive, transparent and open procedure required by the European Union is the public procurement procedure, the framework of which are laid down by EU directives². It has to be highlighted that although the conduct of each public procurement

² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement of entities operating in the water, energy, transport and postal services sectors and

procedure is the task of beneficiaries receiving the funding, the compliance of the procedures – in order to avoid the loss of resources mentioned above – has to be provided for by the Member States.

As a result, the majority of EU Member States apply some kind of monitoring mechanism to control the compliance of public procurement procedures in order to avoid the risks mentioned above, as Hungary has applied and is applying control system(s) in this respect, essentially from the date of EU accession. My dissertation aims to study and monitor this control system and to make suggestions practically applicable to promote the effective operation of the control system.

repealing Directive 2004/17/EC; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

3. THE OBJECTIVES OF THE RESEARCH

The domestic monitoring system established to examine procurements realized with EU funds has undergone substantial development and transformation since its creation, which today forms part of an extremely serious control and monitoring system together with the domestic inspection activities that exist and operate in parallel. The current *main* elements of this system can be summarized as follows:

- 1) *Public Procurement Control Department of the Prime Minister's Office (Minister responsible for Regional Development)*, and the so-called *Managing Authorities*, which carry out the eligibility, accountability and public procurement law control of procurements realized with EU funds, partly in the framework of ongoing and partly ex post controls;
- 2) *Directorate-General for Auditing European Subsidies*, which also carries out ex-post control on procurements realized with the help of subsidies from individual European states;
- 3) *Department for Notice Control and Statistics of the Public Procurement Authority*, which, in the case of both domestic and EU-funded procurements, checks the notices related to the procedures (notices launching the public procurement procedure, contract award notices, etc.), regarding whether the content of the individual notices complies with public procurement legal requirements;
- 4) *Public Procurement Arbitration Board*, which acts within the framework of the Public Procurement Authority, whose exclusive competence is the investigation and adjudication of violations of law related to public procurement; the parties concerned may appeal to the court against the decision of the Arbitration Board;
- 5) *Integrity Authority*, which is an independent control organization established to control public procurements realized from European Union funds, whose task is to take action in all cases where, in its opinion, an organization with tasks and powers in the use of European Union funds or its control has not taken the necessary steps for the prevention, detection and correction of fraud, conflicts of interest, corruption and other violations or irregularities affecting the efficient and effective financial management of the European Union budget or the protection of the financial interests of the European Union, or a serious risk of this arises.

The purpose of my dissertation is to present this control and monitoring system, to examine its effectiveness, and to analyze it, to propose a system that can guarantee the enforcement of compliance, which is a fundamental requirement for the use of EU funds, which can guarantee the efficient implementation of public procurement by eliminating unnecessary, administrative and bureaucratic control mechanisms. Although the question of transparency and, in this respect, corruption, as well as the strategic use and application of public procurement (sustainability and circularity, social goals, innovation), the question of the use of BigData analysis and artificial intelligence arise often related to public procurement, I do not deal with these in my dissertation, on the one hand because they are only distantly and indirectly related to the research topic and the purpose of the research, on the other hand, the processing of these topics would significantly exceed the scope of my dissertation.

In my dissertation, I mean the *effectiveness of public procurement control* and consider the control system to be effective if, during the control(s), irregularities are detected, prevented and filtered out as much as possible, so that a series of controls do not hinder the speedy conduct of public procurement procedures, and thereby the implementation of public procurement.

4. THE HYPOTHESES OF THE RESEARCH

Further development and improvement of the efficiency of the control system that ensures the compliant conduct of public procurements is a continuous need in order to provide for the use of European Union subsidies and the efficiency of public procurements. As a result of the investigation and analysis detailed in my dissertation, I aim to support or refute the following assumptions (hypotheses):

Hypothesis 1.

The current segmented, fragmented, multi-level public procurement control system does not ensure the efficient performance of control activities, and due to the time delay of controls, it specifically hinders the rapid implementation of public procurements.

Hypothesis 2.

By eliminating the fragmentation of the public procurement control system, reducing the number of levels of the multi-level control system, and rationalizing the control methodology, the compliant and rapid implementation of public procurement can be significantly promoted, which also has a positive effect on the use of EU funds.

Hypothesis 3.

Different control organizations conclude conflicting findings on the same legal and factual issues, which results in unpredictability and makes the application of public procurement legislation uncertain. An organization independent of the central public administration and ensuring a uniform interpretation of public procurement legislation would contribute more effectively to the compliant conduct of public procurement procedures.

5. OVERVIEW OF THE RESEARCH METHODOLOGY

In terms of public procurement control, there has been very little research – domestic or international – that relied on primary research results. In addition, it has to be emphasized that due to the nature of public procurement control, the application of many primary research methods encounter difficulties, therefore the application of some methods (for example, the implementation of experiments, since the observations cannot be generalized to the population) was not possible during the research. In view of all this, I had to conduct my own primary and secondary research in order to support the hypotheses.

5.1. Primary research methods

During my *primary research*, I used both *quantitative* and *qualitative* methods to answer my research questions and prove my hypotheses. Among the primary research methods, the *questionnaire survey* and the investigation based on *interviews* proved to be the most appropriate.

I conducted the *questionnaire surveys* in two segments, also examining the opinions of domestic public procurement actors regarding public procurement controls, in order to collect and analyze first-hand information:

ad a) On the side of the contracting authorities: thanks to my supervisor, in 2017 I got involved in one of the independent, so far unpublished sub-projects of a multi-phase, more extensive public procurement survey - which mainly focused on domestic sustainable and innovation-oriented public procurements. This sub-project focused on the public procurement institutional system, the role and powers of the Public Procurement Authority and the Public Procurement Arbitration Board, in addition to surveying the contracting authorities (*Contracting Authority Questionnaire Survey, 2017*). The questions of the sub-project were repeated after the pandemic period in the first months of 2022 (*Contracting Authority Questionnaire Survey, 2022*).

ad b) In addition, I also conducted another questionnaire survey, which was intended to reveal the opinion of the tenderer side related to the public procurement control system. This

survey was conducted in February 2017 among the participants of a public procurement conference (98% of the participants filled out the anonymous questionnaire) (*Tenderer Questionnaire Survey, 2017*).

To conduct the questionnaire process, I chose the self-filling form. I used index indicators for each questionnaire. The answers could be marked on a five-point Likert scale, where 1 means very dissatisfied (or strongly disagree, depending on the question), and 5 means very satisfied (or strongly agree, depending on the question). Finally, I summed up or averaged the numerical values of the answers, based on which a lower score meant less satisfaction.

Upon analyzing the answers received during the questionnaire research, I calculated the descriptive statistics for each variable: mean, standard deviation, minimum and maximum value. After that, taking all questions into account, I performed a cluster analysis (non-hierarchical cluster analysis) to see if it was possible to form groups from the respondents based on the answers. I defined the individual clusters based on the dispersion of the answers to the questions. For the cluster analysis, I used the method of K means. In this context, I prepared the *Calinski-Harabas* statistics, with the help of which I determined the number of clusters: where the value of the Calinski-Harabas statistic was the highest that determined the number of clusters. Based on these calculation methods, I was able to create three clusters for the Contracting Authority Questionnaire Survey, 2017, four clusters for the Contracting Authority Questionnaire Survey, 2022, and two clusters for the Tenderer Questionnaire Survey, 2017. After establishing the clusters, I used *Kruskal-Wallis* tests to check whether the values of the cluster averages differed significantly from cluster to cluster. Interpretation of Kruskal-Wallis tests: significant if p values are less than 0.1.

In addition to the above, I conducted structured *interviews* with one of the major tenderers of the most significant public procurement subject matters based on the value (billion HUF) and number (pieces) of the public procurements conducted (*Procurement Interview, 2022*). My goal was to reveal the meanings behind the phenomena and answer categories through a structured interview investigation, thus helping to gain a deeper understanding of the research topic and verifying my hypotheses. The structured interviews provided an opportunity to explore the opinions and thoughts of the persons included in the investigation at a deeper level. The questions were recorded in writing, anonymously.

During the evaluation of the Public Procurement Interview, 2022, the content of the answers were analyzed in such a way that the key terms were identified for each question, which I examined for all respondents in order to be able to quantify the frequency of occurrence of the given term. The expressions were then classified into common groups based on their meaning, taking into account the previously specified criteria.

As a result of my primary research, I found that the subjects participating in the research are heterogeneous, but their answers clearly tend in one direction, and they consider the rationalization and simplification of the public procurement control system to be fundamentally necessary and extremely important.

5.2. Secondary research methods

During my *secondary research*, I used the following methods:

Ad a) During my *quantitative research*, I analyzed the results supported by numerical data to verify the research hypotheses. I performed a detailed data analysis by examining the official statistical databases published by the Public Procurement Authority³ and analyzing the statistical databases of the Central Statistical Office.

Ad b) In connection with the research topic, it is inevitable to examine the *main sources of law* that govern public procurement controls. Public procurement law in Hungary is regulated in great detail, although in many cases the implementation of EU normative rules prompts the domestic legislator to enact public procurement legislation. There are also extensive other legal regulations in the field of public procurement law ("soft law" legal sources, information sheets, guidelines).

Ad c) In the course of my research, within the framework of a *legal historical analysis*, I examined whether there are solutions and practices in the Hungarian legal history specifically aimed at the control of public procurements - or, using historical terminology, "*public transports*" -, the experiences of which can be used in the development of the current public

³ <https://www.kozbeszerzes.hu/statisztika/>

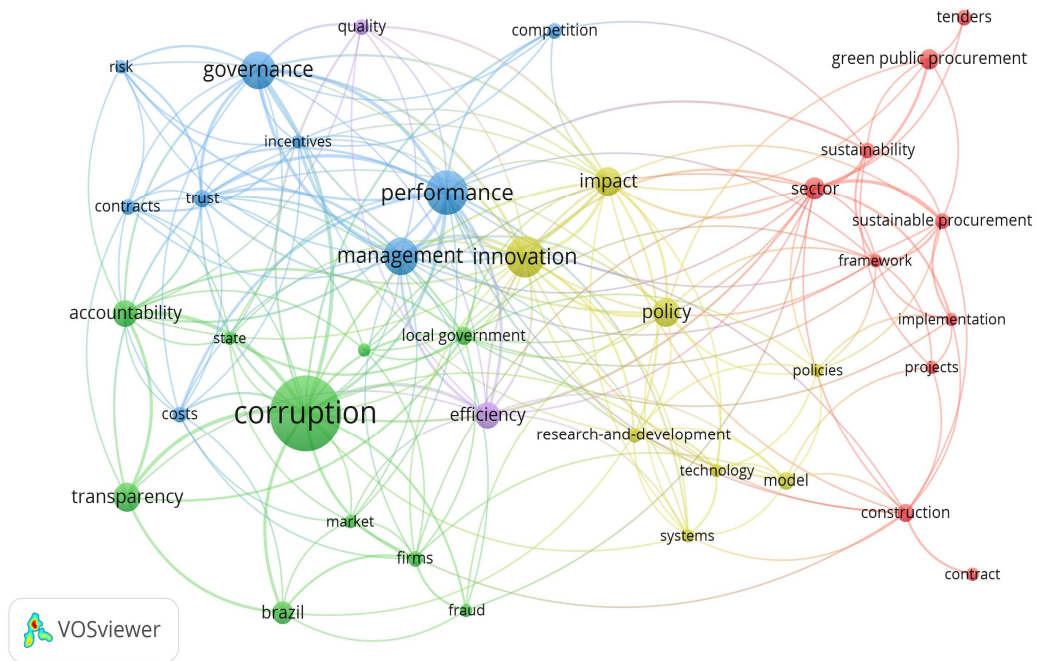
procurement control system. In doing so, I focused primarily on the examination of the first decades of the twentieth century.

Ad d) In the field of public procurement, the *decisions of the Public Procurement Arbitration Board, as well as court and constitutional court case law* arising as a result of judicial review, are of particular importance. A number of decisions by the Court of Justice of the European Union can also be added to this. Accordingly, I systematically reviewed the decisions of these legal remedy bodies related to the research topic.

Ad e) The basis for the investigation presented in this dissertation can be created, on the one hand, by *in-depth examination and comparison of the operation of previous and current control systems*, as well as by the analysis of the relevant operating experiences, on the other hand, by studying and analyzing the legislation relating to the actors of the control institutional system, and, thirdly, by examining the public procurement institutional system of other EU member states.

Ad f) For *literature research*, I primarily used the Academic Journals Collection, JSTOR, ScienceDirect, Springerlink, Web of Science, ResearchGate, Business Source Complete (EBSCO), MTA-MTMT, and Scopus databases. The main directions of the literature studies are illustrated by the chart below.

The main directions of investigations related to the control of public procurement



Source: self made calculation and visualisation based on Web of Science

6. PROVING OF THE HYPOTHESES

When I reached the end of my research, I was able to verify the hypotheses I laid down based on the results of the research methods I used. Below, I summarize the main conclusions that can be made in connection with each hypothesis:

Ad a) Proving hypothesis 1:

As a result of my research, **I proved** that *the rationalization of the operation of the public procurement control system is absolutely necessary*, which can be achieved by eliminating the dysfunctional inspections that are more detrimental than beneficial to the conduct of public procurement procedures, shortening the deadlines for the necessary inspections, and eliminating duplication. **I also found** that the *individual control activities should be complementary, not parallel, competitive* in order to ensure the efficiency of the control and the fast (faster) implementation of public procurement. With the results of my research, **I confirmed** that *by structuring the control organizational system in this way, the transparency of the structure and operation of the institutional system can be achieved, strengthening its effective operation, and in addition to promoting predictable and clear application of the law, the time limit for the submission of tenders and the time until the award of the contract could be significantly shortened.*

Ad b) Proving hypothesis 2:

As a result of my research, **I found** that *there is no real alternative to the ex-ante control of notices containing calls for public procurement procedures and other procurement related standard forms other than that carried out by the independent Public Procurement Authority subordinated to the National Assembly*, which I clearly *supported* by the number of requests for the supply of missing information sent in connection with incompliant notices, the number of legal remedy procedures initiated in connection with such notices, and data on the amount of fines imposed during the legal remedy procedures. In addition to these data, I highlighted the effectiveness of the compliance control of negotiated procedures without prior publication carried out by the Public Procurement Authority, and **proved** that *the maintenance and strengthening of the control activities carried out by the Authority is definitely justified.* In

addition to the fact that the majority of infringements related to the notices, standard forms that launch public procurement procedures can be filtered out, the control carried out in an extremely short period of time guarantees that the conduct of public procurement procedures is not delayed due to the control and its methodology. In this context, I relied on the study of Judit Glavanits (Glavanits 2021), in which the author considers a unified solution for the deployment of control powers exercised by the Public Procurement Authority to be supported.

Naturally, in the case of public procurements carried out from European Union funds, the control of the compliant conduct of public procurement procedures must be carried out as soon as possible after the conduct of the procedure. On the basis of the characteristics of the legal environment for control organizations and the practices of the organizations presented in this thesis, ***I have established that all of this leads to the conclusion of the justification for the introduction of ex-post control⁴ or follow-up control⁵.*** Based on the examination of the practice of the control organizations, I also established that in the case of public procurements carried out from European Union funds, the control should, in addition to all of this, basically only cover those requirements, the disregard or violation of which carries the risk of losing the EU funds.

Ad c) Proving hypothesis 3:

Based on my research, ***I found*** that although *it would be extremely important to ensure a unified legal remedy forum, legislative practice moved into the opposite direction.* In my dissertation, ***I confirmed*** that *the main problem* from the point of view of legal certainty is not that the institutional actors who control public procurements realized from EU funds are entitled to make independent decisions regarding the compliance of public procurements, but that *there is no possibility of legal remedy against the decisions of individual institutional actors*, and the institutional actors controlling public procurements realized from EU funds - although the legal possibility is ensured - do not turn to the Public Procurement Arbitration Board, which has exclusive powers - and acts as a quasi-court, or, accepting the position of Attila Dezső, which is clearly considered a court (Dezső, 2016.) - in order to judge irregularities related to the

⁴ We speak of *ex-post control* when the control of the compliant conduct of the public procurement procedure is carried out on the basis of the documents of the procedure before the announcement of the decision closing the procedure.

⁵ We speak of *follow-up control* when the control of the compliant conduct of the public procurement procedure takes place after the announcement of the decision closing the procedure and the conclusion of the procedure based on the documents of the procedure.

conduct of public procurement procedures. In my thesis, ***I found*** that in order to ensure the efficient functioning of the institutional system that controls public procurement and to enforce the requirement of legal certainty exactly the opposite processes would be required, *it would be necessary for the parties involved in controversial issues related to public procurement to turn to the Public Procurement Arbitration Board*, who is able to ensure uniform legal interpretation in public procurement practice due to the highly professional quality of its decisions. By presenting the legal remedy activities of the Public Procurement Arbitration Board - referring to the fact that, on average, just over ten percent of the decisions of the Arbitration Board are challenged in court, and that the Arbitration Board wins more than ninety percent of the lawsuits for review of the decisions challenged before the court - ***I verified*** clearly that *the organization that ensures a uniform interpretation of the legislation related to public procurement must be the Public Procurement Arbitration Board*.

7. PRACTICAL USABILITY OF THE RESEARCH RESULTS

The results of my research and the proposals made by me can be used directly in public procurement legal practice, as well as in the course of reforming the organizations of the central public administration controlling public procurement procedures. During the redesign/design of the system based on the results of the research, the efficiency of the control activity and the ratio of the compliant conduct of public procurement procedures could be increased, which would also contribute to the reduction of the loss of EU funds, as well as to mitigating the dangers of damaging the central budget, which, in turn, would overall also improve the efficiency of the implementation of public procurement.

The fact that administrative burdens are reduced and the inspection process is accelerated by rationalizing the multi-level, fragmented, and often overlapping actors with powers hardly needs an explanation. In addition, the mere fact that the manpower freed up by the elimination of parallel controls can be redirected to carry out other substantive inspection activities, i.e. more manpower is available to carry out a unit of control tasks, clearly results in the acceleration of the control process.

For my part, in addition to the above, I consider it essential to strengthen the exclusivity and the activities of the legal remedy forum. The requirement of uniform application of the law and legal certainty in the field of public procurement law cannot be realized without respecting the exclusive powers of the Public Procurement Arbitration Board acting as a quasi-court in judging public procurement infringements, and without the mandatory submission to the Arbitration Board of - perceived or real - public procurement infringements discovered by the organizations performing the controls. However, the implementation of this in the current legislative environment still imposes tasks on the legislator, since the relevant legislation moved into the opposite direction.

In addition to all this, the results of the research can be used in at least two other areas in the future, and further research can be initiated based on the results of the research, such as:

- a)* the relationship between the compliant conduct of public procurement procedures and public procurement corruption - in the case of lawfully conducted public procurement procedures, how the possibility of corruption can arise, and the examination of the ways of committing it;
- b)* after the 2014-2020 European Union support period, basically in the 2021-2027 EU programming period, to what extent can the public procurement control system be used to support domestic industry and domestic enterprises on the model of the rules introduced at the beginning of the twentieth century, also taking into account that Hungary is a member of the European Union, where economic operators of EU Member States must be provided national treatment in public procurement procedures.

8. CURRICULUM VITAE

Dr. László Kovács was born in 1978 in Mór. In 1997, he graduated from the József Attila High School in Székesfehérvár (now known as Szent István Ciszterci High School in Székesfehérvár). He obtained his law degree at Eötvös Loránd University's Faculty of State and Law in 2002, and in 2005 he obtained a law-economist degree at the University of West Hungary's Faculty of Public Administration as part of postgraduate training. In 2007, he passed the bar exam.

After graduating from law school, Dr. László Kovács worked in a law firm in Székesfehérvár from 2002 to 2004, where he first encountered the field of public procurement law. In 2004, he joined the then Public Procurement Council, where he worked as a legal, later as a professional consultant until 2010, and then as head of the Legal Department until 2012. In 2010 and 2012, he also worked for a short time in the private sector, during which he was involved in the quality control of public procurements realized from European Union funds in a law firm and a public procurement consulting company. In August 2012, he joined the Ministry of National Development, then, as a result of ministerial changes, in 2014, he joined the Prime Minister's Office, where he worked until 2017 in the field of public procurement legislation, initially as deputy head of department, then as head of department, playing a major role in the new public procurement law adopted in 2015 and in the preparation of related executive decrees. From 2017, he was secretary-general and from 2020 the president of the legal successor organization of the Public Procurement Council, the Public Procurement Authority.

He turned to the scientific approach of public procurement in 2014, when the "control system of public procurement" was announced as a research topic in the Public Management research area of the Doctoral School of Public Administration Sciences of the National University of Public Service, in which he had and still has serious professional experience based on his career up to that point. The focus of the research topic of Dr. László Kovács is the examination of the effectiveness and dysfunctions of the control system related to public procurement procedures. In 2017, he obtained the pre-degree certificate of the Doctoral School of Public Administration Sciences.

During his career, Dr. László Kovács wrote numerous professional articles and studies on public procurement in professional journals on public procurement, and was also the co-author of several commentaries on the current public procurement law. During his career, he gave numerous public procurement-related professional presentations at public procurement-related professional conferences. Between 2005 and 2006, he led a public procurement law seminar at István Bibó College of Eötvös Loránd University. From 2013 - essentially from its inception - until today, he has been teaching as part of the public procurement specialist lawyer course organized at the Ferenc Deák Institute of the Faculty of Law and Political Sciences of Pázmány Péter Catholic University, with regard to the subjects of public procurement history and public procurements realized by using funds, as the subject supervisor of the latter. He is a regular invited lecturer at the public procurement lawyer training organized at the ELTE Institute for Postgraduate Legal Sciences. In addition, Dr. László Kovács played a significant role in the development, education and further development of the subjects, courses, and further specialized training of the National University of Public Service, in the organization of public procurement professional conferences and events held at the University, at which he was also a permanent speaker. Dr. László Kovács played a prominent role in the publication of the Public Procurement Review, created for public procurement professionals. In 2011-2012, he was the professional editor of the journal. From 2019 to the present, he is the editor in charge of the professional monthly journal Public Procurement Bulletin Plus, which replaced the Public Procurement Review, and responsible publisher from 2020. From 2020, he is a member of the Editorial Board of the journal Competition Mirror.

9. THE AUTHOR'S PUBLICATIONS IN THE TOPIC

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