

## TOWARDS (FURTHER) EU HARMONIZATION OF PUBLIC CONTRACT LAW

Chris Jansen, Songül Mutluer, Anja van den Borne, Sophie Prent and  
Ulysse Ellian\*

**ABSTRACT.** The award of public contracts in the Member States of the EU is subject to public procurement regulation. This regulation only affects the award of public contracts. Once contracts have been awarded, conflict issues between the parties must be decided by the national courts of the Member States. In doing so, the courts must apply national contract law principles and rules. Based on a legal analysis of case studies involving conflict issues such as mistake; interpretation of contract; implication of terms; unfair terms; and unforeseen circumstances, this paper argues that national courts may encounter difficulties in applying contract law principles and rules in accordance with EU public procurement regulation. This may cause legal uncertainty among economic operators thus creating barriers that hinder cross-border trade. The authors therefore recommend that the European Commission broadens its current policy and regulatory efforts, aiming at the harmonization of European contract law, to public contracts.

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\* *Chris E.C. Jansen, Dr. jur., is Professor of Private Law at the Department of Private Law, VU University of Amsterdam, Professor of Construction Law, Tilburg University, substitute judge at the Court of Appeal of Den Bosch and chairman of the Netherlands Society of Construction Law. His interests are in Law of Obligations, Contract Law, European Private Law, Public Procurement Law and Construction Law. Songül Mutluer, LL.M., is lecturer and researcher at the Department of Private Law, VU University of Amsterdam. Her interests are in Contract Law and Public Procurement Law. She is currently preparing a Ph.D. thesis on unfair terms in contracts that are concluded following EU regulated tendering procedures. Anja T.M. van den Borne, LL.M., is researcher at the Department of Private Law, VU University of Amsterdam and attorney-at-law at Deterink Attorneys and Notaries in Eindhoven. Her interests are in Contract Law, Public Procurement Law and Construction Law. She is currently preparing a Ph.D. thesis on pre-contractual duties to inform in the framework of EU regulated tendering procedures. Sophie Prent, LL.M., is lecturer and researcher at the Department of Private Law, VU University of Amsterdam. Her interests are in Law of Obligations, Public Procurement Law and Civil Procedure Law. She is currently preparing a Ph.D. thesis on duties under EU regulated tendering procedures from a law of obligations perspective. Ulysse Ellian, LL.M., is lecturer and researcher at the Department of Private Law, VU University of Amsterdam. His interests are in Law of Obligations, Contract Law and Public Procurement Law. He is currently preparing a Ph.D. thesis on the duty of tenderers to complain on procedural risks occurring in EU regulated tendering procedures.*

## 1. INTRODUCTION

### **1.1 Context: Towards a Common European Contract Law**

One of the main objectives of the European Union (EU) is to establish an internal market without internal frontiers in which the free movement of goods, persons, services and capital is ensured.<sup>i</sup> Although many has been achieved in the last decades in this respect, barriers between the EU Member States still remain:

‘Many of these barriers result from differences between national legal systems. Among the main barriers that hinder cross-border trade are differences between the contract law systems of the EU’s 27 Member States (...) In Europe’s single market, there is no single set of uniform and comprehensive contract law rules which could be used (...) in cross-border trade.’<sup>ii</sup>

This observation is not new. It has been made in the past by leading academics<sup>iii</sup> and by the European Parliament<sup>iv</sup> calling for the creation of a European contract law. The European Commission eventually responded to this call and has been working on European contract law for more than a decade now.<sup>v</sup>

The latest and – from a regulatory perspective – most concrete result of this ongoing process is the Proposal for a Regulation on a Common European Sales Law.<sup>vi</sup> According to the European Commission, the Proposal aims for

‘a comprehensive set of uniform contract law rules covering the whole life-cycle of a contract, which would form part of the national law of each Member State as a “second regime” of contract law. This “second regime” is carefully targeted to those contracts that are most relevant to cross-border trade, and where the need for a solution to the barriers that have been identified is most apparent.’<sup>vii</sup>

Once adopted, the Regulation will:<sup>viii</sup>

- (i) be common to all Member States;
- (ii) be optional: choice of the Common European Sales Law will be voluntary;

- (iii) have a focus on 'sales' contracts, but can also be used for contracts involving the supply of services directly related to goods sold under the contract;
- (iv) be limited to cross-border contracts and is not available as a general substitute to existing national contract law;
- (v) focus on B2C contracts and B2B contracts where at least one party is an SME; (vi) it will establish for all the areas of contract law the same common level of consumer protection;
- (vi) include rules that cover issues of contract law that are of practical relevance during the life-cycle of a cross-border contract;<sup>x</sup>
- (vii) have an international dimension in the sense that, in order to be applicable, it is sufficient that only one party is established in a Member State of the EU.

Analysis of the European Commission's policy and regulatory process in the area of European contract law shows that its efforts are focussed on business-to-consumer (B2C) and business-to-business (B2B) contracts.<sup>x</sup> One can only guess for the reasons why government-to-business (G2B) contracts have not been envisaged in that process.<sup>xi</sup> Perhaps (further) EU regulatory action in the area of G2B contracts is considered unnecessary, given that the award of such contracts has been regulated since long by Directives providing for the application of compulsory tendering procedures.<sup>xii</sup> Following this line of reasoning it is perhaps thought that these Directives already contribute to the EU's main objective to establish an internal market, given that they are based on fundamental rules and principles of the Treaty on the functioning of the European Union (TFEU) which in their turn are derived from that objective.<sup>xiii</sup> But one could also problematize this line of reasoning by arguing that EU regulation in the area of public procurement affects the *award* of public contracts only. Issues regarding the *content* of such contracts – once awarded – are to be decided by the national courts of the contracting authority's Member State. In doing so, these courts must apply contract law principles and rules of that Member State. Hence the question raises how it can be justified that G2B contracts – particularly those in the context of public procurement – are left out

from the European Commission's policy and regulatory process in the area of European contract law.

### **1.2 Research Question, Method, and Structure of this Paper**

The main purpose of this paper is to determine whether the European Commission's implicit decision – namely: to leave out G2B contracts from its current policy and regulatory efforts in the area of European contract law – can be problematized from the perspective of the EU's objective to establish an internal market for G2B contracts. Assuming that this is indeed possible, the further purpose of this paper is to determine whether there are any convincing arguments as regards content against including G2B contracts in the aforesaid efforts. These questions will be answered in this paper in the following manner.

Based on a brief analysis of EU public procurement regulation, we will first answer the question to what extent G2B contract issues cannot be solved by applying EU public procurement regulation (*para. 2*). Subsequently, we will problematize this lacuna from the perspective of the EU's main objective to establish an internal market for G2B contracts. We will do this by formulating a proposition as regards two interrelated problems that might operate as a barrier hindering cross-border trade in the context of G2B contracts (*para. 3*). This proposition will then be tested by undertaking a legal analysis of case studies involving G2B contract issues in the aforesaid context. In doing so, we will demonstrate that either one or both of the aforesaid problems are able to occur in each of these case studies (*para. 4*). Next we will refute the arguments that might be proposed *against* further EU policy and regulatory action in this area (*para. 5*). Finally, we will summarize our findings and conclude with a recommendation directed to the European Commission (*para. 6*).

## **2. G2B CONTRACT ISSUES AND EU PUBLIC PROCUREMENT REGULATION**

## 2.1 Preliminary Observations

In this paragraph we will answer the question to what extent G2B contract issues cannot be solved by means of EU public procurement regulation (*para. 2.3*). In order to answer this question, we will first explain which particular aspects of G2B contracts are dealt with by the said regulation. We will do this on the basis of a brief analysis of both the objective underlying the regulation, as well as its content mirroring the means to achieve that objective (*para. 2.2*). Knowledge of the objective and means is also needed in order to be able to test (*para. 4*) the proposition we are about to formulate (*para. 3*). As said, that proposition involves the presumed lacuna in EU public procurement regulation as regards its ability to serve as an instrument by which G2B contract issues can be solved.

## 2.2 EU Public Procurement Regulation: Objective and Means

An important objective of the EU is to establish an internal market without internal frontiers in which the principles of free movement of goods, persons, services and capital are ensured.<sup>xiv</sup> This objective also covers the award of public contracts within the EU.<sup>xv</sup> In order to achieve this objective, public contracts are to be awarded in the Member States by due observance of principles which can be derived from the aforesaid principles: regardless their nationality, all economic operators in the EU must get the same equal opportunities to acquire public contracts.<sup>xvi</sup> For public contracts above a certain value, these principles have been regulated in detailed provisions in Directives<sup>xvii</sup>

'so as to ensure the effects of [these principles] and to guarantee the opening-up of public procurement competition'.<sup>xviii</sup>

The EU's objective to establish an internal market of public contracts is being pursued through the regulation of the *award* of such contracts. This particularly goes for the Directives on public procurement. The provisions of these Directives contain detailed rules, basically regulating the answers to the following questions that may arise whenever the award of a public contract is being considered by an entity in a Member State:

- (i) does the entity qualify as 'contracting authority'?;<sup>xix</sup>
- (ii) does the contract qualify as a 'public contract'?;<sup>xx</sup>
- (iii) does the public contract have a value estimated to be equal to or greater than the relevant threshold provided for in the Directives?;<sup>xxi</sup>
- (iv) in the event that the aforesaid questions are answered in the affirmative: can the contracting authority refrain from awarding the contract by means of a tendering procedure on the basis of the occurrence of either a specific situation or an exception provided for in the Directives?;<sup>xxii</sup>
- (v) in the event that the contracting authority is obliged to apply a tendering procedure in awarding the contract, which particular procedure may be applied?;<sup>xxiii</sup>
- (vi) which decisions is the contracting authority (not) allowed to take in the design and execution of the procedure, particularly as regards the contract specifications,<sup>xxiv</sup> the criteria for qualitative selection,<sup>xxv</sup> the contract award criteria,<sup>xxvi</sup> the advertising of the procedure,<sup>xxvii</sup> and the setting of time limits in the course of the procedure<sup>xxviii</sup>?

It is clear from the content of the provisions of the Directives – particularly the ones that instruct contracting authorities as to how to design and execute compulsory tendering procedures – that they reflect the necessary means to achieve the central objective of EU public procurement regulation: all procedural decisions are to be taken in accordance with the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality, and the principle of transparency. That's what the provisions are all about.

### **2.3 G2B Contract Issues not solved by EU Public Procurement Regulation**

### 2.3.1 Preliminary Observations: No Information Duties Aiming at the Prevention of Contract Risks

It is clear from the brief analysis above that the provisions of the Directives only ensure that the *award* of a public contract takes place, in the context of a tendering procedure, in accordance with principles safeguarding the non-discriminatory, objective and transparent character of that procedure, so as to ensure that all economic operators get the same equal opportunities to acquire the contract. At the same time it is also clear that the regulated tendering procedure results in the conclusion of a contract. Therefore, from a contract law perspective, it can be said that the tendering procedure coincides with the pre-contractual (or: contract formation) stage. In the event that conflict issues arise between the parties to the contract, the facts and circumstances that have occurred at this latter stage are considered to be of crucial importance when solving these issues through the application of principles and rules of contract law.

This is particularly the case either when parties debate whether they are bound by a contract at all or when there are issues between them as regards the duties arising from such contract. If a court is required to solve these issues, it will often have to deal (impliedly) with the question whether pre-contractual duties to investigate and/or to inform are incumbent on either one or both parties to the (alleged) contract by law. The purpose of these pre-contractual duties, as well as their regulation by means of contract law principles and rules, is to prevent and control the occurrence and consequences of information risks. The bottom line is that occurrence of these information risks leads to *contract risks*: either the mere existence of the contract is put at stake, or the outcome of the contract might turn out to be less profitable than expected in advance. These contract risks will be introduced briefly in *par. 2.3.2* and *par. 2.3.3* and they will be analysed further in *para. 4.2* and *para. 4.3*. Not surprisingly, the purpose and relevance of pre-contractual information duties is undisputed in European contract law. We will elaborate further on this in *para. 4.4*.

Information duties are also to be found in the EU Directives regulating public procurement.<sup>xxix</sup> And from a contract law perspective, these duties too have a pre-contractual character.

However, their purpose is different from the one served by the aforesaid information duties developed in contract law. The aim of information duties provided for in the Directives is not to prevent and control the occurrence of risks related to the public contract which is the object of the tendering procedure. Instead, their objective is to regulate procedural actions of the contracting authority, in order to prevent the latter from supplying information to one or more candidates or tenderers in a manner that could disturb the level playing field among them, and which could subsequently amount to procedural infringements with the principles underlying the Directives.

A contracting authority, for instance, must make known its intention to start a tendering procedure by means of the publication of a contract notice.<sup>xxx</sup> However, such notices and their contents may not be published at national level before the date on which they are sent to the European Commission for the purpose of their publication EU wide. By the same token, notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission.<sup>xxxi</sup> Furthermore, to the extent that communication between the contracting authority and candidates or tenderers is allowed, the means of communication chosen must be generally available and thus not restrict access to the tendering procedure.<sup>xxxi</sup> Another example deals with the situation where a candidate or tenderer requests for additional information relating to the specifications or any supporting documents.<sup>xxxiii</sup> Usually the purpose of such request is to receive clarification from the contracting authority on the content and purport of the specifications. The contracting authority must not only send the required information<sup>xxxiv</sup> to the said candidate or tenderer, but will also have to share it with all other candidates and tenderers in the event that *not* sharing the information would lead to a situation where the other candidates or tenderers would not get an equal and fair opportunity to obtain the contract.<sup>xxxv</sup> By the same token, if the contracting authority obtains confidential information from one of the candidates or tenderers as a result of the aforesaid request for additional information – for instance as regards the technical solution the latter considers to offer – such information may not be shared by the contracting authority with other candidates or tenderers.<sup>xxxvi</sup> Finally,

the most prominent example of the point we are trying to make here, is to be found in a joint statement of the European Commission and the Council concerning a provision in one of the predecessors of Directive 2004/18/EC. According to this statement, all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out in open and restricted procedures. However, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders **or** the requirements of the contracting authorities and provided this does not involve discrimination.<sup>xxxvii</sup>

The only information duties that come close to the purpose of ordinary pre-contractual duties developed in contract law can be found in Art. 55 Directive 2004/18/EC, dealing with the case of abnormally low tenders. This provision allows the contracting authority to reject such tenders, but only after having requested in writing details of the constituent elements of these tenders and after having verified those constituent elements by consulting the tenderer, taking account of the evidence supplied.<sup>xxxviii</sup> Clearly, information duties like these can prevent and control *contract* risks.<sup>xxxix</sup> But besides Art. 55, there are no other provisions to be found in EU public procurement regulation imposing information duties on the contracting authority, candidates and tenderers for the purpose of preventing and controlling contract risks. The regulation only provides for information duties of the contracting authority for the purpose of the prevention and control of *procedural* risks.

### 2.3.2 *Contract Risks: Issues regarding the Conclusion of the Contract*

In any contract – including G2B contracts – parties run the risk of finding themselves in a debate on the question whether they are bound by a contract at all. So what are the main issues one might expect to be debated between them? Issues which cannot be solved through the application of EU public procurement regulation?

Firstly, if the contracting authority and a tenderer have entered into contract negotiations at a certain stage of the tendering

procedure, and if the contracting authority subsequently decides to break off these negotiations, a debate might arise whether or not a binding contract has been agreed between the parties and – if not – whether and to what extent duties are nevertheless owed between them.<sup>xi</sup> Secondly, it might be disputed between the parties whether or not the offer submitted by one of the tenderers was accepted by the contracting authority.<sup>xii</sup> Thirdly, even if the acceptance of the offer is undisputed, the tenderer of that offer might contest that he is bound to his (far too low) offer, hence arguing the case of inaccuracy in communication.<sup>xiii</sup> Finally, either the contracting authority or the tenderer may claim that he has entered into the contract as a result of a mistake caused by the other party prior to the conclusion of the contract.<sup>xiii</sup> We will analyse these issues further in *para. 4.2* below, taking into account that they are not being dealt with by EU public procurement regulation.

### 2.3.3 *Contract Risks: Issues regarding the Content of the Contract*

Even when it is clear between the parties that they are bound by a contract, they still might run the risk of finding themselves in a debate on questions regarding the duties arising from their contract. What are the main issues usually debated at this stage, issues that cannot be solved by EU public procurement regulation?

Firstly, uncertainty as to the content of the parties' mutual duties may occur in the event that contract provisions stipulating these duties are unclear and ambiguous. Eventually, a debate on this issue has to be solved by a court of law through interpretation of the provision.<sup>xiv</sup> Secondly, even if the contract is stated in a clear and unambiguous manner, a debate may arise as to whether a duty is incumbent upon a party, notwithstanding the fact that such duty is not explicitly provided for in the contract. This would then require the court to determine whether the duty can be implied in the contract.<sup>xiv</sup> Thirdly, again, in the event that the terms of the contract are clear, a party might argue the case that one of these terms is unfair and is therefore not binding on him.<sup>xvi</sup> Fourthly, if performance of a duty under the contract becomes onerous because of an exceptional change of circumstances, a debate might arise between the parties

whether it is manifestly unjust to hold the party owing such duty to it. If the court determines that this would indeed be the case, it would require the court either to vary or to terminate the contract.<sup>xlvii</sup> Finally, if a term in the contract allows the duties under the contract to be modified by the parties themselves, they might get involved in a debate on the application of such variation clauses.<sup>xlviii</sup> These issues too will be analysed further below, in *para. 4.3*, taking into account that they are not being dealt with by EU public procurement regulation.

### 3. PROPOSITION: INTERNAL MARKET OBJECTIVE UNDER THREAT IN G2B CONTEXT

#### 3.1 *Preliminary Observations*

In the previous paragraph we have shown that important G2B contract issues cannot be solved by means of application of EU public procurement regulation. These issues are therefore necessarily to be decided by the national courts of the contracting authority's Member State. In doing so, the courts must apply contract law principles and rules of that Member State. In our opinion, it is possible to identify two interrelated problems inherent in this approach that could prevent the EU's main objective to establish an internal market for G2B contracts from being achieved.

The first problem, which we will call the *general* problem, can be derived from the proposition that differences between the contract law systems of the EU's Member States cause legal uncertainty among economic operators, thus creating barriers that hinder cross-border trade. We will argue that this proposition, which is largely being endorsed for B2C and B2B contracts, is also valid in the context of G2B contracts (*para. 3.2*).

In addition to this general problem, it is possible to identify a related *specific* problem which can be derived from the particular context of G2B contracts that are concluded following a regulated tendering procedure. If national courts are to solve conflict issues under such contracts, it is not sufficient for them to decide cases

merely by applying national contract law principles and rules. They will have to do so by taking into account the objective and means of EU public procurement regulation. We will argue that this particularity can be translated in terms of legal uncertainty too, which gives an extra dimension to the aforesaid proposition that differences between contract law systems of the Member States of the EU create barriers that hinder cross-border trade (*para* 3.3).

### **3.2 General Problem: Differing Contract Law Systems Cause Legal Uncertainty among Economic Operators**

It was explained in *para* 1.1 that the European Commission has been working on European contract law for more than a decade now. We have also explained briefly why the Commission is doing this: differences between national systems of contract law hinder cross-border trade. This raises the question: *how* do such differences hinder cross-border trade? According to the Commission:

'For traders, these differences generate additional complexity and costs, notably when they want to export their products and services to several other EU Member States. For consumers, these differences make it more difficult to shop in countries other than their own, a situation which is particularly felt in the context of online purchases.'<sup>xlix</sup>

For the purpose of our paper, the Commission's explanation is particularly of interest to the extent that it concerns the consequences of the aforesaid differences on cross-border trade from the perspective of businesses:

'The existence of contract law related barriers may have a negative impact on businesses who are considering trading cross border and may dissuade them from entering new markets. *Once a trader decides to sell products to consumers or businesses in other Member States, he becomes exposed to a complex legal environment characterised by the variety of contract laws that exist in the EU. One of the initial steps is to find out which law is applicable to the contract. If a foreign law applies, the trader has to become familiar with its requirements, obtain legal advice and possibly adapt the*

*contract to that foreign law. (...). Overcoming these hurdles means incurring transaction costs. These have the greatest impact on small and medium-sized enterprises (SMEs), in particular on micro and small enterprises, because the cost to enter multiple foreign markets is particularly high when compared to their turnover [italics added by the authors].* The transaction costs to export to one other Member State could amount up to 7% of a micro retailer's annual turnover. To export to four Member States this cost could rise to 26% of its annual turnover. Traders who are dissuaded from cross-border transactions due to contract law obstacles forgo at least €26 billion in intra-EU trade every year.<sup>1</sup>

The Commission's statement that businesses rank obstacles related to differing contract law systems among the top barriers to cross-border trade, is supported by surveys.<sup>11</sup> Perceptions of businesses regarding such obstacles in the framework of G2B contracts were not included in these surveys. However, we cannot think of a reason why a trader who considers selling goods and services to *government clients* in other Member States, would become less exposed to "a complex legal environment characterised by the variety of contract laws that exist in the EU" than a trader who decides to sell products to *consumers* or *businesses* in other Member States. For as we have demonstrated above – and provided that there exists such a variety – it has certainly not been removed by EU public procurement regulation. Hence we argue that the proposition that differences between the contract law systems of the EU's Member States cause legal uncertainty among economic operators in the context of B2C contracts and some B2B contracts, thus creating barriers that hinder cross-border trade, is also valid in the context of G2B contracts.

### **3.3 Specific Problem: Legal Uncertainty as to How to Apply National Contract Law in an EU Regulated Public Procurement Context?**

The aforesaid general problem of legal uncertainty, resulting from differing contract law systems, can be problematized even further in the context of G2B contracts concluded following an EU regulated tendering procedure. When a national court of the contracting

authority's Member State has to solve one of the issues that were introduced briefly in *par. 2.3.2* and *par. 2.3.3*, it will have to do so by applying contract law principles and rules of that Member State. In all Member States, these principles and rules have been developed for (pre-)contractual relationships between parties that were able to negotiate and conclude their contract without the need to take into account interests of third parties. This means that the said principles and rules are mainly tailored to solve the issues from the perspective of balancing the mutual (economic) interests of the parties to the contract.<sup>iii</sup> However, it is questionable whether a court can solve an issue that has occurred under a G2B contract – (to be) concluded following a regulated tendering procedure – merely by applying contract law principles and rules in the ordinary manner. The reason why this can be doubted is that the court, in doing so, might run the risk of infringing on the regulated interests of economic operators that participated, or might have participated – having known the court's decision in advance – in the tendering procedure which preceded the conclusion of the contract in question. Even if one accepts – as we do – that principles and rules of contract law are sufficiently flexible to take into account these third party interests, one cannot deny that the court will be faced with multiple challenges.

Firstly, when applying ordinary principles and rules of contract law, the court must consider and decide how the archetypical characteristics of a tendering procedure will influence the process of applying these rules and principles to the case that needs to be solved. By the same token, the court will also have to determine how both the objectives underlying EU public procurement regulation in general, as well the content of the regulation of the procedural decisions that have been taken in the context of the tendering procedure in particular, will influence the aforesaid process. This seems particularly challenging with respect to the interaction between restrictions found in public procurement regulation regarding pre-contractual information exchange on the one hand, and contract law rules regarding pre-contractual duties to inform on the other. Thirdly, when determining the implications of both the characteristics as well as the regulatory framework of the tendering procedure for the application of contract law, the court will have to consider and decide *how* to balance the bilateral interests of the

parties to the G2B contract with the regulated interests of the other tenderers involved in the tendering procedure. Is it possible to meet *all* the interests? Or will it only be possible to solve an issue by giving priority to the interests served by EU public procurement regulation over the interests of either one or both parties to the contract? Which interests are prevailing? Which regulatory framework is prevailing?

To our knowledge, national courts in the Member States have to deal with the above challenges without being able to fall back on well-established national principles and rules of G2B contracts concluded in the framework of a regulated tendering procedure. By the same token, European principles and rules stating the common core in this particular domain have neither been established.<sup>iiii</sup> On the whole we think that a trader who considers selling goods and services to government clients in other Member States, and who decides to take part in tendering procedures initiated by such clients, becomes even more exposed to “a complex legal environment characterised by the variety of contract laws that exist in the EU” than a trader who considers to enter into a cross-border contract in ordinary B2C or B2B cases.

#### 4. TESTING THE PROPOSITION: ANALYSIS OF CASE STUDIES

##### 4.1 *Preliminary Observations*

In this paragraph we will elaborate on the proposition that was formulated in the previous paragraph: differences between the contract law systems of the Member States of the EU are capable of causing legal uncertainty among economic operators in the context of G2B contract, thus creating barriers that hinder cross-border trade (general problem). In the event that G2B contracts are concluded in the particular context of regulated public procurement procedures, legal uncertainty will increase given that the courts of the Member States must apply national contract law principles and rules by taking into account the objective and means of EU public procurement regulation (specific problem). In the following paragraphs, this proposition will first be tested by undertaking a legal analysis of case

studies. Each of these case studies involves a conflict issue. Some of these issues involve the question whether the parties are bound by a contract at all (*para. 4.2*).<sup>iv</sup> Other issues relate to questions regarding the duties arising from the contract (*para. 4.3*).<sup>iv</sup>

Each case study starts with a statement of the facts and circumstances of the case. Facts that are common to all case studies are that the G2B contract is concluded (i) following a public procurement procedure which is (ii) EU regulated. These facts will have to be taken into account by the national courts when applying national contract law principles and rules to solve the issue that has arisen in the case study. Our legal analysis will not deal with the question how the national courts of all 27 Member States of the EU will solve the issue. Instead, we will analyse each case study on the basis of the relevant provision(s) of the Draft Common Frame of Reference (DCFR).<sup>vi</sup> These provisions are considered to reflect the common core of EU contract law. In the event, however, that the solution provided by the relevant DCFR provision(s) is considered to be controversial – in the sense that it cannot reflect this common core because there *is* no such common core – we will notice this in our analysis, demonstrating that our proposition is correct as regards the presence of the aforesaid general problem. In addition, we will try to solve the issue in each case study by applying the rule provided in the relevant DCFR provision(s), despite the possible presence of the *general* problem. In doing so we will argue what difficulties the national courts will probably encounter, demonstrating that our proposition is (also) correct as regards the presence of the aforesaid *specific* problem.

Having tested our proposition by means of a legal analysis of case studies, the proposition will be further tested by a brief analysis of provisions in the DCFR dealing with pre-contractual duties to investigate and/or to inform (*para. 4.4*). As said, these duties aim at the prevention of many of the issues that are at the centre of the case studies.<sup>vii</sup> This additional analysis too is to demonstrate that our proposition is correct as regards the presence of the aforesaid general and specific problem.

## 4.2 *Issues Regarding the Conclusion of the Contract*

### 4.2.1 *Breaking Off Negotiations*

Case: contracting authority A undertakes a tendering procedure and intends to award the contract to tenderer B. This intention is communicated to B in anticipation of A's decision to actually award the contract to B. Prior to that decision, A decides to refrain from the project and informs B accordingly. A dispute arises between A and B on the question whether and to what extent duties are owed by A to B.

This case might perhaps be dealt with on the basis of Art. II. – 3:301 DCFR:

- (1) A person is free to negotiate and is not liable for failure to reach an agreement.
- (2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract.
- (3) A person who is in breach of the duty is liable for any loss caused to the other party by the breach.
- (4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

The rules of these provisions seem to reflect the common core of European contract law, at least as far as the Member States on the European Continent are concerned.<sup>lviii</sup> English law does not impose any specific duty on the parties to enter into or continue negotiations in good faith, nor will a party generally be held liable for breaking off negotiations if it enters into or continues negotiations without any intention of concluding a contract.<sup>lix</sup> This means that Art. II. – 3:301 does not entirely reflect the common core of European contract law and that the general problem set out in *para.* 3.2 may occur in this case.<sup>lx</sup>

Application of the aforesaid rules can (also) lead to difficulties having regard to the specific problem referred to in *para.* 3.3. It is true that, from the perspective of EU public procurement regulation, A owes no duty to B to complete the tendering procedure. This follows, for instance, from the *Wien*-case decided by the European Court of Justice:

'The Court of Justice has already had occasion to define the scope of the obligation to notify reasons for abandoning the award of a contract in the context of Council Directive 93/37/EEC (...). In particular, in its judgment in Case C-27/98 *Fracasso and Leitschutz v Salzburger Landesregierung* [1999] ECR I-5697, paragraphs 23 and 25, the Court held that Article 8(2) of Directive 93/37 does not provide that the option of the contracting authority to decide not to award a contract put out to tender, implicitly allowed by Directive 93/37, is limited to exceptional cases or must necessarily be based on serious grounds. It follows that (...) although (...) the contracting authority [is required] to notify candidates and tenderers of the grounds for its decision if it decides to withdraw the invitation to tender for a public service contract, there is no implied obligation on that authority to carry the award procedure to its conclusion.'<sup>ixi</sup>

But this decision leaves unanswered the question whether and to what extent duties may still be owed by A to B on the basis of provisions similar to Art. II. – 3:301. In short: if it is unclear whether and to what extent the rule developed by the European Court of Justice in the context of EU public procurement regulation restricts the application of an ordinary contract law rule regarding breaking off negotiations, such unclarity would be a confirmation of our proposition as regards the specific problem mentioned in *para.* 3.3.

#### 4.2.2 Offer and Acceptance

Case: contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. This decision is communicated to all tenderers, including B. None of the other tenderers challenges A's award decision in court. Nevertheless, A decides to refrain from the project and informs B accordingly. A

dispute arises between A and B on the question whether they are bound by a contract.

This case can be approached on the basis of Art. II. - 4:204(1) DCFR:

Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.

This means that the communication by A of his decision to award the contract to B completes the requirements for a binding contract between the parties.<sup>lxii</sup> This provision does not cause difficulties from the perspective of what has been said in *para. 3.2* regarding the general problem: it reflects the common core of European contract law. Hence the general problem set out in *para. 3.2* does not occur in this case.

However, the specific problem explained in *para 3.3* may occur in this case. This is caused by the implications of important case law decisions of the European Court of Justice. These decisions were provoked by the existence of contract law rules in the Member States that have the same purport as Art. II. - 4:204(1). From a public procurement perspective, the problem with such rules is that the moment upon which a binding contract between A and B comes into existence coincides with the moment upon which A's award decision reaches B. This will make it difficult for the other tenderers to seek remedies against A's award decision prior to the conclusion of the contract. For this reason, the European Court of Justice in the *Alcatel*-case held:

'Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, (...).' <sup>lxiii</sup>

In a later case, the Court held that there must be a reasonable period between the award decision and the conclusion of the contract in order to give unsuccessful tenderers sufficient time to examine the validity of the award decision and in particular to apply for interim

measures.<sup>lxiv</sup> These decisions of the Court have subsequently been codified in the Remedies Directive.<sup>lxv</sup> As a result of this, G2B contracts that are put out to tender in the framework of an EU regulated tendering procedure do not come into existence at the moment of communication of the award decision. However, neither EU public procurement regulation nor ordinary contract law specify at what *alternative* moment the contract between A and B will come into existence. In addition, it remains unclear how to evaluate A's decision to award the contract from a contract law perspective. Does it create no duties between the parties at all? Can A still abandon the project without any legal consequences? Or is the award decision to be interpreted as a genuine acceptance of B's offer, subject to the condition that A's award decision will not be set aside by a court's decision sought by one of the other tenderers? At current it is unclear what the answer to these questions is, which would confirm our proposition as regards the specific problem mentioned in *para.* 3.3.

#### 4.2.3 *Inaccuracy in Communication*

Case: contracting authority A concludes a contract with tenderer B following an EU regulated tendering procedure. After the conclusion of the contract, B declares that he made a mistake in preparing his offer and that, as a result of this, his offer is too low. A and B end up in a debate on the question whether B is bound to the contract.

This case can be dealt with on the basis of Art. II. – 7:202 DCFR:

An inaccuracy in the expression or transmission of a statement is treated as a mistake<sup>lxvi</sup> of the person who made or sent the statement.

The implication of this is that if A knows what was meant by B, the contract will be interpreted as to give effect to the intention of B.<sup>lxvii</sup> But if A does not know that there has been a mistake,

'there will be a binding contract and it will not be avoidable on the grounds of mistake, since [Art. II. – 7:201] limits relief to cases in which [A] either knew or ought to have known of the mistake, or shared it or caused it.'<sup>lxviii</sup>

The said provision does not reflect the common core of European contract law, because there is no such common core:

'All the systems by one means or another give relief when one party has made a mistake as to the terms of the contract being concluded; but the conditions under which relief will be given differ markedly'.<sup>lxix</sup>

The corollary of this is that the general problem set out in *para. 3.2* occurs in this case.

Application of the rules of the aforesaid provisions can in part be problematized from the perspective of the specific problem addressed in *para. 3.3*. In the event that A knows what was meant by B, in which case the contract will be interpreted as to give effect to the intention of B, the case becomes similar to the one that will be discussed in *para. 4.3.1* below. This means that if the content of B's offer would be interpreted "according to the common intention of the parties", there is a possibility that the content substantially differs from the one that would follow from an interpretation of the offer according to a more objective criterion. Hence this could lead to an infringement on the interests of the other tenderers that took part in the tendering procedure prior to the conclusion of the contract. Evidence supporting this problem aspect is further to be found in restrictions under public procurement regulation as regards the possibility for A to allow B to correct his mistake *prior* to the award of the contract.<sup>lxx</sup>

Obviously, the aforesaid rules are less problematic from the perspective of the interests of the other tenderers, in the event that A does not know that B has made a mistake. For this would mean that B would then be bound to his initial offer. Then again, the case could still give rise to questions from the perspective of the interaction between contract law rules and EU public procurement regulation of the phenomenon of "abnormally low tenders".<sup>lxxi</sup> More specifically, it can be questioned whether and to what extent the regulation of possible exchange of information between A and B – prior to the conclusion of the contract and on the basis of B's allegedly abnormal low tender – influences the application of the aforesaid contract law rules. This would be a confirmation of our proposition as regards the specific problem mentioned in *para. 3.3*.

#### 4.2.4 Mistake

Case: contracting authority A concludes a contract with tenderer B following an EU regulated tendering procedure. After the conclusion of the contract, either A or B claims that he has entered into the contract as a result of a mistake caused by the other party prior to the conclusion of the contract.

This case can be dealt with on the basis of Art. II. – 7:201 DCFR:

(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:

(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and

(b) the other party:

(i) caused the mistake;

(ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake;

(iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or

(iv) made the same mistake.

(2) However a party may not avoid the contract for mistake if:

(a) the mistake was inexcusable in the circumstances; or

(b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party.

Although similar solutions will be achieved in the Member States via differing concepts and legal reasonings, it is argued that these are all

more or less reflected in the above rules.<sup>lxxii</sup> However, the provisions do not seem to reflect the common core of European contract law as far as the position of the party against whom relief is sought is concerned, for instance when that party caused the mistake, e.g. by giving incorrect information, or when that party knew or should have known of the mistake. There is no unanimity as regards the answer to the question whether these facts and circumstances are essential before the mistaken party can avoid the contract.<sup>lxxiii</sup> Hence the aforesaid provisions would cause difficulties to some extent from the perspective of what has been said in *para.* 3.2 regarding the general problem. This also goes for an additional provision that is relevant in this case: Art. II. – 7:203(1), which states:

If a party is entitled to avoid the contract for mistake but the other party performs, or indicates a willingness to perform, the obligations under the contract as it was understood by the party entitled to avoid it, the contract is treated as having been concluded as that party understood it. This applies only if the other party performs, or indicates a willingness to perform, without undue delay after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance.

This provision does not reflect the common core of European contract law, because there is no such common core.<sup>lxxiv</sup>

Art. II. – 7:201 and Art. II. – 7:203(1) are also problematic from the viewpoint of the specific problem addressed in *para.* 3.3. First of all, applying contract law rules under the concept of mistake, or concepts alike, requires a normative evaluation of the parties' pre-contractual communications. To put it briefly: the rules either directly or indirectly require the parties to prevent the occurrence of contract risks<sup>lxxv</sup> by performing pre-contractual duties to investigate and/or to inform.<sup>lxxvi</sup> However, in line with what has been said above,<sup>lxxvii</sup> it is unclear how the restrictive EU public procurement regulation on bilateral communications between A and B, prior to the conclusion of their contract, will influence the aforesaid application of contract law rules. This too would seem to confirm our proposition regarding the specific problem in *para.* 3.3. Secondly, application of Art. II. – 7:203(1) or rules alike would amount to the same conclusion. For if A

“indicates a willingness to perform the obligations under the contract as it was understood by the party the party entitled to avoid it” – *i.e.* B – the case becomes rather similar to the one that has been discussed in *para. 4.2.3* above<sup>lxviii</sup> and the one that will be discussed in *para. 4.3.1* below. The similarity is that there is a possibility that B’s understanding of the content of his duties under the contract substantially differs from the one that would follow from an interpretation of his duties according to a more objective criterion. Hence this could again lead to an infringement on the interests of the other tenderers that took part in the tendering procedure prior the conclusion of the contract.

### **4.3 Issues regarding the Content of the Contract**

#### **4.3.1 Interpretation of the Contract**

Case: contracting authority A concludes a contract with tenderer B following an EU regulated tendering procedure. After the conclusion of the contract, a dispute rises between A and B as regards the interpretation of an ambiguous provision in the contract.

This case can be dealt with on the basis of Art. II. – 8:101 DCFR stating:

- (1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.
- (2) If one party intended the contract, or a term or expression used in it, to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could reasonably be expected to have been aware, of the first party’s intention, the contract is to be interpreted in the way intended by the first party.
- (3) The contract is, however, to be interpreted according to the meaning which a reasonable person would give to it:

(a) if an intention cannot be established under the preceding paragraphs; or

(b) if the question arises with a person, not being a party to the contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract's apparent meaning.

Art. II. – 8:102 presents an overview of the factors that may be taken into account, in particular, in interpreting the contract. These rules are not controversial in the sense that they seem to reflect the common core of European contract law.<sup>lxxxix</sup> This implies that the general problem explained in *para. 3.2* would not occur in this case.

However, if one would try to solve the issue in the case by applying the aforesaid rules, one might encounter difficulties related to the specific problem explained in *para. 3.3*. It is true that Art. II. – 8:102(1) mentions some general factors which would allow the particular characteristics of a tendering procedure to be taken into account in the process of interpreting the contract, even the characteristic of limited bilateral pre-contractual communication induced by EU public procurement regulation:<sup>lxxx</sup>

(a) the circumstances in which it was concluded, including the preliminary negotiations;<sup>lxxxi</sup>

(b) the conduct of the parties, even subsequent to the conclusion of the contract;

But the rules do not explain *how* this has to be done. Moreover, the rules do not explicitly refer to third parties' interests – if any – to be taken into account in the interpretation process.<sup>lxxxii</sup> This unclarity in itself confirms our proposition as regards the specific problem mentioned in *para. 3.3*.

In addition to this, one might further argue that the rules are problematic in the sense that they allow the contract to be interpreted as if only the interests of A and B would be relevant, *i.e.* without taking into account the interests of the other tenderers that participated in the tendering procedure prior to the conclusion of the contract. In our opinion, the core of the problem is that interpreting an ambiguous provision in the contract “according to the common

intention of the parties”<sup>lxxxiii</sup> might lead to a result that differs from the one that would be achieved if the provision would be interpreted according to a more objective criterion to be derived from the one developed by the European Court of Justice in matters of public procurement:

‘all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that (...) *all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way* (...) [italics added by the authors]’.<sup>lxxxiv</sup>

One could argue the case that this differing result is problematic in light of other case law of the European Court of Justice, in the event that the duties owed by A and B, interpreted “according to the common intention of the parties”, would substantially differ from the duties that would be owed if the aforesaid objective criterion would be used to interpret the contract.<sup>lxxxv</sup>

#### 4.3.2 Implication of Terms

Case: contracting authority A concludes a contract with tenderer B following an EU regulated tendering procedure. After the conclusion of the contract, parties enter into a debate as to whether a duty is incumbent upon a party, notwithstanding the fact that such duty is not explicitly provided for in the contract.

This case can be dealt with on the basis of Art. II. – 9:101 DCFR, which states:

- (1) The terms of a contract may be derived from the express or tacit agreement of the parties, from rules of law or from practices established between the parties or usages;
- (2) Where it is necessary to provide for a matter which the parties have not foreseen or provided for, a court may imply an additional term, having regard in particular to:
  - (a) the nature and purpose of the contract;

- (b) the circumstances in which the contract was concluded; and
  - (c) the requirements of good faith and fair dealing;
- (3) Any term implied under paragraph (2) should, where possible, be such as to give effect to what the parties, had they provided for the matter, would probably have agreed;
- (4) Paragraph (2) does not apply if the parties have deliberately left a matter unprovided for, accepting the consequences of so doing.

According to the notes to these rules:

‘the topics dealt with in the different paragraphs are not always kept separate in the national contract law systems but the results reached are generally similar’.<sup>lxxxvi</sup>

This implies that the general problem explained in *para.* 3.2 would not occur in this case either.

However, if one would try to solve the issue presented in the case by applying Art. II. – 9:101, particularly paragraph (2), one might again encounter difficulties related to the specific problem explained in *para.* 3.3. For a rule like Art. II. – 9:101(2) enables a court to imply an additional term that may impose additional duties upon the parties. It is also possible that the term implied by the court affects the circumstances or manner in which existing duties have to be performed in unforeseen circumstances.<sup>lxxxvii</sup> On the whole, implication by a court of a term in the contract could be problematic from the perspective of the case law of the European Court of Justice mentioned above,<sup>lxxxviii</sup> in the event that the additional duties imposed upon A and B amount to a substantial modification of the contract which would affect the interests of third parties involved in the tendering procedure prior to the conclusion of the contract. And even if one would subscribe the point of view that, until now, this case law particularly seems to focus on modification of the contract by the contracting parties themselves,<sup>lxxxix</sup> that doesn’t alter the fact that contract law rules allowing a court to impose additional duties upon the parties to such contract, give rise to questions from the perspective of the interaction between national contract law and EU

public procurement regulation. That in itself confirms our proposition as regards the specific problem mentioned in *para.* 3.3.

#### 4.3.3 *Unfair Terms*

Case: contracting authority A concludes a contract with tenderer B following an EU regulated tendering procedure. The terms of the contract are supplied by A. After the conclusion of the contract, B claims that a term of the contract is unfair and is therefore not binding on him.

In this case, B might seek relief on the basis of a provision similar to those that can be found in Book II, Chapter 9, Section 4 DCFR (Unfair terms). Such provision would then enable B to ask a court to establish that the term is unfair and is therefore not binding on him.<sup>xc</sup> Section 4 offers such provisions tailored to B2C contracts,<sup>xcii</sup> B2B contracts,<sup>xciii</sup> and contracts between ‘non-business parties’<sup>xciii</sup>. These provisions generally seem to reflect the common core of European contract law.<sup>xciv</sup> This implies that the occurrence of the general problem explained in *para.* 3.2 will probably be limited in this case.

G2B contracts do not seem to fit in any of the categories of contracts for which Section 4 offers provisions.<sup>xcv</sup> However, this does not have to be a problem, even if the contract would be concluded following an EU regulated tendering procedure. For in the end, one might argue that the outcome of any unfairness test will eventually depend on whether the term in question is contrary to good faith and fair dealing.<sup>xcvi</sup> And assuming that A will have performed his “duty of transparency” under Art. II. – 9:402(1) DCFR,<sup>xcvii</sup> the factors to be taken into account when applying such unfairness test will enable the court to appreciate the particular features of a tendering procedure, including the dominant position of A – who is able to impose terms on B – as well as the limited opportunity of bilateral pre-contractual communication – including contract negotiations – induced by EU public procurement regulation:

When assessing the unfairness of a contractual term for the purposes of this Section, regard is to be had to (...) the nature of what is to be

provided under the contract, to the circumstances prevailing during the conclusion of the contract, to the terms of the contract and to the terms of any other contract on which the contract depends.<sup>xcviii</sup>

However, it is not clear from the rules *how* this exercise has to be carried out regarding an allegedly unfair term in a contract concluded following a tendering procedure. Moreover, it remains unclear whether and to what extent the result of the unfairness test would be influenced by the fact that the term in question – if tested in court *prior* to the conclusion of the contract – would have been assessed as an infringement on the public procurement principle of proportionality.<sup>xcix</sup> Finally, the rules do not explicitly refer to third parties' interests – if any – to be taken into account when applying the unfairness test.<sup>c</sup> These unclaritys would already confirm our proposition formulated in *para.* 3.3. In addition to this, if a court would apply an unfairness test and subsequently declare that the term in question is not binding on B, this too could be problematic from the perspective of the case law of the European Court of Justice mentioned above.<sup>ci</sup> The court's interference may again amount to a substantial modification of the contract affecting the interests of third parties involved in the tendering procedure prior to the conclusion of the contract. That too would confirm our proposition.

#### 4.3.4 *Variation by Court on a Change of Circumstances*

Case: contracting authority A concludes a contract with tenderer B following an EU regulated tendering procedure. After the conclusion of the contract, an exceptional change of circumstances occurs. B argues that performance of one or more duties incumbent on him has become onerous. Nevertheless, A holds B to his duty.

In this case, B might seek relief on the basis of Art. III. – 1:110 DCFR:

(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.

(2) If, however, performance of a contractual obligation (...) becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:

(a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or

(b) terminate the obligation at a date and on terms to be determined by the court.

(3) Paragraph (2) applies only if:

(a) the change of circumstances occurred after the time when the obligation was incurred;

(b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;

(c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and

(d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

Although these rules are a reflection of the prevailing view in the Member States, the

'judicial power granted to the court stands in sharp contrast with the more rigid approach that some countries, such as England and France, have adopted.'<sup>cii</sup>

This means that the general problem set out in *para.* 3.2 may occur in this case.

Applying the rules of Art. III. - 1:110 or rules alike may also cause difficulties having regard to the specific problem referred to in *para.* 3.3. Firstly, if B is required to attempt "to achieve by negotiation a reasonable and equitable adjustment of the terms" regulating his duties under the contract, the performance of which has become more onerous, one has to bear in mind that EU public procurement

regulation restricts the parties' freedom to modify their contract in the interest of the other tenderers that participated in the tendering procedure prior to the conclusion of the contract. It is unclear how these restrictions, which have been signalled briefly in the previous paragraphs,<sup>ciii</sup> and which will be dealt with further in the next paragraph,<sup>civ</sup> will influence the normative appreciation of B's duty to reasonably attempt to renegotiate the contract with A.<sup>cv</sup> By the same token, if the parties themselves are not able to agree on the modification of the contract, it is clear that the exercise by a court of its power under rules similar to Art. III. – 1:110(2) could cause the contract manifestly being modified. We have already argued that such exercise of court powers gives rise to questions from the perspective of the interaction between national contract law and EU public procurement regulation, having regard to the interests of third parties that might be affected as a result of the court's intervention.<sup>cvi</sup> This again confirms our proposition stated in *para.* 3.3.

#### 4.3.5 Variation by Agreement

Case: contracting authority A concludes a contract with tenderer B following an EU regulated tendering procedure. After the conclusion of the contract, A and B decide to modify the contract, either by separate agreement or on the basis of a variation clause in their initial contract. Subsequently, a debate arises between the parties as to the effects of either the separate agreement, or the application of the variation clause.

Art. III. – 1:108(1) DCFR states the main principle for this case in the event that parties modify the contract by separate agreement:

A right, obligation or contractual relationship may be varied (...) by agreement at any time.

This rule, which follows from the general principle of freedom of contract, is undisputed in the contract law systems of the Member States.<sup>cvi</sup> The same goes for the rule of Art. III. – 1:109(1) DCFR which would be relevant in the case where the contract is modified on the basis of a variation clause in it:

A right, obligation or contractual relationship may be varied (...) by notice by either party where this is provided for by the terms regulating it.<sup>cviii</sup>

In both cases, any debate that arises between the parties as to the effects of either the separate agreement, or the application of the variation clause, will have to be dealt with by applying the ordinary contract law principles and rules on interpretation of contract, implication of terms, unfair terms and change of circumstances. This means that everything which has been stated above with respect to the application of these principles and rules in case of a contract concluded following an EU regulated tendering procedure, and in confirmation of our proposition regarding the general and specific problems addressed in *para. 3.2* and *3.3*, is also relevant here.<sup>cix</sup>

In addition to this, modification of the contract by A and B can also be regarded as a problem in light of case law of the European Court of Justice, having regard to the interests of the other tenderers that took part in the tendering procedure prior to the conclusion of the (modified) contract.<sup>cx</sup> This case law is about to be codified in new EU regulation, having regard to Art. 72 of the Proposal for a Directive on public procurement.<sup>cxii</sup> According to Art. 72(1), If the modification is *substantial*, the separate agreement between A and B or the application of the variation clause will be considered as a new award and will require a new procurement procedure.<sup>cxii</sup> Art. 72(2) states that

A modification of a contract during its term shall be considered substantial within the meaning of paragraph 1, where it renders the contract substantially different from the one initially concluded.

In any case, a modification shall be considered substantial if it meets one of conditions established by the European Court of Justice in the *Presstext-case*:<sup>cxiii</sup>

(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the selection of other candidates than those initially selected or would have allowed for awarding the contract to another tenderer;

- (b) the modification changes the economic balance of the contract in favour of the contractor;
- (c) the modification extends the scope of the contract considerably to encompass supplies, services or works not initially covered.<sup>cxiv</sup>

In three types of cases, a modification of the contract by the parties will either not be regarded as “substantial” or will not require a new procurement procedure. Firstly, in the event that the value of the modification can be expressed in monetary terms and where its value does not exceed the thresholds set out in Art. 4 of the Proposal and where it is below 5 % of the price of the initial contract, a modification is not regarded as substantial provided that the modification does not alter the overall nature of the contract.<sup>cxv</sup> Secondly, even if a modification can be regarded as substantial, a new procurement procedure will not be required where the following cumulative conditions are fulfilled:

- (a) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
- (b) the modification does not alter the overall nature of the contract;
- (c) any increase in price is not higher than 50 % of the value of the original contract.<sup>cxvi</sup>

These latter provisions might perhaps provide the parties with a solution for the problem set out in *para. 4.3.4* above, in case B is required by Art. III. – 1:110(3)(d) DCFR or provisions alike to attempt “to achieve by negotiation a reasonable and equitable adjustment of the terms” in the event that performance of his duties under the contract has become more onerous because of an exceptional change of circumstances. Finally, modification of the contract by the parties will not be considered substantial

where they have been provided for in the procurement documents in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They

shall not provide for modifications or options that would alter the overall nature of the contract.<sup>cxvii</sup>

It is argued here that contract law principles and rules similar to Art. III. – 1:108(1) and III. – 1:109(1) DCFR, allowing A and B to modify their contract either by separate agreement or by applying a variation clause, may give rise to questions from the perspective of the interaction between national contract law and EU public procurement regulation. Nevertheless it can be admitted that Art. 72 of the Proposal for a Directive on public procurement is an attempt to deal with such questions contributing to a solution for the specific problem explained in *para.* 3.3 for the above case.

#### **4.4 Pre-contractual Duties to Inform Aiming at the Prevention of Contract Risks**

In *para.* 4.2 and 4.3 we have tested our proposition set out in *para.* 3 by means of a legal analysis of several case studies. It has become clear from the analysis that, when solving these cases by applying principles and rules of contract law, courts will frequently have to render a normative appreciation of A and B's pre-contractual behaviour. The reason for this is that several of these principles and rules require the parties to prevent the occurrence of contract risks<sup>cxviii</sup> by imposing on them, either directly or indirectly, pre-contractual duties to investigate and/or to inform.<sup>cxix</sup>

It is important to note that the aforementioned duties are not the *only* pre-contractual duties recognized in the contract law systems of the Member States. A brief analysis of the provisions of the DCFR shows that there are many other examples of either direct or indirect pre-contractual duties to communicate in general, and to investigate and/or to inform in particular. Book II of the DCFR contains an entire Chapter 3 with provisions on “Marketing an pre-contractual duties” dealing with “information duties”;<sup>cxx</sup> “duties to prevent input errors”;<sup>cxxi</sup> and “negotiation and confidentiality duties”<sup>cxxii</sup>. Other relevant provisions are to be found in Book IV, particularly in Part C on service contracts. With the exception of those provisions in Book II that are specifically related to B2C contracts, all the aforementioned provisions – that is to say: their equivalents in the contract law

systems of the Member States – may also be relevant in the context of a G2B contract that is concluded following a EU regulated tendering procedure.<sup>cxiii</sup> This raises the question whether and to what extent our proposition in *para. 3* is (also) true for these provisions.

Firstly, it is doubted whether the said provisions can be regarded as a genuine reflection of the common core of European contract law regarding issues of pre-contractual communication:

‘Pre-contractual duties to inform have firmly developed in many European jurisdictions and are still developing. This development has influenced European law, given that several EU Directives impose pre-contractual duties to inform on suppliers of goods and services, particular in the context of consumer contracts. (...) These developments are reflected in Book II, Chapter 3, Section 1 of which deals with pre-contractual information duties. In addition to general contract law provisions on mistake of fact or law, pre-contractual duties of service providers to inform have further been developed by the courts in some of the countries investigated (...). The exact basis of such duties is not always firmly established. This does not appear to be regarded as a major problem in legal doctrine, given that various legal concepts seem appropriate for providing such a basis, notably the concept of good faith and *culpa in contrahendo*. (...) English law is reluctant, however, to accept pre-contractual liability outside the scope of “statements”. The general rule is that mere non-disclosure of information does not constitute misrepresentation, for there is, in general, no duty on a party to a contract to disclose material facts that would be likely to affect the other party’s decision to conclude the contract. Exceptions to this rule are limited (...). Further development of pre-contractual duties to inform are said to be hampered by the fact that English law has not committed itself to overriding general principles of good faith and *culpa in contrahendo*.<sup>cxiv</sup>

All in all our estimation is that the general problem set out in *para. 3.2* can also occur with regard to the aforesaid contract law principles and rules dealing with pre-contractual communications, in addition to those that have been analysed in the case studies.

Secondly, we have pointed out that it is unclear how the restrictive EU public procurement regulation on bilateral communications between A and B, prior to the conclusion of their contract, will influence the application of contract law principles and rules dealing with pre-contractual duties to investigate and/or to inform in the case studies. We see no reason why this conclusion would be different with respect to the additional pre-contractual duties referred to above. This would mean that our proposition is also correct as regards the presence of the *specific* problem explained in *para. 3.3*.

## 5. G2B CONTRACTS TO BE INCLUDED IN EU ACTION AIMING FOR THE HARMONIZATION OF EUROPEAN CONTRACT LAW

We have demonstrated in the previous paragraphs that the European Commission's implicit decision – namely: to leave out G2B contracts from its current policy and regulatory efforts in the area of European contract law – can be problematized from the perspective of the EU's objective to establish an internal market for G2B contracts. This raises the question whether there are any convincing arguments as regards content in favor of excluding G2B contracts from the aforesaid efforts. In our opinion, such arguments in favor will only be convincing if they are able to outweigh the arguments against such exclusion. However, we think that there are no such prevailing arguments.

First of all, one has to take into account that the general and specific problem addressed in *para. 3* and *4* cannot be solved on the basis of the concept of invalid contracts. It is true that contracts which are *contra legem*, in the sense that they infringe EU public procurement regulation, may be invalid.<sup>cxv</sup> But apart from the case study dealt with in *para. 4.3.5*, where a substantial modification of the contract by the parties themselves can perhaps be problematized from the perspective of invalid contracts,<sup>cxvi</sup> all other case studies deal with contracts that are concluded in accordance with EU public

procurement regulation. The problem in these other cases is not that the contracting parties will encounter difficulties in attuning national contract law principles and rules to the aforesaid regulation: the problem is that there is a risk that the national courts of the Member States will come across such difficulties.

This brings us back to the strongest argument in favor of including G2B contracts in the policy and regulatory efforts in the area of European contract law. That argument has already been provided indirectly by the European Commission itself in the framework of current efforts. We have summarized this argument in *para. 3.2* above: differing systems of contract law will cause legal uncertainty among economic operators. This may have a negative impact particularly on small and medium-sized enterprises who are considering trading cross border and may dissuade them from entering new G2B markets. We have tried to strengthen this argument in *para. 3.3* and *para. 4* by demonstrating that legal uncertainty among economic operators is likely to increase in a G2B context, given that principles and rules of differing contract law systems are then to be applied in the framework of contracts that have been concluded following an EU regulated tendering procedure.

Obviously, one might argue that the national courts are required to interpret their national (contract) laws in the light of the wording and the purpose of the EU Directives on public procurement.<sup>cxxvii</sup> But the core of the increased problem of legal uncertainty is that it is unclear *how* the typical features of a tendering procedure, as well as the EU public procurement regulation of (public) interests involved in such a procedure, are to be taken into account by the national courts when applying principles and rules of their (differing) systems of contract law.

One could further argue that this latter problem might eventually be solved little by little by the national courts, guided by case law decisions of the European Court of Justice. However, it can be doubted whether such a case by case approach will result – within the foreseeable future – in a clear, consistent and comprehensive system of European G2B contract law that is suitable for application in the context of contracts concluded following an EU regulated tendering procedure. It is more likely that such a result can be

achieved much faster if the European Commission would take on action in this particular matter. Moreover, the policy reasons for undertaking such action would also be in line with those underlying actions currently undertaken in the area of B2C and B2B contracts.<sup>cxxviii</sup>

Finally, an argument in favor of including G2B contracts in the policy and regulatory efforts in the area of European contract law is that this could contribute to the further opening-up of the internal market for G2B contracts. It is true that EU regulation of the *award* of public contracts was – and still is – an important condition that needed to be fulfilled in order to enable economic operators to enter into other G2B contract markets *at all*. But this regulation is only able to remove cross-border trade barriers with respect to “buy national” practices of contracting authorities in the Member States. It cannot take away legal uncertainty perceived among economic operators who – for the very reason of such uncertainty – are reluctant to participate in tendering procedures outside their Member State.

## 6. CONCLUSION AND RECOMMENDATION

The main purpose of this paper is to determine whether the European Commission’s implicit decision – namely: to leave out G2B contracts from its current policy and regulatory efforts in the area of European contract law – can be problematized from the perspective of the EU’s objective to establish an internal market for G2B contracts. In order to answer this question, we have explained that conflict issues, which may arise between the parties to a G2B contract that has been concluded following an EU regulated tendering procedure, cannot be solved by applying EU public procurement regulation. These issues are therefore necessarily to be decided by the national courts of the contracting authority’s Member State. In doing so, the courts must apply contract law principles and rules of that Member State.

Subsequently, we have argued that this may cause two interrelated problems that could prevent the EU's objective from being achieved. The first problem, which we have called the general problem, can be derived from the proposition that differences between the contract law systems of the Member States cause legal uncertainty among economic operators, thus creating barriers that hinder cross-border trade. We have argued that this proposition is also valid in the context of G2B contracts. In addition to this general problem, we have identified a related specific problem which can be derived from the particular context of G2B contracts that are concluded following a regulated tendering procedure. If national courts are to solve conflict issues under such contracts, they cannot decide cases merely by applying national contract law principles and rules. They will have to do so by taking into account the objective and means of EU public procurement regulation. We have argued that this particularity can also be translated in terms of legal uncertainty, which gives an extra dimension to the aforesaid proposition regarding the general problem.

In order to test our proposition, we have carried out a legal analysis of several case studies dealing with conflict issues between parties to a G2B contract that is concluded following an EU regulated tendering procedure. Our analysis has shown what difficulties the national courts will probably encounter when applying principles and rules of contract law, demonstrating that our proposition as regards the presence of the aforesaid problems is correct.

That being the case, we have concluded our paper by dealing with possible arguments against including G2B contracts in the European Commission's current policy and regulatory efforts in the area of European contract law. We think these arguments are not convincing and that they are being outweighed by arguments in favor of such inclusion. Therefore, we call upon the European Commission to broaden its focus and to include G2B contracts in its actions aimed at the harmonization of European contract law.

## NOTES

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- i Art. 3(3) Treaty on European Union (TEU) *jo.* Art. 26 Treaty on the Functioning of the European Union (TFEU).
- ii COM(2011) 636, pp. 2 and 4. See also *para.* 3.2 below as regards the nature of these hindrances.
- iii Kötz, H. (1981), pp. 486-487; Zweigert, K. & Kötz, H. (1987), p. 23; Kötz, H. (1992), p. 38; Lando, O. (1992), p. 224.
- iv Resolution of 26 May 1989 on action to bring into line the private law of the Member States, *OJ C* 158 of 26 June 1989, p. 400; Resolution of 6 May 1994 on the harmonisation of certain sectors on the private law of the Member States, *OJ C* 205 of 25 July 1994, p. 518; Resolution of 15 November 2001 on the approximation of the civil and commercial law of the Member States, *OJ C* 140 E of 13 June 2002, p. 538. See also Resolution of 2 September 2003 on the Communication from the Commission to the European Parliament and the Council – A more coherent European contract law - An action plan, *OJ C* 76 E of 25 March 2004, p. 95; Resolution of 23 March 2006 on European contract law and the revision of the *acquis*: the way forward, *OJ C* 292 E of 1 December 2006, pp. 109-112; Resolution of 7 September 2006 on European contract law, *OJ C* 305 E of 14 December 2006, pp. 247-248; Resolution of 12 December 2007 on European contract law, *OJ C* 323 E of 18 December 2008, pp. 364-365; and the Resolution of 3 September 2008 on the common frame of reference for European contract law, *OJ C* 295 E of 4 December 2009, pp. 31-32.
- v See COM(2001) 398 and COM(2003) 68. With this Action Plan the European Commission proposed to improve the quality and coherence of European contract law by establishing a Common Frame of Reference containing common principles, terminology and model rules to be used by the EU legislator when making or amending legislation. The Commission subsequently assigned an international academic network to carry out the preparatory legal research which was completed at the end of 2008 and led to the publication of the Draft Common Frame of Reference (DCFR), see Bar, C. Von, Clive, E. & Schulte-Nölke, H. (2009). The European Commission then established an expert group on European contract law by Decision of 26 April 2010, *OJ L* 105/109 of 27 April 2010. This expert group was asked to carry out a Feasibility Study on a possible future European contract law instrument covering the main aspects which arise in practice in cross-border transactions. The result of this Feasibility Study was published on 3 May 2011. Meanwhile the European Commission had started a public

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consultation on the basis of a Green Paper: COM(2010) 348. One of these options involved the creation of optional EU-wide contract rules that would ease cross-border transactions as an alternative to existing national laws for parties to choose ('option 4'). This latter option received a four-fifths majority in the European Parliament on 8 June 2011, see COM(2011) 636, p. 5-6 and OJ C 240 E 44/52. This led the European Commission to propose a Regulation for a Common European Sales Law as discussed below.

vi COM(2011) 635. The Proposal integrates the results from the aforesaid Feasibility Study published by the Expert Group on European contract law on 3 May 2011.

vii COM(2011) 636 of 11 October 2011, p. 7.

viii COM(2011) 636 of 11 October 2011, pp. 7-9.

ix See also COM(2011) 636, p. 8: 'These issues fall within the areas of the rights and obligations of the parties and the remedies for non-performance, pre-contractual information duties, the conclusion of a contract (including formal requirements), the right of withdrawal and its consequences, avoidance resulting from a mistake, fraud or unfair exploitation, interpretation, the contents and effects of a contract, the assessment and consequences of unfairness of contract terms, restitution after avoidance and termination as well as prescription. It settles the sanctions available in case of the breach of the obligations and duties arising under its application.'

x This is particularly confirmed in an explanatory comment on the aforementioned feature (v) of the proposed Regulation on a Common European Sales Law: 'The scope of the Common European Sales Law is focussed on aspects which pose real problems in cross-border transactions, i.e. business-to-consumer relations and business-to-business relations where at least one of the parties is an SME. Contracts concluded between private individuals (C2C) and contracts between traders where neither of the parties is an SME are not included, as there is at the moment no demonstrable need for EU-wide action for these types of cross-border contracts. The Common European Sales Law leaves Member States the option to decide to make the Common European Sales Law also available for contracts concluded between traders neither of which is an SME. The Commission will keep the matter under review in the coming years to see whether additional legislative solutions may be required as regards C2C and B2B contracts', see COM(2011) 636, p. 8. Likewise the Feasibility Study of 3 May 2011 of the Expert Group on European contract law at p. 6. See also Art. I.-1:101(2) DCFR

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- explaining that its rules are not intended to be used, or used without modification or supplementation, in relation to rights and obligations of a public law nature.
- xi Although some academics have suggested – in response to COM(2001) 398 – that common principles of European contract law could also be incorporated into contracts concluded in a public procurement context, see COM(2003) 68, p. 38. See also at p. 40 and at pp. 44-45.
- xii Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*OJ* 2004, L 134/1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (*OJ* 2004, L 134/114).
- xiii See *para. 2.2.*
- xiv Art. 3(3) Treaty on European Union (TEU) *jo.* Art. 26 Treaty on the Functioning of the European Union (TFEU). See also *para. 1.1.*
- xv See recital 2 of Directive 2004/18/EC: ‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services (...).’
- xvi See recital 2 of Directive 2004/18/EC (continued): ‘(...) and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. (...)’
- xvii See *para. 1.1.*
- xviii Recital 2 of Directive 2004/18/EC.
- xix Art. 1(9) Directive 2004/18/EC.
- xx Art. 1(2)(a) Directive 2004/18/EC.
- xxi Art. 7 Directive 2004/18/EC.

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- xxii Art. 10-18 Directive 2004/18/EC.
- xxiii Art. 28-34 Directive 2004/18/EC.
- xxiv Art. 23-27 Directive 2004/18/EC.
- xxv Art. 45-52 Directive 2004/18/EC.
- xxvi Art. 53-55 Directive 2004/18/EC.
- xxvii Art. 35-37 Directive 2004/18/EC.
- xxviii Art. 38-39 Directive 2004/18/EC.
- xxix See Chapter VI, Art. 35-43 Directive 2004/18/EC.
- xxx Art. 35(2) Directive 2004/18/EC.
- xxxi Art. 36(5) Directive 2004/18/EC.
- xxxii Art. 42(2) Directive 2004/18/EC.
- xxxiii Art. 39(2) and Art. 40(4) Directive 2004/18/EC.
- xxxiv Art. 39(2) and Art. 40(4) Directive 2004/18/EC.
- xxxv Art. 2 Directive 2004/18/EC. See also Art. 38(7) Directive 2004/18/EC: 'If, for whatever reason, the specifications and the supporting documents or additional information, although requested in good time, are not supplied within the time limits set in Articles 39 and 40 (...) the time limits for the receipt of tenders shall be extended so that all economic operators concerned may be aware of all the information needed to produce tenders.'
- xxxvi Art. 6 Directive 2004/18/EC. See also Art. 35 *in fine* and Art. 41 Directive 2004/18/EC.
- xxxvii Statement of the European Commission and the Council concerning art. 7(4) of Council Directive 93/37/EEC, *O.J.* 1994, L 111/114.
- xxxviii Art. 55(1) and (2) Directive 2004/18/EC.
- xxxix See the contract risk dealt with in *para.* 4.2.3.
- xl Art. II. – 3:301 DCFR (Negotiations contrary to good faith and fair dealing), to be discussed in *para.* 4.2.1.
- xli Book II, Chapter 4, Section 2 DCFR (Offer and acceptance), to be discussed in *para.* 4.2.2.
- xlii Art. II. – 7:202 DCFR (Inaccuracy in communication), to be discussed in *para.* 4.2.3.
- xliii Art. II. – 7:201 DCFR (Mistake), to be discussed in *para.* 4.2.4. Less likely, but in theory also possible, is that a party claims that its

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- counterpart has induced the conclusion of the contract by fraudulent misrepresentation, by coercion or by threat, or that it has entered into the contract under influence of economic distress and that its counterpart has unfairly exploited its situation, see the following provisions in the DCFR: Art. II. – 7:205 (Fraud), 7:206 (Coercion or threats), and 7:207 (Unfair exploitation).
- xliv Book II, Chapter 8, Section 2 DCFR (Interpretation of contracts), to be discussed in *para. 4.3.1*.
- xlv Art. II. – 9:101 DCFR (Terms of a contract), to be discussed in *para. 4.3.2*.
- xlvi Book II, Chapter 9, Section 4 DCFR (Unfair terms), and particularly Art. II. – 9:408(1) DCFR (Effects of unfair terms), to be discussed in *para. 4.3.3*.
- xlvii Art. III. – 1:110 DCFR (Variation or termination by court on a change of circumstances), to be discussed in *para. 4.3.4*.
- xlviii Art. III. – 1:108 DCFR (Variation or termination by agreement) and Art. III. – 1:109 DCFR (Variation or termination by notice), to be discussed in *para. 4.3.5*.
- xliv COM(2011) 636, p. 2.
- i COM(2011) 636, pp. 2-3.
- ii Eurobarometer 321 on European contract law in business-to-consumer transactions (2011) and Eurobarometer 320 on European contract law in business-to-business transactions (2011).
- iii See also Bar, C. Von, Clive E. & Schulte-Nölke, H. (2009), p. 63: ‘The DCFR does not contain explicit provisions at such a general level on the relation of contracts to third parties. It takes it as self-evident that parties can contract only for themselves, unless otherwise provided, and that contracts, as a rule, regulate only the rights and obligations between the parties who conclude them.’
- iii Needless to say, the Draft Common Frame of Reference (DCFR) does not establish this common core either.
- liv See also *para. 2.3.2*.
- lv See also *para. 2.3.3*.
- lvi See *para. 1.1*.
- lvii See *para. 2.3.1*.
- lviii Compare Notes (1) to (7) and (9) to (11) to Art. II. – 3:301 DCFR.
- lix Notes (8), (12) and (14) to Art. II. – 3:301 DCFR.
- ix Compare also Beale, H., Fauvarque-Cosson, B., Rutgers, J., Tallon D. and Vogenauer, S. (2010), p. 412.
- lxi ECJ 18 June 2002, Case C-92/00 (HI/Wien), ECR 2002, I-5553, paragraphs 40-41.

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- lxii See also Art. II. – 4:205(1) DCFR: ‘If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror’.
- lxiii ECJ 28 October 1999, Case C-81/98 (Alcatel Austria), *ECR* 1999, I-07671, paragraph 43.
- lxiv ECJ 24 June 2004, Case C-212/02 (Commission/Austria), (unpublished), paragraph 24.
- lxv Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.
- lxvi See Art. II. – 7:201 DCFR (Mistake).
- lxvii Art. II. – 8:101(1) DCFR: ‘A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words’. See also *para. 4.3.1* below. Compare Beale, H., Fauvarque-Cosson, B., Rutgers, J., Tallon D. and Vogenauer, S. (2010), p. 466.
- lxviii Beale, H., Fauvarque-Cosson, B., Rutgers, J., Tallon D. and Vogenauer, S. (2010), pp. 466-467.
- lxix Note (1) to Art. II.-7:202 DCFR. Compare also Beale, H., Fauvarque-Cosson, B., Rutgers, J., Tallon D. and Vogenauer, S. (2010), p. 466.
- lxx Compare ECJ 22 June 1993, Case C-243/89 (Storebaelt), *ECR* 1993, I-03353, paragraphs 32-44.
- lxxi See *para. 2.3.1 in fine*.
- lxxii Notes (1), (2) and (5) to Art. II.-7:201 DCFR. See also Beale, H., Fauvarque-Cosson, B., Rutgers, J., Tallon D. and Vogenauer, S. (2010), p. 444: ‘The comparison of the different laws is made even more difficult by the already mentioned fact that, in each system, situations which fall within the general heading of ‘mistake’ are actually dealt with not just by doctrines of mistake and – in English law – misrepresentation but by other doctrines also.’
- lxxiii Notes (18) ff. and particularly Note (23) to Art. II.-7:201 DCFR: ‘As stated earlier, English and Irish law will not allow escape from the contract on the ground of mistake unless the mistake was shared. Avoidance may be given for misrepresentation but only where one party misled the other’. Compare also Beale, H., Fauvarque-Cosson, B., Rutgers, J., Tallon D. and Vogenauer, S. (2010), p. 444: ‘Another major difference we noted earlier: a mere failure to disclose

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- information cannot amount to fraud or misrepresentation in English law.' See also at pp. 512, 529-530 and 535-536.
- lxxiv See the differences between the legal systems of various Member States in Notes (1) to (11) to Art. II-7:203 DCFR.
- lxxv See *paras.* 2.3.2 and 2.3.3 above.
- lxxvi See *para.* 2.3.1 above.
- lxxvii See *para.* 4.2.3 *in fine*.
- lxxviii The case would particularly become similar in the event that the rule of Art. 7:203(3) DCFR can be applied: 'Where both parties have made the same mistake, the court may at the request of either party bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred.'
- lxxix Although the process of interpretation of a contract may be 'guided by two different approaches' giving precedence either to 'the subjective will of the parties' or to 'the external fact of the words in which the will has been objectively expressed', it is argued that '[M]ost modern contract law regimes hover between 'objective' and 'subjective' interpretation', see Beale, H., Fauvarque-Cosson, B., Rutgers, J., Tallon D. and Vogenauer, S. (2010), p. 668. Compare also Notes (8) to (18) to Art. II. – 8:101 DCFR. But see also our next note.
- lxxx See *para.* 4.2.4. Having regard to another characteristic – the dominant position of the contracting authority – Art. II. – 8:103(1) may also be relevant: 'Where there is doubt about the meaning of a term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.' Likewise, Art. II. – 8:104: 'Terms which have been individually negotiated take preference over those which have not.'
- lxxxi See however Note (2) to Art. II. – 8:102: 'English and Irish law are different in that they show a marked reluctance to rely on the pre-contractual negotiations as being an unreliable guide to the interpretation of a formal contract document', partly confirming the general problem referred to in *para.* 3.2.
- lxxxii With the exception of Art. II. – 8:101(3) sub b and Art. II. – 8:102(2) DCFR. However, these provisions are not relevant in the context of contracts concluded following a tendering procedure. These provisions specify interpretation rules for questions with a person, not being a party to the contract or a person such as an assignee who by law has no better rights than such a party, who has reasonably and in good faith *relied* on the contract's apparent meaning.

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- lxxxiii Art. II. – 8:101(1) DCFR.
- lxxxiv ECJ 18 October 2001, Case C-19/00 (SIAC Construction), *ECR* 2001, I-7725, paragraph 42; ECJ 4 December 2003, Case C-448/01 (Wienstrom), *ECR* 2003, I-14527, paragraph 57; ECJ 29 April 2004, Case C-496/99P (Succhi di Frutta), *ECR* 2004, I-3801, paragraph 111.
- lxxxv ECJ 19 June 2008, Case C-454/06 (Presstext Nachrichtenagentur GmbH/Austria), *ECR* 2008, I-4401, paragraphs 35-37. Compare also Jansen, C.E.C. (2011), pp. 208-209.
- lxxxvi Note (1) to Art. II. – 9:101 DCFR.
- lxxxvii See also Comment ‘Filling Gaps’ (F) to Art. II. – 9:101 DCFR.
- lxxxviii ECJ 19 June 2008, Case C-454/06 (Presstext Nachrichtenagentur GmbH/Austria), *ECR* 2008, I-4401, paragraphs 35-37.
- lxxxix Compare also art. 72, COM(2011) 896.
- xc Art. II. – 9:408(1) DCFR: ‘A term which is unfair under this Section is not binding on the party who did not supply it.’
- xci Art. II. – 9:403 DCFR: ‘In a contract between a business and a consumer, a term [which has not been individually negotiated] is unfair for the purposes of this Section if it is supplied by the business and if it significantly disadvantages the consumer, contrary to good faith and fair dealing.’
- xcii Art. II. – 9:405 DCFR: ‘A term in a contract between businesses is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.’
- xciii Art. II. – 9:404 DCFR: ‘In a contract between parties neither of whom is a business, a term is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and significantly disadvantages the other party, contrary to good faith and fair dealing.’
- xciv Compare Beale, H., Fauvarque-Cosson, B., Rutgers, J., Tallon D. and Vogenauer, S. (2010), pp. 828-829. See also the Notes to the Articles in the DCFR cited in the previous notes.
- xcv In the ‘ordinary’ case – *i.e.* when the G2B contract is concluded outside the scope of an EU regulated tendering procedure – one might argue that the case would best be approached on the basis of a B2B contract.
- xcvi See Art. II. – 9:403 to 9:405 *jo.* Art. 1:103 DCFR.

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- xcvii Stating: 'A person who supplies terms which have not been individually negotiated has a duty to ensure that they are drafted and communicated in plain, intelligible language.'
- xcviii See Art. II. – 9:407(1) DCFR.
- xcix See Art. 15, COM(2011) 896.
- c Compare also the case analysed in *para. 4.3.1*.
- ci See *para. 4.3.1* and *4.3.2*.
- cii Beale, H., Fauvarque-Cosson, B., Rutgers, J., Tallon D. and Vogenauer, S. (2010), p. 1127. See also Note (1) ff to Article III. – 1:110 DCFR.
- ciii See *para. 4.3.1* to *4.3.3* and particularly *para. 4.3.2 in fine*.
- civ *Para. 4.3.5*.
- cv In the future, this case can perhaps be solved by applying Art. 72(6), COM(2011) 896. See on this also *para. 4.3.5* below.
- cvi See *para. 4.3.1* to *4.3.3* and particularly *para. 4.3.2 in fine*.
- cvii Note (1) ff. to Art. III. – 1:108 DCFR.
- cviii See Note (1) to Art. III. – 1:109 DCFR: 'The rule in paragraph (1) is universally recognised, even if not expressly stated.'
- cix See *para. 4.3.1* to *4.3.4* above.
- cx This too has been signalled in *para. 4.3.1* to *4.3.4* above.
- cxii COM(2011) 896.
- cxiii Art. 72(1), COM(2011) 896.
- cxiv ECJ 19 June 2008, Case C-454/06 (Presstext Nachrichtenagentur GmbH/Austria), ECR 2008, I-4401, paragraphs 35-37.
- cxv Art. 72(2), COM(2011) 896. According to paragraph (3) of the provision '[T]he replacement of the contractual partner shall be considered a substantial modification within the meaning of paragraph 1.'
- cxvi Art. 72(4), COM(2011) 896.
- cxvii Art. 72(6), COM(2011) 896.
- cxviii Art. 72(5), COM(2011) 896. This seems to be a codification of ECJ 29 April 2004, Case C-496/99P (Commission/CAS Succhi di Frutta), ECR 2004, I-3801, paragraphs 118-120 and 126.
- cxviii See *para. 2.3.2* and *2.3.3* above.
- cxix See particularly *para. 4.2.3* (Inaccuracy in communication); *para. 4.2.4* (Mistake); *para. 4.3.1* (Interpretation of the contract); and *para. 4.3.3* (Unfair terms). See also *para. 2.3.1* above.
- cxx Book II, Chapter 3, Section 1 DCFR.
- cxxi Book II, Chapter 3, Section 2 DCFR.
- cxxii Book II, Chapter 3, Section 3 DCFR.

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- cxxiii See in particular Art. II. – 3:101 (Duty to disclose information about goods, other assets and services); Art. II. – 3:106 (Clarity and form of information); Art. II. – 3:107 (Information about price and additional charges); Art. II. – 3:109(2) ff. (Remedies for breach of information duties); Art. II. – 3:201 (Correction of input errors); Art. II. – 3:302 (Breach of confidentiality); Art. II. – 3:501 (Liability for damages); Art. II. – 5:104 (Adequate information on the right to withdraw); Art. II. – 9:102 (Certain pre-contractual statements regarded as contract terms); Art. II. – 9:103 (Terms not individually negotiated); Art. IV.A. – 2:302 (Fitness for purpose, qualities, packaging); Art. IV.A. – 2:307 (Buyer’s knowledge of lack of conformity); Art. IV.C. – 2:102 (Pre-contractual duties to warn); Art. IV.C. – 2:106 (Obligation to achieve result); Art. IV.C. – 3:104 (Conformity); Art. IV.C. – 6:102 (Pre-contractual duty to warn); and Art. IV.C. – 7:102 (Obligation to acquire and use expert knowledge).
- cxxiv Notes (1) and (2) to Art. IV.C. – 2:102 DCFR.
- cxxv Compare Bar, C. Von, Clive, E. & Schulte-Nölke, H. (2009), pp. 64-65.
- cxxvi Book II, Chapter 7 DCFR. See particularly Section 3 (Infringement of fundamental principles or mandatory rules).
- cxxvii ECJ 10 April 1984, Case 14/83 (Von Kolson and Kamann/Nordrhein-Westfalen), *ECR* 1984, I-01891, paragraph 26. See on the subject matter Prechal, S. (2006), pp. 180 ff.
- cxxviii See *para. 1.1 jo. 3.2*.

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