

“Public Contracts in the EU – Scope of ReNEUAL research”

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A. The scope of the ReNEUAL research

I. The contracts covered by the research

- (1) Use of the term “public contract” in EU legislation is only associated with public procurement:

Art. 88 § 1 Regulation No 1605/2002

on the Financial Regulation applicable to the general budget of the European Communities

<p>Public contracts are contracts for pecuniary interest concluded [...] in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services.</p>	<p>Les marchés publics sont des contrats à titre onéreux conclus [...] en vue d'obtenir, contre le paiement d'un prix payé en tout ou en partie à la charge du budget, la fourniture de biens mobiliers ou immobiliers, l'exécution de travaux ou la prestation de services.</p>	<p>Öffentliche Aufträge werden [...] im Wege [...] entgeltlicher Verträge zur Beschaffung von beweglichen oder unbeweglichen Gütern, Bauleistungen oder Dienstleistungen gegen Zahlung eines ganz oder teilweise aus dem Haushalt finanzierten Betrags vergeben.</p>
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- (2) Use of the term by ReNEUAL in a much broader sense: **All contracts concluded by EU institutions and other EU bodies, offices and agencies with private entities or national administrations regarding administrative matters** (procurement contracts, employment contracts of the contractual agents of the EU, contracts concerning the sale of property, privatization contracts, concessions, contracts used to directly implement EU policies such as financial agreements or settlement agreements, etc.).

II. The aspects of the contractual life covered by the research

- (3) Award procedure: May be governed by specific procurement rules if the contract is a public contract in the narrow sense of the Financial Regulation, but may also be understood as administrative procedure in the sense of the administrative procedure acts.
- (4) Conclusion of the contract: The rules governing the conclusion of the contract are decisive for the question of whether and under which conditions a contract is valid and legally binding.
- (5) Execution and end of the contract: This phase is governed by the law of obligations and the rules governing the consequences of a failure to fulfil the obligations of a contract.

- (6) The requirement of good administration is not only concerned in the contract award phase, but also in the phases of implementation and termination of the contract.
- (7) *Annual Report 2010 of the European Ombudsman, p. 33*: “Execution of contracts – The Ombudsman considers that maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it. Maladministration may thus also be found when the fulfilment of obligations arising from contracts concluded by EU institutions is concerned.”
- (8) Civil Service Tribunal of the EU, Judgment of 26 October 2006 - Pia Landgren v European Training Foundation (ETF) - European Court reports - staff cases 2006 Page I-A-1-00123; Page II-A-1-00459, para. 70 ff.: Obligation to motivate a decision dismissing a contractual agent of the EU on the grounds of Article 41 of the Charter of Fundamental Rights.

B. Challenges concerning the restatement of the rules on the *conclusion and execution* of EU public contracts

I. Reconstructing the status quo based on the existing material

- (9) *Materials concerning the rules on the conclusion and execution of EU public contracts*: Financial Regulation, regulations concerning specific policy fields, “contract forms” and other contractual (model) documents designed by the Commission, case law of the ECJ, etc.
- (10) Lack of consensus about how to understand this material due to different conceptions of “public contracts” in the national legal orders: *German model*: Public contracts as a more favourable alternative for the citizen *as compared to unilateral administrative action* – *French model*: Administrative contracts as an alternative more suitable for the specific needs and duties of the administration *as compared to contracts regulated by common contract law*.
- (11) Regulation is inconclusively determined by primary law due to the fact that Article 335 TFEU assumes that EU institutions can enter into contracts *to which Member State law* is applicable.

II. Issues raised based on the existing material

- (12) In which cases is Member State law applicable to EU public contracts? Are there also EU public contracts which are only governed by EU law? And what would be the content of this EU law?
- (13) The law of which Member State is applicable to a specific EU public contract? And which law: national private law or national public law? And what about those Member States whose legal orders do not recognize the public private law divide?
- (14) What is the importance of choice of law clauses included in most EU public contracts: can they take precedence over national or European binding contract law?

- (15) May the EU legislator establish specific rules directly applicable to EU public contracts, even if these contracts are governed by national law? Or is the EU legislator confined to guide the “contractual behaviour” of the contracting authorities by imposing the obligation to include certain clauses in EU public contracts or by forbidding the use of specific contractual arrangements which would be allowed by national law – without being able to impose *legal consequences* for the violation of these rules concerning the validity, implementation or termination of the contract in question?
- (16) The ECJ may decide on these questions by virtue of an arbitration clause (Article 272 TFEU). Jurisprudence reflects a certain disinterest in the subject: no detailed analysis of the applicable national rules and the choice-of-law-problematic.
- (17) First task in restating the law: clarifying the legal framework for EU public contracts established by primary law (Articles 272, 335 and 340 § 1 TFEU); determining the possible interpretations of these articles and their legal consequences.

C. Challenges concerning the restatement of the rules on the award procedure

- (18) Restatement of the rules governing the award procedure seems far less problematic because of a large consensus concerning the “good” (transparent, non-discriminatory, non-arbitrary...) organisation of a procurement procedure.
- (19) Principles of non-discrimination and transparency are extended to other award procedures (for privatization contracts, concessions, financial agreements, employment contracts of contractual agents, etc.) by the ECJ and national jurisprudence.
- (20) Restatement of award procedures concerns not only public contracts, but also single case decisions (e.g.: Financial Regulation stipulates the same administrative procedure for the award of financial aid, independent of whether the aid is granted by contract or by unilateral decision). Restatement and statement of the rules governing the award procedure has to be carried out by the contracts working group in tight cooperation with the single case decision making working group.

Relevant Treaty Provisions:

Art. 272 TFEU	Art. 335 TFEU	Art. 340 § 1 TFEU
The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.	In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. [...].	The contractual liability of the Union shall be governed by the law applicable to the contract in question.