DEUTSCHES FORSCHUNGSINSTITUT FÜR ÖFFENTLICHE VERWALTUNG SPEYER
GERMAN RESEARCH INSTITUTE FOR PUBLIC ADMINISTRATION SPEYER

Ulrich Stelkens / Hanna Schröder

EU Public Contracts

Contracts passed by EU Institutions in Administrative Matters

FÖV 70
Discussion Papers

Ulrich Stelkens / Hanna Schröder

EU Public Contracts

Contracts passed by EU Institutions in Administrative Matters

FÖV 70
Discussion Papers

Deutsches Forschungsinstitut für öffentliche Verwaltung Speyer

2012

Gefördert durch die Bundesrepublik Deutschland

Nicht im Buchhandel erhältlich
Schutzgebühr: € 5,-
Bezug: Deutsches Forschungsinstitut
für öffentliche Verwaltung Speyer
Postfach 14 09
67324 Speyer
http://www.foev-speyer.de

ISSN 1868-971X (Print)
ISSN 1868-9728 (Internet)

Universitätsprofessor Dr. iur. Ulrich Stelkens

Professor of Public Law with a special focus on German and European Administrative Law at the German University of Administrative Sciences Speyer and Fellow of the German Research Institute for Public Administration Speyer
stelkens@foev-speyer.de

Hanna Schröder, LL.M.

Research Fellow at the German Research Institute for Public Administration Speyer
Research Project: Europeanisation of Public Contract Law
hschroeder@foev-speyer.de

www.foev-speyer.de/verwaltungsvertraege

Abstract

To prospect the existing EU legislation for elements that could be used for the restatement work on EU public contracts, it is vital to agree on the **primary law basis for contracting by EU institutions**. Jurisprudence is not coherent on this subject and the doctrine is divided; each of the authors of the few articles written on this subject seems to understand primary law and jurisprudence in a different way.

The primary law provisions relevant for contracting by EU institutions determine the substantive law applicable to EU public contracts as well as litigation in this field. Hence, the following paper addresses these two aspects successively.

Contents

Table of Abbreviations

AEAP	Annuaire européen d'administration publique
Am. J. Comp. L.	American Journal of Comparative Law
BB	Betriebs-Berater (Journal)
CDE	Cahiers de droit européen
DVBl	Deutsches Verwaltungsblatt
ELJ	European Law Journal
ELR	European Law Review
EuGRZ	Europäische Grundrechte-Zeitschrift
EuR	Europarecht (Journal)
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWS	Europäisches Wirtschafts- und Steuerrecht
JDI	Journal du droit international
JöR	Jahrbuch des öffentlichen Rechts der Gegenwart
JTDE	Journal des tribunaux – Droit européen
LContempProbl	Law and Contemporary Problems
NJW	Neue Juristische Wochenschrift
NuR	Natur und Recht (Journal)
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NZBau	Neue Zeitschrift für Baurecht und Vergaberecht
OJ	Official Journal of the European Union
RDAI/IBLJ	Revue de droit des affaires internationales/ International Business Law Journal
RDC	Revue des contrats
Rev. arb.	Revue de l'arbitrage
RFDA	Revue française de droit administratif
RTD eur.	Revue trimestrielle de droit européen
SächsVBl	Sächsische Verwaltungsblätter
VerwArch	Verwaltungsarchiv (Journal)

VVDStRL	Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZEuP	Zeitschrift für Europäisches Privatrecht
ZEuS	Zeitschrift für europarechtliche Studien
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht

Introduction

As with the former EC Treaty, the Treaty on the Functioning of the European Union (TFEU) does not explicitly empower EU institutions to engage in contracts with private entities, Member States or Member State organs regarding *administrative* matters, *i.e.* for means of the proper functioning of the EU administration (procurement, employment, etc.) or the implementation of EU policies (grants, execution of projects financed by the EU, etc.), contracts that we will call hereinafter "public contracts" in the sense of contracts to which a public body – here an EU organ – is a party.[1] Hence, we use the expression in a much wider sense then Article 88 (1) of the Financial Regulation[2], which defines public contracts basically as procurement contracts,[3]

---

1 The acceptation of the term "public contracts" as contracts to which a public body is a party is helpful in a comparative context, as this acceptation does not imply any statement as to the legal nature or regime of the contracts in question; see Noguellou, Rozen/Stelkens, Ulrich, "Propos introductifs/ Introduction", *in* Noguellou, Rozen/Stelkens, Ulrich (eds.), *Droit comparé des Contrats Publics/Comparative Law on Public Contracts*, 2010, p. 1-24, p. 5 ff. For an example of the use of the expression "public contracts" in this sense by legal doctrine see the website of the research network "Public Contracts in Legal Globalization" (www.public-contracts.net). For a critical appreciation of this notion whose legal content remains nevertheless necessarily wispy see Fromont, Michel, "L'évolution du droit des contrats de l'administration – différences théoriques et convergences de fait", *in* Noguellou/Stelkens, *ibid.*, p. 263-278, p. 264; for a discussion of the notion see Eckert, Gabriel, "Réflexions sur l'évolution du droit des contrats publics", *RFDA* 2006, p. 238-244. Concerning the issue of the use of the notion of "public body" in a comparative context see Lemaire, Sophie, *Les contrats internationaux de l'administration*, 2005, p. 5 f., with further references.

2 Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (*OJ* L 248 of 16 Sept. 2002, p. 1) in its consolidated version of 29 Nov. 2010. See also Commission Regulation (EC, Euratom) No 2342/2002 of 23 Dec. 2002 laying down detailed rules for the implementation of the Financial Regulation (*OJ* L 357 of 31 Dec. 2002, p. 1) in its consolidated version of 1 Jan. 2009.

3 "1. Public contracts are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of Articles 104 and 167, in order to obtain,

whereas the "grant agreements" mentioned later on in the same regulation are of course covered by *our* acceptation of the term "public contracts".

Public contracts as a tool are not one of the acts listed as available for EU institutions to exercise the Union's competences as laid out in Article 288 TFEU.[4] Nevertheless, the possibility for EU institutions to resort to the contractual instrument has never been contested,[5] especially because Articles 272 and 340 (1) TFEU as well as several rules in secondary EU law presuppose the eventuality of contractual action by EU organs. Thus, Articles 88 ff. of the Financial Regulation provide procurement rules for contracts awarded by EU institutions and Articles 108 (1) second phrase of the same regulation provides for written agreements as an alternative instrument to unilateral decisions for the allocation of grants. The Regulation for the implementation of the Seventh EU Framework Programme for Research also contains provisions for grant agreements,[6] for which the Commission has developed a standardized "model grant agreement".[7]

---

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."

4 See Hofmann, Herwig, "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality", *ELJ* 2009, p. 482-505, p. 493 note 56, who regrets quite rightly that contracts still do not appear in a more explicit manner as a tool for the implementation of EU policies.

5 It is indeed commonly held that the enumeration of Article 288 TFEU (and its predecessors) is not exhaustive, see *e.g.* Louis, Jean-Victor, Art. 189 CEE n° 74, *in* Louis, Jean-Victor/Vandersanden, Georges/Waelbroeck, Denis/Waelbroeck, Michel (eds.), *Commentaire Mégret – Tome 10 : Les actes des institutions,* 2nd ed., 1993; Ruffert, Matthias, Art. 288 AEUV, *in* Callies, Christian/Ruffert, Matthias (eds.), *EUV/AEUV*, 4th ed., 2011.

6 See Articles 18 ff. of Regulation (EC) No 1906/2006 of the European Parliament and of the Council of 18 Dec. 2006 laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007-2013) (*OJ* L 391 of 30 Dec. 2006, p. 1). See on this subject Janssen, Helmut/El Khoury, Christian, "Rechtswidrig erhaltene EU-Forschungs-Subventionen – Welche Risiken tragen Unternehmen?", *EuZW* 2010, p. 212-216, p. 213 ff.; Sonnenschein, Edwin, "Das Siebte Rahmenprogramm für Forschung und technologische Entwicklung aus vertraglicher Sicht und mit Bezügen zum gewerblichen Rechtsschutz", *EWS* 2010, p. 75-80, p. 76 f.; Ziller, Jacques, "Ricerca e innovazione", *in* Chiti, Mario

Hence, public contracts have in reality always been a common tool of the EU for "ordinary" procurement, personnel employment and property management (*e.g.* purchase and sale of plots of land or other assets). But the EU administration also uses public contracts to directly implement its policies[8] and to resolve conflicts concerning the rights and obligations arising from pre-existing legal relations governed by EU law.[9] However, the legal framework of EU administrative action by contract is still far from clear,[10] probably because EU law does not

---

P. *et al.* (eds.), *Trattato di diritto amministrativo europeo*, Vol. III, 2nd ed., 2007, p. 1655-1678, p. 1664 ff.

7 See ftp://ftp.cordis.europa.eu/pub/fp7/docs/fp7-core-ga_en.pdf.

8 Concerning the granting of **subsidies and aids** see Grunwald, Jürgen, "Die nicht-völkerrechtlichen Verträge der Europäischen Gemeinschaften", *EuR* 1984, p. 227-267, p. 248 ff.; concerning the **European development assistance policy** see Prieß, Hans-Joachim, *Handbuch des europäischen Vergaberechts*, 3rd ed., 2005, p. 489 ff.; Perez, Sophie, "Autorité et contrat dans l'administration communautaire", *AEAP* 1997, Vol. XX, p. 181-205, p. 193 ff. Concerning the resort to **Public Private Partnerships** by the EU institutions see Mörth, Ulrika, "The Market Turn in EU Governance – The Emergence of Public-Private Collaboration", *Governance*, Vol. 22, No 1, Jan. 2009, p. 99-120. Concerning the **implementation of European research and development programs** see *supra* note 6.

9 See for such cases (where the Member States had concluded contracts in the name and on behalf of the EC) *ECJ*, joined cases C-80/99, C-81/99, C-82/99, *Flemmer* [2001] ECR I-7211, para. 41 ff.; *Oberverwaltungsgericht Münster*, judgement of 30. 8. 2000 – case 9 A 5294/97 – *NVwZ* 2001, p. 691 ff.; see also Bleckmann, Albert, "Der Verwaltungsvertrag als Handlungsmittel der Europäischen Gemeinschaften", *DVBl* 1981, p. 889-898, p. 896; Koch, Christian, *Arbeitsebenen der Europäischen Union*, 2003, p. 402 ff.

10 There is an increasing interest in the matter, see *e.g.* Auby, Jean-Bernard, "Accountability and Contracting Out by Global Administrative Bodies. The Case of Externalization Contracts made by European Community Institutions", 2007, available at http://chairemadp.sciences-po.fr/pdf/seminaires/2007/Accountability_and_Contracting_JB_Auby.pdf; Bassi, Nicola, "Accordi nel diritto comunitario", *in* Chiti *et al.* (note 6), Vol. I, p. 1-24, p. 16 ff.; Bauer, Hartmut, "Verwaltungsverträge", *in* Hoffmann-Riem, Wolfgang *et al.* (eds.), *Grundlagen des Verwaltungsrechts II*, 2008, § 36 No 24 ff. (p. 1174 ff.); Bleckmann (note 9) and same author, "Die öffentlich-rechtlichen Verträge der EWG", *NJW* 1978, p. 464-467; von Danwitz, Thomas, *Europäisches Verwaltungsrecht*, 2008, p. 253 ff., 375 ff.; Frenz, Walter, *Handbuch Europarecht*, Vol. 5, 2010, p. 505 ff.,

really explicitly provide a general framework for contractual action by EU organs. This chapter thus analyses the primary law bases which determine as well the substantive law applicable to EU public contracts (I.) as the regulation of litigation related to EU public contracts (II.).

On a preliminary note, we must say that we will neither raise the question of whom is empowered to sign contracts in the name of the EU (what organs within the EU, what persons within these organs, Member States, etc.)[11] nor deal with the question of the conditions which must be met before an EU institution can resort to contracts rather than to one of the acts provided for by Article 288 TFEU (which means bypassing the procedural rules established by the Treaties for the adoption and issuing of those acts).[12] Instead, we base our reflections on the contractual practice of the Commission, which is likely the "model" used for contracting by all EU organs including agencies.[13] Furthermore, we will not treat contracts between EU organs and Member States or Member State public bodies that concern the

---

No 1697 ff.; Grunwald (note 8); Hofmann, Herwig, "Agreements in EU law", *ELR* 2006, p. 800-820; Hofmann, Herwig/Rowe, Gerard/Türk, Alexander, *Administrative Law and Policy of the European Union*, 2011, Chapter 19 "Administrative Agreements"; Mörth (note 8); Perez (note 8); Ritleng, Dominique, "Les contrats de l'administration communautaire", *in* Auby, Jean-Bernard/Dutheil de la Rochère, Jacqueline (eds.), *Droit Administratif Européen*, 2007, p.147-170. See further references in the following notes and the bibliography.

11 See on this point Craig, Paul, *EU Administrative Law*, 2006, p. 34 ff.; Frenz (note 10), p. 517, No 1732; Heukels, Ton, "The Contractual Liability of the European Community Revisited", *in* Heukels, Ton/McDonnell, Alison (eds.), *The Action for Damages in Community Law*, 1997, p. 89-108, p. 92; Ritleng (note 10), p. 152 f.

12 See on this point Bleckmann (note 9), p. 891 f.; Brenner, Michael, *Der Gestaltungsauftrag der Verwaltung in der Europäischen Union*, 1996, p. 146 ff.; Frenz (note 10), p. 508, No 1705; Stelkens, Ulrich, "Probleme des Europäischen Verwaltungsvertrags nach dem Vertrag zur Gründung einer Europäischen Gemeinschaft und dem Vertrag über eine Verfassung für Europa", *EuZW* 2005, p. 299-304, p. 303 f.

13 Tending in this direction see Fischer-Appelt, Dorothee, *Agenturen der Europäischen Gemeinschaft*, 1999, p. 139 f.; Heukels (note 11), p. 93 f.

coordination of administrative tasks, *i.e.* "real" "public-public" contracts.[14]

To be able to develop and explain the legal regime of EU public contracts, we need to refer to the "philosophies" of public contract law within the national legal orders of the Member States. To do this, in principal, it would have been most suitable to take into account the legal frameworks adopted in each of the 27 EU Member States.[15] Nevertheless, for several reasons we will juxtapose only the French and the German models. First of all, it would be impossible within the scope of this chapter to carry out a complete analysis of the public contract law of even just the most significant Member States.[16] But moreover, a recent comparative study of public contract law confirmed

---

14 Indeed, contracts concerning administrative cooperation between public bodies are generally special, being not necessarily submitted to the public contract law applicable to contracts between the administration and private bodies in most legal orders, see Noguellou/Stelkens (note 1), p. 8, with further references. Nevertheless, one has to distinguish between "real" "public-public" contracts concerning administrative cooperation and cases in which an administration or a public body acts as service provider on the market and enters into a contract with another public body like a private entity; see for this distinction case C-480/06, *"Hamburg Waste Case"* [2009] ECR I-4747, para. 31 ff.; Burgi, Martin, "Warum die 'kommunale Zusammenarbeit' kein vergaberechtspflichtiger Beschaffungsvorgang ist", *NZBau* 2005, p. 208-212, p. 211 f.; Jennert, Carsten, "Staat oder Markt: Interkommunale Zusammenarbeit im Spiegel des EG-Vergaberechts", *NZBau* 2010, p. 150-155, p. 152 ff.; Ruhland, Bettina, "Öffentlich-öffentliche Partnerschaften aus der Perspektive des Vergaberechts", *VerwArch* 101 (2010), p. 399-407, p. 405 ff. In the light of this distinction and in way of analogy to the *Hamburg Waste Case*, contracts between EU institutions and Member States or Member State authorities or administrations in which the latter act as service providers on the market have to be assimilated to the contracts between EU institutions and private entities treated hereinafter. See also the Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation') – SEC(2011) 1169, available at http://ec.europa.eu/internal_market/publicprocurement/docs/public_public_cooperation/sec2011_1169_en.pdf, esp. p. 13.

15 Demanding this approach is Frenz (note 10), p. 513, No 1720; Frenz, Walter/Götzkes, Vera, "Fall Opel: Beihilfe durch einen europäischen öffentlich-rechtlichen Vertrag?", *EWS* 2009, p. 19-25, p. 21.

16 See for such a study the national reports on public contract law in different EU Member States *in* Noguellou/Stelkens (note 1).

that the French and the German system are the two reference models, mutually exclusive and impervious to one another, that have shaped the public contract law of all European legal orders.[17] In the French case, public contract law is a regime that accords systematically specific powers to public contractors and which is distinct from common contract law; in the German case, public contract law is a regime governed by common contract law and which accords specific powers to public contractors only if specifically provided for by contractual clauses. In public contract law, differentiation between regimes is to be made with reference to these two models rather than to the classic distinction between "common law" versus "civil law" systems.[18]

---

17 Fromont (note 1), p. 264 ff., evaluating the outcome of the national reports in Noguellou/Stelkens (note 1); see also Langrod, Georges, "Administrative Contracts – A comparative study", *Am. J. Comp. L.* 1955, p. 325-364, p. 347 ff.

18 Thus, English public contract law resembles in substance – *i.e.* independent of the public or private law nature of the contracts but concerning the existence of specific powers of the administration vis-à-vis its contracting partner – more the French than the German public contract law; see Craig, Paul, "Specific Powers of Public Contractors", *in* Noguellou/Stelkens (note 1), p. 173-198, p. 179 ff.; Noguellou/Stelkens (note 1), p. 10 ff.; Davies, Anne, "Le droit anglais face aux contrats administratifs: en l'absence de principes généraux garantissant l'intérêt public, une maison sans fondation?", *RFDA* 2006, p. 1039-1047; Langrod (*supra* note 17), p. 332 ff. and explicitly p. 362 ff.: "In this connection, it is obvious that the difference between the French system and those in which Austrian and German legal and administrative thought prevails, is far greater than between the French and the two Anglo-American systems, which in spite of manifold differences, approach the French pattern" (p. 362); "In this comparison, observing and opposing the various systems, it is surprising to find that the century-old classification of legal systems is no longer decisive in this field. The border line has moved; it divides the European continent […] separating the traditions and achievements of French legal thought from the German and Austrian, while the Anglo-American countries are gradually approaching French thought" (p. 363). See also the comparative study of John D. B. Mitchell, *The contracts of public authorities*, 1954, in which the author comes to the conclusion that "the English standard terms and conditions of government contracts would not surprise a Frenchman brought up upon administrative contracts" (p. 220).

I. The Substantive Law applicable to EU Public Contracts

Article 335 TFEU specifies that in each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under domestic law. When mentioning that the Union may, in particular, acquire or dispose of movable and immovable property, Article 335 TFEU makes clear that EU institutions can enter into contracts to which Member State law is applicable. However, this does not exclude the possibility for EU institutions to enter also into contracts governed exclusively by (possibly unwritten) EU law, even if this possibility is not explicitly mentioned by the Treaties. Hence, we distinguish between two questions, which while closely linked together, are not identical:

– Which criteria determine whether a contract is governed (exclusively) by European law or by the law of a particular Member State?
– What does "national law" and "European law" really mean in this context?

Looking more closely at these questions, it appears that before reasonably being able to discuss the question of the criteria that determine which law is applicable (see *infra* B.), we have to work out the consequences of the applicability of one legal regime or the other (A.).

A. Meaning of "national law" and "European law" in the context of EU public contracts

1. The meaning of "national law" in the context of EU public contracts

When Member State law is to be applicable to an EU public contract, EU organs usually include a specific contractual clause specifying the applicable law. For "simple" procurement contracts, it seems common to choose the law of the Member State in which the contracting EU organ has its seat, whereas for other contracts, mainly grant agreements, commonly the law of the country in which the action is to be

carried out is chosen.[19] However, the question of whether such contracts are submitted to national public law or to national private law – if the distinction exists in the legal order of the Member State in question – remains unanswered (*a*). Furthermore, one must examine whether the fact that one of the contracting parties is an EU institution has any influence on the legal interpretation of the applicable national law (*b*).

a) National public or private law?

Article 272 TFEU presupposes that the EU can enter not only into private law contracts, but also into contracts governed by public law. The "most extensive legal capacity accorded to legal persons" that the Union shall enjoy in the Member States thus must include the capacity to enter into contracts submitted to public law as provided for by the national legal order in question. However, this is true only in cases in which the EU enters – like a citizen or any other legal person – into a contract with a Member State administration and/or public body. In such a case, the public law nature of the contract does not follow from the fact that the EU enters into a contract, but from the fact that its contracting partner is a Member State organ (*e.g.* in the case of a building contract for the construction of EU premises).

In contrast, an EU public contract is not governed by Member State public contractual law just because a similar contract entered into by an administration of the Member State in question would be a public law contract. Indeed, Article 335 TFEU does not imply that EU organs are entitled to use means of action that are provided for by national administrative law (only) so that national administrations can fulfil their administrative tasks. Nobody argues, for example, that EU institutions may enact a French "acte administratif" or a German "Verwaltungsakt" when acting vis-à-vis French or German (EU) citizens. Hence, the "most extensive legal capacity" as defined by Article 335 TFEU comprises only the legal and contractual capacity enjoyed by "citizens" (*i.e.* private law legal persons) of the relevant Member State and not the capacity enjoyed by its administration (*i.e.*

19 See further Heukels (note 11), p. 94 ff. For the question of whether it could also be possible to agree on the applicability of the "general principles common to the legal orders of the Member States" or the "general principles of EU law" see *infra* note 47 and accompanying text.

the State and public law legal persons),[20] which in most cases includes specific powers.

This means (at least in general) that contracts between the EU and private persons that are governed by Member State law are governed by private Member State law, even if the legal order in question would stipulate that a contract with an identical object would fall under public law if it had been signed by one of its own administrations instead of an EU administration. Thus, grant agreements concluded by the EU under German law are to be governed by German private law[21] even in cases in which German public law would apply to a similar contract concluded by a German administration.[22] Equally, EU public works contracts governed by French law are to fall under French private law[23] even if similar contracts signed by French administrations fall under the category of "contrats administratifs".[24]

According to this assumption, EU public contracts governed by private law should be the standard and EU public contracts governed by public law the exception – which could make it surprising that the latter are especially mentioned in Article 272 TFEU, that stipulates that the Court of Justice of the European Union (hereinafter the Court of Justice or the Court) can have jurisdiction over the interpretation of EU public contracts pursuant to any contractual arbitration clause,[25] *whether the contract be governed by public or private law*. Yet this is surprising only from the point of view of the legal orders that allow the

---

20 The Court's argumentation in case 44/59, *Fiddelaar v. Commission* [1960] ECR 535, p. 543, does not lead to another conclusion. Indeed, even if according to this judgement "legal personality" in the sense of the present Article 335 TFEU "is one of public law by virtue of the powers and duties appropriate to it", the context of the judgement shows that the problem at stake concerned labour law and the objective of the Court's argument was to justify its own competence according to ex-Article 179 EEC (Article 272 TFEU).

21 Cases C-209/90, *Feilhauer* [1992] ECR I-2613, para. 16 ff.; C-156/97, *Van Balkom Non-Ferro Scheiding BV* [2000] ECR I-1095, para. 10; Brenner (note 12), p. 139.

22 See Stelkens, Ulrich, *Verwaltungsprivatrecht*, 2005, p. 744 ff.

23 Case C-172/97, *SIVU* [1999] ECR I-3363, para. 5.

24 Noguellou, Rozen, "France", *in* Noguellou/Stelkens (note 1), p. 675-699, p. 681.

25 See *infra* II.A.2.

resort to arbitration for contracts concluded by public bodies;[26] but there are legal orders that exclude – at least as a general rule – such a resort, as for example the French legal system.[27] Hence, the possibility to include an arbitration clause giving jurisdiction to the Court of Justice in contracts concluded by EU institutions[28] has to be foreseen in the Treaty for the case of contracts concluded by EU institutions with Member State public bodies, even more so because the validity of an arbitration clause included in an EU public contract is appreciated by the Court of Justice exclusively based on the Treaty.[29] This explanation is corroborated by the fact that the French legal system has been formative for the European legal order.[30]

Yet, even if one adopts the point of view exposed above, according to which contracts between the EU and private entities governed by Member State law are governed by private Member State law, even if a contract with an identical object would fall under public law if it had been signed by one of the administrations of the Member State in question instead of an EU administration, one has to recognise that the Court of Justice, in case it has jurisdiction by virtue of Article 272 TFEU, does not follow this line of argument.[31] On the contrary, the Court instead simply applies the rules from the national law brought forward by the parties without conducting a detailed analysis of these rules or questioning their applicability. Instead of following the principle *iura novit curia* – which would imply that application of national law by the Court would not differ from its application by national courts[32] – the Court typically refers directly to the national rules invoked without considering the specific context of each case and

---

26 As for example the German legal system, see Stelkens, Ulrich/Schröder, Hanna, "Allemagne/Germany", *in* Noguellou/Stelkens (note 1), p. 307-338, p. 334 f.

27 Noguellou (note 24), p. 697 f.

28 For the question of whether the jurisdiction the Court may have by virtue of such a clause corresponds to that of an arbitrator or to that of an (international) court see *infra* note 89.

29 See *infra* II.A.*2.a)*.

30 See *infra* note 52 and accompanying text.

31 Ritleng (note 10), p. 159 f.

32 Kohler, Christian/Knapp Andreas, "Nationales Recht in der Praxis des EuGH", *ZEuP* 2002, p. 701-726, p. 705.

without following a clear line of argument: if the parties invoke the application of national public law rules, the Court will follow them even if according to our argumentation national private law should be applicable. This is the reason why isolated examples from the Court's case law[33] cannot lead to a general theory capable of generating universal criteria for guiding the choice between national public and private law in every case where this distinction exists in the national law in question:[34] such criteria thus must be built up through theoretical legal argumentation.[35]

b) "Euro-specific" national private law for EU institutions?

When EU organs enter into contracts to which Member State law is applicable, it goes without saying that the applicable national law may have been harmonised by EU law on relevant fields. Thus, the EU has to respect, for example, national consumer protection law as it stands after the transposition of the relevant EU directives.

This assessment has to be distinguished from the question of whether EU law could, due to the principle of primacy, give rise to a special legal regime for EU public contracts submitted in principle to national law, a regime that would be "more suitable" for the needs of

---

33 See case C-167/99, *European Parliament v. SERS and Ville de Strasbourg* [2003] ECR I-3269, para. 12 f., 113, concerning the application of French administrative law to a public works contract concluded by the European Parliament; comparable: case 318/81, *CO.DE.MI. SpA.* [1985] ECR 3693, para. 24 ff., where the question was whether the Commission can dispose of prerogatives conferred to legal persons governed by public law under Belgian law; see also case C-299/93, *Bauer* [1995] ECR I-839, para. 16 ff., where the question was whether the Commission can enjoy the privileges of a "public body" under Italian law.

34 Concerning the not very predictable character of the application of national law by the Court in litigation under Article 340 (1) TFEU see also Heukels (note 11), p. 106 f.

35 For an illustrative discussion of the "delicacy" of the interpretation of national law by the Court, yet also of the ineluctability of such an interpretation especially in cases in which "national law has been 'incorporated' by an institution into its legal measure" (notably into its contracts!) see the Opinion of Advocate General Mengozzi in case C-401/09 P, *Evropaïki Dynamiki v. European Central Bank*, delivered on 27 January 2011, para. 64 ff.

the EU or the "European public interest" than national private law.[36] Such a regime would lead to the parallel application of national and European law. Some authors consider that *e.g.* the grant agreements of Article 108 of the Financial Regulation are contracts submitted to national law, but that some rules of Articles 117 ff. of the Financial Regulation could, if necessary, take precedence over certain rules in national law.[37] Yet Articles 117 ff. of the Financial Regulation convey a certain philosophy of *European* public contract law which establishes a dominant position for the contracting EU authority and therefore resembles French administrative law (see *infra* I.A.*2.b*). Hence, to admit that certain rules and principles of EU law could prevail over national law regulating a contract would mean that national private law could be interpreted as recognising a dominant position for the contracting EU administration – meaning, *e.g.*, unilateral powers of contract modification and termination – even if the national law in question does not normally recognise such powers.

Yet such an assumption appears fundamentally incompatible with the purpose of Article 335 TFEU, which grants the Union the most extensive legal capacity accorded to legal persons *under national law*. Thus, the imperative of legal certainty requires that in cases where a legal relation is governed by national law, the latter applies *exclusively*: EU law cannot determine whether a legal relation resulting from an EU public contract can be modified or abrogated if the contract in question is governed by Member State law. The opposite opinion would materially signify that an EU public contract governed in principle by national law would no longer be submitted to common contract law but rather to a specific regime, similar to the one for administrative contracts in French administrative law.[38] This appears incompatible with the purpose of Article 335 TFEU given that it pre-

---

36 Arguing in this sense v. Danwitz (note 10), p. 254 f.; Hofmann (note 10), p. 805 f.; Hofmann/Rowe/Türk (note 10), p. 658; Ritleng (note 10), p. 156 f.; Röhl, Hans Christian, *Verwaltung durch Vertrag*, 2002, p. 57 f.; Marti, Gaëlle, "L'office du juge communautaire dans le contentieux des contrats", *RFDA* 2011, p. 601-609, p. 608; Bergé, Jean-Sylvestre, "La Cour de justice, juge du contrat soumis à la loi étatique choisie par les parties", *RDC* 2/2005, p. 463-467, p. 464 f.

37 In this sense see Schenk, Wolfgang, *Strukturen und Rechtsfragen der gemeinschaftlichen Leistungsverwaltung*, 2006, p. 166 f.

38 See concerning this regime Noguellou (note 24), p. 677 ff.

cisely refers to national law, as well as being incompatible with the principle of attribution of competences, as national courts have in principal jurisdiction over EU public contracts[39]. In the end, such a "regime" would no longer enable contracting parties to foresee which rules would regulate a given situation, thus violating the imperative of legal certainty and the principle of transparency of contractual relations. The prejudicial consequences of such a mixture can be seen in the so-called "administrative private law" regime within German law, which is an attempt to integrate public law principles in the application of private law governing certain public contracts.[40] The results of these legal constructions rooted in case-law are increasingly unforeseeable, making them poor candidates to be uploaded to European public contract law.

It is possible, however, that European legal rules make it compulsory for the contracting institutions to include certain standard terms or clauses in their contracts governed by national law, to make sure these contracts are consistent with certain EU law specifications – provided that such European law does not impose legal consequences for the violation of these rules concerning the validity, implementation or termination of the contract in question, as these consequences are to be determined by national law.

This analysis is confirmed by the Commission itself, who states in recital 26 of Regulation 478/2007[41] that "[i]n order to ensure that Community law is applicable to all legal relationships to which institutions are party, it should be made compulsory for the authorising officers to insert in all their contracts and grant agreements a specific clause on the applicability of Community law, complemented as appropriate by the national law agreed by the parties". This statement only makes sense if the Commission assumes that specific EU law rules do not apply *ipso iure* (*i.e.* due to the principle of primacy) to contracts governed by national law, but have to be incorporated in the contract by contractual clauses. Consequently, Article 130 (4) (c) of

---

39 See *infra* II.A.*1*.

40 See Stelkens (note 22), p. 926 ff.

41 Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (*OJ* L 111 of 28 April 2007, p. 13).

Regulation 2342/2002 for the implementation of the Financial Regulation, as amended by Regulation 478/2007, provides that the model contract that shall form a part of the documents relating to the invitation to tender shall in particular "state that, when the institutions are contracting authorities, Community law is the law which applies to the contract, complemented, where necessary, by national law as specified in the contract". Likewise, Article 164 (1) (f) (i) of the same regulation provides that the general terms that shall form a part of the grant agreement shall "state that Community law is the law which applies to the grant agreement, complemented, where necessary, by national law as specified in the grant agreement".

2. The meaning of "EU law" in the context of EU public contracts

The fact that a "mixture" of European and national law is prohibited does not mean that European law cannot create a special regime for contracts that are to be regulated exclusively by EU law. In this case, the legal capacity to enter into such contracts does not result from Article 335 TFEU, which regulates only the legal capacity of the Union under national law. We will show hereafter that the application of certain provisions of EU law, such as Articles 117 ff. of the Financial Regulation, lead the entire contract to fall under European law (see *infra* I.B.*2.*). Yet if a contract is to be regulated exclusively by EU law, but explicit secondary law rules about all the details of the contractual regime are lacking, it is not clear how EU law will regulate the contractual regime. Articles 117 ff. of the Financial Regulation for example regulate the principal obligations of grant agreements, but do not regulate contractual responsibility, nor does Article 340 (1) TFEU, which refers only to the "law applicable to the contract in question". Hence, to fill the gaps in EU contract law there are only two solutions: Firstly, it is possible to include a contractual clause providing for subsidiary applicability of a national law (*a*). Secondly, it is also possible to develop a European public contract law (*b*).

a) Filling the gaps in EU legislation by contractual solutions

When EU public contracts are governed by EU law, the institutions generally insert a clause in these contracts providing for the subsidiary

applicability of the contract law of one of the Member States.[42] Thus, Article 9 of the model grant agreement for the implementation of the Seventh EU Framework Programme for Research[43] – a type of contract entirely governed by European law (see *infra* I.B.*2.b*) – provides not only for the application of the relevant EU legal rules but also for the application, on a subsidiary basis, of the domestic law of the Member State in which the responsible authorising officer is seated.[44] And as we have just discussed (see *supra* I.A.*1.b*), since the amendment of Regulation 2342/2002 for the implementation of the Financial Regulation by Regulation 478/2007, the contracts governed by this regulation shall specify that EU law is the law which applies to the contract, complemented, where necessary, by national law as specified in the contract. Such a *contractual* resort to national law, which then leads to a *predefined* "mixture" of European and national law, is possible. Indeed, in this case the "mixture" of European and national law is not provided for in a general way by the European lawmaker or defined *ad hoc* by the judge of the contract, but determined on a case-by-case basis by the contracting parties. The contractual resort to national law in a contract governed by European law can be understood as the regulation of all predictable situations through "general conditions of contract".

b) Filling the gaps in EU legislation by the development of general principles of EU law

But what is the content of European public contract law besides individual contractual solutions? Developing a proper EU public contract law is complicated by the fact that it is impossible in this context to

---

42 For the question of whether it could also be possible to agree on the subsidiary applicability of the "general principles common to the legal orders of the Member States" or the "general principles of EU law" see *infra* note 47 and accompanying text.

43 See *supra* note 7.

44 "[T]his *grant agreement* shall be governed by the terms of this *grant agreement*, the *Community* acts related to FP7, the Financial Regulation applicable to the general budget and its implementing rules and other *Community* law and, on a subsidiary basis, by the law of [*country of the seat of the authorising officer responsible under the internal rules on the execution of the general budget of the European Communities*]."

use the "critical comparative method", which is generally used to develop unwritten general principles of EU law.[45] Indeed, aside from certain basic principles such as mutual consent as a condition for the formation or good faith as a general principle for the implementation of contracts[46] – principles that seem to be linked to the legal institution of contracts as such[47] – the Member States apply completely different concepts regarding public contracts.[48] Thus, in Germany, for example, contracts as a means of action for the administration have – independent of their public or private nature – been conceived of as a more favourable alternative for the citizen as compared to unilateral administrative action. The contract alternative is characterised by an egalitarian instead of a subordinate relationship between the admini-

---

45 In this sense see also v. Danwitz (note 10), p. 254 f.; Frenz (note 10), p. 511, No 1715; Frenz/Götzkes (note 15), p. 21; Ritleng (note 10), p. 155 ; Spannowsky, Willy, *Grenzen des Verwaltungshandelns durch Verträge und Absprachen*, 1994, p. 494 ff.; Stelkens (note 12), p. 301 f.; the general principles identified by Bleckmann (note 9, p. 897 ff.) concern only the question of the consequences of the illegality of a public contract for its validity – but it is doubtful that these principles are really common to (all) the Member States, see Noguellou/Stelkens (note 1), p. 15 ff.

46 See Pujol-Reversat, Marie-Christine, "La bonne foi, principe général du droit dans la jurisprudence communautaire", *RTD eur.* 2009, p. 201-229.

47 Hence, if it is currently held that it is also possible to agree on the (subsidiary) applicability of the "general principles common to the legal orders of the Member States" to EU public contracts, it has to be assumed that these "general principles" are principles of Member State *private* and not principles of Member State *public* contract law. See Waelbroeck, Michel and Denis, Art. 181 CEE n° 4, *in* Louis/Vandersanden/Waelbroeck, D./Waelbroeck, M. (note 5), Tome 10 : La Cour de justice; Audit, Mathias, "Les marchés de travaux, de fournitures et de services passés par les organisations internationales", *JDI* 2008, p. 941-997, p. 958, esp. note 64; Salmon, Jean, *Le rôle des organisations internationales en matière de prêts et d'emprunts*, 1958, p. 277 ff.; Marti (note 36), p. 608 f.; Grisay, Dominique, "La Cour de justice face au contentieux des contrats conclus entre particuliers et autorités communautaires", *JTDE* 2004, p. 225-230, p. 228 f. Likewise, concerning the "general principles of Community law" mentioned at Article 19 (1) of Regulation (EC) No 1906/2006 (note 6), nothing allows to conclude that these are EU-wide established general principles of *public contract law*; it seems that the principles referred to here are rather more general principles of EU law such as good administration, sound financial management, sincere cooperation, etc.

48 See Noguellou/Stelkens (note 1), p. 10 ff.

stration and the citizen, which means that the administration cannot impose its contractual rights or modify the contract unilaterally. As to their regime, these German public contracts resemble in no way the French administrative contracts, which have been conceived of as an alternative that is more suitable for the specific needs and duties of the administration as compared to contracts regulated by common contract law. Thus, the administration possesses – in the name of the "intérêt général" (public interest) – specific powers in terms of control, sanction, modification and termination of the contract, which leads to a certain asymmetry in the relationship between the contracting parties.[49] This example illustrates that a "critical comparative work" on the matter will find few common principles suitable to establish the basis for a "European public contract law".

As there are neither written rules nor the possibility to develop unwritten principles through the critical comparative method, the only possible solution for determining the content of EU public contract law seems to be to resort to the Member State legal system whose "philosophy" corresponds the most to the few provisions of EU (secondary) law that address contractual administrative action (for the EU as well as the Member States). Here it appears that rules like Articles 117 ff. of the Financial Regulation or the rules for the implementation of the Seventh EU Framework Programme for Research resemble French administrative law. Indeed, these rules correspond to a contractual model that includes specific powers for the contracting administration, as they provide the Commission with unilateral powers for the protection of the financial interests of the Union even after the conclusion of a grant agreement.[50] This resemblance to the French model corresponds to the fact that French public contract law has influenced public contract law in several other Member States[51] as well

---

49 See Fromont, Michel, *Droit administratif des États européens*, 2006, p. 313 ff. as well as the comparative studies on the matter cited *supra* (notes 16-18).

50 The contract thus appears as a basis for the later issuing of individual decisions in the sense of Article 288 (4) TFEU, that can be challenged according to Article 263 (4) TFEU; see also Hofmann (note 10), p. 809; Schneider, Jens-Peter, "Verwaltungsrechtliche Instrumente des Sozialstaates", *in* VVDStRL 64, *Der Sozialstaat in Deutschland und Europa*, 2005, p. 238-273, p. 254; for a different opinion see Prieß (note 8), p. 527 f.

51 Fromont (note 49), p. 298 ff., cites Belgium, Greece, Italy, Luxembourg, Portugal and Spain.

as to the fact that French administrative law in general has widely inspired EU administrative law.[52] Hence, the development of unwritten general principles of EU public contract law should be informed by the theory of administrative contracts developed by the French Conseil d'État.

B. Determining the applicable law for an EU public contract

Having considered the implications of the applicability of national and European law to an EU public contract, we can now turn to the question of how to choose between the former and the latter. In attempting to answer this question some approaches mix up the question of the choice and the content of the applicable law, which gets us nowhere (*1.*). Thus a new approach has to be found (*2.*).

1. Wild goose chases

First of all, it must be explained as to why it is so important not to mix up the question of the applicable law and the question of the legal nature of the contract when determining which law is applicable to an EU public contract (*a*). This exploration will then lead to the assessment that the existence of procurement rules determined by European law does not have any influence on which law is applicable to a specific contract (*b*).

a) Mixing up the question of the applicable law and the question of the legal nature of the contract

The question of the existence of EU public contracts governed exclusively by European law is often viewed in relation to the question of the law applicable to contracts concluded by the Union which are "governed by public law", explicitly mentioned at Article 272 TFEU. Some authors consider that these contracts should be governed exclu-

---

52 See *e.g.* Chiti, Mario P., "Forms of European administrative action", *LContempProbl* 68 (2005), p. 37-57, p. 39; concerning public contracts see Lichère, François, "L'influence du droit communautaire sur le droit des contrats publics", *in* Auby/Dutheil de la Rochère (note 10), p. 945-968; Spannowsky (note 45), p. 491.

sively by Member State public law,[53] which means that the EU "borrows" the public law of the Member State in question.[54] Yet we have already shown that Article 335 TFEU does not allow such "borrowing" (see *supra* I.A.*1.a*). On the other end of the spectrum, other authors consider that a contract entered into by an EU organ is a public law contract only if it is governed (exclusively) by EU law.[55]

Yet, these two opinions presuppose that "contracts governed by public law" according to Member State law are also "contracts governed by public law" according to European law. But European law ignores, at least from a formal point of view, the distinction between public and private law, which means that it also ignores the distinction between contracts governed by public and contracts governed by private law.[56] The question of differentiating between public law and private law occurs only at the Member State level and even then only if the distinction matters in the legal regime of the Member State in question.[57] Furthermore, the border between public and private law and the function of this distinction vary from one Member State to another.[58] Hence, the first step is to work out whether a contract is governed by European law.[59] In this case, the question of its legal nature no longer arises, because European law does not differentiate between public and private law. But how do we discover whether a contract is governed by European law?

---

53 Frenz (note 10), p. 513 ff., No 1721 ff.; Frenz/Götzkes (note 15), p. 21.

54 Ehlers, Dirk, "Die Europäisierung des Verwaltungsprozessrechts", *DVBl* 2004, p. 1441-1451, p. 1444.

55 Bleckmann (note 9), p. 894; Spannowsky (note 45), p. 491 f.

56 Koen Lenaerts and Dirk Arts, *Procedural Law of the European Union*, 1999, No 17-003, seem to propose a *material* criterion to distinguish public-law and private-law contracts, yet without drawing a *formal* conclusion on the applicable law, when stating that "[w]hat may be meant [by a public-law contract in this context] is agreements concluded by the Community with Member States, with third countries or with international organizations (…) *and administrative agreements concluded with individuals*. Private-law contracts comprise all contracts into which the Community enters as a party to *normal legal transactions*" (our italics).

57 See Stelkens (note 22), p. 363 ff.

58 See the national reports *in* Ruffert, Matthias (ed.), *The Public-Private Law Divide*, 2009.

59 Same appreciation Hofmann (note 10), p. 805.

b) Does the existence of procurement rules determined by EU law have any influence on the law applicable to a contract?

To find an answer to this question it needs to be clarified whether the existence of a certain regulation during the pre-contractual phase can be decisive for the law applicable to a contract: does the law applicable to the pre-contractual phase determine the law applicable to the contract? As already mentioned, secondary EU law contains rules for the award of certain contracts. Thus, the Financial Regulation requires respecting the principles of equal treatment of candidates and transparency in the awarding of contracts by EU institutions and establishes detailed rules for the awarding of these contracts.[60] Likewise, there are precise rules for the recruitment of contractual agents by the Commission.[61] Furthermore, EU institutions must respect the general principles, as established by EU law, of equal treatment, non-discrimination and transparency in the process of awarding of any contract.[62]

However, the existence of award rules *in itself* has no influence on the law applicable to the relevant contracts.[63] Hence, the fact that the rules concerning the award procedures are determined by EU law does not determine which contract law – European or national – will regulate the validity, implementation and completion of the contract or the consequences in case of failure. Thus, the Court assumes that even if European law establishes rules for the award procedure (*e.g.* imposing a bidding procedure), the contract itself can still be governed by Member State law.[64] This seems obvious, however, as the funda-

---

60 See Articles 89 ff. and 109 ff. of Regulation 1605/2002 and Articles 118 ff. and 165 ff. of Regulation 2342/2002.

61 See the "General implementing provisions on the procedures governing the engagement and the use of contract staff at the Commission" (consolidated version of decisions C(2004)1313, C(2004)2862, C(2004)4952, C(2005)5411), available at http://www.es-ue.org/Documents/DISPOSICIONES%20GENERALES%20DE%20APLICACION%20-%20VERSION%20CONSOLIDADA%20(%20EN%20).doc.

62 Audit (note 47), p. 948.

63 See Röhl (note 36), p. 53 f.

64 See cases 23/76, *Pellegrini* [1976] ECR 1807, para. 17 ff.; 318/81, *CO.DE.MI. SpA.* [1985] ECR 3693, para. 18 ff.; C-42/94, *Heidemij Advies* [1995] I-1417, para. 16 ff.

mental principles of EU law govern the award of all contracts concluded by EU institutions, regardless of whether they are concluded for the management of the EU administration (purchase contracts, employment contracts…) or for the implementation of EU policies (grant agreements…). Hence, if the existence of EU rules for the award of contracts led automatically to the application of EU law also for the contract itself, all contracts entered into by the EU administration would be governed by EU law. Yet this is not compatible with Article 335 TFEU, which presupposes the existence of EU public contracts governed by Member State law. Hence, another criterion capable of determining whether a contract is governed by EU or by Member State law has to be found.

2. What criterion governs the choice between EU and Member State law?

When raising the question of which criteria determine whether a contract is governed by European law or by the law of a particular Member State, it has to be born in mind that in practice, most EU public contracts are suitable to contain more or less explicit choice of law clauses or dispositions. Yet firstly, not all contracts contain such clauses[65] and secondly, the choice of the law applicable to a certain contract is only to a certain extent at the disposal of the parties. Hence, objective criteria capable of generating a theory for the determination of the law applicable to EU public contracts have to be established.

a) Theoretical approach

If it is not the pre-contractual phase that determines which law is applicable to a contract, the latter necessarily has to follow from the object or the nature of the agreement in question. Hence, when a contract modifies or abrogates *pre-existing* EU law relations, as is the case for transaction agreements, only EU law can be applicable. Indeed, Member State law cannot determine the conditions for valid modification of legal relations governed by EU law. There has never been a doubt, for example, that the settlement procedure of Article

65 Grisay (note 47), p. 228.

10a of Commission Regulation (EC) No 773/2004,[66] introduced by Commission Regulation (EC) No 622/2008,[67] is entirely governed by EU law.[68] Likewise, the question of the choice between EU and Member State law only arises when the object of the contract allows the implementation of the contractual obligations as well under EU as under Member Sate law. If the Commission commits itself to a contractual obligation that can only be governed by EU law, as for example the enactment or non-enactment of EU legislation, it goes without saying that the contract can only be governed by EU law. Hence, the question of whether the Environmental Agreements introduced by Commission Communication COM(96) 561 final can give rise to any rights or obligations[69] can obviously be resolved only under EU law. Thus, determining the applicable law for an EU public contract is only problematic in cases when this contract establishes a *new* legal relation between the EU and its contracting partner that could theoretically be governed as well by EU as by Member State law.

Unfortunately, there are neither general principles of EU law nor a common foundation in the Member States' laws that could resolve this problem in a satisfactory manner. Some *German* scholars consider that the criterion for the distinction between applicability of European law and applicability of Member State law should be whether the EU enters into a contract to meet the requirements for its proper functioning (in which case Member State law should be applicable) or to implement its policies (in which case European law should be applica-

---

66 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (*OJ* L 123 of 27 April 2004, p. 18) in its consolidated version of 1 July 2008.

67 Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (*OJ* L 171 of 1 July 2008, p. 3).

68 See the Commission Notice on the conduct of settlement procedures (2008/C 167/01, *OJ* C 167 of 2 July 2008, p. 1); see also Hennig, Thomas Tobias, *Settlements im Europäischen Kartellverfahren*, 2010, p. 292 ff.; Hirsbrunner, Simon, "Settlements in Kartellverfahren", *EuZW* 2011, p. 12-16; Soltész, Ulrich, "Belohnung für geständige Kartellsünder", *BB* 2010, p. 2123-2127.

69 See on this question Petit, Yves, "Accords environnementaux", *Rép. communautaire Dalloz*, with further references.

ble).[70] Yet the suitability of this criterion for the distinction between the applicability of European public contract law or Member State contract law is doubtful. In German administrative law this criterion serves to distinguish public contracts governed by public law from public contracts governed by private law. But this distinction is justified only because in German administrative law it is commonly held that the main objective of submitting contracts to public law is to ensure that the administration respects its specific public law obligations, which it could possibly avoid by entering into contracts governed by private law.[71]

This concept is the mirror opposite to the one governing French administrative law, which distinguishes contracts governed by public law and contracts governed by private law basically by whether there are legislative rules or contractual clauses that submit a contract to a specific regime, characterised above all by privileges possessed by the administration, or whether the very object of the contract is the implementation of a public service of general interest, which implies that the administration has to dispose of specific powers to guarantee the continuity of the public service and thereby the general interest.[72] The "contrat administratif" (administrative contract) – unlike the German "public law contract" – is thus a tool that takes into account not only the specific *obligations* but also the specific *needs* of the administration.[73]

It seems quite convincing to apply this criterion in order to determine whether an EU public contract that establishes a new legal relation is governed (exclusively) by European law. Indeed, one could assume that the existence of explicit European rules standardising the

---

70 In this sense see Bleckmann (note 9), p. 892 ff.; see also Schenk (note 37), p. 167; Spannowsky (note 45), p. 498.

71 See Stelkens/Schröder (note 26), p. 316 ff.

72 Thus, in French administrative law, there are two (alternative) criteria to determine the public law ("administrative") nature of a public contract: the occurrence of an element which is "exorbitant" compared to common contract law, *i.e.* which could not occur in a "normal" private law contract ("le critère de l'exorbitance"), and the fact that the very object of the contract is the implementation of a public service of general interest ("le critère du service public"), see Noguellou (note 24), p. 678 f.

73 See Fromont (note 49), p. 298 ff., 313 ff.; Noguellou/Stelkens (note 1), p. 10 ff.

regime of certain contracts is an indication of the need to ensure these contracts fall under a unified regime. Hence, an EU public contract that establishes a new legal relation is governed (exclusively) by European law (only) if secondary EU law sets homogeneous rules that are directly binding for the contracting parties. In cases where there are no such specific regulations for the implementation of the contract, from a European law perspective it does not seem necessary to apply a specific legal regime different from Member State contract law. Thus, the latter is applicable according to the principle established by Article 335 TFEU.

b) Some examples of the application of the criterion proposed

If one applies the criterion proposed in order to distinguish EU public contracts governed (exclusively) by EU law from those governed (exclusively) by Member State law, it seems evident that the "grant agreements" of Article 108 (1) second phrase of the Financial Regulation are contracts governed exclusively by European law, given that Articles 117 ff. of the said regulation – concerning payment, control and implementation of agreements – give the Commission significant privileges vis-à-vis the beneficiary of a financial grant. This assessment seems to be shared by the Commission itself, who has in 2007 amended the Implementing Regulation in order to make it compulsory that the general terms and conditions applicable to grant agreements "state that Community law is the law which applies to the grant agreement, complemented, where necessary, by national law as specified in the grant agreement".[74] The application of EU law is even more evident concerning grant agreements governed by "exorbitant" clauses according to Articles 18 ff. of the Regulation for the implementation of the Seventh EU Framework Programme for Research.[75] The Regulation concerning the Conditions of Employment of Other

74 See Article 164 (1) (f) (i) of Regulation 2342/2002 as amended by Regulation 478/2007. See also *supra* note 41 and accompanying text.

75 See *supra* notes 6 and 7 (esp. Article 9 of the model grant agreement). See also Article 5 of Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) (*OJ* L 412 of 30 Dec. 2006, p. 1); Janssen/El Khoury (note 6), p. 214 f., esp. notes 27, 51.

Servants of the European Communities employed on a contractual basis[76] – the application of which excludes the application of national law[77] – also comprises such rules. These examples have in common that the *principal* obligations of the contracts in question are determined and regulated by secondary law that establishes a "model contract", the implementation of which is governed by rules clearly defined by EU law.

c) The particular case of procurement contracts

The categorisation of public procurement contracts falling under Articles 88 ff. of the Financial Regulation turns out to be more difficult. Indeed, the Financial Regulation contains rules concerning specific powers (unilateral modification or termination, sanctions, *e.g.* Article 103 (2) and (3)) assigned to the contracting European entity. According to our reasoning, the existence of such a specific regime implies the submission of the contract to European law. Hence, only European law should be applicable. But in this case European law does not provide rules concerning the *principal* obligations of the contract. Thus, the Financial Regulation does obviously not contain special rules necessary to regulate in detail for example building contracts. Indeed, it is precisely because there is no European contract law suitable for the implementation of all European public contracts that Article 335 TFEU allows the resort to national contract law, recalling that any sort of semi-harmonisation of the contractual regime on the European level is not possible (see *supra* I.A.*1.b*).

As a consequence, European contractual practice shows that procurement contracts passed by EU institutions are generally submitted to national law, even since the entry into force of the Financial Regulation. Hence, it seems that the rules of Article 103 of the Financial Regulation have to be interpreted as instructions for contracting authorities which specify that possibilities of termination and sanction

---

76 Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (*OJ* 45 of 14 June 1962, p. 1385) in its consolidated version of 1 Jan. 2010.

77 See cases 105/80, *Desmedt* [1981] ECR 1701, para. 14; 257/85, *Dufay* [1987] ECR 1561, para. 12.

have to be provided for by the contractual clauses. This makes them enforceable independent of the national law applicable to the contract in question. Indeed, as European law cannot determine the conditions for the validity of a contract submitted to Member State law, it cannot stipulate contractual clauses that would apply *ex officio – i.e.* without being expressly included in the contract – to European public contracts governed by Member State law. This reasoning applies also to Article 102 of the Financial Regulation and Articles 151 ff. of its Implementing Regulation, which allow and in certain cases oblige the contracting entity to require performance guarantees in order to ensure the correct implementation of the contracts in question. These rules are also to be understood as specifications that must be included in the contract by the contracting authority and not as specific validity conditions or implementation rules. According to this interpretation EU procurement contracts are governed by national law, by which their validity has to be appreciated.

Nevertheless, in the light of the conception that seems to underlie the just mentioned secondary law rules, public procurement contracts are a field in which an evolution towards the application of European law, complemented by a contractual resort to national law for technical details, is possible. This is corroborated by the fact that in 2007, the Commission has introduced the obligation, for the contracting authorities, to foresee in their contracts the applicability of EU law, complemented, where necessary, by national law as specified in the contract.[78]

In this context, an observation has to be made as to Article 105 (2) of the Financial Regulation, which obliges the EU institutions – in accordance with the rules established by the Court in its *Alcatel* judgement and codified for the Member States in the remedies directive – to respect a standstill period before signing certain contracts[79]. As a special rule to be observed by the contracting EU institutions, this provision is unobjectionable. Unsurprisingly, it stipulates that the implementing rules shall specify the exceptions and conditions for the application of the standstill period, but does by no means empower the Commission to establish the consequences for the validity

78 See Article 130 (4) (c) of Regulation 2342/2002 as amended by Regulation 478/2007. See also *supra* note 41 and accompanying text.

79 See also *infra* II.B.*2.a)*.

of the contract in case of a violation of the standstill period. Yet Article 158a (1) subparagraph 4 of the Implementing Regulation, which specifies the standstill regulation, disposes that a contract signed before the expiry of the standstill period shall be null and void! This is problematic, and we held that this provision should be considered void, because it works on the assumption that EU law can establish conditions for the validity of EU public contracts, be they governed by national law or by EU law. Indeed, it cannot be held that this condition only applies in case a contract is governed by EU law, because the wording and systematic of the rule leave no room for such a differentiated interpretation. Yet the assumption that EU law can establish conditions for the validity of contracts governed by national law is inconsistent with Article 335 TFEU. Indeed, this would lead to the famous "mixture" of national and European contract law the inadmissibility of which has been outlined above (see *supra* I.A.*1.b*). And contrary to the provisions on specific powers of the contracting EU institutions discussed above, Article 158a (1) subparagraph 4 of the Implementing Regulation cannot be interpreted as instruction for the contracting EU entity specifying that such a validity condition has to be included in the contractual clauses, because it establishes *ipso iure* a material validity condition for the contracts in question. This example shows that EU legislation itself does not convey a clear and coherent conception of the legal framework of EU contractual action.

II. EU Public Contract Litigation

Litigation related to EU public contracts raises several questions, which must be considered in the light of primary law. Indeed, according to the dominant legal doctrine, secondary EU law cannot provide for new review proceedings or modify the review proceedings established by primary law in Articles 263 ff. TFEU.[80] On a preliminary

80 See in this context the discussion in relation to Article 12 of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (*OJ* L 264 of 25 September 2006, p. 13); see Guckelberger, Annette, "Die EG-Verordnung zur Umsetzung der Aarhus-Konvention auf der Gemeinschaftsebene", *NuR* 2008, p. 78-87, p. 86; Jans, Jan H., "Did Baron von

note, it might be useful to remark that the question of jurisdiction is independent of the question of the law applicable to an EU public contract. Concerning EU public contract litigation, two distinct issues have to be considered: firstly, litigation between the contracting parties (A.), and, secondly, litigation initiated by third parties (B.).

A. Litigation between the contracting parties

Apart from legal actions related to employment contracts governed by the Conditions of Employment of Other Servants of the European Communities, which have to be brought to the Court of Justice of the European Union according to Article 270 TFEU and which won't be discussed here,[81] as a general rule the national courts have jurisdiction for legal actions between the parties to an EU public contract (*1.*), whereas jurisdiction of the Court of Justice is an exception to the rule (*2.*).

1. The general jurisdiction of the national courts

Article 272 TFEU stipulates that the Court of Justice is competent for litigation between the parties to a contract concluded by or on behalf of the Union only when an arbitration clause is included in a contract. Hence, if there is no such clause, litigation between contracting parties concerning the validity or the implementation of an EU public

---

Munchhausen ever Visit Aarhus?", *in* Marcory, Richard (ed.), *Reflections on 30 Years of EU Environmental Law*, 2006, p. 475-489, p. 477 ff.; Pallemaerts, Marc, *Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention*, 2009, p. 30 ff.; Pernice-Warnke, Silvia, "Der Zugang zu Gericht in Umweltangelegenheiten für Individualkläger und Verbände gemäß Art. 9 Abs. 3 Aarhus-Konvention und seine Umsetzung durch die europäische Gemeinschaft – Beseitigung eines Doppelstandards?", *EuR* 2008, p. 410-423, p. 417 ff.; Walter, Christian, "Internationalisierung des deutschen und Europäischen Verwaltungsverfahrens- und Verwaltungsprozessrechts – am Beispiel der Århus-Konvention", *EuR* 2005, p. 302-338, p. 318.

81 See Perez (note 8), p. 188 f.; O'Leary, Síofra, "Applying Principles of EU Social and Employment Law in EU Staff Cases", *ELR* 2011, p. 769-797; Vandersanden, Georges, "Le contentieux de la fonction publique de l'Union européenne: Décision judiciaire ou règlement amiable?", *CDE* 2010, p. 569-585.

contract has to be brought to national courts. Article 274 TFEU, which specifies that disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States, confirms this general jurisdiction of the national courts.[82] Accordingly, national courts also have jurisdiction over litigation in relation to contracts that are to be governed by EU law according to the criteria defined before (*supra* I.B.*2.a*). Furthermore, because Article 268 TFEU concerns only actions for compensation according to Article 340 (2) and (3) TFEU, actions concerning contractual liability are also to be brought to the national courts.[83]

a) Ordinary or administrative national courts?

The law applicable to the contract can still play a role in answering the question of whether an action has to be brought to ordinary or administrative courts, if the legal order in question recognises the distinction between the two types of court. As EU public contracts governed by national law are mostly submitted to private law,[84] in general the national ordinary courts should have jurisdiction. But in cases where a contract is governed by EU law, should litigation be brought to national administrative courts, given that they are specific courts for the national administration? It seems that the answer to this question depends on the procedural rules in national law.[85] In general, questions of (international) jurisdiction, as well as judicial procedure, are governed exclusively by national law.[86]

b) Need to request a preliminary ruling from the CJEU?

Yet, it could be asked whether national courts can autonomously resolve questions of validity and interpretation of contracts passed by

---

82 Heukels (note 11), p. 97 ff.

83 Heukels (note 11), p. 98.

84 See *supra* I.A.*1.a)*.

85 In Germany, the Higher Administrative Court of Muenster has once considered its jurisdiction, see *Oberverwaltungsgericht Münster*, judgement of 30. 8. 2000 – case 9 A 5294/97 – *NVwZ* 2001, p. 691 ff.

86 Concerning particularities in the matter of implementation of judgements of national courts vis-à-vis the EU see Heukels (note 11), p. 99 f.

the EU or whether they have to refer a preliminary question to the Court of Justice in accordance with Article 267 (1) (b) TFEU, which stipulates that the Court shall have jurisdiction to give preliminary rulings concerning "the validity and interpretation of *acts* of the institutions, bodies, offices or agencies of the Union". Indeed, if Article 267 TFEU was applicable to contracts passed by the EU, it would be compulsory for national courts (even for those who are not courts of last resort) to refer to the Court on questions concerning the validity and interpretation of these contracts.[87]

Hence, the question is whether a contract passed by an EU administration constitutes an "act" in the sense of Article 267 (1) (b) TFEU (see for a similar question *infra* II.B.*1.*). Some authors come to this conclusion, arguing that this would be the only way to ensure a homogeneous application of EU law.[88] But to recognise public contracts in administrative matters as "acts" in the sense of Article 267 TFEU would be incompatible with the purpose of Articles 272 and 274 TFEU. Indeed, these rules give general jurisdiction over litigation in relation to EU public contracts to the national courts, independent of whether the contracts are governed by national law or not. This general decision in favour of the jurisdiction of national courts should not be circumvented by adopting an extensive interpretation of Article 267 TFEU, all the more so because the contracts in question are often governed by national law anyhow. But even concerning contracts governed exclusively by EU law, a general obligation for national courts to refer preliminary questions to the Court of Justice would not make sense because this would mean transferring certain contract law questions to the Court (*i.e.* questions concerning the validity and interpretation of the contract), whereas other questions which fall outside the scope of the preliminary ruling (*i.e.* questions concerning application of implementation rules, contractual responsibility according to Article 340 (1) TFEU, etc.) would stay under jurisdiction of the national courts. Hence, it should be concluded that the general jurisdiction of the national courts provided for by Article 274 TFEU rules out the applicability of Article 267 (1) (b) TFEU for contractual litigation in relation to EU public contracts.

---

87 See *e.g.* case C-461/03, *Schul* [2005] ECR I-10513, para. 15 ff.

88 Spannowsky (note 45), p. 497; Grisay (note 47), p. 230.

2. The exceptional jurisdiction of the Court of Justice

Even though national courts in principle have jurisdiction over EU public contracts, Article 272 TFEU provides contracting parties with the possibility of derogating from this rule by agreeing that the Court of Justice shall have jurisdiction pursuant to an arbitration clause.[89] Hence, the Court may have to interpret and apply Member State law if the latter is applicable to a certain contract,[90] which in practice leads to a rather incoherent interpretation of national law rules[91].

a) Validity and interpretation of an arbitration clause

Regarding the conditions for the validity and entry into force of such an arbitration clause, it has to be highlighted that for the Court the validity of an arbitration clause according to Article 272 TFEU has to be

---

89 Several authors observe that the expression "arbitration clause" calls for specification as to the question of whether in the relevant proceedings the Court acts as an arbitrator or as an (international) court, concluding nevertheless predominantly in support of the latter, notably because the judgements of the Court are directly enforceable. See Lenaerts/Arts (note 56), No 17-005; Bergé (note 36), p. 463; Burst, Jean-Jacques, "L'arbitrage dans ses rapports avec les Communautés européennes", *Rev. arb.* 1979, p. 105-115, p. 108 ff.; differentiating Idot, Laurence, "Arbitrage et droit communautaire/Arbitration and EC Law", *RDAI/IBLJ* 1996, p. 561-591, p. 585 f. The question of whether the EU institutions can also resort to ("real") arbitration other than that of the ECJ seems to be answered in the affirmative by legal doctrine, see Burst, *ibid.*, p. 107 f.

90 **For Belgian law** see *e.g.* cases 318/81, *CO.DE.MI. SpA.* [1985] ECR 3693, para. 18 ff.; 249/87, *Mulfinger* [1989] ECR 4127, para. 2 ff.; C-42/94, *Heidemij Advies* [1995] ECR I-1417, para. 16 ff; **for German law** see *e.g.* cases C-209/90, *Feilhauer* [1992] ECR I-2613, para. 16 ff.; C-156/97, *Van Balkom Non-Ferro Scheiding BV* [2000] ECR I-1095, para. 10 ff.; C-77/99, *Oder-Plan-Architektur GmbH* [2001] ECR I-7355, para. 4; **for French law** see *e.g.* case C-172/97, *SIVU* [1999] ECR I-3363, para. 5; **for Italian law** see *e.g.* cases 23/76, *Pellegrini* [1976] ECR 1807, para. 17 ff.; 109/81, *Porta* [1982] ECR 2469, para. 11; C-299/93, *Bauer* [1995] ECR I-839, para. 11 ff.; C-334/97, *Comune di Montiorio al Vomano* [1999] ECR I-3387, para. 6.

91 See *supra* I.A.*1.a)*.

recognised exclusively based on the Treaty.[92] This means that the conditions for the validity of an arbitration clause according to Article 272 TFEU are not determined by national law even if the contract is otherwise governed exclusively by the national law in question.[93] Hence, Article 272 TFEU is the only exception to the principle of the "exclusivity" of national law[94], derogating as *lex specialis* from the principle of Article 335 TFEU according to which a legal relation that falls under national law is *exclusively* governed by the latter. As it turns out, the Court of Justice is not very demanding concerning the conditions for the validity of an arbitration clause,[95] which can be problematic for the requirements national law otherwise poses for the validity of the contract in question. This shows that a "mixture" of national and European law for the recognition of the validity of a European public contract leads to legal uncertainty.

b) Is the inclusion of an arbitration clause an "advantage" for EU institutions?

Originally, Article 272 TFEU and its predecessors have been foreseen in the treaties so as to avoid that litigation in which essential EU interests are concerned is divested from the jurisdiction of the Court of Justice.[96] Nevertheless, it turns out that the inclusion of an arbitration clause is not necessarily an advantage for the EU institutions;[97] the enforcement of the judgements of the Court can be especially prob-

---

92 Lenaerts/Arts (note 56), No 17-009; Waelbroeck, Michel and Denis (note 47), Art. 181 CEE n° 2; Marti (note 36), p. 607; Idot (note 89), p. 584 f.

93 See cases C-209/90, *Feilhauer* [1992] ECR I-2613, para. 12 ff.; C-299/93, *Bauer* [1995] ECR I-839, para. 11.

94 See *supra* I.A.*1.b)*.

95 See cases 23/76, *Pellegrini* [1976] ECR 1807, para. 8 ff.; 318/81, *CO.DE.MI. SpA.* [1985] ECR 3693, para. 9; C-142/91, *Cebag* [1993] ECR I-553, para. 10 ff. See also Idot (note 89), p. 583 f.

96 Lenaerts/Arts (note 56), No 17-002; Waelbroeck, Michel and Denis (note 47), Art. 181 CEE n° 1; Burst (note 89), p. 107; Grisay (note 47), p. 230.

97 For a different opinion see Lenaerts/Arts (note 56), No 17-002; differentiating Grisay (note 47), p. 230.

lematic.[98] According to Article 280 TFEU, the judgements of the Court are enforceable under the conditions laid down in Article 299 TFEU, which means that enforcement is governed by the rules of civil procedure of the State in the territory of which it is carried out. Furthermore, Article 299 TFEU only allows the enforcement of pecuniary obligations and not the enforcement of other injunctions the Court may pronounce within its unlimited jurisdiction under Article 272 TFEU. But even to enforce pecuniary obligations under Article 299 TFEU, the contracting EU institutions are still obliged to refer to the competent national authorities, what implies supplementary procedural obligations. Particularly in a case in which an arbitration clause leads to the jurisdiction of the Court of Justice concerning the substance of a case and the jurisdiction of the national courts for the enforcement of the Court's judgement, the contracting EU organs cannot resort to the simplified enforcement procedures provided for by the national civil procedure rules (*e.g.* summonses).

Hence, to resort to the jurisdiction of the Court of Justice for their contracts does not necessarily turn out to be advantageous *per se* for the EU institutions. Combined with the legal uncertainty resulting from the incoherent application of national law by the Court, it seems that an arbitration clause that precludes the jurisdiction of the national courts is useful only if justified by the necessity to ensure the uniform application of European law.[99] According to our reasoning, this occurs only in cases when a contract is governed by European law.[100] Nevertheless, EU contractual practice is not in keeping with this assessment.

---

98 Grisay (note 47), p. 230. See generally concerning this problem Hakenberg, Waltraud, "Die Befolgung und Durchsetzung der Urteile der Gemeinschaftsgerichte", *EuR* 2008, Beiheft (Supplement) 3, p. 163-175; Wegener, Bernhard W., "Der Numerus Clausus der Klagearten – Eine Gefahr für die Effektivität des Rechtsschutzes im Gemeinschaftsrecht?", *EuGRZ* 2008, p. 354-359.

99 Grunwald (note 8), p. 263.

100 See *supra* I.B.*2.*

B. Litigation initiated by third parties

The legal protection of competing actors in the context of EU administrative action by contract remains problematic. This problem arises regardless of whether a contract is governed by European or Member State law and whether a third party claims the right to enter into the contract itself – as is the case in public procurement matters – or whether it is protesting against a contract concluded with another party, without itself having any claim upon this contract – as may be the case in state aid matters.[101] Secondary law does not provide for specific review procedures, such as those instituted in the Member States by virtue of the remedies directive, to prevent or sanction illegalities committed by the contracting European entity in the pre-contractual phase.[102] This is not surprising, because, according to the dominant legal doctrine, with the exceptions of Articles 257 and 261 f. TFEU, secondary EU law cannot provide for new review proceedings or modify the review proceedings established by primary law in Articles 263 ff. TFEU.[103] Aggrieved bidders or competitors thus can bring action to the Court only in accordance with the general procedures set out by primary law. The relevant procedure concerning EU public contracts is the action for annulment provided for in Article 263 TFEU, because the core question is whether the aggrieved competitors can obtain the annulment of an irregular contract and not be limited only to claiming damages for the harm done. Hence, the matters of provisional legal protection according to Articles 278 f. TFEU[104] and actions for damages by virtue of non-contractual liability of the Union

---

101 Papier, Hans-Jürgen, "Rechtsformen der Subventionierung und deren Bedeutung für die Rückabwicklung", *ZHR* 152 (1988), p. 493-508, p. 502 f.; Schwarze, Jürgen, "Subventionen im gemeinsamen Markt und der Rechtsschutz des Konkurrenten, *in* Selmer, Peter *et al.* (eds.), *Gedächtnisschrift für Wolfgang Martens*, 1987, p. 819-849, p. 843 ff.

102 Ritleng (note 10), p. 163.

103 See *supra* note 80.

104 Concerning provisional legal protection by the CJEU see Schoch, Friedrich, "Vorläufiger Rechtsschutz im Europäischen Gemeinschaftsrecht", *in* Ehlers, Dirk/Schoch, Friedrich (eds.), *Rechtsschutz im Öffentlichen Recht*, 2009, § 12 No 6 ff.

according to Article 268 TFEU[105] will not be addressed here, because they depend on the questions related to action for annulment, which will be discussed hereinafter.

Litigation concerning contract award procedures of EU institutions always falls under the competence of the Court of Justice because the Court assumes – without problematising the question – that the decision to enter into a contract, as well as other decisions preceding the conclusion of a contract, are independent of the contract and can therefore be contested by an action for annulment according to Article 263 (4) TFEU.[106]

After the entry into force of the Lisbon Treaty a modification in the wording of this clause compared to its predecessor ex-Article 230 (4) EC Treaty raised the question of the possibility of an action for annulment being filed directly against an EU public contract (*1.*). As we discover this eventuality to be problematic, possibilities for the improvement of the current review system have to be discussed (*2.*).

1. Action for annulment against an EU public contract?

Article 263 (4) TFEU does not make the possibility to institute proceedings dependent upon the existence of one of the "legal acts"

---

105 Concerning the association of action for annulment and action for damages, which is current practice before the CJEU (Ehlers, Dirk, "Schadensersatzklage", in Ehlers/Schoch [note 104], § 10 No 24) in our context, see *e.g.* cases T-365/00, *AICS v. European Parliament* [2002] ECR II-2719, para. 73 ff.; T-89/07, *VIP Car Solutions SARL v. European Parliament* [2009] ECR II-1403, para. 99 ff.; see also Ritleng (note 10), p. 165 f.

106 See *e.g.* cases 23/76, *Pellegrini* [1976] ECR 1807, para. 17 ff.; 56/77, *Agence Européene d'Interims SA* [1978] ECR 2215, para. 10 ff.; T-19/95, *Adia Interim SA* [1996] ECR II-321, para. 31 f.; T-169/00, *Esedra SPRL* [2002] ECR II-609, para. 188 ff.; T-411/06, *Sogelma v. AER* [2008] ECR II-2771, para. 33 ff.; Bleckmann (note 10), p. 466; Schilling, Theodor, "Rechtsschutz bei der Vergabe öffentlicher Aufträge durch Organe der EG", *EuZW* 1999, p. 239-243, p. 240; Röhl, Hans Christian, "Die anfechtbare Entscheidung nach Art. 230 Abs. 4 EGV", *ZaöRV* 60 (2000), p. 331-366, p. 344 ff.; Hofmann (note 10), p. 808; Ritleng (note 10), p. 164; Gromitsaris, Athanasios, "Kontraktualisierung im Öffentlichen Recht", *in* Häberle, Peter (ed.), *JöR*, Vol. 57, 2009, p. 255-299, p. 266 ff.; Marti (note 36), p. 603 ff.

enumerated in Article 288 TFEU, but on the general existence of an "act" performed by an EU organ. The wording of this clause is thus clearly different from that of its predecessor, ex-Article 230 (4) EC Treaty, according to which the possibility to institute proceedings was dependent on the existence of a "decision". Of course, according to the Court, the wording of ex-Article 230 (4) EC Treaty did not limit the possibility of an action for annulment to the "decisions" in the sense of ex-Article 249 (4) EC Treaty, but allowed also for an action for annulment to be brought against "any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position".[107] Nevertheless, the wording of ex-Article 230 (4) EC Treaty clearly limited the possibility of an action for annulment to *unilateral* acts of the Community institutions.[108]

This has changed with the wording of the new Article 263 (4) TFEU, because the word "act", unlike the word "decision" used in ex-Article 230 (4) EC Treaty, no longer limits the interpretation to unilateral acts. This raises the question of whether a *contract* could constitute an "act", "the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position" (see for a similar question *supra* II.A.*1.b*). Thus, an act constituted by the completion of a contract at the end of an award procedure does not affect an aggrieved bidder any less than a unilateral decision having preceded the conclusion of such a contract and for which the case law unambiguously admits that it is of direct and individual concern to certain third parties.[109] Could a public contract passed by an EU organ thus be the object of an action for annulment under Article 263 (4) TFEU?

---

107 Case 60/81, *IBM* [1981] ECR 2639, para. 8 f.

108 Frenz, Walter/Distelrath, Anna-Maria, "Klagegegenstand und Klagebefugnis von Individualnichtigkeitsklagen nach Art. 263 IV AEUV", *NVwZ* 2010, p. 162-166.; Lenaerts, Koen, "Le Traité de Lisbonne et la Protection juridictionnelle des Particuliers en Droit de l'Union", *CDE* 2009, p. 711-745, p. 718 ff.

109 See *supra* note 106.

a) The "Tropic" model in French administrative law

A procedure that allows for the possibility of an action being brought directly against a public contract by third parties has recently been established by the French Conseil d'État.[110] Nevertheless, this procedure is not an action for annulment, where jurisdiction of the court is limited to declaring void or valid the act in question, but a "*plein contentieux*"-action, which means that the judge has unlimited jurisdiction. Thus, he can adopt his sanctions to the gravity of the irregularity committed and take into account all interests at stake: He has not only the power to annul the contract, but can also modify contractual clauses, decide that the contract should be implemented provided the contracting administration amends the irregularity, grant damages to the third party, etc. This remedy thus reconciles the requirements of the legality principle (the irregularity of a contract has to be sanctioned) and those of legal certainty and stability of legal relations.[111]

b) Difficulties in the implementation of this model on the EU level

If one tries to transpose this model onto the European level within the framework of Article 263 (4) TFEU, two problems arise. First of all, it follows clearly from Article 264 (1) TFEU that the action under Article 263 (4) TFEU is an action for annulment, which means that the power of the Court is limited to the possibility of declaring void the contested act.[112] Even if it has the possibility to state which of the effects of the act that it has declared void shall be considered as definitive,[113] it does not have the range of powers that are at the disposal of

---

110 CE, Ass., 16 July 2007, *Sté Tropic Travaux Signalisation*, Rec. p. 360; *RFDA* 2007, p. 696, concl. Casas; *RJEP* 2007, p. 327, note Delvolvé.

111 See further Noguellou (note 24), p. 694 ff.

112 Thus, the organ that has issued the annulled act has to "take the necessary measures to comply with the judgement", see *e.g.* case 1/54, *French Republic v. High Authority* [1954] ECR 1, p. 16; joined cases 42 and 49/59, *S.N.U.P.A.T.* [1961] ECR 53, p. 88; cases T-114/92, *BEMIM* [1995] ECR II-147, para. 33; T-89/07, *VIP Car Solutions SARL v. European Parliament* [2009] ECR II-1403, para. 112.

113 According to Article 264 (2) TFEU, the Court can "state which of the effects of the act which it has declared void shall be considered as definitive". This

the judge in the French proceeding described above. Hence, an action for annulment against a contract as an "act" of an EU organ in the sense of Article 263 (4) TFEU could lead only to the continuation or the annulment of the contract, which does not allow taking into account and reconciling all the interests at stake or resolving the contradiction that often results from the combination of the requirements of the legality principle, the principle of legal certainty and the "intérêt general".

But an action for annulment against an EU public contract would raise another problem. As outlined before, a great number of EU public contracts are governed by (private) Member State law. Hence, the conditions for the validity of these contracts are determined *exclusively* by the applicable national law. European law can set up rules for the award of these contracts, but it cannot determine the consequences of the violation of these rules for the validity of the contract. Yet the different national legal orders provide for completely different consequences in cases of illegality of a public contract that is linked to an illegality committed during the award procedure. Even concerning public procurement contracts, these different legal regimes have been only partially unified by the remedies directive.[114] Hence, it is not possible to give the European judge the ability to annul a contract governed by Member State law, because it is the latter that determines the modalities for the ineffectiveness of the contract. Otherwise, the principle of "exclusivity" of national law, the importance of which has been outlined above (*supra* I.A.*1.b*), would be called into question.

The annulment of a contract by the European judge as a sanction for the violation of the award rules would thus be imaginable only for EU public contracts governed (exclusively) by EU law. But this would imply that the admissibility of an action for annulment, by virtue of Article 263 (4) TFEU, against a contract as an "act" of an EU institution would depend on the law applicable to the contract in question: if the latter was governed by EU law, such an action would be possible, whereas this would not be the case for a contract governed by Member State law. Yet it seems impossible to establish such a differentiation based on the interpretation of the word "act" in the framework of Article 263 (4) TFEU: if it was decided that contracts are "acts" in the

---

clause differs from its predecessor in ex-Article 231 (2) EC, which allowed such a proceeding only for regulations.

114 See Noguellou/Stelkens (note1), p. 17.

sense of this article, this interpretation would certainly be valid for all EU public contracts. Hence, for the moment, baring the further evolution of EU public contract law, it does not seem possible to consider that the new wording of Article 263 (4) TFEU opens up the possibility of an action for annulment against EU public contracts, which means that it is necessary to discuss the possibilities for improving the current review system.

2. The model of the "actes détachables"

As mentioned above third parties for whom the conclusion of an EU public contract is of direct and individual concern can bring an action for annulment under Article 263 (4) TFEU against the unilateral acts taken by the contracting EU institutions before the conclusion of the contract ("actes détachables").[115] Nevertheless, the consequences of the annulment of such acts are uncertain.[116] The question is whether the annulment of a decision that has been constitutive for the conclusion of a contract leads to the obligation, for the contracting EU entity, to provide for the ineffectiveness of the contract in question.

a) The standstill period

First of all, it has to be stated that this problem occurs only in case an act is annulled after the conclusion of the contract. Yet one could ask whether the obligation to respect a standstill period between the notification of the award decision to the unsuccessful bidders and the conclusion of the contract could prevent such a configuration, thus avoiding the question of the effects of the annulment of the award decision on the subsequent contract. Such a standstill obligation, first established for contracting Member State authorities by the *Alcatel* judgement[117] and then codified for contracts of Member State authori-

---

115 See *supra* note 106 and accompanying text.

116 This problem seems to be rarely addressed by legal doctrine, see Prieß (note 8), p. 239 f., 307; Schilling (note 106), p. 240 ff.; Schneider (note 50), p. 255; see nevertheless Ritleng (note 10), p. 165 f.; Marti (note 36), p. 605 f.

117 Case C-81/98, *Alcatel Austria* [1999] ECR I-7671, para. 29 ff.; see also cases C-212/02, *Commission v. Austria*, judgement of 24 June 2004,

ties that fall under the public procurement directives[118], has also been codified for certain EU procurement contracts by Article 105 (2) of the Financial Regulation and Article 158a of its Implementing Regulation, which stipulate a standstill period of fourteen calendar days after the notification or publication of the award decision. Nevertheless, the existence of this standstill obligation cannot exclude a configuration in which an act that has been constitutive of the conclusion of a contract is annulled after the contract has come into force, thus raising the question of the consequences of this annulment for the contract in question.

First of all, the standstill period of fourteen days codified in the Financial and the Implementing Regulations does not apply to all EU public contracts (*i.e.* not to grant agreements) and even not to all procurement contracts (see Article 158a of the Implementing Regulation). Certainly, one could argue that the *Alcatel* principle, according to which the contractual practice of a contracting entity shall not lead to the exclusion of any possibility of review *before* the conclusion of a contract, should be valid for all contracts concluded by the EU institutions, pleading the existence of a standstill period for all EU public contracts. Still, even in this case, in way of analogy to Article 158a of the Implementing Regulation the length of this standstill period would also be fourteen days.

Yet unlike in the case of contracts awarded by Member State contracting authorities, where unsuccessful candidates can challenge the award decision by way of the injunction proceedings established by the directive, there is no special review procedure for the award of contracts by EU institutions, which means that the award decision has to be challenged under Article 263 (4) TFEU – and the period for

---

para. 20 ff. (unpublished); C-444/06, *Commission v. Kingdom of Spain* [2008] ECR I-2045, para. 37 ff.; C-327/08, *Commission v. French Republic*, judgement of 11 June 2009, ECR I-102 (Summary), para. 36 ff.

118 Article 2a of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (*OJ* L 395 of 30 Dec. 1989, p. 33), in its consolidated version after the modification by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (*OJ* L 335 of 20 Dec. 2007, p. 31).

filing suit under Article 263 (4) TFEU is two month.[119] Hence, in spite of the existence of a standstill obligation, it is probable that award decisions of contracting EU entities are challenged under Article 263 (4) TFEU after the conclusion of a contract,[120] which raises the question of the effect of their annulment on the latter. Furthermore, a situation where there is an annulment of an award decision after the conclusion of a contract may also arise in cases where the contracting entity does not respect the standstill period[121] as well as in cases of "Over-the-Counter"-contracts, where a contracting entity awards a contract without any publicity. In addition, other decisions constitutive of the conclusion of a contract than the award decision (the notification of which makes run the standstill period) can be challenged after the conclusion of the contract.

b) The "Bockhorn" configuration

As mentioned above, in an action for annulment the Court of Justice refuses to determine itself the consequences of the annulment of an act.[122] Hence, its judgments declaring void acts that preceded the conclusion of contracts are silent as to the consequences of the illegality of the act in question for the contract.[123] According to Article 266 (1) TFEU, "[t]he institution whose act has been declared void [according to Article 264 (1) TFEU] […] shall be required to take the

---

119 Furthermore, it is difficult to obtain provisional legal protection in this context, see Marti (note 36), p. 606.

120 For a recent example see case T-518/09, Action brought on 23 December 2009 *Ecoceane v. EMSA*, *OJ* C 80 of 27 March 2010, p. 29, not yet decided.

121 It has been outlined *supra* (I.B.2.c) that the provision of Article 158a (1) subparagraph 4 of the Implementing Regulation, which disposes that a contract signed before the expiry of the standstill period shall be null and void, should itself be considered void and would in any case be problematic to enforce for a contract governed by national law.

122 See note 112.

123 In most cases the claims are admissible but the Court declares them unfounded and does not annul the challenged acts. In the rare cases where such acts are (partially) annulled, the Court does not address the question of the consequences of the annulment for the contract. See *e.g.* case T-365/00, *AICS v. European Parliament* [2002] ECR II-2719, para. 73 ff. This corresponds to what has been stated *supra* (note 112).

necessary measures to comply with the judgement of the Court of Justice of the European Union". Does this mean that an institution whose decision to enter into a contract has been declared void is required to terminate the contract in question?

To answer this question, "inspiration" can be sought in the case law concerning the violation of European public procurement law by Member State administrations, as established in infringement procedures. Indeed, the legal consequences of a judgement establishing an infringement under Articles 258 ff. TFEU and those of a judgement declaring void an act of an EU institution under Articles 263 ff. TFEU are the same: the party who has committed a violation of EU law – in the first case the concerned Member State, in the second case the institution whose act has been declared void – "*shall be required to take the necessary measures to comply with the judgement of the Court*" (see Articles 260 (1) and 266 (1) TFEU).

In infringement procedures, it appears that according to the Court a substantial illegality committed by a contracting Member State administration in the pre-contractual phase leads to the illegality of the subsequent contract itself, because "the adverse effect on the freedom to provide services arising from the infringement of Directive [...] *must be found to subsist throughout the entire performance of the contracts concluded in breach thereof*".[124] Thus, an infringement consisting of a violation of EU law through the conclusion of a contract by a Member State administration can be remedied only by providing for the ineffectiveness of the contract in question, which thus appears to be the "necessary measure to comply with the judgement" according to Article 260 (1) TFEU.[125]

---

124 Joined cases C-20 and C-28/01, *Bockhorn and Braunschweig I* [2003] ECR I-3609, para. 36. Drawing the opposite conclusion when interpreting this judgement: Ritleng (note 10), p. 165.

125 Joined cases C-20 and C-28/01, *Bockhorn and Braunschweig I* [2003] ECR I-3609, para. 21, 31, 40 f.; case C-125/03, *Commission v. Germany* [2004] ECR I-4771, para. 15 f.; case C-126/03, *Commission v. Germany* [2004] ECR I-11197, para. 25 f.; case C-414/03, *Commission v. Germany*, judgement of 3 March 2005, para. 10 f. (unpublished); case C-503/04, *Bockhorn and Braunschweig II* [2007] ECR I-6153, para. 28 ff.; case C-199/07, *Commission v. Greece* [2009] ECR I-10669, para. 22 ff.; case C-536/07, *Commission v. Germany* [2009] ECR I-10355, para. 22 ff.; case C-275/08, *Commission v. Germany*, judgement of 15 October 2009, ECR I-168 (Summary), para. 26 ff.; case C-17/09, *Commission v. Germany*,

Consequently, the "necessary measure", under Article 266 (1) TFEU, to comply with a judgement declaring void an act of an EU administration constitutive of the conclusion of a contract must also consist of providing for the ineffectiveness of the contract in question. Otherwise the violation of EU law subsists as long as the contract remains in force, just as in the case of infringement by a Member State.

This obligation to provide for the ineffectiveness of the contract could only be tempered contingent on the importance of the act declared void for the subsequent contract. Thus, one could imagine that the annulment of the decision on the contracting partner should automatically lead to the irregularity and thus the obligation to provide for the ineffectiveness of the contract. Yet a procedural error committed during the tender procedure that was not a determining factor for the choice of the contracting partner may not automatically lead to the obligation to terminate the contract. It is in cases in which an act has really been constitutive of the conclusion of a contract, or is even related to the object of the contract itself,[126] that the consequence of its annulment must be the obligation to provide for the ineffectiveness of the contract.

Obviously, such an obligation would give rise to practical problems. Indeed, unlike the instruments the Court possesses under Article 260 (3) TFEU to enforce its judgements in infringement procedures, it does not have any special instruments to enforce its judgements under Article 264 TFEU. It follows from Article 280 TFEU that the judgements of the Court shall be enforceable under the conditions laid down in Article 299 TFEU, but this only concerns pecuniary obligations. Hence, it is not clear how a claimant, having obtained the annulment of an act that preceded the conclusion of a contract by an EU administration, could really get the contracting EU organ to terminate the contract. One could imagine the possibility of introducing an

---

judgement of 21 January 2010, *OJ* C 179 of 3 July 2010, p. 9 (Summary), para. 22 f.; see on this case law Bitterich, Klaus, "Kein Bestandsschutz für vergaberechtswidrige Verträge gegenüber Aufsichtsmaßnahmen nach Art. 226 EG", *EWS* 2005, p. 162-168; Jennert, Carsten/Räuchle, Robert, "Beendigungspflicht für vergaberechtswidrige Verträge", *NZBau* 2007, p. 555-558; Kalbe, Peter, "EWS-Kommentar", *EWS* 2003, p. 566-568; Storr, Stefan, "Fehlerfolgenlehre im Vergaberecht", *SächsVBl* 2008, p. 60-67.

126 See case T-365/00, *AICS v. European Parliament* [2002] ECR II-2719, para. 41 ff.

action for failure to act under Article 265 (3) TFEU provided the obligation to terminate a contract was considered an act of direct and individual concern to the third party that obtained the annulment of the "acte détachable".[127] In any case, this *procedural* difficulty does not alter the *material* obligation to provide for the ineffectiveness of such a contract by virtue of Article 266 (1) TFEU, all the more so given the fact that the enforcement of the judgements of the Court is a general problem (see also *supra* II.A.*2.b)* and *esp.* note 98).

Independent of the problems of enforcing the judgements of the Court, the obligation for an EU organ to terminate a contract by virtue of such a judgement can give rise to problems if the legal regime governing the contract does not provide for the possibility to terminate a contract for such a reason. Indeed, a judgement of the Court establishing the irregularity of an act having preceded the conclusion of a contract can only lead to the *irregularity* but not to the *invalidity* of the subsequent contract, because the ineffectiveness of the contract has to be determined according to the conditions established by the regime by which it is governed. Yet, as outlined before, a great number of contracts entered into by EU administrations are governed by (private) Member State law. Hence, it is possible that certain national legal orders do not recognise the possibility of the ineffectiveness of a contract as a sanction for an illegality committed during the pre-contractual phase. German law for example, based on the application of the principle "pacta sunt servanda", traditionally does not allow aggrieved bidders to challenge a public contract after its conclusion, and thus limits legal protection to action for damages.[128] Nevertheless, in infringement procedures, the Court has stated that "even if it were to be accepted that the principles of legal certainty and of the protection of legitimate expectations, the principle pacta sunt servanda and the right to property could be used against the contracting authority by the other party to the contract in the event of rescission, Member States

---

127 Sceptical concerning this option is Marti (note 36), p. 606.

128 See on this subject Stelkens, Ulrich, "Primärrechtsschutz trotz Zuschlagserteilung? – oder: Warum nach wirksamer Zuschlagserteilung trotz § 114 II 1 GWB ein Nachprüfungsverfahren möglich sein kann", *NZBau* 2003, p. 654-661; Stelkens (note 22), p. 1141 ff.; Schröder, Hanna, "Le marché public – Contrat de droit privé en Allemagne", *Droit et Ville* 2010, p. 223-232, p. 230 ff.; Schröder, Hanna/Stelkens, Ulrich, "Le contentieux des contrats publics en Europe – Allemagne", *RFDA* 2011, p. 16-24, p. 19 ff.

cannot rely thereon to justify the non-implementation of a judgment establishing a failure to fulfil obligations under [ex-]Article 226 EC and thereby evade their own liability under [EU][…] law".[129] This means that when the obligation to rescind a contract results from a judgement establishing an infringement consisting of the violation of EU public procurement law in the contract award phase, the concerned Member State cannot invoke the fact that its own law does not provide for this possibility. Thus, it must find a way to provide for the ineffectiveness of the contract, at worst by "buying back" the contract from its contracting partner.[130] In the same way, the new Article 2d of the remedies directive requires that the Member States provide for the ineffectiveness of contracts in cases of serious infringements of the EU public procurement directives. Yet the consequences of the ineffectiveness shall be determined by national law, which can either provide for retroactive annulment of all contractual obligations or limit the effects of the annulment to the obligations that are still to be implemented.[131] Thus, the annulment, by virtue of an action under Article 263 (4) TFEU, of the decision of an EU organ to enter into a contract must lead to the obligation, for the contracting entity, to rescind the contract by way of one of the possibilities provided for by the law applicable to the contract. This can be by action for rescission before a competent judge or by unilateral termination or, if the applicable law does not provide for such possibilities, by obtaining termination through "buying back" the contract from its contracting partner.

Conclusion

The field of EU public contracts illustrates a general problem of EU administrative law, which is the "constitutionalisation" of specific aspects of administrative procedure and litigation and of administrative law in general by primary law. The fact that aspects as detailed as, for example, the period for filing suit against administrative decisions of the EU institutions are regulated on the primary law level, without any

---

129 Case C-503/04, *Bockhorn and Braunschweig II* [2007] ECR I-6153, para. 36.

130 Kalbe (note 125), p. 567; Storr (note 125), p. 63.

131 See Article 2d of Council Directive 89/665/EEC in its consolidated version after the modification by Directive 2007/66/EC (cited *supra* note 118).

possibility of derogation by specific secondary law provisions, is problematic. Indeed, this turns out to be an obstacle to the appropriate regulation of judicial legal protection in administrative matters and other aspects of administrative law.[132] This obstacle is especially perceptible in the field of EU public contracts, where some aspects of procedure and litigation are subject to detailed (primary law) regulation, while a general framework for contractual administrative action by EU institutions is lacking.

This reflects the general problem of the conceptualisation of forms of administrative action in direct EU administration, which exists also regarding individual administrative decisions of the EU administration.[133] Indeed, the question of forms of action of the EU organs is traditionally addressed from a "constitutional" rather than an "administrative" perspective, thus concentrating on the forms of rulemaking foreseen in Article 288 TFEU and the "constitutional" relationships between the EU institutions on the one hand and between the EU and the Member States on the other hand.[134] Nevertheless, EU law (primary and secondary law, case law, legal principles, legal practice, "soft law" such as communications, administrative documents, etc.) already comprises a plethora of rules that are bound to influence the regulation of direct EU *administration* and, in our context, contracting by EU entities. Hence, it is up to legal doctrine to survey this body of rules so to be able to find, analyse and develop its underlying logic and structure. As far as EU public contract litigation is concerned, under current primary law the only possible solution seems to be to conduct a rigorous analysis and to ensure a consistent application of the relevant primary law provisions in order to meet the requirement of effective judicial protection in the field of EU administrative action.

---

132 See generally concerning this problem Stelkens, Ulrich, "Die Europäische Entscheidung als Handlungsform des direkten Unionsrechtsvollzugs", *ZEuS* 2005, p. 61-97, p. 95 ff.

133 Stelkens (note 132), p. 95 ff.

134 Bast, Jürgen, "Handlungsformen und Rechtsschutz", *in* von Bogdandy, Armin/ Bast, Jürgen, *Europäisches Verfassungsrecht*, 2009, p. 489-557; Bumke, Christian, "Rechtsetzung in der Europäischen Gemeinschaft – Bausteine einer gemeinschaftsrechtlichen Handlungsformenlehre", *in* Schuppert, Gunnar Folke *et al.*, *Europawissenschaft*, 2005, p. 643-702.

Table of Legislation

Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (*OJ* L 248 of 16 September 2002, p. 1) in its consolidated version of 29 November 2010

Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (*OJ* L 357 of 31 December 2002, p. 1) in its consolidated version of 1 January 2009

Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 amending Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (*OJ* L 111 of 28 April 2007, p. 13)

Regulation (EC) No 1906/2006 of the European Parliament and of the Council of 18 December 2006 laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007-2013) (*OJ* L 391 of 30 December 2006, p. 1)

Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) (*OJ* L 412 of 30 December 2006, p. 1)

Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (*OJ* 45 of 14 June 1962, p. 1385) in its consolidated version of 1 Jan. 2010

Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (*OJ* L 123 of 27 April 2004, p. 18) in its consolidated version of 1 July 2008

Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (*OJ* L 171 of 1 July 2008, p. 3)

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (*OJ* L 395 of 30 December 1989, p. 33) in its consolidated version after the modification by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (*OJ* L 335 of 20 December 2007, p. 31)

Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (*OJ* L 264 of 25 September 2006, p. 13)

Table of Cases

GENERAL COURT

Case T-114/92, *BEMIM* [1995] ECR II-147

Case T-19/95, *Adia Interim SA* [1996] ECR II-321

Case T-169/00, *Esedra SPRL* [2002] ECR II-609

Case T-365/00, *AICS v. European Parliament* [2002] ECR II-2719

Case T-411/06, *Sogelma v. AER* [2008] ECR II-2771

Case T-89/07, *VIP Car Solutions SARL v. European Parliament* [2009] ECR II-1403

Case T-518/09, Action brought on 23 December 2009 *Ecoceane v. EMSA*, *OJ* C 80 of 27 March 2010, p. 29, not yet decided

COURT OF JUSTICE

Case 1/54, *French Republic v. High Authority* [1954] ECR 1

Case 44/59, *Fiddelaar v. Commission* [1960] ECR 535

Joined cases 42 and 49/59, *S.N.U.P.A.T.* [1961] ECR 53

Case 23/76, *Pellegrini* [1976] ECR 1807

Case 56/77, *Agence Européene d'Interims SA* [1978] ECR 2215

Case 105/80, *Desmedt* [1981] ECR 1701

Case 60/81, *IBM* [1981] ECR 2639

Case 109/81, *Porta* [1982] ECR 2469

Case 318/81, *CO.DE.MI. SpA.* [1985] ECR 3693

Case 257/85, *Dufay* [1987] ECR 1561

Case 249/87, *Mulfinger* [1989] ECR 4127

Case C-209/90, *Feilhauer* [1992] ECR I-2613

Case C-142/91, *Cebag* [1993] ECR I-553

Case C-299/93, *Bauer* [1995] ECR I-839

Case C-42/94, *Heidemij Advies* [1995] I-1417

Case C-156/97, *Van Balkom Non-Ferro Scheiding BV* [2000] ECR I-1095

Case C-172/97, *SIVU* [1999] ECR I-3363

Case C-334/97, *Comune di Montiorio al Vomano* [1999] ECR I-3387

Case C-81/98, *Alcatel Austria* [1999] ECR I-7671

Joined cases C-80/99, C-81/99, C-82-99, *Flemmer* [2001] ECR I-7211

Case C-77/99, *Oder-Plan-Architektur GmbH* [2001] ECR I-7355

Case C-167/99, *European Parliament v. SERS and Ville de Strasbourg* [2003] ECR I-3269

Joined cases C-20 and C-28/01, *Bockhorn and Braunschweig I* [2003] ECR I-3609

Case C-212/02, *Commission v. Austria*, judgement of 24 June 2004 (unpublished)

Case C-125/03, *Commission v. Germany* [2004] ECR I-4771

Case C-126/03, *Commission v. Germany* [2004] ECR I-11197

Case C-461/03, *Schul* [2005] ECR I-10513

Case C-414/03, *Commission v. Germany*, judgement of 3 March 2005 (unpublished)

Case C-503/04, *Bockhorn and Braunschweig II* [2007] ECR I-6153

Case C-444/06, *Commission v. Kingdom of Spain* [2008] ECR I-2045

Case C-480/06, *"Hamburg Waste Case"* [2009] ECR I-4747

Case C-275/08, *Commission v. Germany*, judgement of 15 October 2009, ECR I-168 (Summary)

Case C-327/08, *Commission v. French Republic*, judgement of 11 June 2009, ECR I-102 (Summary)

Case C-536/07, *Commission v. Germany* [2009], ECR I-10355

Case C-199/07, *Commission v. Greece* [2009], ECR I-10669

Case C-17/09, *Commission v. Germany*, judgement of 21 January 2010, *OJ* C 179 of 3 July 2010, p. 9 (Summary)

NATIONAL COURTS

Oberverwaltungsgericht Münster, judgement of 30. 8. 2000 – case 9 A 5294/97 – *NVwZ* 2001, p. 691 ff.

Conseil d'État, Assemblée, 16 July 2007, *Sté Tropic Travaux Signalisation*, Rec. p. 360

Bibliography

Auby, Jean-Bernard, "Accountability and Contracting Out by Global Administrative Bodies. The Case of Externalization Contracts made by European Community Institutions", 2007, available at http://chairemadp.sciences-po.fr/pdf/seminaires/2007/Accountability_and_Contracting_JB_Auby.pdf

Audit, Mathias, "Les marchés de travaux, de fournitures et de services passés par les organisations internationales", *JDI* 2008, p. 941-997

Bassi, Nicola, "Accordi nel diritto comunitario", *in* Chiti, Mario P. *et al.* (eds.), *Trattato di diritto amministrativo europeo*, Vol. I, Milan, Giuffrè, 2nd ed., 2007, p. 1-24

Bast, Jürgen, "Handlungsformen und Rechtsschutz", *in* von Bogdandy, Armin/Bast, Jürgen, *Europäisches Verfassungsrecht*, Berlin, Heidelberg, Springer, 2009, p. 489-557

Bauer, Hartmut, "Verwaltungsverträge", *in* Hoffmann-Riem, Wolfgang *et al.* (eds.), *Grundlagen des Verwaltungsrechts II*, Munich, Beck, 2008, § 36 (p. 1155-1274)

Bergé, Jean-Sylvestre, "La Cour de justice, juge du contrat soumis à la loi étatique choisie par les parties", *RDC* 2/2005, p. 463-467

Bitterich, Klaus, "Kein Bestandsschutz für vergaberechtswidrige Verträge gegenüber Aufsichtsmaßnahmen nach Art. 226 EG", *EWS* 2005, p. 162-168

Bleckmann, Albert, "Die öffentlich-rechtlichen Verträge der EWG", *NJW* 1978, p. 464-467

Bleckmann, Albert, "Der Verwaltungsvertrag als Handlungsmittel der Europäischen Gemeinschaften", *DVBl* 1981, p. 889-898

Brenner, Michael, *Der Gestaltungsauftrag der Verwaltung in der Europäischen Union*, Tübingen, Mohr, 1996

Bumke, Christian, "Rechtsetzung in der Europäischen Gemeinschaft – Bausteine einer gemeinschaftsrechtlichen Handlungsformenlehre", *in* Schuppert, Gunnar Folke *et al.*, *Europawissenschaft*, Baden-Baden, Nomos, 2005, p. 643-702

Burgi, Martin, "Warum die 'kommunale Zusammenarbeit' kein vergaberechtspflichtiger Beschaffungsvorgang ist", *NZBau* 2005, p. 208-212

Burst, Jean-Jacques, "L'arbitrage dans ses rapports avec les Communautés européennes", *Rev. arb.* 1979, p. 105-115

Callies, Christian/Ruffert, Matthias (eds.), *EUV/AEUV*, Munich, Beck, 4th ed., 2011

Chiti, Mario P., "Forms of European administrative action", *LContempProbl* 68 (2005), p. 37-57

Craig, Paul, *EU Administrative Law*, Oxford, OUP, 2006

von Danwitz, Thomas, *Europäisches Verwaltungsrecht*, Berlin, Heidelberg, Springer, 2008

Davies, Anne, "Le droit anglais face aux contrats administratifs: en l'absence de principes généraux garantissant l'intérêt public, une maison sans fondation?", *RFDA* 2006, p. 1039-1047

Eberhard, Harald, *Der verwaltungsrechtliche Vertrag*, Wien, Springer, 2005

Eckert, Gabriel, "Réflexions sur l'évolution du droit des contrats publics", *RFDA* 2006, p. 238-244

Ehlers, Dirk, "Die Europäisierung des Verwaltungsprozessrechts", *DVBl* 2004, p. 1441-1451

Ehlers, Dirk/Schoch, Friedrich (eds.), *Rechtsschutz im Öffentlichen Recht*, Berlin, De Gruyter, 2009

Fischer-Appelt, Dorothee, *Agenturen der Europäischen Gemeinschaft*, Berlin, Duncker & Humblot, 1999

Frenz, Walter, *Handbuch Europarecht*, Vol. 5, Berlin, Heidelberg, Springer, 2010

Frenz, Walter/Götzkes, Vera, "Fall Opel: Beihilfe durch einen europäischen öffentlich-rechtlichen Vertrag?", *EWS* 2009, p. 19-25

Frenz, Walter/Distelrath, Anna-Maria, "Klagegegenstand und Klagebefugnis von Individualnichtigkeitsklagen nach Art. 263 IV AEUV", *NVwZ* 2010, p. 162-166

Fromont, Michel, *Droit administratif des États européens*, Paris, PUF, 2006

Grisay, Dominique, “La Cour de justice face au contentieux des contrats conclus entre particuliers et autorités communautaires”, *JTDE* 2004, p. 225-230

Gromitsaris, Athanasios, “Kontraktualisierung im Öffentlichen Recht”, *in* Häberle, Peter (ed.), *JöR*, Vol. 57, Tübingen, Mohr Siebeck, 2009, p. 255-299

Grunwald, Jürgen, “Die nicht-völkerrechtlichen Verträge der Europäischen Gemeinschaften”, *EuR* 1984, p. 227-267

Guckelberger, Annette, “Die EG-Verordnung zur Umsetzung der Aarhus-Konvention auf der Gemeinschaftsebene”, *NuR* 2008, p. 78-87

Hakenberg, Waltraud, “Die Befolgung und Durchsetzung der Urteile der Gemeinschaftsgerichte”, *EuR* 2008, Beiheft (Supplement) 3, p. 163-175

Hennig, Thomas Tobias, *Settlements im Europäischen Kartellverfahren*, Baden-Baden, Nomos, 2010

Heukels, Ton, “The Contractual Liability of the European Community Revisited”, *in* Heukels, Ton/McDonnell, Alison (eds.), *The Action for Damages in Community Law*, The Hague, Boston, Kluwer Law International, 1997, p. 89-108

Hirsbrunner, Simon, “Settlements in Kartellverfahren”, *EuZW* 2011, p. 12-16

Hofmann, Herwig, “Agreements in EU law”, *ELR* 2006, p. 800-820

Hofmann, Herwig, “Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality”, *ELJ* 2009, p. 482-505

Hofmann, Herwig/Rowe, Gerard/Türk, Alexander, *Administrative Law and Policy of the European Union*, Oxford, OUP, 2011, Chapter 19 “Administrative Agreements”

Idot, Laurence, “Arbitrage et droit communautaire/Arbitration and EC Law”, *RDAI/IBLJ* 1996, p. 561-591

Jans, Jan H., “Did Baron von Munchhausen ever Visit Aarhus?”, *in* Marcory, Richard (ed.), *Reflections on 30 Years of EU Environmental Law*, Widdershoven, European Law Publishing, 2006, p. 475-489

Janssen, Helmut/El Khoury, Christian, "Rechtswidrig erhaltene EU-Forschungs-Subventionen – Welche Risiken tragen Unternehmen?", *EuZW* 2010, p. 212-216

Jennert, Carsten/Räuchle, Robert, "Beendigungspflicht für vergaberechtswidrige Verträge", *NZBau* 2007, p. 555-558

Jennert, Carsten, "Staat oder Markt: Interkommunale Zusammenarbeit im Spiegel des EG-Vergaberechts", *NZBau* 2010, p. 150-155

Kalbe, Peter, "EWS-Kommentar", *EWS* 2003, p. 566-568

Koch, Christian, *Arbeitsebenen der Europäischen Union*, Baden-Baden, Nomos, 2003

Kohler, Christian/Knapp Andreas, "Nationales Recht in der Praxis des EuGH", *ZEuP* 2002, p. 701-726

Langrod, Georges, "Administrative Contracts – A comparative study", *Am. J. Comp. L.* 1955, p. 325-364

Lemaire, Sophie, *Les contrats internationaux de l'administration*, Paris, L.G.D.J., 2005

Lenaerts, Koen/Arts, Dirk, *Procedural Law of the European Union*, London, Sweet & Maxwell, 1999

Lenaerts, Koen, "Le Traité de Lisbonne et la Protection juridictionnelle des Particuliers en Droit de l'Union", *CDE* 2009, p. 711-745

Lichère, François, "L'influence du droit communautaire sur le droit des contrats publics", *in* Auby, Jean-Bernard/Dutheil de la Rochère, Jacqueline (eds.), *Droit Administratif Européen*, Brussels, Bruylant, 2007, p. 945-968

Louis, Jean-Victor/Vandersanden, Georges/Waelbroeck, Denis/Waelbroeck, Michel (eds.), *Commentaire Mégret – Tome 10 : La Cour de justice / Les actes des institutions*, Brussels, Éd. de l'Université de Bruxelles, 2nd ed., 1993

Marti, Gaëlle, "L'office du juge communautaire dans le contentieux des contrats", *RFDA* 2011, p. 601-609

Mitchell, John D. B., *The contracts of public authorities*, London, Bell, 1954

Mörth, Ulrika, "The Market Turn in EU Governance – The Emergence of Public-Private Collaboration", *Governance*, Vol. 22, No 1, Jan. 2009, p. 99-120

Niedobitek, Matthias, *Das Recht der grenzüberschreitenden Verträge*, Tübingen, Mohr Siebeck, 2001

Noguellou, Rozen/Stelkens, Ulrich, *Droit comparé des Contrats Publics/Comparative Law on Public Contracts*, Brussels, Bruylant, 2010

O'Leary, Síofra, "Applying Principles of EU Social and Employment Law in EU Staff Cases", *ELR* 2011, p. 769-797

Pallemaerts, Marc, *Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention*, London, Institute for European Environmental Policy, 2009

Papier, Hans-Jürgen, "Rechtsformen der Subventionierung und deren Bedeutung für die Rückabwicklung", *ZHR* 152 (1988), p. 493-508

Perez, Sophie, "Autorité et contrat dans l'administration communautaire", *AEAP* 1997, Vol. XX, p. 181-205

Pernice-Warnke, Silvia, "Der Zugang zu Gericht in Umweltangelegenheiten für Individualkläger und Verbände gemäß Art. 9 Abs. 3 Aarhus-Konvention und seine Umsetzung durch die europäische Gemeinschaft – Beseitigung eines Doppelstandards?", *EuR* 2008, p. 410-423

Petit, Yves, "Accords environnementaux", *Rép. communautaire Dalloz*

Prieß, Hans-Joachim, *Handbuch des europäischen Vergaberechts*, Cologne, Heymanns, 3rd ed., 2005

Pujol-Reversat, Marie-Christine, "La bonne foi, principe général du droit dans la jurisprudence communautaire", *RTD eur.* 2009, p. 201-229

Ritleng, Dominique, "Les contrats de l'administration communautaire", *in* Auby, Jean-Bernard/Dutheil de la Rochère, Jacqueline (eds.), *Droit Administratif Européen*, Brussels, Bruylant, 2007, p.147-170

Röhl, Hans Christian, "Die anfechtbare Entscheidung nach Art. 230 Abs. 4 EGV", *ZaöRV* 60 (2000), p. 331-366

Röhl, Hans Christian, *Verwaltung durch Vertrag*, Non published Habilitation Thesis, 2002

Ruffert, Matthias (ed.), *The Public-Private Law Divide*, London, BIICL, 2009

Ruhland, Bettina, "Öffentlich-öffentliche Partnerschaften aus der Perspektive des Vergaberechts", *VerwArch* 101 (2010), p. 399-407

Salmon, Jean, *Le rôle des organisations internationales en matière de prêts et d'emprunts*, London, Stevens & Sons Ltd., 1958

Schenk, Wolfgang, *Strukturen und Rechtsfragen der gemeinschaftlichen Leistungsverwaltung*, Tübingen, Mohr Siebeck, 2006

Schilling, Theodor, "Rechtsschutz bei der Vergabe öffentlicher Aufträge durch Organe der EG", *EuZW* 1999, p. 239-243

Schneider, Jens-Peter, "Verwaltungsrechtliche Instrumente des Sozialstaates", *in* VVDStRL 64, *Der Sozialstaat in Deutschland und Europa*, Berlin, De Gruyter, 2005, p. 238-273

Schröder, Hanna, "Le marché public – Contrat de droit privé en Allemagne", *Droit et Ville* 2010, p. 223-232

Schröder, Hanna/Stelkens, Ulrich, "Le contentieux des contrats publics en Europe – Allemagne", *RFDA* 2011, p. 16-24

Schwarze, Jürgen, "Subventionen im gemeinsamen Markt und der Rechtsschutz des Konkurrenten, *in* Selmer, Peter. *et al.* (eds.), *Gedächtnisschrift für Wolfgang Martens*, Berlin, De Gruyter, 1987, p. 819-849

Soltész, Ulrich, "Belohnung für geständige Kartellsünder", *BB* 2010, p. 2123-2127

Sonnenschein, Edwin, "Das Siebte Rahmenprogramm für Forschung und technologische Entwicklung aus vertraglicher Sicht und mit Bezügen zum gewerblichen Rechtsschutz", *EWS* 2010, p. 75-80

Spannowsky, Willy, *Grenzen des Verwaltungshandelns durch Verträge und Absprachen*, Berlin, Duncker & Humblot, 1994

Stelkens, Ulrich, "Primärrechtsschutz trotz Zuschlagserteilung? – oder: Warum nach wirksamer Zuschlagserteilung trotz § 114 II 1 GWB ein Nachprüfungsverfahren möglich sein kann", *NZBau* 2003, p. 654-661

Stelkens, Ulrich, *Verwaltungsprivatrecht*, Berlin, Duncker & Humblot, 2005

Stelkens, Ulrich, “Probleme des Europäischen Verwaltungsvertrags nach dem Vertrag zur Gründung einer Europäischen Gemeinschaft und dem Vertrag über eine Verfassung für Europa”, *EuZW* 2005, p. 299-304

Stelkens, Ulrich, “Die Europäische Entscheidung als Handlungsform des direkten Unionsrechtsvollzugs”, *ZEuS* 2005, p. 61-97

Storr, Stefan, “Fehlerfolgenlehre im Vergaberecht”, *SächsVBl* 2008, p. 60-67

Vandersanden, Georges, “Le contentieux de la fonction publique de l’Union européenne: Décision judiciaire ou règlement amiable?”, *CDE* 2010, p. 569-585

Walter, Christian, “Internationalisierung des deutschen und Europäischen Verwaltungsverfahrens- und Verwaltungsprozessrechts – am Beispiel der Århus-Konvention”, *EuR* 2005, p. 302-338

Wegener, Bernhard W., “Der Numerus Clausus der Klagearten – Eine Gefahr für die Effektivität des Rechtsschutzes im Gemeinschaftsrecht?”, *EuGRZ* 2008, p. 354-359

Ziller, Jacques, “Ricerca e innovazione”, *in* Chiti, Mario P. *et al.* (eds.), *Trattato di diritto amministrativo europeo*, Vol. III, Milan, Giuffrè, 2nd ed., 2007, p. 1655-1678

ISSN 1868-971X (Print)
ISSN 1868-9728 (Internet)