



Impacts of the EU law on national legislation

/

Az uniós jog hatása a nemzeti szabályozásra

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PROCEDURAL ISSUES OF PUBLIC CONTRACTS: EUROPEAN EFFECTS AND NEW ELEMENTS OF HUNGARIAN REGULATION

ABSTRACT

Performing public tasks, administrative structures and rules governing procedures of public administrative organs have characteristic features State by State. Nevertheless, the operational particularities of public administrative bodies in the European Union shows more consistent picture. Structure and operation of Public Administration and similarly administrative procedures are not harmonized within the framework of the EU, neither in direct nor in indirect area. Public contracts are special area of administrative procedural rules. Within the framework of recent paper, it will be examined whether the EU's unification aspirations have an impact on domestic legislation of PA administrative procedural rules.

Key words: *public tasks, administrative procedural rules, public contracts*

I. INTRODUCTION

Administrative structures and procedures of public administrative organs in the European Union (EU) present diversity. EU public administrative bodies differ from the national administrative organizations in terms of their operation and procedures. These organs were established in general; independently from each other, aimed the implementation of certain public policies, contrarily the States' administrative structure is initialized by the national traditions and peculiarities. Structure and operation of Public Administration (hereinafter: PA) and similarly administrative procedures are not harmonized within the framework of the EU, neither in direct nor in indirect PA. In line with the prevalent requirement of good

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administration,² efforts are being made for the unification of administrative procedures of EU organs. The European Parliament resolution of 15 January 2013 on a Law of Administrative Procedure of the European Union includes a recommendation on the objective and the scope of the regulation to be adopted.³ Public contracts are a special area of administrative procedural rules.⁴ Contracts concluded between public bodies and/or other contracting parties show a very diverse picture at European Union level.⁵ This landscape becomes even more complex when the national levels are taken into account. Member States of the EU apply very different national concepts to public contracts, regardless of whether these contracts are governed by national public or national private law, or by a mixture comprising public and private law elements.

Regarding Europeanization effects, public law elements of public service contracts and the special administrative procedural provisions – leading to the conclusion of these types of contracts – should be considered. Within the framework of recent paper it will be examined whether the EU's unification aspirations have an impact on domestic legislation of PA administrative procedural rules. Given the fact that the vast majority of public contracts are linked to public services, first of all, European public procurement rules are worth to refer. Nevertheless, the evolving European legislation of Model Rules on EU Administrative Procedure (hereinafter: Model Rules)⁶ deserve special attention, as well. Model Rules on contracts are to be understood as a contribution to the debate on EU contracts, the administrative procedures which are leading to their conclusion and their execution. The Model Rules although determine the general scope⁷ of application – to all contracts and legally binding agreements concluded between an EU Authority and a private entity, between an EU Authority and a Member State authority, if the Member State authority acts as a service provider

² Referring to the extent to the Charter of European Union of Fundamental Rights 2012/C 326/02 Art. 41. Right to good administration.

³ European Parliament resolution. Annex, Recommendation 1. The recommendation states that '[t]he objective of the regulation should be to guarantee the right to good administration by means of an open, efficient and independent administration based on a European Law of Administrative Procedure.[...] It should codify the fundamental principles of good administration and should regulate the procedure to be followed by the Union's administration when handling individual cases to which a natural or legal person is a party, and other situations where an individual has direct or personal contact with the Union's administration'.

⁴ Kovács – Várhomoki-Molnár – Szilvásy – Koi – Iván (2017) 134. p.

⁵ Craig – Hoffman – Schneider – Ziller (2017) 140. p.

⁶ Model Rules on EU Administrative Procedure 2014.

⁷ Model Rules Book IV-1. Scope of application. 155.

on the market and concludes the contract with an EU Authority as a private person would –, but there is no consensus on the substance of public law contract.⁸

The study focuses only the first phase of the 'life' of public contracts, on administrative procedural rules leading to the conclusion of a public contract.⁹ The paper cannot take sides in this debate, only would like to point out, that in Hungarian law the concept of public law contract is unclear and whether progress has been made to clarify it by adoption new administrative procedure and administrative litigation Codes.¹⁰

II. CONTRACT AWARD – PROCEDURAL ISSUES AT EU LEVEL

Most of the public contracts' object could be defined as a purchase of goods, services or construction works carried out by administrative body, therefore general public procurement rules and because of public law elements of contracts, special administrative procedural provisions should be considered. How to fit both procedures in one picture? The public procurement procedures and the Model Rules should be considered all the more together, because the awarding process of public contracts due to the Model Rules contains provisions similar to public procurement rules.

During the preparation of a public contract, public procurement procedure shall often be applied. On one hand European public procurement rules, and on the other hand, evolving European legislation of Model Rules is worth to refer. These Model Rules on contracts are to be understood as a contribution to the debate on EU contracts, the administrative procedure which is leading to their conclusion and their execution.

First, public procurement rules and subsequently Model Rules on public contract are referred.

Public procurement, in generally, refers to the process by which public authorities, such as government departments or local authorities purchase work, goods or

⁸ Craig – Hoffman – Schneider – Ziller (2017) 140. p.

⁹ Model Rules Book IV 148. p. The 'life' of public contracts can be divided into three phases: (1) administrative procedure lading to conclusion of an administrative contract, (2) conclusion of the contract, (3) execution and expiration of the contract.

¹⁰ Act CL of 2016 on General Administration Procedures and Act I of 2017 on Judicial Review of Administrative Acts.

services from companies. The *EU Public Procurement Directive*¹¹ (hereinafter: PPD) establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests; the PPD determines inter alia the definition of public contracts,¹² and especially the public service contract.¹³ Beyond this PPD, the specific related Directives shall be applied, as well.¹⁴

The transposition deadline for three directives on public procurement and concessions adopted two years ago was 18 April, 2016. In other words, it was the date by which EU countries must have put in place national legislation conforming to the directives. The new rules makes public procurement easier and cheaper to bid public contracts, they will ensure the best value for money for public purchases and will respect the EU's principles of transparency and competition. To encourage progress towards particular public policy objectives, the new rules also allow for environmental and social considerations, as well as innovation aspects to be taken into account when awarding public contracts. But the success of the new legislation also depends on its effective enforcement in EU countries and the readiness of the 250.000 public buyers in the EU to make procurement processes more efficient and business-friendly for the benefit of citizens.

From the view of subject matter, the new Model Rules¹⁵ is remarkable. The contracts and agreements concluded at the framework of public administrations show a very diverse picture at European Union level. This landscape becomes even more complex when the national levels are taken into account. Member States of the EU apply very different national concepts to public contracts, regardless of whether these contracts are governed by national public or national private law, or by a mixture comprising public and private law elements, as it is stated in report, drawn up by the *Model Rules Preparatory Committee*.¹⁶

Discussing the effect of Model Rules, it is also necessary to point out, that there may be uncertainty to the legal basis of this regulation, ruling of Book IV could be considered as 'hypersensitive' because of the relationship between public and private law elements, substantive and procedure law and finally European Union

¹¹ PPD.

¹² PPD Art. 2. par. (5).

¹³ PPD Art. 2. par. (9).

¹⁴ Council Directive 92/13/EEC.

¹⁵ See: Kovács – Várhomoki-Molnár – Szilvássy – Kősi – Iván (2017) 134-179. p.

¹⁶ Model Rules Book IV 147. p.

law and the legal system of Member States.¹⁷ How the scope of Book IV can be determined in that case where there is no consensus on the substance of ‘*public contract law*’ itself, at all.¹⁸ For the purpose of correct interpretation of Model Rules it should be highlighted, that only contracts regarding administrative activity concluded between EU authorities and private entities or with Member State administrations fall within the scope of Book IV. Therefore public contracts concluded by Member State authorities with other parties than EU authorities are not covered by Book IV. The incorporation of this Book to the general provisions of Model Rules may raise justifiable doubts, thus the *contract* under this provisions such an agreement, which is concluded between two or more parties, intended to create a binding legal relationship or have some other legal effect.¹⁹ This type of contract is considered as a decision, and consequently the provision of Book III, on Single Case Decision, shall be applied. Model Rules, beyond the preparation of general terms of contracts, provide on tendering procedures as well. Order of public procurement procedures are considered in Model Rules. Principles and requirements applicable to public procurement by contracting authorities in the Member States are also summarized for that public procurement which is not subject to the PPD. In addition, Model Rules also cover the formal requirements for representation of EU authorities and EU treaties, but lay down provisions in general terms as to the termination of the contract, its invalidity and certain compensation clauses.

These contracts might have a special significance in domestic case law also governed by the law of Member State. This Chapter of Model Rules principally recalls the French system of public contracts hence the power of contracting derived from the first level legal act or from the second level legal act, the Court of Justice of the European Union’s (CJEU) jurisprudence. In the latter case the effect of French model is outstandingly traceable.²⁰ At the same time, however it should be pointed out, that the jurisprudence of CJEU, the normativity of precedents may make the classification of contracts uncertain.²¹

European Union bodies can only exercise tasks and competences where they are duly endowed with powers, delegated from Member States. All their activities

¹⁷ Nagy (2017) 389. p.

¹⁸ Model Rules Book IV. 147. p.

¹⁹ Model Rules Book IV-2. a).

²⁰ Hofmann – Schneider (sine anno) 24. p.

²¹ See in details: Jacob (2014) Chapter 8 - The normativity of ECJ precedents 218-275. p.

based on provisions of the founding Treaties or acts of European secondary law. The implementation process of European public policies by general application of Model Rules through administrative action may result certain indirect effects on national public contracts law.

III. ADMINISTRATIVE PROCEDURAL ISSUES IN THE HUNGARIAN LAW

Hungarian Law concepts of public contracts, public administrative contracts, public law contracts and government contracts are not legal, but scientific, dogmatic definitions.²² There is no legal background for this type of contracts; nevertheless there are many contracts that can be included in these categories.

Discussing issues related to legal procedural issues of public contracts, the administrative procedural rules and administrative rules should be considered. The administrative sectoral rules are not included in the analysis because the range and details of general rules also demands limited scope.

III.1. Public Administration Procedures

Code on General Public Administration Procedures (hereinafter: Code on PAP) shall not be applied on the awarding procedure of public contracts only in the case of administrative agreement.²³ This type of contracts, the administrative agreements are considered as administrative actions, therefore these agreements represent only a smaller proportion of public contracts. The administrative action (case) is falling within the scope of the Code on PAP; it means where the authority brings a decision to define a client's right or obligation, to settle a client's dispute, to establish a client's infringement, to verify a fact, status or data, or to keep records and where it moves to enforce such decisions.²⁴ From the analysis of the definition it can be concluded that the procedural issues of public contracts in the majority of the cases are falling outside the scope of the Code on PAP.

III.2. Administrative litigation

²² Részletes jelentés 2. 14. p.

²³ Act CL of 2016 Section 92-93.

²⁴ Act CL of 2016 Section 7. par. 2.

The only normative regulation on public contracts in a generic term is contained in the *Code Judicial Review of Administrative Acts* (hereinafter: Code on Judicial Review).²⁵ According to the provision of the Code on Judicial Review, the subject-matter of an administrative legal dispute is the lawfulness of the administrative action. The administrative contractual relations, the public contracts are considered objects of administrative legal dispute.²⁶ Provision on public administrative contract includes that contract considered to be the object of administrative litigation only in a case, when it is qualified as this way by a law or government decree. However, it also should be added that the only type of public contract considered this way by Code on PAP now the so-called administrative agreement.²⁷ Administrative agreements are agreements concluded by the authority. In accordance with provision concerning administrative agreement, the authority should be allowed or ordered by law to enter into an administrative agreement with the client, instead of passing a resolution, with a view to settlement in cases within its competence that is best suitable for the public and for the client alike. The other case of public administrative contracts is that type when all the contracting parties are public bodies and the object of the contract is a public task.

It must be pointed out that, under this definition, contracts concluded public administrative bodies under the *Public Procurement Act* are of the highest number of contracts, are falling outside the scope of the Code. Classification of public procurement contracts is controversial. Known is a position that this type of contracts belongs to the private law contract but a public law contract. The public procurement contract is a special private law contract type, this speciality resulted from the selection procedure, and these selection rules belong to the public law provisions.²⁸

In the view of certain authors, the absence of administrative jurisdiction impeded the becoming autonomous legal institution and dogmatic development of public contracts.²⁹

²⁵ Act I of 2017 Section 4. par. 7.2.

²⁶ Act I of 2017 Section 4. par. 1–3.

²⁷ Act CL of 2019 Section 92–93.

²⁸ Juhász (2012) 1–2. p.

²⁹ Fazekas (2017) 455. p.

IV. CLOSING REMARKS

Legal regulation has not covered generally public contracts, entirely, despite the fact that the lack of uniform-based statutory regulation is the debt of national legislation, having regard to the enhancement of the service provider function of PA and also to European public tasks performance models, especially to Model Rules, as an aspiration to consistency of administrative procedure rules. With regard to the public law determination of public administrative contracts, the contract concluding procedures are closely related to general rules of public administrative procedures.³⁰

Procedural issues of concluding public contracts are not subject of general legal rules, but only sectoral rules include provisions on preparation process and public procurement procedure. The comprehensive regulation of these specific contracts is a major deficiency of Hungarian legislation. In the immediately preceding period the entry into force of new Code on *Judicial Review of Administrative Acts* the attitude to consider the contract as public law contract due to its content became dominant, especially in judicial practice. This practice was abolished by the Curia in 2012, when a decision in principle was adopted,³¹ stating that a contract may be considered public contract only by law. The new judicial code has further strengthened this aspect, by excluding the opportunity for interpretation, nevertheless the contracts concluded by public bodies are considered as public administrative contracts, if the object of the contract is performing public tasks.

The public administrative contracts are considered as administrative acts, the Code on Judicial Review defines specific causes of invalidity, and, however, general rules are missing from the legal regulation. Above all it includes the regulation of procedures for the conclusion of a contract, the legal rules of content of public administrative contracts, determination of additional rights for public bodies, and guarantee elements for other contracting parties included in performance of public tasks. The ineffectiveness of a contract needs legal regulation as well. The regulation in litigation procedure is definitely not a sufficient basis.

³⁰ Részletes jelentés 1. 27-28. p.

³¹ 1/2012. (XII.10.) KMK-PK vélemény

- in the water, energy, transport and telecommunications sectors OJ L 76 23.3.92.
3. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC OJ L 94, 28.3.2014.
 4. ReNEUAL Model Rules on EU Administrative Procedure Book IV – Contracts. 2014. Version for online publication. Available: http://www.reneual.eu/images/Home/BookIV-Contracts_online_version_individualized_final_2014-09-03.pdf (31.08.2017.)
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 8. Act CL of 2016 on General Administration Procedures
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