ReNEUAL Model Rules on EU Administrative Procedure

Book IV – Contracts

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Structure

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Editorial note and acknowledgements

This publication of the Research Network on EU Administrative Law (ReNEUAL) is the result of a cooperative effort by many people and institutions. ReNEUAL was set up in 2009 upon the initiative of Professors Herwig C.H. Hofmann and Jens-Peter Schneider who coordinate the network together with Professor Jacques Ziller. ReNEUAL has grown to a membership of well over one hundred scholars and practitioners active in the field of EU and comparative public law.

The objectives of ReNEUAL are oriented towards developing an understanding of EU public law as a field which ensures that the constitutional values of the Union are present and complied with in all instances of exercise of public authority. It aims at contributing to a legal framework for implementation of EU law by non-legislative means through a set of accessible, functional and transparent rules which make visible rights and duties of individuals and administrations alike. The Model Rules on EU Administrative Procedure are proof that it is possible to draft an EU regulation of administrative procedures adapted to the sometimes complex realities of implementing EU law by Union bodies and Member States in cooperation.

In order to develop the Model Rules, ReNEUAL established four working groups addressing the main aspects of EU administrative procedure in the EU. These working groups were concerned primarily with executive rule-making (chaired by Deirdre Curtin, Herwig C.H. Hofmann and Joanna Mendes; Book II); single-case decision-making (chaired by Paul Craig, Giacinto della Cananea, Oriol Mir and Jens-Peter Schneider; Book III); public contracts (chaired by Jean-Bernard Auby, Ulrich Stelkens and Jacques Ziller; Book IV); and information management (chaired by Diana-Urania Galetta, Herwig C.H. Hofmann and Jens-Peter Schneider; Books V/VI). The design of these working groups reflected the scope of the ReNEUAL project on Model Rules on EU Administrative Procedure. In order to draft the various books the chairpersons of the working groups established drafting teams. In addition to the chairpersons the following scholars acted as drafting team members: Micaela Lottini (Book VI), Nikolaus Marsch (Book VI), Michael Mirschberger (Book IV), Hanna Schröder (Book IV), Morgane Tidghi (Book VI), Vanessa M. Tünsmeyer (Books III, V), Marek Wierzbowski (Book III). Edoardo Chiti, Paul Craig and Carol Harlow actively collaborated in the initial drafting of Book II. Detailed information about the chairpersons and the

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additional members of the drafting teams are provided in the respective list following this note and acknowledgements.

A steering committee composed of the chairs and most active members of the working groups undertook the task of management of the project and ensuring the consistency of content and drafting and finally acted as the editorial board of these ReNEUAL Model Rules. It was joined by Professor George Berman (Columbia University, New York) as external member.

The working groups' research and drafting activities benefitted from the insights and critical input in terms of time and expertise by many ReNEUAL members as well as civil servants from the EU institutions and bodies and also other experts from Europe and other parts of the world during presentation at workshops and conferences, and as reactions to earlier publications.

ReNEUAL would like to express its particular gratitude to the support from the European Ombudsman and the European Parliament. In 2011 the European Parliament established a sub-committee to the JURI committee under the presidency of MEP Luigi Berlinguer. The committee heard *inter alia* ReNEUAL steering committee members Paul Craig, Oriol Mir and Jacques Ziller as experts. The EP sub-committee prepared the January 2013 EP resolution requesting the Commission to submit a proposal for an EU Administrative Procedures Act. Following this invitation, the European Commission has undertaken hearings to which ReNEUAL Steering Committee members have contributed.

Since 2011 ReNEUAL has closely cooperated with the European Ombudsman initially with Ombudsman Nikiforos Diamandouros and since 2014 with Ombudsman Emily O'Reilly. Both have publicly supported ReNEUAL's efforts to improve EU administrative procedure law. We are especially grateful for the opportunities they offered to discuss the ReNEUAL project in 2012 and 2014 at conferences in the European Parliament organised by the Ombudsman. We would also like to thank Ian Harden, Secretary General, European Ombudsman's office, for his interest and support of the ReNEUAL project.

ReNEUAL would also like to acknowledge the cooperation with ACA-Europe, an association composed of the Court of Justice of the European Union and the Councils of State or the Supreme administrative jurisdictions of each of the members of the European Union. ACA-Europe's first joint conference with

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ReNEUAL was organised in April 2013 at the European Food Safety Authority in Parma, Italy, at which judges from nearly all EU member states of the EU participated and contributed to the discussion of composite decision-making procedures. The meeting had been prepared by a preparatory workshop of of members of the French Conseil d'Etat with Herwig Hofmann, under the chairmanship of the vice-President of the Conseil Jean-Marc Sauvé. The second conference in which ACA-Europe cooperated with ReNEUAL was held in Amsterdam (Netherlands) under the Dutch presidency of ACA-Europe with participation of Paul Craig and Jean-Bernard Auby of ReNEUAL, in The Hague in November 2013, in collaboration with the Council of State of the Netherlands.

The European Law Institute (ELI) joined the ReNEUAL project in 2012. In this context, we received many thoughtful comments by members of the ELI Membership Consultative Committee chaired by Marc Clément (Lyon) and Christiaan Timmermans (The Hague) and by participants of two ELI annual general meetings. We would like to thank all individual commentators for contributing their time, energy and knowledge to this joint project as well as ELI for lending its institutional support. A conference organized by the Centre for Judicial Cooperation, Department of Law of the European University Institute in Florence under the directorship of Loïc Azoulai in cooperation with ELI and ReNEUAL in February 2014 allowed for further in-depth discussion. Next to the organisers, we would like to especially thank the participating judges from Member States high jurisdictions.

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Table of Abbreviations

APA(s)	Administrative Procedure Act(s)
Austrian APA	Allgemeines Verwaltungsverfahrensgesetz 1991 (BGBl. Nr. 51/1991) das zuletzt durch Artikel 1 des Bundesgesetzes vom 31. Juli 2013 (BGBl. I Nr. 161/2013) geändert worden ist
CFR	Charter of Fundamental Rights of the European Union [2007] OJ C 303/1
CJEU	Court of Justice of the European Union
CJ	Court of Justice
CoE	Council of Europe
CoE Recommendation	Council of Europe Recommendation of the
CM/Rec(2007)7	Committee of Ministers to member states on good administration CM/Rec(2007)7
Commission Communication on contract awards	Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement directives (2006/C 179/02)
DCFR	Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) - Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law, available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.
DG	Directorate-General
Dutch GALA	Wet van 4 juni 1992 houdende algemene regels van bestuursrecht (Stb. 1992, 315), in werking getreden op 1 juli 1994, laatstelijk gewijzigd bij Wet van 25 juni 2014, in werking getreden op 1 augustus 2014

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ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EDPS	European Data Protection Supervisor
EO	European Ombudsman
EO Code	European Ombudsman – The European Code of Good Administrative Behaviour
EP	European Parliament
EP Resolution of 15 January 2013	European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI))
EU	European Union
EURODAC	European Data Comparison system for the comparison of fingerprints for the effective application of the Dublin Convention established by Council Regulation (EC) No 2725/2000 of 11 December 2000
GALA	General Administrative Law Act
GC	General Court of the Court of Justice of the European Union
German APA	Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist
Italian APA	Legge 7 agosto 1990 n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (pubblicata nella Gazzetta Ufficiale del 18 agosto 1990 n. 192)
MoU	Memorandum of Understanding
Polish APA	Ustawa z 14 czerwca 1960 r. Kodeks postępowania administracyjnego (Dziennik Ustaw Nr 30, poz.

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	168), tekst jednolity z dnia 30 stycznia 2013 r. (Dziennik Ustaw z 2013 r. poz. 267), zmiana z dnia 10 stycznia 2014 r. (Dziennik Ustaw z 2014 r. poz. 183)
RAPEX	Rapid Exchange of Information System
RASFF	Rapid Alert System for Food and Feed
SIRENE	Supplementary Informaton Request at the National Entry [Regulation (EC) no 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)]
SIS	Schengen Information System
Spanish APA	Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (BOE núm. 285, de 27.11.1992), modificada por última vez por la Ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la Administración Local (BOE núm. 312, de 30.12.2013)
Swedish APA	Förvaltningslag (1986:223) Utfärdad: 1986-05-07, last amended by Lag (2014:630) om ändring i förvaltningslagen (1986:223)
US APA	Administrative Procedure Act of 1946, Pub.L 79-404, §§ 500 – 596, 60 Stat. 237 (1946)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TFP	European Civil Service Tribunal of the Court of Justice of the Union

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ReNEUAL Model Rules on EU Administrative Procedure
Book IV – Contracts

Structure

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A. Introduction to Book IV

(1) The 'model rules' on contracts that are presented in Book IV are to be understood as a contribution to the debate on **EU contracts**, the **administrative procedure leading to their conclusion and their execution**. There is very little existing mandatory law on contracts with EU authorities which can be drawn upon for this purpose; although the proposed rules often derive from existing practice, there is **usually no common approach** shared by all or even most of the EU institutions, bodies, offices and agencies. Even within the European Commission approaches vary from one policy sector and DG to another.

I. Problems of a restatement of EU law with regard to Public Contracts

(2) Work on public contracts at an EU level entails several problems. To begin with, one has to screen an **abundant amount of restatement material** (EU legislation, case law, ombudsprudence (the 'jurisprudence' of the EO), standard contracts and contract templates developed by the Commission), which coincidentally is nonetheless **very ambiguous and fragmentary** in nature. What is more, there is no consensus among lawyers on how to understand this material. The same rules and clauses are interpreted in different ways by different contracting authorities, courts, lawyers, advocates general and scholars. Thus, a **very heterogeneous landscape presents itself on the European level**. This landscape becomes even more complex when the national levels are taken into account. Member States apply very different national concepts to public contracts (and public contract law) – regardless of whether these contracts are governed by national public or national private law, or by a mixture comprising public and private law elements.

(3) Furthermore, there is **no consensus on the substance of 'public contract law'** itself. Many questions arise in this context, *inter alia*: Does public contract law only concern public procurement or does it also involve the conclusion and execution of all contracts concluded by public authorities (including transactions, settlements, grant agreements, employment contracts)? Are contracts between public entities (regarding the division of competences) contracts which should be made subject to the same rules as public contracts between public administration and private persons?

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II. The starting point

(4) The working group leaders for this book began their research on public contract law long before the commencement of the ReNEUAL project. The preparatory scientific work, within and outwith ReNEUAL, which served as a basis for the rules of Book IV, can be seen in the resources of the **research network 'Public Contracts in Legal Globalization'** (www.public-contracts.eu), headed by Jean-Bernard Auby. This network is composed of an international group of experts working on public contracts and involves regular meetings for workshops and seminars on this topic. Various publications on International, European and Comparative Public Contract Law have resulted from the scientific exchange within this network. Another **forum for scholarly discussions** has been the research network ReNEUAL, in which the different concepts of EU contracts, represented by different scholars, have been the subject of lively debate within the working group on contracts and during various workshops with experts in EU Law and national administrative law. The ideas developed within the working group have subsequently been amended and further developed to take account of new literature and case law.

III. The 'life' of public contracts in a nutshell

(5) In general, the 'life' of a public contract can be divided roughly into **three phases**, which are *in nuce* usually common to all legal systems:

1. Administrative procedure leading to the conclusion of a public contract

This phase is governed by administrative procedure and public procurement rules.

2. Conclusion of the contract

This phase is governed by the rules establishing the prerequisites for the validity of a contract and the right to invoke invalidity.

3. Execution and end (expiration) of the contract

This phase is above all governed by the law of obligations. However, one should also consider whether the decision making process of the public authority, for instance with regard to the exercise of contractual rights, the termination of the contract or the decision to enact a unilateral act in order to enforce contractual rights, has to be subject to administrative procedure rules.

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IV. Between ambition and self-restraint: The decision on the scope of the draft

(6) Taking these three phases of the 'life' of public contracts into consideration, the working group had to engage with several questions prior to the completion of the academic draft. Should the draft only include rules regarding the administrative procedure leading to the conclusion of a public contract (especially public procurement rules)? Or should rules concerning administrative procedures in execution of a contract (for example regarding the decisions to terminate a contract, to exercise contractual rights etc.) also be incorporated? Moreover, should the work only consider **administrative procedure rules in sensu stricto** or also **provisions concerning the consequences of non-observance of such rules in view of the validity of the contract and judicial review?** Is it at all **possible to differentiate between procedural and substantive law in public contract law?** Should the draft only provide a restatement with regard to public contracts with EU authorities, or also in relation to public contracts between Member State administrations and third parties? More challenging still: Should Book IV also deal with the problems of sub-contractors?

(7) In order to answer the majority of these questions, **several aspects were *discussed*** in the working group:

(8) – *First* of all, extending the scope of Book IV to public contracts concluded by Member State authorities would only be possible if its focus is limited to the administrative procedures leading to the conclusion of a public contract (especially public procurement rules). However, **Member State laws on the validity and execution of public contracts are too heterogeneous for any harmonization on EU level**. Furthermore, the **issue of a legal basis for codification** of administrative procedure law which is being discussed in the Introduction to Book I of these Model Rules **is even more complicated** in the case of contracts of Member States' authorities for the reasons which have just been indicated.

(9) – *Second*, **public procurement rules are already exhaustively laid out** in the various public procurement directives, Title V of Regulation 966/2012 on the financial rules applicable to the general budget of the Union (Financial

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Regulation) and the Commission's Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement directives (2006/C 179/02)'.

(10) – *Third*, **ombudsprudence and case law of the CJEU** demonstrate important **gaps of legislation** with regard to the principles of good administration in the execution phase of public contracts and in relation to the practice of subcontracting.

(11) – *Fourth*, **public contracts typically create continuing obligations**. This fact justifies placing the **focus on the execution of public contracts** (without neglecting the procedure leading up to the conclusion of the contract).

(12) – *Fifth*, national laws on public contracts have some clear shortcomings, particularly with regard to the consequences of illegality of such public contracts, and may therefore not always serve as suitable models for the solution of these problems on an EU level: Book IV therefore also proposes some new solutions which should not be considered as a restatement but as a proposal on how to improve public contract law.

(13) Discussing all these questions and assessing the arguments presented during the drafting period finally led to the following **compromise between ambition and necessary *self-restraint***:

(14) – Only contracts regarding administrative activity concluded between EU authorities and private entities or, with some reservations, with Member State administrations fall within the **scope of Book IV**. Hence, the scope of application of the Model Rules of Book IV is the same as for Books II and III.

(15) – Book IV covers all three phases of the 'life' of an EU public contract, as well as the problems of subcontracting.

(16) – It is necessary to align the Model Rules of Book IV with primary law on judicial review, Articles 272 and 335 TFEU, and the case law concerning 'acts' within the meaning of Articles 263 and 299 TFEU.

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(17) – Furthermore with regard to questions of validity, execution and judicial review it is necessary to distinguish between on the one hand **EU contracts that are governed solely by EU law** and on the other hand **EU contracts that are governed solely by the law of a Member State**, or even a Third State. In contrast, there is generally no need to differentiate between these two kinds of EU contracts with regard to the administrative procedures that lead to the conclusion and concern the execution or termination of such contracts.

V. EU contracts solely governed by EU law and EU contracts governed by the law of a Member State

(18) The necessary distinction between EU contracts solely governed by EU law and EU contracts governed by the law of a Member State, or a Third State, brings about the need to outline the respective **characteristics of these two types of EU contracts.** It could be said that under the present state of EU law ***EU contracts solely governed by EU law***:

(19) – Are usually contracts **serving as a tool to implement EU policies** (bearing only few similarities to contracts concluded between private parties), *inter alia* grant agreements, transactions and settlement agreements (but also staff contracts in the sense of the EU Staff Regulations);

(20) – Require a **'uniform contract law'** assuring a uniform implementation of EU law across the whole EU territory.

(21) In contrast, under the present state of **EU law EU contracts governed by the law of a Member State**:

(22) – Are usually **contracts *which could also be concluded between private parties***, *inter alia* contracts concerning the purchase and sale of goods or real estate, rental and lease contracts, or contracts for the supply of services;

(23) **–** Do **not require separate EU contract law** as the application of national private law in relation to the validity and the execution of these contracts is sufficient. In this instance, special rules for EU contracts would be considered as unjustified 'privileges' for the contracting EU authority.

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(24) Yet, even with regard to EU contracts governed by the law of a Member State, the ***EU authority*** **does not enjoy the contractual freedom** (in the sense of the German concept of '*Privatautonomie*') **typical of private persons** in either the award procedure or during the execution of the contract: the EU authority is bound by the right to good administration which finds its expression, *inter alia*, in Article 41 CFR. Therefore, Book IV contains rules on administrative procedures with regard to the conclusion, execution and termination of such contracts.

VI. Background on the application of Member State law

(25) It could be argued that for reasons of primacy EU law could establish a special legal regime for EU contracts subject in principle to national law. The implementation of this approach would result in a parallel application of national and EU law to contracts and, moreover, in special cases this approach would create a certain dominant position for the EU authority in the contractual relationship. This **book is however based on the opposite view**, which also corresponds to the *de lege lata* situation, namely **that there is not a special EU law regime for all EU contracts**.

(26) Article 335 TFEU gives the EU the most extensive legal capacity accorded to legal persons under the respective national law, but it does not have the characteristics of a legal basis and certainly could not be used in order to provide EU Authorities with additional powers in a contracting situation. Hence, for reasons of legal certainty it seems obvious and desirable that there be a clear distinction between EU law and national law on this topic. Therefore, it would also be logical that, if a relation is governed by national law, such law has to be applied exclusively without further interference or exemptions. Otherwise the contract would no longer be subject to a regime of national contract law, but to a special regime, a mixture of national law with some reservations drawn from EU law. This would necessitate the drafting of a new intermediate regime, but not the application of a national law of contracts.

(27) Such an **intermediate regime**, which would be comparable to the German concept of '*Verwaltungsprivatrecht*' ('administrative private law'), **would furthermore contribute to legal uncertainty and a lack of transparency** as the contractors would neither be able to assess the rules applicable to the

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contract, nor their substantive content (as the German experiences with '*Verwaltungsprivatrecht*' shows).

(28) This being said, even if the contract is governed by national law, **standard terms or contractual clauses** should make it **possible to adapt the contract to EU law specifications**, especially those that serve to guarantee rights protected by the CFR and further consequences of the right to good administration. Standard clauses on the core issues of national contract law regimes, such as those about validity or performance of contracts for instance, would however be excluded, as the relevant national contract law should apply without reservations to its core regime.

(29) Following a strict division of contract law regimes – as opposed to the creation of a new intermediate regime – seems to also be in line with the opinion of the European Commission.[1] Article IV-35(3) and Article IV-36 are the clearest illustration of the option made in favour of such a strict division.

VII. Rules on transactions, settlements and mediation?

The working group considered including a chapter on **special rules on transactions, settlement and mediation** into Book IV. They could have been based on Recommendation Rec(2001)9 of the Committee of Ministers of the Council of Europe to Member States on alternatives to litigation between administrative authorities and private parties. Article 147(1) of the Rules of Procedure of the Court of Justice[2] presumes for direct execution of EU law that the parties are able to settle a controversy on arguable questions of the case, which means that basically a (non-judicial) dispute settlement is licit in general. For reasons of the prevalence of the objective legal protection function, **this basic presumption does not hold true for proceedings based on Articles 263 and 265 TFEU** (Article 147(2) of the Rules of Procedure of the Court of Justice[3]), which are in practice very important. Nevertheless some sort of

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1 Commission Regulation (EC, Euratom) 478/2007 of 23 April 2007 amending Regulation (EC, Euratom) 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities [2007] OJ L111/13.

2 Rules of Procedure of the Court of Justice of 25 September 2012 [2012] OJ L265/1, as amended on 18 June 2013 [2013] OJ L173/65.

3 Rules of Procedure of the Court of Justice of 25 September 2012 [2012] OJ L265/1, as amended on 18 June 2013 [2013] OJ L173/65.

amicable dispute settlement is possible in proceedings under Article 263 and 265 TFEU by withdrawal of the claim or in cases which do not proceed to judgments (disposal of a case), Articles 148 – 151 Rules of Procedure of the Court of Justice.[4] **Settlements by compromise** through contracts on rights and duties/obligations of EU law between EU authorities and private persons are not uncommon.[5] **Commitments in the field of EU anti-trust and merger control law** also appear as comparable to compromise settlements. For the EU anti-trust law settlements agreements are explicitly provided for in Article 10a of Commission Regulation 773/2004 since the amendment by Commission Regulation 622/2008.[6] Nevertheless the working group on this book **refrained from drafting a 'law on settlements agreements'**. The question whether and under which circumstances settlement agreements and mechanisms of alternative settlements of disputes are licit is **assessed very differently in the Member States**. This heterogeneity is based on the different views on the principle of legality of administration. In the end this **question is a topic of substantive law, not of administrative procedure law.** Hence, **Book IV does not provide for rules on the question if a settlement agreement or alternative dispute resolution can be closed at all.** However we would like to stress that if the EU Authority seeks to conclude a transaction contract or a settlement contract, the standard procedure of Articles IV-7 an IV-8 will apply. Furthermore for the execution of such contracts Chapter 3 of this Book IV is directly applicable. As regards the applicable substantive law, the law of the Member States is only applicable, if the transaction serves to settle a conflict about contractual obligations arising from a contract which is governed by Member State law. In all other cases EU law applies.

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4 Rules of Procedure of the Court of Justice of 25 September 2012 [2012] OJ L265/1, as amended on 18 June 2013 [2013] OJ L173/65.

5 On such cases where Member States concluded contracts in the name and for account of the European Community: Joined Cases C-80-82/99 *Flemmer/Christoffel v Council and Commission* [2001] ECR I-7211 paras 29 f.

6 Commission Regulation (EC) 622/2008 of 30 June 2008 amending Regulation (EC) 773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L171/3.

B. Model Rules

Chapter 1: General provisions

IV-1 Scope of application

(1) Book IV applies to all contracts and legally binding agreements concluded
(a) between an EU Authority and a private entity;
(b) between an EU Authority and a Member State authority, if the Member State authority acts as a service provider on the market and concludes the contract with an EU Authority as a private person would.
(c) Book IV applies also to contracts between an EU Authority and a Member State authority other than those mentioned in (b) if these rules are appropriate in view of the nature of the contract constituting an arrangement relating to administrative organisation.

(2) Paragraph (1)(a) and (b) of this Article applies *mutatis mutandis* to contracts between EU Authorities.

(3) Where a contract involves subcontracting, only the special rules of Chapter 4 of Book IV shall apply.

(4) Book IV does not apply to agreements concluded by EU Authorities under public international law.

IV-2 Definitions

For the purpose of this Book the following definitions apply:

(a) 'Contract' means an agreement between two or more parties which is intended to create a binding legal relationship or to have some other legal effect.
(b) 'Contractor' means the person that has entered into a contractual relationship with an EU Authority.
(c) 'EU contract' means all contracts as defined in Article IV-1(1) and (2).
(d) 'General terms of contract' means contractual terms which have not been individually negotiated. A term shall be regarded as not individually negotiated where it has been drafted in advance by one of the parties and the other party has therefore not been able to influence the substance of the term.

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(e) 'Participant' means any person that made an application or a tender in a competitive award procedure in the sense of Chapter 2 Section 3 of Book IV.
(f) 'Party' means the EU Authority or the contractor as parties of an EU contract.
(g) 'Potential Contractor' means any person that expressed an interest in concluding an EU contract in cases where a competitive award procedure in the sense of Chapter 2 Section 3 of Book IV did not take place or where he or she was excluded from the participation in such a procedure.
(h) 'Specific obligations of EU Authorities as public authorities' mean the obligations of an EU Authority to comply with fundamental rights in accordance with Article 6 TEU as well as with general principles of EU Law, with EU rules applicable to the conclusion of contracts, EU budgetary and financial rules, and with other general or specific obligations imposed under EU law on EU Authorities as public authorities.
(i) 'Subcontractor' means any person who has entered into a contractual relationship with the contractor for the purpose of implementing an existing EU contract.
(j) 'Third party' means any person who is not a party to the EU contract.

IV-3 Determination of the law applicable to an EU contract

(1) An EU contract is governed by either EU law or by the law of a Member State or by the law of a Third State. Where an EU legal act determines the law applicable to contracts, the parties cannot choose to submit a contract to another law.

(2) An EU contract is governed solely by EU law in the following cases:
(a) if explicitly provided for by an EU legal act;
(b) if the contract is a contract within the meaning of Article IV-1(1)(c);
(c) if the contract is modifying or abrogating pre-existing EU law relations between the parties;
(d) if the obligations of the EU Authority can only be fulfilled through an act within the meaning of Article 288 TFEU or through similar measures implying the exercise of public authority conferred on the EU Authority by EU law;
(e) if an EU legal act establishes homogeneous rules regarding the principal obligations under the respective contract which are directly binding upon the contracting parties. The present rule applies in particular when unilateral powers to modify the contract or to enforce the contractual obligations are conferred on the EU Authority, even where they are not explicitly enshrined in contractual clauses.

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(3) For the purpose of paragraph (2)(e) of this Article, the following contracts in particular are to be considered as contracts governed solely by EU law:

(a) staff contracts within the meaning of the EU Staff Regulations;
(b) grant agreements within the meaning of the EU Financial Regulations;
(c) grant agreements within the meaning of the EU Regulations implementing Framework Programmes on Research.

(4) If an EU contract is not governed by EU law, it is governed by the law of a Member State chosen by the parties pursuant to the criteria under Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I). To the extent that the applicable Member State law has not been chosen by the parties, or if the choice of law clause is invalid, the criteria of Regulation (EC) No 593/2008 shall be applied to determine which Member State law is applicable.

(5) All 'public contracts' within the meaning of Article 101(1) of Regulation (EU, EURATOM) No. 966/2012 on the financial rules applicable to the general budget of the Union are to be considered as contracts in the sense of paragraph (4) of the present Article.

(6) The law of a Third State shall apply to a contract in the case of paragraph (4) of the present Article, if the application of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) stipulates this result. All the rules of Book IV pertaining to EU contracts governed by Member State law shall apply accordingly to EU contracts governed by the law of third countries.

IV-4 Rules applicable to EU contracts solely governed by EU law

EU contracts in the sense of Article IV-3(2) are governed by the rules of Book IV, by their respective contractual provisions, by sector specific EU legislation, by general principles of EU contract law as well as other general principles of EU law.

IV-5 Rules applicable to EU contracts governed by Member State Law

(1) If an EU contract is governed by the law of a Member State, the EU Authority shall enjoy the most extensive legal capacity accorded to legal persons under the law of the respective Member State pursuant to Article 335 TFEU; the EU Authority cannot refer to the exercise of public authority conferred by the law of the respective Member State on its own public authorities. Article 343 TFEU on privileges and immunities shall remain unaffected.

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(2) The applicability of Member State law to an EU contract cannot relieve the EU Authority of its obligations to comply with fundamental rights in accordance with Article 6 TEU, general principles of EU Law, with EU rules applicable to the conclusion of contracts, EU budgetary and financial rules, and with other general or specific obligations imposed under EU law on EU Authorities as public authorities.

Chapter 2: Procedures for the conclusion of contracts

Section 1: Preparation of general terms of contracts

IV-6 Procedure for drafting general terms of contract

(1) The rules of Book II shall apply *mutatis mutandis* to the procedure for drafting general terms of the contract by the EU Authority. This does not apply

(a) to general terms of contracts corresponding to model contracts which are part of a legislative act or an act of general application in the sense of Article II-1(1);
(b) to non-substantial modifications of general terms of contracts especially if such modifications serve to adapt contracts to new legislation or jurisprudence, or if they are solely advantageous for the contractor.

(2) General terms of contract can be adopted in an expedited procedure in the sense of Article II-5. In such a case they may only be used for 12 months after their first use. If new general terms of contract are adopted following the regular rule-making procedure, the EU Authority is obliged to offer its contractor the opportunity to change the contract in order to incorporate the new general terms of contract. The second sentence of this paragraph is not applicable

(a) if the contract has been fully performed by both parties;
(b) if the new general terms of contract are disadvantageous for the contractor in comparison to the general terms of contract adopted in the expedited procedure.

(3) The second and third sentence of paragraph (2) shall apply *mutatis mutandis*

(a) if the general terms of contract included in an EU public contract have not been drafted according to paragraph (1) of the present Article, or if the general terms have been adopted before the entry into force of these Model Rules on Administrative Procedure;
(b) if the act of general application referred to in paragraph (1) No 1 of the present Article has been adopted in an expedited procedure in the sense of Article II-5.

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(4) General terms of contract submitted by the EU Authority and not individually negotiated may be invoked against the contractor only if the contractor was aware of them, or if the EU Authority took reasonable steps to draw the contractor's attention to these terms, before or during the conclusion of the contract. A mere reference to such terms within a contractual document will not suffice for these to be considered as brought to the contractor's attention in a sufficient manner, even if the contractor signs the document. Section 3 of Chapter 3 of Book IV remains unaffected.

Section 2: General rules on procedure

IV-7 Applicability of Book III

(1) The following Articles of Book III shall apply *mutatis mutandis* to the decision of an EU Authority on whether or not to conclude an EU contract unless stipulated otherwise in Book IV:

- Article III- 3 – General duty of fair decision-making
- Article III- 5 – Initiation
- Article III-6 – Special rules on application procedures
- Article III-7 – Responsible official
- Article III- 8 – Management of procedures
- Article III-10 – Principle of investigation
- Article III-11 – Investigation by request
- Article III-13 – Duties to cooperate of parties to the proceedings
- Article III-14 – Privilege against self-incrimination and (legal) professional privilege
- Article III-15 – Witnesses and experts
- Article III-22 – Access to the File
- Article III-23 – Right to be heard by persons adversely affected
- Article III-29 – Duty to give reasons
- Article III-30 – Duty to indicate available remedies
- Article III-31 – Formal and language requirements
- Article III-32 – Decisions in electronic form

(2) Paragraph (1) of this Article applies *mutatis mutandis* to the decision of an EU Authority to suggest or to accept a modification of an existing contract, or its cancellation. Article IV-9(3) remains unaffected.

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IV-8 Effects on judicial procedure

(1) The refusal to conclude or to modify a contract is a decision in the sense of Article III-2 of the present Model Rules.

(2) Any person having participated in a competitive award procedure or having expressed an interest in concluding the contract may institute proceedings within the meaning of Article 263 TFEU against the contract award decision in the sense of Article IV-18, in cases where such a procedure did not take place, even if the decision is not addressed to that person.

(3) The time limit established under Article 263 TFEU shall begin after the notification of the decision leading to the conclusion of the contract to the plaintiff, or in the absence thereof, on the day in which the decision came to the knowledge of the plaintiff.

(4) A contracting EU Authority whose decision leading to the conclusion of an EU contract, has been declared void by the Court of Justice of the European Union is required to render the contract ineffective in compliance with the judgment, if the contractor has not fully met his part of the contractual obligations. This duty only allows the contracting EU Authority to terminate or modify the contract, or to claim its invalidity under the conditions laid down in Chapter 3 of the present book. This duty shall not affect any obligation which may result from the application of Article 340(2) TFEU.

Section 3: Competitive award procedure

IV-9 Scope

(1) The competitive award procedure is applicable to the conclusion of EU contracts

(a) if the contracting EU Authority is not legally obliged to conclude an EU contract with every person satisfying the criteria for the award;

(b) if the contracting EU Authority is not legally bound by a framework contract, decision or otherwise to conclude the contract with a specific person

(2) The special rules regarding award procedures applicable to EU contracts in the sense of Article IV-3(3) and (5) as well as any other rules on competitive award procedures laid down in sector specific EU legislation, take precedence over the rules of this section.

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(3) A substantial modification of the provisions of an EU contract during its term shall be considered as a new award subject to the provisions of this section. A modification shall be considered substantial, where it renders the contract substantially different from the one initially concluded. Modifications arising from the rights provided under Article IV-6(2) and (3), Article IV-8(4), Article IV-23(3), Article IV-24(3), Article IV-28(1), Article IV-32 should in general not be deemed substantial.

IV-10 General principles

(1) The rules in Article IV-7(1) are applicable in a residual way to competitive award procedures.

(2) The rules of the present section will be considered as respected if the contracting EU Authority applies the rules mentioned in Article IV-9(2) *mutatis mutandis* in appropriate cases. This includes provisions relating to exceptions from obligations resulting from the aforementioned rules.

IV-11 Prior advertising

(1) The contracting EU Authority has to ensure the publication of a sufficiently accessible advertisement prior to the award of the contract in order to guarantee competitive tendering and impartiality of the award procedure. An advertisement is sufficiently accessible if, in light of the relevant market, every person who may have a reasonable interest in the contract has access to appropriate information prior to its award, which enables this person to express his or her interest in obtaining the contract.

(2) The contracting EU Authorities are responsible for deciding the most appropriate medium for advertising the contracts. Their choice should be guided by an assessment of the relevance of the contract for the respective market, in particular in view of the subject matter and value of the contract as well as the customary practices in the relevant sector.

(3) Adequate means of publication include:

- Advertisements on the website of the EU Authority,
- Publication in the Official Journal of the European Union/ TED (Tenders Electronic Daily),
- Publication in National journals specializing in public procurement announcements, newspapers with national or regional coverage, or

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specialist publications where there is only a local, regional or specialized market for the contract in question.

IV-12 Content of the advertisement and the contract documents

(1) The advertisement may be limited to a short description of the essential details of the contract and of the award method along with an invitation to contact the respective EU Authority. If necessary, it might be complemented with additional information available on the Internet, or accessible upon request from the contracting EU Authority. The advertisement and any additional documentation should provide as much information as is reasonably necessary for the persons interested to be able to make a decision on whether to express their interest in obtaining the contract.

(2) The subject matter of the contract shall be described in a non-discriminatory manner within the contract documents. The description of the characteristics required of a product or service should not refer to a specific make or source, a particular process, or to trade marks, patents, a specific origin or types of production, unless such a reference is justified by the subject matter of the contract and is accompanied by the words 'or equivalent'.

IV-13 Cases justifying use of the negotiated procedure without prior advertisement

EU contracting Authorities may award EU contracts by means of a negotiated procedure without prior advertisement in the following cases:

(a) when for technical or artistic reasons, or for reasons pertaining to the protection of exclusive rights, the contract may only be awarded to a particular person;

(b) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the EU Authority in question, the rules laid down in this section cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting EU Authority;

(c) in similar cases, especially if the EU Authority has developed and applies an award procedure pursuant to Article IV-9(2).

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IV-14 Equal access for economic operators from all Member States

(1) The contracting EU Authority shall only impose conditions which do not cause direct or indirect discrimination against persons who might be interested in the contract in specific Member States.

(2) If participants are required to submit certificates, diplomas or other forms of written evidence, documents from all Member States certifying an equivalent level of guarantee must be accepted.

(3) Time limits for expressing interest and for submitting offers should be long enough to allow persons from all Member States to make a meaningful assessment and prepare their tender.

(4) All participants must have prior access to the applicable rules along with the certainty that these rules shall apply equally to all candidates.

IV-15 Limit on the number of participants invited to submit a tender

(1) The contracting EU Authority may take measures to appropriately limit the number of participants, provided this is done in a transparent and non-discriminatory manner. The respective EU Authority must apply objective factors, such as the experience of the participants in the relevant sector, the size and infrastructure of their business, their technical and professional abilities, or other factors. Contracting EU Authorities may opt for a drawing lots procedure, either exclusively or in combination with other selection criteria. In any event, the number of shortlisted participants shall take account of the need to ensure adequate competition.

(2) Alternatively, EU Authorities may establish qualification systems where a list of qualified persons is compiled by means of a sufficiently advertised, transparent and open procedure. In the event of an award of individual contracts falling within the scope of this system, the EU Authority may select the persons to be invited to submit a tender from the list of qualified persons on a non-discriminatory basis, in particular by drawing in rotation from the list.

IV-16 Equal treatment

(1) While the competitive award procedure is running, all contacts between the contracting EU Authority and the participants shall satisfy conditions ensuring

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transparency and equal treatment. Such contacts shall not lead to an amendment of the terms and conditions of the contract or of the original tender.

(2) In procedures allowing for negotiation with shortlisted participants, negotiations should be organized in a way that gives all participants access to the same amount of information, excluding any unjustified advantages for a specific participant.

IV-17 Contracts of low value

(1) Contracts of low value may be awarded without prior advertisement on the basis of an appropriate market analysis and, if appropriate, through a negotiated procedure based on an adequate number of applications. The threshold for contracts of low value shall be established and published on a regular basis by each EU Authority. In the absence of a published threshold, the threshold established by the Commission for the implementation of the EU Financial Regulations shall apply.

(2) For the purpose of this Article the contracting EU Authority should accept unsolicited applications and establish open lists with qualified persons. If it comes to the knowledge of the EU Authority that a number of qualified persons are interested in concluding such low value contracts, the contracts should be awarded on the principle of rotation where the offered prizes and terms of contracts are similar, and where the negotiated procedure would be inappropriate with respect to the value of the contracts.

IV-18 Contract award decision

(1) The final decision awarding the contract has to comply with the procedural rules laid down at the outset as well as with the principles of non-discrimination and equal treatment.

(2) The contracting EU Authority shall notify simultaneously all participants whose application or tender have been rejected of the grounds on which the decision was taken. The contracting EU Authority shall notify all participants meeting the exclusion and selection criteria who make a request in writing, the characteristics and relative advantages of the successful tender along with the name of the participant to whom the contract is awarded. Article III-32 on decisions in electronic form applies *mutatis mutandis*. However, specific details need not be disclosed if their disclosure would hinder the application of the law,

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would be contrary to the public interest or would harm legitimate business interests or could distort fair competition.

(3) The contracting EU Authority shall invite all participants and known potential contractors to present their concerns or make their comments within the standstill period provided under Article IV-19.

IV-19 Standstill period before signature of the contract

(1) The contracting EU Authority shall not sign the contract with the successful participant until 14 calendar days have elapsed. This period shall begin to run after the simultaneous dispatch of the notifications to successful and unsuccessful participants.

(2) If necessary, the contracting EU Authority may suspend the conclusion of the contract for the purpose of additional examination if this is justified on the grounds of requests or comments made by unsuccessful or aggrieved participants or potential contractors or on the grounds of any other relevant information received.

(3) The non-observance of the standstill period or its expiry has no effect on the time limit mentioned in Article IV-8(3), or on the obligation of the contracting EU Authority to render the contract ineffective pursuant to Article IV-8(4) and Article IV-31.

Chapter 3: Execution and validity of EU contracts

Section 1: General provisions

IV-20 Representation of EU Authorities and formal requirements for EU contracts

(1) The representation of EU Authorities and the question whether a person is able to legally bind an EU Authority are solely governed by EU law.

(2) Any provision pertaining to the form of an EU contract which is laid down in an EU legal act is to be understood as a rule limiting the representative power of the person representing the EU Authority.

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IV-21 Claims of the EU Authority in the context of contracts

Procedures which lead to the EU Authority's exercise of contractual rights or its claim of invalidity shall be subject to the principles of good administration, in particular those enshrined in the following Articles of Book III:

- Article III-3 – General duty of fair decision-making
- Article III-5 – Initiation
- Article III-7 – Responsible Official
- Article III-8 – Management of procedures
- Article III-10 – Principle of investigation
- Article III-11 – Investigation by request
- Article III-13 – Duties to cooperate of parties to the proceedings
- Article III-14 – Privilege against self-incrimination and (legal) professional privilege
- Article III-15 – Witnesses and experts
- Article III-22 – Access to the File
- Article III-23 – Right to be heard by persons adversely affected
- Article III-29 – Duty to give reasons
- Article III-30 – Duty to indicate available remedies
- Article III-31 – Formal and language requirements
- Article III-32 – Decisions in electronic form

IV-22 Decisions of the EU Authority on an extra-contractual basis

(1) Neither the terms of an EU contract nor Member State law applicable to such a contract can exclude the exercise of public authority powers on extra-contractual grounds by an EU Authority. Such powers may not be misused by the EU Authority in its intention to suspend or cease its own contractual obligations. The exercise of public authority powers by EU authorities, which are unrelated to contracts, shall leave unaffected:

- the rights of parties under Article 340(2) TFEU;
- any claim by the contractor on the basis of the contract.

(2) If the powers referred to in paragraph (1) are executed by means of a decision that is enforceable within the meaning of Article 299 TFEU, and if the pecuniary obligation imposed by this decision is also contractually due, the contractual obligation shall be deemed fulfilled if the contractor complies with the decision.

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IV-23 Review by the European Ombudsman

(1) The scope of review by the European Ombudsman includes the fulfilment of EU Authorities' obligations arising both from Article IV-21 and from EU contracts.

(2) The recommendation issued by the European Ombudsman does not affect the right of the parties to have their contractual dispute examined and authoritatively settled by a court of competent jurisdiction.

(3) A conclusion by the European Ombudsman that his inquiry has revealed an instance of maladministration on the part of the EU Authority does not affect the validity of the contract or its terms and clauses, nor the validity of claims pursuant to Article IV-21.The EU Authority has to remedy its maladministration by using its contractual powers or by accepting offers from the contracting party to re-negotiate or modify the respective contract, or by means of financial compensation.

IV-24 Arbitration Clauses

(1) The validity of an arbitration clause within the meaning of Article 272 TFEU is solely determined by EU law even if the EU contract is governed by Member State law. The clause shall be incorporated into the written contract. If the arbitration clause is not incorporated into the contract, the parties can still conclude it by signing a separate document with reference to the contract. If there is no written arbitration clause whatsoever, it shall be presumed irrefutably that no arbitration clause has been concluded. The written form can be replaced by an electronic form. Article III-32 on decisions in electronic form applies *mutatis mutandis*.

(2) An arbitration clause within the meaning of Article 272 TFEU can be concluded until an application for court proceedings has been submitted.

(3) The EU Authority shall agree to annul an arbitration clause within the meaning of Article 272 TFEU upon the request of the contractor:

(a) if the arbitration clause has not been individually negotiated;
(b) if the jurisdiction of courts or tribunals of the Member States or a Third State would be more appropriate in view of the law applicable to the contract and/or the principle of effective legal protection;
(c) if the request has been made shortly after the contractor became aware of the intention of the EU Authority to file an action based on the clause before the European Court of Justice.

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A decision of the EU Authority refusing the annulment of an arbitration clause shall give reasons as to why the conditions under b) of the present paragraph were not deemed to be fulfilled.

IV-25 Exclusion of compensation

Compensation as provided for in this chapter is excluded if the contractor

(a) has obtained the award of the contract or a beneficial contractual position through false pretences, threat or bribery;
(b) has obtained the award of the contract or a beneficial contractual position by providing substantially incorrect or incomplete information;
(c) was aware of the illegality of the contract or was unaware thereof due to gross negligence on his part.

Section 2: EU contracts governed by EU law

Subsection 1: Execution and performance

IV-26 Good faith and fair dealing

(1) The contracting parties have a duty to act in accordance with good faith and fair dealing when performing an obligation, exercising a right to performance, pursuing or disputing a remedy for non-performance, or when exercising a right to terminate an obligation or the contractual relationship.

(2) The duty under paragraph (1) may not be excluded or limited by contract.

IV-27 Contractual rules

(1) The EU Authority should ensure that any EU contract solely governed by EU law contains a provision specifying a law of obligations, or specific model rules, applicable on a complementary basis to issues not covered by the rules mentioned in Article IV-4, such as the place and time of performance, remedies for non-performance, refusal of performance, termination, damages and interest, and limitation rules.

(2) In order to guarantee uniformity in the execution of EU contracts, the EU Authority should ensure that the provision introduced in paragraph (1) refers to

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the same law of obligations or model rules in all contracts serving the same purposes.

Subsection 2: Change of circumstances and related clauses

IV-28 Change of circumstances

If the circumstances which determined the content of an EU contract have changed so substantially since the conclusion of the contract that one of the parties cannot reasonably be expected to adhere to the original contractual provisions, this disadvantaged party may request the adaptation of the agreement or, where such an adaptation is not possible or cannot reasonably be expected of the other party, the disadvantaged party may terminate the contract.

IV-29 Termination to avoid grave harm to the common good

(1) The EU Authority may also terminate an EU contract in order to avoid or eliminate a risk of grave harm to the common good. The termination shall have no retroactive effect.

(2) Following an application, the EU Authority shall compensate any disadvantage suffered by the contractor which resulted from its reliance on the continued existence of the EU contract, to the extent that such reliance merits protection.

IV-30 Termination for non-performance

(1) Each party may terminate the contract if the other party's non-performance of a contractual obligation is fundamental. A non-performance of a contractual obligation is fundamental if:

(a) it substantially deprives the creditor of what the creditor was entitled to expect under the contract, as applied to the whole or relevant part of the performance, unless at the time of conclusion of the contract the debtor did not foresee and could not reasonably be expected to have foreseen that result; or

(b) it is intentional or reckless and gives the creditor reason to believe that the other party's future performance cannot be relied upon.

(2) Each party may terminate the contract in a case of delay in performance of a contractual obligation which is not in itself fundamental if the party gives a

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notice fixing an additional period of time of reasonable length for performance and the debtor does not perform within that period. If the period fixed is unreasonably short, termination is possible only after a reasonable period from the time of the notice.

(3) Each party may terminate the contract before performance of a contractual obligation is due if the debtor has declared that there will be a non-performance of the obligation, or it is otherwise clear that there will be such a non-performance, and if the non-performance would have been fundamental.

(4) Each party which reasonably believes that there will be a fundamental non-performance of a contractual obligation by the other party may terminate if it has requested an adequate assurance of due performance and no such assurance has been provided within a reasonable time.

(5) The right to seek damages is not excluded by the termination.

Subsection 3: Consequences of illegality and unfair terms

IV-31 Termination due to an infringement of the provisions of Chapter 2

(1) For the purpose of complying with Article IV-8(4), or if the EU Authority becomes aware that the rules on the procedure regarding the conclusion of an EU contract have not been respected to the detriment of a third party, the EU Authority may terminate the contract in order to re-open this procedure.

(2) This right of termination does not apply
- (a) if there is no possibility that the infringement has influenced the decision on the matter;
- (b) if the contract award decision has become definitive due to the expiration of the time limit for the actions provided under Article IV-8(2);
- (c) if the award decision has been confirmed by court;
- (d) if the contractor has irreversibly executed his main obligations in whole or in substantial part.

(3) A termination in the sense of paragraph (1) has no retroactive effect.

(4) The EU Authority shall compensate the other party for a disadvantage suffered due to its reliance on the existence of the EU contract provided such reliance deserves protection. The contractor cannot request to be treated as if the contract had been fulfilled.

IV-32 Renegotiation due to an infringement of the specific obligations of EU Authorities as public authorities

(1) If the content of an EU contract is illegal due to the non-observance of the specific obligations of the EU Authority as a public authority, the EU Authority may request that the content of the agreement be adapted to restore lawful conditions.

(2) If the content of the contract is illegal because the unobserved rules intended to protect the rights and interests of the other party, then that party may request that the content of the agreement be adapted to restore lawful conditions.

(3) These adaptations may consist *inter alia* in a change of terms and clauses, price adjustments, modifications of the main obligations, or in the cancellation of the agreement with or without compensation.

(4) If the competitive award procedure was applicable to the contract, only a cancellation of the agreement with compensation may be negotiated. A change of terms and clauses is only possible if the modification is not substantial in the sense of Article IV-9(3).

IV-33 Invalidity

An EU contract is invalid

(a) if an equivalent contract between private persons would be considered invalid and thus not binding in accordance with the general principles common to the laws of the Member States;

(b) if a single case decision of the EU Authority with equivalent content would be nonexistent.

Each party may request the other party to confirm the invalidity.

IV-34 Unfair terms

EU legislation on unfair terms in consumer contracts shall apply *mutatis mutandis* if the contractor is a consumer within the meaning of this legislation.

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Section 3: EU contracts governed by Member State Law

IV-35 Applicable Law

(1) The conditions for the validity and termination of EU contracts governed by the law of a Member State shall be determined by the respective Member State law.

(2) If an EU contract infringes EU law, this shall not be considered a ground for invalidity or termination of the contract if a similar contract concluded between private parties would be considered valid and binding in accordance with the applicable Member State law.

(3) If the exercise of contractual rights of the EU Authority is effective according to the law of the Member State in spite of an infringement of the rules mentioned in Article IV-5(2), this shall not preclude the obligation of the EU Authority, which follows from its duties mentioned in Article IV-5(2), to conclude or re-negotiate the contract with the contractor, or to compensate the contractor by other means for the damage he or she suffered because of the illegal decision.

IV-36 Contractual clauses for compliance with EU Law

(1) The exercise of public authority by an EU Authority may not give rise to contractual obligations on the part of the contractor. The specific obligations of an EU Authority as a public authority may only entail direct consequences for the validity or termination of the contract if they have been made constituent components of that contract. The EU Authority shall ensure that an EU contract includes a clause enabling the EU Authority to terminate the contract where it is subsequently established that the specific obligations of the EU Authority as a public authority have not been complied with.

(2) The validity of the standard terms and clauses described in paragraph (1) is determined in accordance with the Member State law applicable to the contract. These standard terms and clauses should provide adequate protection for the legitimate expectations of the contractor to the extent that his reliance on the continued existence of the contract merits protection.

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Chapter 4: Subcontracts

IV-37 Admissibility and scope of subcontracts

(1) The contractor may subcontract the performance of the EU contract in whole or in part without the EU Authority's consent, unless personal performance is required under the EU contract. Any subcontractor so engaged must be of adequate competence. The contractor must ensure that any tools and materials used for the performance of the EU contract are in conformity with the EU contract and the applicable laws, and fit to achieve the particular purpose for which they are to be used. The EU Financial Regulations are applicable to the contractor's choice of subcontractors and to the financial accountability of the contractor.

(2) A contract concluded for the performance of an EU contract by the contractor with a subcontractor does not create any direct relationship between the subcontractor and the relevant EU Authority in the absence of an explicit provision within the EU contract indicating the scope and consequence of such a relationship.

(3) The contractor remains responsible for performance of the EU contract. Nothing can limit the contractor's liability vis-à-vis the contracting EU Authority for the breach of contractual duties caused by a subcontractor.

(4) The EU Authority is not liable to third parties for the negligence of a subcontractor.

IV-38 Choice of the law applicable to subcontracts

(1) In the absence of a specific provision on the law applicable to subcontracts, such law shall be determined by the law applicable to the contractor's activities.

(2) Article IV-37(1) remains unaffected.

IV-39 Duties of the EU Authorities towards subcontractors

(1) The absence of a direct relationship between an EU Authority and a subcontractor, and the limitations that derive thereof for the standing of subcontractors in actions based upon Articles 263, 265 and 340 TFEU, shall not

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exempt that Authority from its duties to apply the principles of good administration, especially those established in Book III under the following Articles:

- Article III-3 – General duty of fair decision-making
- Article III-5 – Initiation
- Article III-7 – Responsible Official
- Article III-8 – Management of procedures
- Article III-9 – Time limits for concluding procedures
- Article III-10 – Principle of investigation
- Article III-11 – Investigation by request
- Article III-13 – Duties to cooperate of parties to the proceedings
- Article III-14 – Privilege against self-incrimination and (legal) professional privilege
- Article III-15 – Witnesses and experts
- Article III-22 – Access to the File
- Article III-23 – Right to be heard by persons adversely affected
- Article III-29 – Duty to give reasons
- Article III-30 – Duty to indicate available remedies
- Article III-31 – Formal and language requirements
- Article III-32 – Decisions in electronic form

(2) The EU Authority shall ensure that the contractor informs the subcontractor of the applicability of principles of good administration.

(3) A subcontractor should have the right to know of any criticism by the EU Authority which is party to the EU contract regarding his or her performance. The subcontractor should also have the right to be heard in relation to such criticism. If the EU Authority intends to request the replacement of a subcontractor, it should inform the latter of its intention and give reasons for doing so. The request shall only be made to the contractor after the subcontractor has had an opportunity to present his or her observations.

(4) In order to also protect subcontractors, the EU Authority shall check a contractor's financial stability before awarding it an EU contract, and shall continue to do so throughout the term of the contract.

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C. Explanations

Chapter 1: General provisions

IV-1 Scope of application

Paragraph 1(a)

(1) For the definition of EU authority → **Article I-4(5)**.

Paragraph 1(b)

(2) This rule on special types of contracts between EU authorities and Member States authorities takes in the criteria developed by the CJEU concerning the application of EU public procurement law to public-public cooperation.[7] It could also be referred to Article 12 No 4 Directive 2014/24,[8] which is more detailed in regard of public procurement objectives.

Paragraph 1(c)

(3) Contracts between public entities which do not fulfil the criteria of Article IV-1(1)(b) are almost always considered as contracts submitted to a special regime, or they are at least treated in a special way by jurisprudence in Member State law. However, the limited applicability of Book IV shall not affect the capacity of the EU Authorities to conclude such a contract; such a contract may lead to modifications in the distribution of competences and areas of responsibility between the EU Authority and the Member State's administration only if it is based upon an enabling provision of EU law.

Paragraph 2

(4) **Interinstitutional agreements** generally do **not** fall within the scope of Book IV; that is also justified by their 'constitutional' character.[9] This being said, it may be possible that Book IV applies to contracts between the EU Commission and an EU Agency if the Agency acts as a service provider for the Commission.

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[7] See e. g. Commission Staff Working Paper, SEC(2011)1169_final concerning the application of EU public procurement law to relations between contracting authorities.

[8] Directive (EU) 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

[9] See e. g. Art 17(1) Sentence 4 TEU and Art 295 TFEU.

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Paragraph 4

(5) The conclusion and the execution of **international treaties** is a question of public international law and therefore cannot fall within the scope of an Administrative Procedure Act.

IV-2 Definitions

Lit. (a)

(6) The definition of **contract** is taken from **Article II.–1:101 of the DCFR**[10] which has, however a slightly different wording: '*A contract* is *an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act*. '

Lit. (d)

(7) The definition of general terms of contract is taken from Article 3 Directive 93/13.[11]

Lit. (h)

(8) The definition of **specific obligations of EU Authorities as public authorities** seeks to **address the specific obligations of administrative authorities** which arise from their status as a public authority submitted to special rules that are not applicable to private persons, and which administrative authorities must comply with even when acting like private persons. For example, according to the **ombudsprudence**, EU Authorities have to comply with Article 41 CFR even if executing an EU contract submitted under a Member State's private law.

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[10] Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) - Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law, available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

[11] Council Directive (EEC) 93/13 of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 last amended by Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [2004] OJ L364/1 and Directive (EU) 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

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IV-3 Determination of the law applicable to an EU contract

Paragraph 1

(9) Primary law **does not provide for any specific provision on the determination of the law applicable to an EU contract.** However primary law presupposes that there are EU contracts which are solely governed by EU Law and EU contracts which are governed by the law of a Member State (or a third country), see **Article 335 TFEU**.

Paragraph 2(c)

(10) A typical contract modifying or abrogating pre-existing EU law relations between the parties would be a **settlement** or **transaction**.

Paragraph 3

(11) **(a) staff contracts in the sense of EU Staff Regulation** refers to Regulation 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ 1385 in its up-to-date version.

(12) **(b) grant agreements in the sense of EU Financial Regulations** refers to Article 121 Regulation 966/2012 in its up-to-date version.[12]

(13) **(c) grant agreements in the sense of EU Regulations implementing the Framework Programme for Research** refers to Regulation 1290/2013 in their up-to-date version.[13]

Paragraph 4

(14) The reference to Regulation 593/2008 on the law applicable to contractual obligations (Rome I)[14] concerns **primarily Article 3 and 4 of this regulation**.

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[12] Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 [2012] OJ L298/1 last amended by Regulation (EU, Euratom) No 547/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union [2014] OJ L163/18.

[13] Regulation (EU) 1290/2013 of the European Parliament and of the Council of 11 December 2013 laying down the rules for participation and dissemination in 'Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020)' and repealing Regulation (EC) No 1906/2006 [2013] OJ L 347/81.

Those rules are appropriate to be applied *mutatis mutandis* to EU contracts even when not directly applicable: not all EU contracts may be qualified as contracts in 'civil and commercial matters', but some may be qualified as contracts in 'revenue, customs or administrative matters' in the sense of Article 1(1) of the Rome I Regulation. However there is **no reason why the criteria set out in the rules of the Rome I Regulation would not be appropriate** to determine the applicable law even in these cases.

Paragraph 5

(15) Article 101 of Regulation 966/2012 on the financial rules applicable to the general budget of the Union uses the term **Public contracts** in the sense of *marché public* and *öffentlicher Auftrag*. Public contracts are defined as '*contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of Articles 117 and 190, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services. Such contracts comprise: (a) building contracts, (b) supply contracts, (c) works contracts, (d) service contracts.'*

(16) It is general practice to apply the (private) law of a Member State to these contracts.

IV-4 Rules applicable to EU contracts solely governed by EU law

(17) In practice the **general principles of EU contract law** will be derived (more or less) from **the French law on public contracts**, as it is the country whose system of public contract law is closest to the existing EU rules that apply EU contracts.

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[14] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 last amended/corrected by Corrigendum to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008) [2009] OJ L309/87.

Chapter 2: Procedures for the conclusion of contracts

Section 1: Preparation of general terms of contract

IV-6 Procedure for drafting general terms of contract

Paragraph 1

(18) The draft breaks new ground insofar as it is submitting the elaboration of general terms of contracts and the necessary adaptations to the rulemaking procedure of Book II; the reason is that in public contract law the elaboration of general terms of contracts may serve as a substitute for administrative rulemaking. If specific general terms of contracts are included systematically in all public contracts they may guarantee a standardization of the content of these contracts and guarantee therefore not only a simplification for the contracting EU Authority but also equal treatment of the contractors.

(19) As general terms of contracts may serve as a substitute for administrative rulemaking one may infer that the elaboration of general terms of contracts shall **be submitted to the rules of Book II** in the same way as proper administrative rulemaking to ensure that in the drafting phase the constitutional principles of participatory democracy and transparency, and principles of EU administrative law – specifically participation and the obligation of full and impartial assessment of all relevant facts ('duty of care') –, are being complied with.

(20) A positive secondary effect of the proposed rules may be a **reduction of the variety of models of general terms of contracts** used by different EU Authorities and therefore a reduction of complexity thanks to the transparency and the publication of general terms of contract ensured by the application of Book II. The formalities foreseen by Book II may lead an EU Authority to apply existing models of general terms of contract rather than inventing new ones.

Paragraph 2 and 3

(21) Paragraph 2 and 3 takes into account the **specific operation and effect of general terms of contracts**. In contrast to proper administrative rules general terms of contracts do not apply directly but have **to be transposed into a contract in order to be effective**. It is therefore impossible to give retroactive

effect to general terms of contract in order to make them also apply to contracts which have been concluded **before** their drafting. In order to ensure that general terms of contract drafted in the regular rulemaking procedure are also applicable to contracts that have been previously concluded, it is necessary **to impose an obligation** on the EU Authority to include new general terms of contract **by way of a modification of the contract** so as to guarantee equal treatment of the contractors.

Paragraph 4

(22) See Article II-9:104 DCFR.[15]

Section 2: General rules on Procedure

IV-7 Applicability of Book III

(23) The general rules on procedure concern contracts which can **only be concluded with one specific person**. This is, for example, the case as regards transactions and settlements,[16] and also for all cases in which a contractual relationship exists already and shall be changed by a new contract as is provided under Article IV-6(2) and (3), Article IV-8(4), Article IV-23(3), Article IV-24(3), Article IV-28(1), Article IV-32.

IV-8 Effects on judicial procedure

Paragraph 3

(24) For the time limit see **Article 263(6) TFEU**.

Paragraph 4

(25) The provision deals with the **consequences of a successive annulment action on the already signed contract**. According to **Article 266(1) TFEU**, '[t]he institution whose act has been declared void [according to Article 264(1) TFEU]

[15] Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) - Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law, available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

[16] See Section VII. of the introduction.

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[…] shall be required to take the necessary measures to comply with the judgement of the Court of Justice of the European Union'. In the framework of an action for annulment the CJEU refuses to determine the consequences of the annulment of an act. Thus, the organ that has issued the annulled act has to 'take the necessary measures to comply with the judgement'.[17] Hence, CJEU judgements declaring void acts that preceded the conclusion of contracts are **silent as to the consequences of the illegality of that act** for the contract.[18]

(26) In our view, this lack of determination of the consequences of illegality means that an institution whose decision to enter into a contract has been declared void **is required to terminate the contract in question**. Inspiration for our may can be found in the case law concerning the violation of European public procurement law by Member State administrations, as established in infringement procedures. The legal consequences of a judgement establishing an infringement under Articles 258 – 260 TFEU and those of a judgement declaring void an act of an EU institution under Articles 263 – 266 TFEU are the same: the party who has committed a violation of EU law – in the first case the concerned Member State, in the second case the institution whose act has been declared void – '*shall be required to take the necessary measures to comply with the judgement of the Court*' (see Articles 260(1) and 266(1) TFEU).

(27) In infringement procedures, it appears according to the CJEU that a **substantial illegality** committed by a contracting Member State administration in the pre-contractual phase **leads to the illegality of the subsequent contract itself**, because '*the adverse effect on the freedom to provide services arising from the infringement of Directive* […] *must be found to subsist throughout the entire performance of the contracts concluded in breach thereof*'.[19] Thus, an infringement consisting of a violation of EU law through the conclusion of a contract by a Member State administration **can be remedied only by providing**

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17 See *e.g.* Case 1/54 *French Republic v High Authority* [1954] ECR 1, p 16; Joined Cases 42 and 49/59, *S.N.U.P.A.T.* [1961] ECR 53, p 88; Cases T-114/92, *BEMIM* [1995] ECR II-147, para 33; T-89/07, *VIP Car Solutions SARL v European Parliament* [2009] ECR II-1403, para 112.

18 In most cases the claims are admissible but the Court declares them unfounded and does not annul the challenged acts. In the rare cases where such acts are (partially) annulled, the Court does not address the question of the consequences of the annulment for the contract. See *e.g.* Case T-365/00, *AICS v European Parliament* [2002] ECR II-2719, para 73 f.

19 Joined Cases C-20 and C-28/01, *Bockhorn and Braunschweig I* [2003] ECR I-3609, para 36.

for the ineffectiveness of the contract in question, which thus appears to be the 'necessary measure to comply with the judgement' according to Article 260(1) TFEU.[20] Article 73(c) Directive 2014/24 presumes this.

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

Section 3: Competitive award procedure

(29) Chapter 2 Section 3 is inspired by the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement directives (2006/C 179/02 – here after Commission Communication on contract awards),[21] by Title V of Regulation 966/2012 on the financial rules applicable to the general budget of the Union and by Title V of Regulation 1268/2012.[22]

IV-9 Scope

Paragraph 1 and 2

(30) Due to existing EU specific legislation the rules of this chapter **will only have a limited scope of application**:

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[20] Cases C-20 and C-28/01 *Bockhorn and Braunschweig I* [2003] ECR I-3609 paras 21, 31, 40f; Case C-125/03 *Commission v Germany* [2004] ECR I-4771 paras 15f; Case C-126/03 *Commission v. Germany* [2004] ECR I-11197 paras 25f; Case C-414/03 *Commission v Germany* paras 10f [not yet reported]; Case C-503/04 *Bockhorn and Braunschweig II* [2007] ECR I-6153 paras 28ff.; Case C-199/07 *Commission v. Greece* [2009] ECR I-10669 paras 22f; Case C-536/07 *Commission v Germany* [2009] ECR I-10355 paras 22f; Case C-275/08 *Commission v Germany* [2009] ECR I-168 paras 26 f.

[21] Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement directives (2006/C 179/02).

[22] Commission Delegated Regulation (EU) 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union [2012] OJ L362/1.

(31) - **public procurement** of EU Authorities is in general subject to Title V of **Regulation 966/2012** on the financial rules applicable to the general budget of the Union,

(32) - **granting of financial aids** in competitive award procedures is in general subject to Title VI of **Regulation 966/2012** on the financial rules applicable to the general budget of the Union,

(33) - the selection of contractual agents is in general subject to the specific procedure of competitions foreseen in Annex III of Regulation 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ 1385 in its up-to-date version.

(34) However, the **sale of assets** by EU authorities beyond the thresholds of these special rules may be governed by the competitive award procedure providing a minimum level of protection.

Paragraph 3

(35) This paragraph transposes the main principles of **Article 72 Directive 2014/24** to EU Contract law. The aforementioned far more detailed Article 72 may be used as a source of inspiration flesh out the notion of substantial modification.

(36) A **specific difficulty** may arise when EU contracts are modified due to the obligation of the EU-Authority to offer or accept modifications of contracts arising from Article IV-6(2) and (3), Article IV-8(4), Article IV-23(3), Article IV-24(3), Article IV-28(1), Article IV-32 or similar provisions arising from Member State Law. Whereas it is not possible to consider all **transactions** as non-substantial and exempt them from the scope of the competitive award procedure it should in general be possible to consider **modifications** of a contract as non-substantial, if they are **the consequence of an enforceable right** of one of the parties to a contract modification and if the **modification does not exceed the 'frame' of this right**.

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IV-10 General Principles

Paragraph 1

(37) For the compatibility of the award procedure with the rules and principles of the Treaties, especially the **principles of transparency, equal treatment and proportionality**, see also Article 102 **Regulation 966/2012**.

Paragraph 2

(38) The proposed rule of this paragraph is an **experimental clause** for the development of new forms of competitive award procedures.

IV-11 Prior Advertising

(39) On prior advertising see 2.1. of the Commission Communication on contract awards (2006/C 179/02).

IV-12 Content of the advertisement and the contract documents

(40) On the content of the advertisement see 2.1.3. of the Commission Communication on contract awards (2006/C 179/02).

IV-13 Cases justifying use of the negotiated procedure without prior advertisement

(41) For cases without prior publication of the advertisement see 2.1.4. of the Commission Communication on contract awards (2006/C 179/02).

IV-14 Equal access for economic operators from all Member States

(42) For equal access see 2.2.1. of the Commission Communication on contract awards (2006/C 179/02).

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IV-15 Limit on the number of participants invited to submit a tender

(43) For the limit on the number of applicants invited to submit an offer see 2.2.2. of the Commission Communication on contract awards (2006/C 179/02).

IV-17 Contracts of low value

Paragraph 1

(44) The threshold established by the Commission for the implementation of the EU Financial Regulations is laid down in Commission Delegated **Regulation (EU) 1268/2012** in its up-to-date version.

IV-18 Contract award decision

(45) For the award decision see Article 113 Regulation 966/2012.

IV-19 Standstill period before signature of the contract

Paragraph 1

(46) For the standstill period see Article 118 Regulation 966/2012, for the starting of the period see Article 171 Regulation 1268/2012.

Paragraph 3

(47) According to the non-respect of the standstill period or its expiry and the non-effect on the time limit provided in Article 263(6) TFEU: due to the mandatory character of Article 263(5) TFEU it is impossible to modify the time limit for judicial action in order to try and coordinate it with the standstill period.

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Chapter 3: Execution and validity of EU contracts

Section 1: General Provisions

IV-20 Representation of EU authorities and formal requirements of EU contracts

Paragraph 2

(48) On the perception of formal requirements for EU contracts provided for EU legal acts as limitation of representative powers of the person representing the EU authority: this **rule reflects the German way of dealing with formal requirements** provided for in the law of the Länder (federated states) concerning public contracts governed by private law concluded by the administration of the relevant Land (one of the federated states). These rules are regarded as rules limiting the representative power of the person representing the Land authority because the Land has no legislative power to impose additional formal requirements for contracts governed by (federal) private law.

IV-21 Claims of the EU authority in the context of contracts

(49) This Article is tries clarify that all decisions of the EU Authority taken within execution of the contract shall be subjected to administrative procedure rules and the principle of good administration. If the judgement of the GC in T-116/11[23] paragraph 245 were to be understood as meaning that the principle of good administration is not applicable due to the contractual status between private parties and the EU Authority – which means substantively excluded – we would not agree with this position.[24] Our view is also not in line with the so called ombudsprudence.[25] We assume that the aforementionned judgement is limited to the restricted types of claims in the CJEU court proceedings and that despite this judicial statement Article 41 CFR is applicable.

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[23] Case T-116/11 *EMA v European Commission* [not yet published].

[24] See also Case F-1/05 *Landgren v ETF* [2007] I-A-1–00123, II-A-1–00459 paras 70 f; confirmed by Case T-404/06 P. [2009] ECR II-2841 para 148.

[25] For ombudsprudence in the field of contracts see e.g.: European Ombudsman, Annual Report 2012, p 46 f.

(50) However, the contractor **cannot institute proceedings in the sense of Article 263 TFEU** against the decision mentioned in Article IV-21. The rules concerning the definitive character of acts not challenged within the time limit foreseen in Article 263 TFEU **do not apply to those determinations**. Therefore this Article shall not affect the right of the parties to have their contractual dispute arising from these decision examined and authoritatively settled by a court of competent jurisdiction.

IV-22 Decisions of the EU Authority with extra-contractual basis

(51) This Article deals with problems arising from the **unclear jurisprudence of the CJEU** concerning the relationship between contractual litigation and the enforcement of decisions of an EU Authority following Article 299 TFEU.[26] The Article is **premised on the assumption that** the contractor may not challenge the legality of decisions in the sense of this paragraph on the basis of the contract. But the **definitive character of such decisions does not block a claim** by the contractor **on the basis of the contract**; the respective pecuniary obligations under the contract remain unaffected.

IV-23 Review by the European Ombudsman

(52) The **Article** transposes **the practice of the EO** concerning the execution of EU contracts[27] and develops it further.

IV-24 Arbitration clauses

Background of the Article

(53) Article IV-24 is meant to deal with **some particularities of EU public contract litigation between the parties to the EU contract**. The rules on the competent **courts** for this kind of litigation are not coordinated with the law applicable to the contract

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[26] See Case C-334/97 R-EX Commission v *Comune di Montorio al Vomano* [2001] ECR I-4229; Case T-220/10 – Commission v *EU Research Projects Ltd.* [not yet published]; Case T-260/04 *Centro di educazione sanitaria e tecnologie appropriate sanitarie (Cestas) v Commission* [2008] ECR II-701; Case T-224/09 *Centre d'étude et de valorisation des algues SA (CEVA) v Commission* [2001] ECR II-277.

[27] See e.g. European Ombudsman, Annual Report 2012, p 46 f.

(54) - The **CJEU** is competent for litigation between the parties of an EU contract only if an **arbitration clause within the meaning of Article 272 TFEU** has been concluded.[28] If an arbitration clause in the sense of Article 272 TFEU has been included in an EU contract governed by the law of a Member State the CJEU is **not limited to review manifest errors of interpretation of the Member State`s law** by the contracting parties, **but shall apply Member State's law as it is understood by the Member State's courts**. However, the CJEU should as far as possible **avoid applying national rules without taking cognisance of the jurisprudence of national courts on these rules**.[29]

(55) - If **no arbitration clause in the sense of Article 272 TFEU** has been concluded the courts or tribunals of the Member States are competent in accordance with Article 274 TFEU. To determine the jurisdiction of the Member State's courts the relevant **rules of the Member State's law and the relevant EU regulations** on jurisdiction in legal disputes of a civil or commercial nature between individuals resident in different Member States[30] **applies**, **as far as the EU contract falls into their scope**. Where Member State's courts have jurisdiction this will extend to the validity and interpretation of EU contracts. Article 267(1)(b) TFEU is **only applicable** in order to determine whether decisions leading to the conclusion of an EU contract were in conformity with the relevant EU law rules.

(56) Article IV-24 has to be understood in this context. It deals with arbitration clauses within the meaning of Article 272 TFEU allowing change to this system.

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[28] Article 272 TFEU: 'The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.'

[29] See for examples the 'handling' of national law in **Belgium** *inter alia* Case 318/81 *Commission v Co. De. Mi.Spa* [1985] ECR 3693 paras 18f; Case 249/87 *Mulfinger et al. v Commission* [1989] ECR 4127 paras 2f; Case C-42/94 *Heidemij Advies BV v European Parliament* [1995] ECR I-1417 paras 16f; for **German law** *inter alia* Case C-209/90 *Commission v Feilhauer* [1992] ECR I-2613 paras 16f; Case C-156/97 *Commission v Van Balkom Non-Ferro Scheiding BV* [2000] ECR I-1095 paras 10f; Case C-77/99 *Commission v Oder-Plan-Architektur GmbH et al.* [2001] ECR I-7355 para 4; for **French law** *inter alia* Case C-172/97 *SIVU v Commission* [1999] ECR I-3363 para 5; for **Italian law** *inter alia* Case 23/76 *Pellegrini v Commission* [1976] ECR 1807 paras 17f; Case 109/81 *Porta v Commission* [1982] ECR 2469 para 11; Case C-299/93 *Bauer v Commission* [1995] ECR I-839 paras 11f; Case C-334/97 *Commission v Comune di Montiorio al Vomano* [1999] ECR I-3387 para 6.

[30] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L012/1 last amended by Commission Regulation (EU) No 566/2013 of 18 June 2013 amending Annex I to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2013] OJ L167/29.

Paragraph 1

(57) The **jurisdiction of the CJEU** based on Article 272 TFEU **is independent of national provisions conflicting with Article 272 TFEU**. Even if substantive national law is applicable and national law conflicts with the jurisdiction of the ECJ, the jurisdiction nevertheless is given to the CJEU, if such a clause has been agreed on in the contract. According to the CJEU: '*This objection of lack of jurisdiction cannot be upheld. While, under an arbitration clause entered into pursuant to Article 181 of the EEC Treaty [now: 272 TFEU], the Court may be called on to decide a dispute on the basis of the national law governing the contract, its jurisdiction to determine a dispute concerning that contract falls to be determined solely with regard to Article 181 of the EEC Treaty and the terms of the arbitration clause, and this cannot be affected by provisions of national law which allegedly exclude its jurisdiction*.'[31]

(58) The **validity of an arbitration clause** is determined by Union law and by Union law only. According to the CJEU: 'Article 38(6) of the rules of procedures stipulates that any application submitted under Article 153 of the Euratom Treaty shall be accompanied by a copy of the arbitration clause. Since these requirements have been fulfilled in this instance by the production of the contractual documents, consisting in the 'Draft Agreement' and the correspondence referring thereto, the bringing of the matter before the Court of justice under Article 153 is valid.'[32]

(59) For **reasons of legal certainty** the arbitration clause has to be concluded **in written form**. Although this might conflict with some case-law of the CJEU – it has been admitted[33] that if both parties appeal to the CJEU, this could be sufficient even without a written clause – our proposed rule is **based on reasons of contractor protection**. It **should not be possible for the European Commission to sue a contractor before the CJEU without a written document** that establishes the jurisdiction of the CJEU. This is to avoid the implication that a mere response to the CJEU by the contractor as a consequence of a claim of the European Commission lead to an implied

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31 Case C-209/90 *Commission v Feilhauer* [1992] ECR I-2613 para 13. For further jurisprudence see Case C-299/93 *Bauer v Commission* [1995] ECR I-839 para 11; Case T-271/04 *Citymo SA v Commission* [2007] ECR I-01375 para 55.

32 Case 23/76 *Pellegrini v Commission* [1976] ECR 1807 para 10.

33 With regard Case T-180/95 *Nutria AE v Commission* [1997] ECR II-01317, para 38 and Case T-44/96 *Oleifici Italiani SpA v Commission* [1997] ECR II-01331 para 37.

arbitration agreement, which was maybe not intended. The requirement of a **written** arbitration clause **is also fulfilled by a reference in the contract to another document** that contains a written arbitration clause.[34]

Paragraph 2

(60) The arbitration clause can be concluded **later than the contract itself**, until the initiation of court proceedings.[35]

Paragraph 3

(61) Paragraph 3 is included to **harmonise jurisdiction with the applicable law**. EU Authorities seem sometimes to include arbitration clauses in EU contracts even if giving jurisdiction to the CJEU seems not adequate due to the nature of the contract, of the applicable law and of the sometimes more effective Member State judicial system that would apply due to Article 274 TFEU if there were no arbitration clause. **In these cases there should be a possibility to avoid such problems by cancelling the arbitration clause**.

IV-25 Exclusion of compensation

(62) This general clause is **designed to avoid repetitions** in Article IV-29(2), Article IV-31(4), Article IV-32(3) and Article IV-36(2). It is **inspired by § 48(2) of the German APA.**[36]

Section 2: EU Contracts governed by EU law

Subsection 1: Execution and performance

IV-27 Contractual Rules

(63) Such a clause should make clear:

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[34] Compare Case 318/81 *Commission v Co. De. Mi.Spa* [1985] ECR 3693 paras 9 f.

[35] Compare Case 109/81 *Teresita Pace, née Porta, v Commission* [1982] ECR 2469 para 10.

[36] Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist

a) if the clause refers to the common contract law of the relevant Member State, or

b) if the EU Authority may avail itself of the specific privileges granted to public authorities in the contractual law of the relevant Member State, or

c) if the contract should be treated like a contract governed by public law of the relevant Member State.

(64) Instead of referring to the law of a Member State, the contract may refer to the DCFR[37], to Unidroit rules[38] or to other qualified model codes.

Subsection 2: Change of circumstances and related clauses

IV-28 Change of Circumstances

(65) For changes of circumstances see: **§ 60 of the German APA**.[39] **Article III-1:110** of the **DCFR**[40] provides for the following solution concerning private law contracts:

'III. – 1:110: Variation or termination by court on a change of circumstances

(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 or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional

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37 Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) - Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law, available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

38 International Institute for the Unification of Private Law (UNIDROIT): UNIDROIT Principles of International Commercial Contracts, http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf.

39 Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist

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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.'

(66) In comparison with the solution of Article III-1:110 of the DCFR[41] the solution proposed in this Article seems better adapted to EU contracts, above all because it avoids the necessity of a court action.

IV-29 Termination to avoid grave harm for the common good

(67) This article is inspired by **§ 60 of the German APA**.[42] The reasons for termination must be **very limited** i.e. only in cases where adherence to the contract would be **absolutely intolerable**. In Germany this clause is therefore considered as a 'fear clause' (*Angstklausel*) or 'emergency valve' (*Notventil*) and there are to our knowledge no actual cases of application of this clause.

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42 Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 3 des Gesetzes vom 25. Juli 2013 (BGBl. I S. 2749) geändert worden ist

IV-30 Termination for non-performance

(68) The Article **takes over Article III-3:502 to Article III-3:505** of the **DCFR**[43] and reveals the difficulties and problems of the divide of procedural rules and substantive provisions. It reveals moreover the difficulties of defining substantive provisions and therefore **highlights the decision of the working group on contracts not to define a new substantive law on EU contracts**, but to stick to the rules necessary for the administrative procedure of conclusion and execution of EU contracts.

Subsection 3: Consequences of illegality and unfair terms

IV-31 Termination because of an infringement of the provisions of Chapter 2

(69) This provision seems to be considered as common sense among scholars and is oriented towards Article 2d Directive 89/665[44] and Article 73 Directive 2014/24.

IV-32 Renegotiation because of an infringement of the specific obligations of EU Authorities as a public authority and IV-30 Invalidity

(70) We are aware of the fact that this rule **is not common in the Member States's administrative law systems**. However the problem is that there is **actually no convincing common standard** for the solution of infringements of the specific obligations of EU Authorities. There is moreover **little discussion about such a rule among scholars** and in many administrative law systems the questions of illegality of a public contract is not decisive, as there are several quite simple ways to terminate a public contract. Often, such as in **France**, a substantively

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44 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33 last amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1.

illegal public contract is seen as coincidentally invalid, whereas illegality is only granted if the contract contradicts certain legal provisions on formalities of public contracts or certain strict legal prohibitions. These cases are therefore **very rare in actual contracting** with the consequence that a specific common national standard cannot be identified. Moreover there is to our knowledge **no jurisprudence of the CJEU or of the ECHR** on this issue. The **principle of legality of administration does not provide a solution for the legal consequences of such infringements**.

(71) For **direct execution by EU authorities** the following appears to represent **current practice**: only if the contract is solely submitted to EU law do the infringement rules of EU law apply to the contract. Our position is that if there is no secondary legislation the consequences of infringements should be borrowed from the French system (comments on Article IV-4); that would mean that a substantively illegal public contract is invalid, but invalidity can only asserted if a court declared invalidity. However, transposing this solution to EU contracts would require the existence of a type of remedy with the CJEU resembling the French *plein contentieux* –, where both annulment and damages or other claims may be presented in the same proceeding –, and that is not the case.

(72) The rule has been drafted in this manner for the abovementioned reason. The rule **seeks to uphold the contract by giving the possibility of action back to the parties of the contract**, which is the basic idea of contracts. It is then for the parties to make an initial decision about the future of the contract. The idea behind the **suggestion of a renegotiation** is that **each party can only refer to its protected rights** that have been violated when renegotiating, but **not to the rights of the other party**. For instance the EU authority cannot call for invalidity because of the violation of rights of the contractor in the procedure, if the contractor has no problem with the violation and does not want any further changes. This idea is based upon the assumption that the contractor may anyway renounce its right. Therefore the parties should have the opportunity to renegotiate the contract and **hence uphold the contract in substance with the renegotiated changes**. Thus the solution given here **does not lead automatically to invalidity** because of infringements of obligations while contracting, but it provides a possibility of settlement by facilitating the conclusion of a new contract based on the earlier one. In addition this provision **attempts to adapt the rules on infringement of single-case decisions and possible legal**

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consequences to the needs of contracts. The all-or-nothing principle is not sufficient in such cases.

(73) As a result one can state clear rules of invalidity without a judgement of the court as a prerequisite (as in the French model). **Only in very distinctive and restricted cases** does an infringement lead automatically to the **invalidity** of a contract. In other instances the renegotiation procedure applies.

IV-36 Unfair terms

(74) If the contractor acts as a consumer see **Directive 93/13**[45] in its up to date version.

Chapter 4: Subcontracts

(75) Subcontractors are **third parties that are in a particularly weak position** due to the combination between principles of sound management and rules of standing in court procedures. **As far as sound management is concerned**, when a number of activities for the performance of a contract have to be performed by different persons, it is advisable for the sake of overview – especially for sound financial management – that an EU Authority delegate the burden of managing those persons to a sole contractor, who in turn will establish the necessary subcontracts. Having delegated that burden, EU Authorities usually consider that nothing in the relationship between a contractor and its subcontractors is of their concern.

(76) **On the side of standing rules**, decisions taken by an EU Authority in the implementation of a contract are not considered by the EU Courts as decisions in the sense of Article 263 TFEU. While contractors have the possibility to have such decisions reviewed by the judge of the contract, which may be an EU court or a Member State's or other court, **subcontractors have therefore no standing to bring an action for annulment, or an action for failure to act**

[45] Council Directive (EEC) 93/13 of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 last amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

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under Article 265 against the EU Authority. In turn, the judge of the subcontract (which furthermore is normally not an EU Court) cannot review the decisions made by the EU Authority in the implementation of the EU contract, as these are not formally addressed to the subcontractor: this solution also is clear in the (rather limited) case law of the GC on actions introduced by subcontractors.

(77) A number of subcontractors have made complaints to the EO, who has developed an **ombudsprudence** on the applicability of the principles of good administration to the actions, or to the inaction, of EU Authorities that have implications for the situation of subcontractors.

(78) The proposed model rules **do not intend to lead to a change of the Court's case law on standing of subcontractors**, as this would not easily be compatible with the wording of the relevant Treaty Articles. The rules aim at clarifying and systematising what has emerged from the relevant ombudsprudence, and apply it in the context of the practice on subcontracts.

IV-37 Admissibility and scope of subcontracts

Paragraph 1

(79) The wording of paragraph 1 is **partly based on** the DCFR[46], Articles IV. C. – 2:104: Subcontractors, tools and materials and IV. D. – 3:302: Subcontracting. The wording takes also into account the few relevant provisions of the **EU Financial Regulations**: Article 161 Regulation 966/2012.

(80) The rest of the Article is mainly intended to clarify the consequences of paragraph 1.

[46] Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) - Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law, available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

IV-38 Choice of the law applicable to subcontracts

(81) This Article is mainly intended to clarify a situation in a way that is logical in terms of contract law.

IV-39 Duties of the EU Authorities towards subcontractors

Paragraph 1

(82) This is the main provision of the model rules on subcontracts. The wording of paragraph 1 is fleshing out **the meaning of the application of principles of good administration to subcontracts**. The references to Book III are the same as those in Article IV-21 (Claims of the EU Authority in the context of contracts).

Paragraph 2 and 3

(83) The wording of paragraph 2 and 3 is trying to summarise a part of the relevant recommendations of the EO. Paragraph 3 appears to be particularly relevant in view the following EO cases: 53/2009/MF, paragraph 52, EO 2449/2007/VIK paragraphs 73-75 and 2610/2009/ (BU) MF, paragraph 35.

Paragraph 4

(84) The wording of paragraph 4 is taken from a **recommendation of the EO in case 1811/2009/ (BB) FOR, paragraph 21,** where it seemed that the Commission had neglected to verify the financial stability of a contractor and had refused to take over claims of subcontractors against the latter after the contractor went bankrupt.

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