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Contracts of the public administration and concessions in Europe

Thesis summary

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I. Summary of research objectives

The thesis aims to examine the specific features of contracts concluded by bodies of the public administration, with a particular focus on concessions.

The study presents the different approaches taken by the main European legal systems when dealing with contracts of the public administration and seeks to explore the common considerations associated with the public interest and the similar features of these contracts in the examined national laws.

The thesis gives a detailed study of the EU law on concessions, showing its evolution and the most important parts of the current legal framework. While discussing EU law issues, the thesis tries to highlight which elements were taken over from national laws into EU law, how those aspects and interests important for national laws in dealing with contracts of the administration appear in the law of the European Union and how the EU law on concessions affects the traditional institutions of member states' laws. I also try to understand the approach upon which the EU law on concessions shapes the involvement of the state in the economy and the boundaries it sets for the public administration to decide on the most appropriate way of organizing public services.

The findings of the comparative legal research and the analysis of EU law obligations is used to better understand the position and specificities of contracts of the public administration in Hungarian law and the difficulties in the domestic application of the EU law on concessions. The overview of other European solutions also helps us to explore how public interest aspects appear in the application of Hungarian contract law.

Contracts concluded by the public administration are very important in the economy, according to the European Commission, procurements of public bodies alone represent around 14% of Member States' GDP.[1] The practical relevance of research on the topic is unquestionable. In spite of that, domestic private law literature has dealt relatively little with contracts of the administration in a more comprehensive way, with systematizing their legal problems and drawing general conclusions.[2] In a limited area, such as analyzing the characteristics of a public contract,[3] there is more scholarly literature available.[4] Recently, in

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[1] https://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm (2020.01.26.)

[2] Outstanding works of the Hungarian literature are: Harmathy Attila: Szerződés, közigazgatás, gazdaságirányítás. Akadémiai Kiadó, Budapest, 1983.; not particularly on contractual matters, but closely related to the subject: Kecskés László: Perelhető-e az állam? Immunitás és kárfelelősség. Közgazdasági és Jogi Kiadó, Budapest, 1988.

[3] The summary uses the term „public contract" in accordance with its meaning in EU public procurement law. See Article 2., 1. (5)-(9) of Directive 2014/24/EU. The term „public administration contracts" refers to all contracts where at least one of the contracting parties is an administrative body.

[4] See among others: Kiss Mária: A közbeszerzés polgári jogi kérdései. Gazdaság és Jog. 2005/3., pp. 3-9.; Juhász Ágnes: A közbeszerzés közösségi és nemzeti jogi szabályozása - magánjogi elemek a közbeszerzési szerződésre vonatkozó rendelkezések körében, doktori értekezés, 2011, Miskolci Egyetem, elérhető: http://193.6.1.94:9080/JaDoX_Portlets/documents/document_6362_section_1736.pdf (2019.12.12.); Németh Anita: A közbeszerzési szerződések és az érvénytelenség. In: Jogi Tanulmányok I. kötet, Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskoláinak III. konferenciája, 2012. április 20. Budapest, pp. 445-456. elérhető: http://www.ajk.elte.hu/file/doktkonf2012_01.pdf (2019.10.08.); Auer Ádám: Lehet-e semmis a közbeszerzési szabályok megsértésével megkötött szerződés? In: Közbeszerzési Szemle. 2012/12. sz., pp. 45-57.; Miklós Gyula – Hubai Ágnes – Bozzay Erika: Fejezetek az új Ptk. közbeszerzési eljárásokra gyakorolt hatásáról. In: Közbeszerzési Szemle 2013/12. sz., pp. 39-56.; Miklós Gyula: Fejezetek az új Ptk. közbeszerzési eljárásokra gyakorolt hatásáról (folytatás). In: Közbeszerzési Szemle 2014. 2. sz. 39-43.; Várhomoki-Molnár Márta: A közbeszerzési törvény új Polgári Törvénykönyvvel összefüggő módosítása. In:

response to the increasing use of contracts in the operation of the administration, administrative law theory has been paying attention to the possibilities of introducing the concept of administrative contracts in Hungary.[5] Based on the results of the research, the dissertation also gives some thoughts on the institution of administrative contract recently recognized by Hungarian law.

Research of the topic is challenging not only as there is little domestic literature on the subject, but also since the arising legal issues cut across different fields of law, and an overview of the socio-economic context is also essential for understanding those legal problems.

II. Research methodology and the analysis carried out

My research mainly followed a comparative legal approach and covered the examination of the three most influential European legal systems, French, English and German law, the analysis of the EU law on concessions and the position and certain problems of public administration contracts and concessions in Hungarian law. The dissertation aims to discuss legal issues in their socio-economic context.

In my thesis I first give an overview of the theoretical foundations of the topic by presenting three principles and theories having a great influence on the relationship between state and economy in the studied legal systems: the French *service public*,[6] German ordoliberalism and the English doctrine of the sovereignty of Parliament. (Chapter II)

Then in Chapter III, as an important part of the economic background of this field of law, I discuss the different ways of organizing public services, the role of the private sector in delivering public services, the traditional forms of service provision and their development in the selected countries.

Chapter IV summarizes general trends in the law of contracts of the administration that emerged as a result of new tools in the functioning of modern public administration, such as participation of private sector operators and the use of private law in fulfilling public tasks.

In Chapter V I describe how the examined national laws deal with contracts concluded by the public administration, where they allocate them in the legal system, and what are those important public-interest aspects that they take into account, and by what means these are

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Közbeszerzési Szemle 2014/3. sz. pp. 2-10.; Cser-Palkovics Tamás: A Kbt. és az új Ptk. viszonyrendszere, elérhető: https://ptk2013.hu/szakcikkek/cser-palkovics-tamas-a-kbt-es-az-uj-ptk-viszonyrendszere/4502 (2019.12.11.); Juhász Ágnes: A közbeszerzésről másképpen – közjog és magánjog határán, Lectum Kiadó, Szeged, 2014.; Gyulai-Schmidt Andrea: Közös magánjogi elemek a megújult társasági jogban és a közbeszerzésben, In: Pázmány Law Working Papers 2014/13., elérhető: http://plwp.eu/docs/wp/2014/2014-13_Gyulai-Schmidt.pdf (2019.12.08.); Auer Ádám - Balog Balázs - Jenovai Petra - Juhász Ágnes - Papp Tekla - Strihó Krisztina - Szeghő Ágnes (szerk. Papp Tekla): Atipikus szerződések, Budapest, Opten, 2015.

[5] Molnár Miklós, Margaret M. Tabler: Gondolatok a közigazgatási szerződésekről, In: Magyar Közigazgatás, 2000/10. szám, pp. 598–608.; Petrik Ferenc: Közszerződés a közjog és a polgári jog határán. In: Gazdaság és jog 2005/11., pp. 3-8. és Petrik Ferenc: A közigazgatási aktus alakváltozása, a közszerződés. In: Magyar Közigazgatás 2005/5., pp. 267-275.; Ádám Antal: A közjogi szerződésekről. In: Jura 2004/1., pp. 5-18.; Horváth M. Tamás: A közigazgatási szerződések szabályozási koncepciója. In: Magyar Közigazgatás 2005/3., pp. 142-147.; F. Rozsnyai Krisztina: Közigazgatási bíráskodás Prokrusztész-ágyban. ELTE Eötvös Kiadó, Budapest, 2010.; Barabás Gergely: A közigazgatási szerződések egyes eljárás- és perjogi kérdései a magyar (közigazgatási és polgári) bírói joggyakorlatban. In: Közbeszerzési Szemle 2014/11., Jogtár online.

[6] On the concept of *service public* and its reception in other European countries see: Nagy Marianna: Service public, az ezerarcú jogintézmény In: Tanulmányok Nagy Tibor tiszteletére. (szerk. Simon István) Szent István Társulat, Budapest, 2009.

considered. I pay attention to the problems of concessions in this part of the dissertation too, but I also try to give a general picture of the state of public administration contracts in the examined legal systems.

Then I embark on the study of the EU law on concessions (Chapter VI). After discussing the evolution of the legislation and case-law on concessions, I examine certain elements of this body of law on the basis of the new Concessions Directive and the jurisprudence of the European Court of Justice. Here, I elaborate further on the concept of concession and on the rules that affect the ability of the public administration to decide on the ways in which public services are organized and the framework for the state's involvement in the economy. While analyzing the EU law on concessions, I try to highlight how aspects of public interest important for national laws in dealing with contracts of the administration appear in the law of the European Union. The conclusions on the interaction between Member State and EU law are summarized in a separate chapter (Chapter VII).

After the examination of EU law, the dissertation moves on to the discussion of domestic law. Following the fundamental questions related to the position of the contracts of the administration in the legal system, I examine in more detail how public interest in the operation of the administration can be taken into account in the application of contract law, through the private law approach of Hungarian law.

Then I deal with the concept of concession in Hungarian law and with problems encountered in the application of the EU-law concept in domestic public procurement practice.

III. Summary of conclusions and their possible application

1. Changes affecting the law of contracts of the administration

From the economic context shaping the law of public administration contracts, the dissertation discusses the solutions for the delivery and organization of public services, which play an important role in the development of the law of these contracts and particularly the law on concessions. Even within the common EU framework, there are considerable differences between European member states in the extent and modalities of their involvement in the economy and in the underlying economic policies and legal approaches. The law of public administration contracts has been particularly affected in recent decades by the economic changes that have led to the increasing outsourcing and privatization of public tasks.

There have been significant changes since the beginning of the 20th century in the relationship between state and economy, which have also affected the law of contracts of the administration. Tendencies include mixing of public and private law elements, relativization of the public law/private law divide, growing restrictions on contractual freedom, blurring boundaries of the administration as a result of increasing outsourcing of public tasks, increased recourse to contracts in functioning of the administration and an emerging need to respect public law values in case the administration acts through private law means.

There is a general trend towards unification, mainly deriving from EU public procurement law whose main focus is on sustaining an undistorted competition in public purchases through transparent procedural rules. But this process is also taking place on the basis of different legal traditions in the national laws. It is possible to maintain various approaches to public

contracts in the individual legal systems, however, their special point of views can only apply within the boundaries set by EU law.

2. Different approaches and common features of public administration contracts in the examined legal systems

The French legal system has created the concept of administrative contract and the specific law governing those contracts, based upon the principle that the rules of contracts of public authorities have to reflect the public interest and the aim to ensure the proper functioning of public services. Administrative contracts form a distinct category from private law contracts and the legal disputes relating to them fall within the jurisdiction of administrative courts. Certain special rules are applicable to these contracts beyond the underlying law of the French Civil Code. It is usually considered to be the main feature of administrative contracts that the parties to the contract are not in an equal position and that the law acknowledges certain prerogatives for the public authorities. However, it is also important that the rules of administrative contracts fairly protect the interests of the contracting party of the administration by their rules aimed at sustaining the economic balance of the contract and at compensating the private party in case the administration exercises its special rights.
The point of departure to observe English law is that its evolution is much more based on the needs arising from private economic activity than that of continental contract laws. In the system of *common law*, it derives from the principle of the rule of law that the same law applies to both the state and private parties when they take part in economic relationships. This approach led to the consequence that even the existence of administrative law was recognized much later in England than in Germany or France. The specificities of public contracts appear in the principles elaborated by courts and in codified laws, however, there is no general legal concept or theory on how the public interest is considered in relation to public contracts.
The German legal system was traditionally based on a strict distinction between the branches of private and public law. Its main approach to contracts of public authorities is that the public administration is also subject to private law when it takes part in economic relationships. However, German law also acknowledges certain specificities of public administration contracts in connection with the administrative role of the contractor and the related public interest. The emphasis in German law was put on the requirement that public authorities have to remain bound by certain public law requirements, particularly by human rights even if they act by contract. In order to apply public law requirements to private law contracts German courts channelled these public law principles into the application of general private law clauses. This solution of taking public constraints into account in the interpretation of private law led to the development of *Verwaltungsprivatrecht* that can be regarded as a kind of special private law (*Sonderprivatrecht*). [7]

In spite of the conceptual divergences, common features and common underlying interests relating to public administration contracts can also be observed in the main European legal systems. As a general rule, law always has to find the right balance between private and public interests when the unchanged application of general private law would lead to an outcome contrary to the public interest in the functioning of the administration.

The study identifies the following common elements and considerations in the examined legal systems:

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[7] On the concept of *Verwaltungsprivtrecht* see: Stelkens, Ulrich: Verwaltungsprivatrecht - Zur Privatrechtsbindung der Verwaltung, deren Reichweite und Konsequenzen. Duncker & Humblot, Berlin, 2005.

- Organs of the public administration should retain their ability to exercise their functions in society, and law should therefore ensure that contracts do not constitute an obstacle to making decisions in the public interest. This justifies giving public administrations more leeway to exercise their contractual rights, which is reflected in specific elements of national laws. A unilateral right for the administration to modify the contract or to terminate it on public interest grounds or the limited availability of certain remedies against the administration are expressions of this principle. However, where the public interest prevails over the binding nature of the contract, appropriate compensation must always be provided to the contractor.
- Organs of the public administration have to observe the limits of their competences and the goals of the organization even when they act through contracts. This requirement led to the limitation of public bodies' capacity to contract in the English and German legal systems. However, the scope of the ultra-vires doctrine has diminished in recent years due to the important interests in legal certainty and the protection of legitimate expectations.
- The requirement that bodies of the administration, when acting through a contract, are not exempt from public law obligations which guarantee the protection of citizens' rights, is linked to their role as a holder of public authority. Bodies of the administration should be bound by basic public law norms, such as human rights that guarantee the rights of citizens in their relations to the state even when they act by means of contract. This approach leads to the application of human rights and certain public law principles to contractual relationships of the administration.
- Private law contractual rules often have to be applied together with other fields of law – such as budget law, rules of public property and access to public data or laws governing the civil service – that follow different goals.
- Contracts can also be used as a tool of economic policy in connection with the state's role in governing the economy. Contracts often include terms that do not relate strictly to the subject matter of the contract but that reflect the state's intention to influence economic processes indirectly.

3. Concessions in the law of the European Union

The evolution of the EU law on concessions

As with other parts of EU economic law, the law on concessions under EU public procurement law is evolving towards an ever closer integration. Concerning concessions, compared to the situation of public contracts,[8] the development of the law is characteristic in that the Court of Justice of the European Union played a prominent role in shaping it. This phenomenon can be observed mainly in the area of service concessions, but the situation of service concessions has generally determined the development of the law on concessions.

EU member states have long resisted regulating service concessions in a directive. However, the Court of Justice of the European Union in its so called transparency case-law, beginning with its milestone-decision in the *Teleaustria* case[9], extended the basic principles of public

[8] The two categories of contracts covered by the scope of public procurement law are public contracts and concessions.

[9] Case C-324/98 *Telaustria and Telefonadress*, Judgment of the Court of 7 December 2000, ECLI:EU:C:2000:669

procurement law – the principle of equal treatment and transparency – to contracts not covered by the Public Procurement Directives. Thus, by the interpretation of primary law, the Court imposed obligations on contracting authorities of the member states which had not been known earlier. The Court made it clear that in spite of the lack of secondary regulation, member states were not free to award these contracts to the economic operator of their choice, but the award had to be opened up to competition and the principle of equal treatment had to be observed.

However, the case-law developed by the Court has been subject to a number of uncertainties, such as the consideration of the existence of a cross-border interest or the determination of the specific procedural requirements deriving from the obligation of transparency. The transparency case-law has not lost its importance even after the adoption of the Concessions Directive.[10] It is noteworthy that, in recent years, the exportation of the principles of public procurement has taken place under primary law, outside the scope of public contracts and concessions to various forms of state-economy relations, such as the granting of exclusive licenses for certain economic activities.[11]

The difficulty in adopting a directive on concessions was mainly due to the relationship of concessions with the organization of public services. The Directive was finally adopted in 2014 and the compromises in its text, mainly concerning its scope, reflect the fact that member states did not want to extend the principles of undistorted competition to certain sensitive areas in the same way as to other services. Member states clearly wanted to exclude from competition their traditional solutions of service organization where non-profit organizations perform rescue, firefighting or other danger prevention or civil protection tasks.

In this field, the case-law of the Court of Justice has also recognized the limits of competition in relation to the Italian voluntary ambulance service providers.[12] In general, the sensitivity of health, social and cultural services is also reflected in their "light regime" regulation in the Directive.

In order to achieve the adoption of the Directive, public service concessions for drinking water were also excluded from its scope,[13] without any indication of this exception in primary law or case-law.

The history of its adoption also defined the features of the Directive: in order to have a proposal acceptable to all, the Commission had already adopted, in the course of the preparation of the legislation, a not-too-detailed, flexible regulatory approach to the award of concessions. Compared to the provisions of the Public Procurement Directives, the Concessions Directive provides a much less detailed regulation, but it did clarify the essential procedural requirements of EU law on the award of concessions.

The notion of concession

[10] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts

[11] See Cases C-203/08 *Betfair,* Judgment of the Court of 8 June 2010, ECLI:EU:C:2010:307; Case C-64/08 *Engelmann,* Judgment of the Court of 9 September 2010, ECLI:EU:C:2010:506 and joined Cases C-458/14 and C-67/15 *Promoimpresa Srl* and *Mario Melis and others,* judgment of the Court of 14 July 2016, ECLI:EU:C:2016:558

[12] Case C-113/13 *Spezzino,* judgment of the Court of 11 December 2014, ECLI:EU:C:2014:2440; Case C-50/14 *CASTA,* judgment of the Court of 28 January 2016, ECLI:EU:C:2016:56

[13] On the background of the exclusion, see: Gyulai-Schmidt Andrea: A szolgáltatási koncesszió európai harmonizációja In: (L)ex Cathedra et Praxis, Ünnepi Kötet Lábady Tamás 70. születésnapja alkalmából, Budapest, Pázmány Press, 2014, pp. 285-305.

EU law distinguishes between two types of concession: works and services concession.[14] Due to the complexity of the concept, one of the most difficult issues for legal practice is often the qualification of the contract. As the Court's case-law has played a decisive role in the development of the law on concessions, the concept itself has also evolved predominantly in the case-law and has been surrounded by uncertainty in many ways. A number of judgments of the Court have dealt with the interpretation and definition of the concept of concession, in particular service concession, especially as regards the distinction between public contracts and concessions. Although a definition of service concession has been included in Directives 2004/18/EC and 2004/17/EC, this definition was very narrow and substantial interpretative questions about the concept have still been decided in the Court's jurisprudence.

The delimitation of concessions from public contracts had a great practical importance. In case of service concessions, the lack of EU directive regulation in many countries has led to a huge difference in the room for maneuver of contracting authorities, in the rules governing the award of contracts and the rights of the parties concerned to legal remedies, depending on whether it was a service concession or a public service contract.

The concept has developed in the case-law of the Court of Justice of the European Union in a way that EU law has used and built upon certain elements of member state law, in particular French law, but in accordance with the objectives of EU public procurement law, it has put these elements in a separate system with a logic different from that of national contract or administrative laws. As the notion evolved in EU law, it has lost elements (such as the public service nature of the contracted service, which is an important element of the French category of public service concession) that would not have served the widest possible application of the principles of equal treatment and transparency or would have led to unjustified differences between member states.

The legislator sought to incorporate the results of the case-law into the text of the Directive and, at the same time, to clarify the uncertainties regarding the concept of concession. However, in the detailed analysis of the concept, the thesis points out that not all questions were clearly answered. By making economic risk-taking of the contractor a central conceptual element of concessions, EU law did not make it easy for national contracting authorities and courts to apply the law. Although the Directive tries to give better guidance on the sorts of risks relevant for classifying a contract, for example, the classification of contracts where the contracting authority pays the contractor a fee based on the availability of the infrastructure for a long period of time, still remains uncertain.

There is also a need for more precise guidance on the demarcation of service concessions and agreements authorizing the conduct of an economic activity.

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[14] Acoording to points a)-b) 1. Article 5 of Directive 2014/23/EU: 'concessions' means works or services concessions, as defined in points (a) and (b):

(a) 'works concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment;

(b) 'services concession' means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

Different models for the organization of public services and EU public procurement law

The principle underlying EU public procurement law is that it respects the choice between different economic models, and does not oblige member state administrations to outsource their tasks and privatize certain services. However, besides this theoretical starting point, EU public procurement law does influence the choices available for member state administrations.[15]

While national decision-makers typically see a fundamental difference in whether a task is performed by a public or a private operator, the relevant dividing line for EU public procurement law is between public administration and market activities. If an administrative body decides to carry out a task contractually, with the involvement of another legal entity, competition already opens between public and private economic operators, who have to be treated equally by the contracting authority. Public procurement rules do not, therefore, allow contracts to be reserved for publicly owned companies and do not allow for a free choice between forms of ownership.

However, it is a difficult question for public procurement law to find where the boundaries between public administration and market are, i.e. when the performing of tasks remains within the public administration and when a task is outsourced where competition and a level playing field between public and private operators must prevail. Here, too, the case-law of the Court of Justice of the European Union, mainly concerning public services, laid the conditions according to which the member states' freedom of decision-making between outsourcing and administration is safeguarded. The case-law of the Court of Justice has developed a set of conditions that strike a balance between this freedom of decision and the interest in ensuring that the activities of public operators do not distort competition in the market. The aforementioned conditions are, above all, the rules for *in-house* contracting and horizontal cooperation between public authorities, codified also (in addition to the Public Procurement Directives) by the Concessions Directive.

In the context of member states' freedom to decide whether or not to outsource a task, the relationship of public procurement law with exclusive rights is also relevant, and might be particularly important regarding concessions.

The public interest relating to contracts and the principle of pacta sunt servanda

A common feature of European legal systems in relation to public administration contracts is the need for the law to provide in certain cases, with regard to the public interest, a greater freedom of action for public administrations than for individuals. The greater margin of maneuver afforded to the public administration in contractual relations primarily concerns the termination and modification of contracts. However, the individual legal systems do not represent the same approach on the relationship between the state and the economy. Whereas French administrative contract law presupposes, with appropriate compensation of the contractor, the possibility of stronger state interference in contractual relations, under English

[15] Other parts of EU economic law also significantly influence the organization of public services. See on this topic: Kende Tamás: A közvállalkozásokra vonatkozó politika In: Bevezetés az Európai Unió Politikáiba (szerk. Kende Tamás), Wolters Kluwer, Budapest 2015. pp. 201-240.

and German law the legal system allows more limited intervention by the public body and contractual provisions have a greater importance.

EU public procurement law provides scope for divergent national approaches to the contracts of the administration, but also limits the free exercise of contractual rights. Its effect extends increasingly to the period after the conclusion of the contract and, in the context of the contractual relationship, requires that the exercise of the parties' contractual rights are monitored to ensure that, with regard to the competition prior to the conclusion of the contract, the principle of equal treatment is observed. The dissertation accepts the view that there is generally no legal obstacle to the termination of contractual relationships in the public interest from a public procurement point of view.

The rules of public procurement law limit the scope for contract modifications to prevent distortions of competition and, in this area, contribute to the strengthening of the principle of *pacta sunt servanda*. At the same time, the Directives aim to give rules that also take into account the interest in contract modifications.

Within the framework of EU public procurement law, the approach of putting the public interest represented by public procurement rules ahead of the interest in upholding contracts in the event of a breach of EU rules appears to be getting stronger. While in the past it was considered to be entirely the competence of the member states' contract law to assess how an infringement of public procurement rules affects the legal fate of a contract already awarded, in 2007 the judgment in *Commission v Germany*[16] and then Directive 2007/66/EC[17] made it clear that contracts cannot be upheld in cases of the most serious breaches of EU law. However, that directive permits derogations from the general rule on imperative grounds of public interest and, in exceptional cases, allows the effects of the contract concerned by the infringement to be recognized. The Public Procurement Directives and the Concessions Directive, adopted in 2014, provide for the right to terminate contracts in the case of certain infringements, which also points to the more effective application of EU law and the weakening of the *pacta sunt servanda* principle.

4. Contracts of the public administration and concessions in Hungarian law

Contracts of the public administration in the Hungarian legal system

Dealing with contracts of the public administration, Hungarian law has historically followed the German pattern, where contracts concluded by public authorities have not been distinguished from other civil law contracts, and the point of departure has been the principle of equality between the parties.

However, changes that affected contract law or, more specifically, the law of contracts of the administration in the twentieth century, particularly the increasing restrictions on contractual freedom and the increasing use of contracts in new areas of public administration,[18] have also had an impact on Hungarian law. Contracts appeared, whose subject was specifically related to the performance of public administration tasks and where the weight of administrative rules

[16] Case C-503/04 *Commission v Germany,* judgment of the Court of 18 July 2007, ECLI:EU:C:2007:432

[17] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts

[18] See on this topic: Kisfaludi András: A polgári jogi szerződés tárgya In: Polgári Jogi Kodifikáció, 2008/3., pp. 13-18. és Kisfaludi András: A szerződés jogintézménye az állami funkciók ellátásában, In: Polgári Jog 2018/1. pp. 1-15.

determining the content of the contracts was also significant. For some of these contracts, which are subject to special rules, particularly grant agreements, there has been some uncertainty in recent judicial practice on whether such contracts are to be regarded as civil law contracts, and this issue has mainly arisen in disputes regarding the competence of courts.

In its KMK-PK opinion nr. 1/2012. (XII. 10.) the Kúria (the supreme court in Hungary) confirmed the essentially private law approach to public administration contracts in Hungarian law, stating that, in the absence of public authority powers provided by law in the given legal relationship, the relationship is considered to be a civil law relationship in spite of certain public law elements, and the dispute falls within the jurisdiction of the civil courts.[19]

As of 1 January 2018 the concept of administrative contract was introduced into the Hungarian legal system by the new Code of Administrative Court Procedure. At present, this qualification determines whether contractual disputes are subject to administrative or civil litigation. The new concept has not altered the traditional private law approach to the economic contractual relationships of the administration in the Hungarian legal system. At the same time, the treatment of public administration contracts has changed in that disputes regarding certain contracts, specifically serving administrative purposes, which are characterized by the dominance of public law elements and are subject to special regulation, have become subject to administrative litigation.
Taking into account the development and traditions of the Hungarian legal system so far, the author's approach suggests the choice of a narrower concept of administrative contract for the future. The scope of the German public law contracts may be an example for the legislator in this regard.

The private law approach to contracts does not preclude the consideration of public interest aspects in the economic contractual relations of the administration. Public law requirements relating to the functioning of the administration and requirements of public interest relating to the role of the administration in society influence contractual relations through the mediation of private law, in particular through the use of general clauses such as illegal contracts or contracts „contrary to good morals" (Ptk. 6:96. §). However, maybe due to the scarcity of relevant private-law theoretical works, it is difficult to identify established principles in Hungarian law relating to contracts of the administration, and the legal practice can find little theoretical support when weighing up different interests in individual cases.

The requirement in the operation of the public administration that contracts should not impede the exercise of public powers in the public interest, the prohibition of contractual obligations specifically for the exercise of public authority powers, is also enforced by Hungarian judicial practice, even if there is uncertainty as to whether a contract is void or non-existent or subsequently frustrated in this case.

The prudent management of public funds and the public financial interest have also been the subject of numerous private law litigation cases relating to contracts, which primarily concerned the problem of nullity of illegal contracts and the question of contestability of contracts due to striking disproportionality between the value of the service and the consideration (Ptk. 6:98. §). In some cases, where the violation of economic public interest is at the same time a clear violation of the moral standards accepted by society, the contract can also be considered null and void for being contrary to good morals.

[19] Authors in favour of the introduction of the category of administrative contract into Hungarian law criticized this approach. See: Barabás 2014; F. Rozsnyai Krisztina: A közigazgatási perjog fejlesztésének koncepcionális irányai In: Magyar Jog 2015/9., pp. 485-497.

When enforcing public interest requirements linked to the functioning of the administration through private law norms, the law must strike a balance between the public interest and the principle of *pacta sunt servanda*, since legal certainty in business operations and the credibility of the state's contractual obligations are of fundamental importance to the functioning of the economy. The legal principles and practices developed in the European legal systems are also examples of the fact that the public interest is considered in contractual relations in a way that takes into account the balance of interests.

If the legislator or courts give priority to the public interest, for example when declaring a contract invalid, compensation for the contractor may be necessary in some cases.

The state is also able to influence its contractual relationships in its capacity as the holder of public authority. In this regard, other areas of the legal system (constitutional law, EU law, investment protection law in case of foreign involvement) draw the limits of a reasonable political margin for the exercise of the state's public power in relation to contracts concluded.

Concessions in Hungarian law

Private initiative also played an important role in the development of public services and infrastructure in Hungary in the 19th century. Already from the 1830s onwards, laws were adopted that created the regulatory framework for private companies to take part in providing various public services and in creating the assets necessary for these services.[20] Concerning the essence of concessions, Magyary states that „an individual or commercial company is licensed to perform public tasks and to use public assets for that purpose. (…) Since the licensee makes a significant investment, the license, although temporary, usually lasts for 50 or 90 years and usually provides exclusivity."[21] According to this concept, which prevailed before the Second World War, the concession was an administrative license granted to private operators to provide public services and create the necessary assets for the provision of those services. The legal approach to private investment in infrastructure was thus different from that of public works and supply contracts, which were considered to be private law contracts.

The need for private sector financing in the provision of public services and the building of public infrastructure reappeared after the change of the political system. With the adoption of Act XVI of 1991 on Concessions, the legislator intended to provide a uniform and comprehensive regulation of the economic activities constituting a state monopoly and their transfer to private operators in a transparent manner. A concession contract pursuant to the Concessions Act (and Act CXCVI of 2011 on National Property) is a civil law contract having as its object the transfer of the right to pursue an economic activity subject to state or local government monopoly to a legal entity operating at least in part with private participation. The characteristics of this Hungarian legal institution of the concession – which, although subject to several changes, have been preserved in its main concept – are significantly influenced by the fact that it was created during the time of the economic transition of the change of system in Hungary. The concept of regulation in today's economic law environment, greatly influenced by EU law, can be regarded as outdated in several aspects.

Public contracts, as well as works and service concessions, as regulated in Act CXLIII of 2015 on Public Procurements, are the transposition into Hungarian law of an EU legal

[20] On the history of concessions in Hungary, see: Papp Tekla: A koncesszió, Pólay Elemér Alapítvány, Szeged, 2006., pp. 20-39.
[21] Magyary Zoltán: Magyar Közigazgatás, Királyi Magyar Egyetemi Nyomda, Budapest, 1942., p. 446.

institution which has been formed in accordance with the objectives of EU public procurement law and whose rules therefore apply irrespective of the public/private classification, type of contract or other legal classification in sectoral legislation.

With the transposition of the Concessions Directive, the Hungarian legislator, like other European countries, sought to ensure a flexible procedure for contracting authorities. An overview of public procurement legal practice relating to works and service concessions suggests that demarcation issues are important in the domestic practice as well, the interpretation of the relationship between notions of an EU law origin and other legal concepts regulated in sectoral legislation causes difficulties for practitioners, and risk-taking as a distinguishing criterion between public contracts and concessions is not yet adequately reflected in domestic practice.

The results of the comparative legal study in the doctoral dissertation and the analysis of domestic case-law can provide useful knowledge for practice as well. Better knowledge of the characteristics of economic contractual relations of the public administration can help to solve legal problems that may arise both in contractual and in judicial practice. A detailed analysis of the EU law on concessions can help domestic public procurement practitioners (including review bodies) to apply rules of EU law origin in their work.

IV. Publications of the author in the topic of the dissertation

Márta Molnár: Az állam és a költségvetési szervek polgári jogi szerződései [Private Law Contracts of the State and Budgetary Organizations] In: Jog és állam 9., XXVIII. Országos Tudományos Diákköri Konferencia, Állam és Jogtudományi Szekció (2007) kiadja: Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Budapest, 2007.

Márta Várhomoki-Molnár: A koncesszió fogalma az Európai Unió Bíróságának gyakorlatában [The Notion of Concession in the Case Law of the European Court of Justice] In: Európai Jog, 2010/6. szám, pp. 27-34.

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