

Subcontractors and third parties in EU contracts

A case study in how to proceed with lacunae in existing law

Presentation for the
EU Ombudsman / ReNEUAL conference

Towards an EU administrative procedure law ?

Brussels, March 15-16th 2012

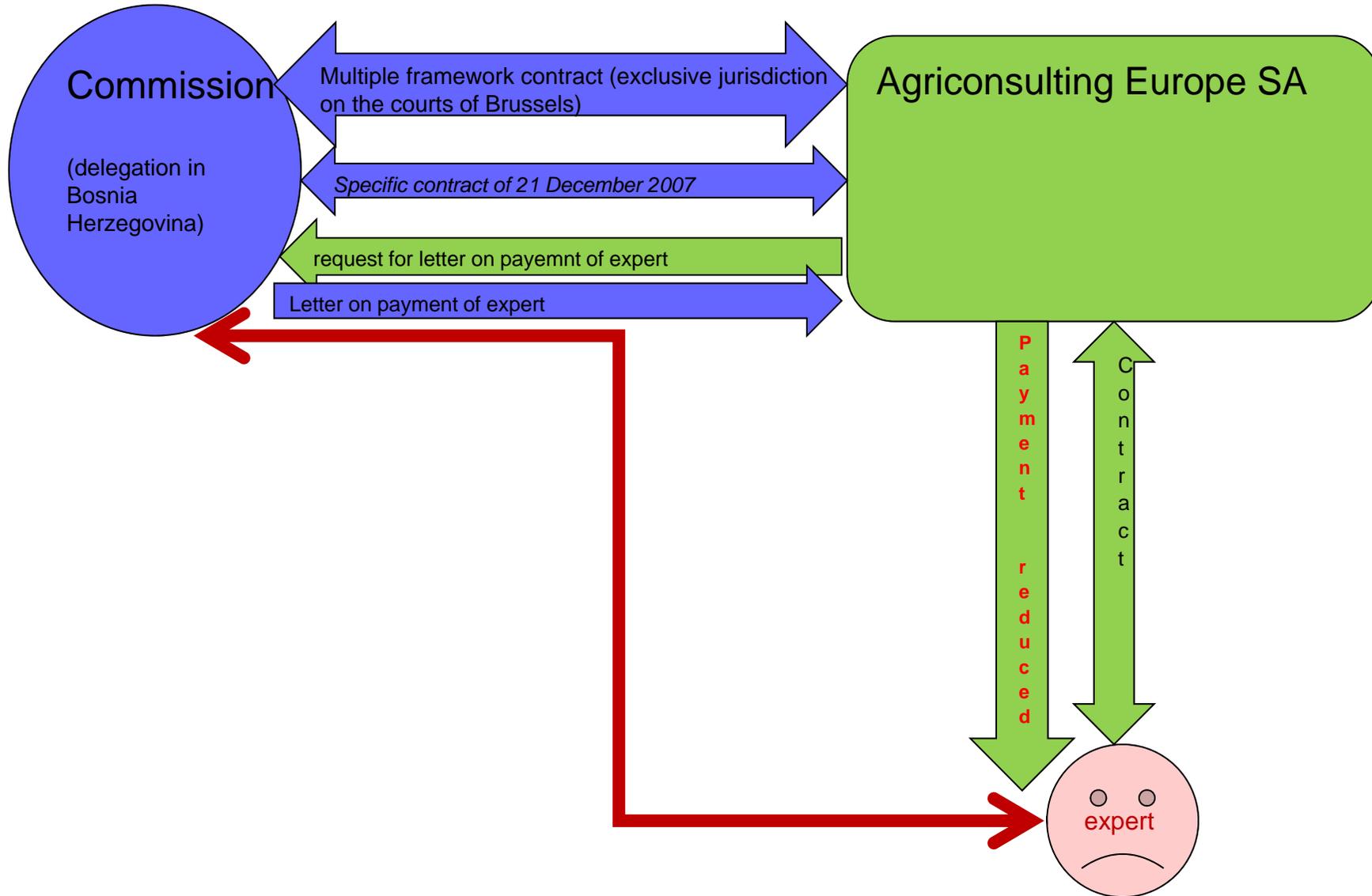
The process of restating and stating the law

- Collecting and structuring materials: reconstructing the status quo
- Evaluation of the status quo through case studies and comparative analysis
 - Diagnosis
 - Discussion of the need/possibility/content of remedies
- Drafting, explaining and justifying statements and restatements
 - Model rules
 - Comments
 - Notes
- Involvement of practitioners in the process

Collecting and structuring materials

- Previous academic analysis on Research and Technological Development
 - contract as a main tool for direct policy implementation (contracts and “grants”)
- Scarcity of case law
 - but *Mauerhofer* case confirms both existence of issues and limitations due to procedural rules of judicial review
- Cases submitted to the European Ombudsman
- *Personal experience in the awarding phase as evaluator and in the managing phase as member of teams involved in research*
- → Hypothesis: important series of issues with subcontractors

Evaluation of status quo – 1 the Mauerhofer v. Commission case



Evaluation of status quo – 1 the Mauerhofer v. Commission case

- *ECJ Order, 30 march 2011, 433/10 P* (+ General Court Order 29 June 2010, T-515/08)
- Confirms issues due to limited access to justice
 - rules of admissibility action for annulment (treaty and case-law)
 - impediments to EU judges dealing effectively rights and interests of subcontractor in a “public contract”
 - choice of applicable law and forum
 - scarcity of case law not due to absence of legal problems
- Confirms existence of potential problems regarding elements of right to good administration (art.41 Ch)
 - Right to have his or her affairs handled fairly
 - Right to be heard
 - Right to award of damages
 - Right to an effective remedy (art. 47 Ch)

Evaluation of status quo – 2 some European Ombudsman Cases

- *2449/2007/VIK; 2610/2009/(BU)MF; 53/2009/MF; 2910/2008/TN; (1811/2009/(BB)FOR; etc.*
- Confirm existence of problems regarding elements of right to good administration
 - requests to replace experts ; sub-contractors not paid
 - Rights: have affairs handled fairly ; be heard; award of damages
- Give indications on possible remedies → EU institution
 - has responsibility and power to require contractor to ensure procedural fairness.
 - should inform subcontractor and provide fair and objective grounds to justify its requests to contractor – subcontractor should be given opportunity to present observation
 - has a responsibility to check a contractor's financial stability before awarding and throughout the term of the contract.

Next steps

- Collecting further materials at EU level
 - General conditions for contracts (institutions, bodies, DGs, agencies)
 - Materials on issues that have arisen
- Comprehensive evaluation of the status quo
 - Summary of issues/principle and rules (*'bottom up'*)
 - Checking with relevant EU law principles (*'top down'*)
 - other case studies (R&D; others?)
 - Comparative analysis (selection of legal systems)
- Involvement of practitioners (balancing rights and efficiency ?)
- Drafting statements, if any
 - On scope of general principles
 - Principles and rules specific to subcontractors (?)