

## **CLASSIFICATION OF PUBLIC CONTRACTS IN THE CONTEXT OF NATIONAL LAWS**

**Mathias AMILHAT<sup>1</sup>**

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<sup>1</sup> Maître de conférences en droit public – HDR, Institut des études juridiques de l’urbanisme, de la construction et de l’environnement (IEJUC).

## 1. INTRODUCTION

Variety poses formidable challenges where public contracts are concerned. How can principles common to public contracts in Europe be identified without a common definition of what a public contract is?

This question may seem unnecessary as everyone seems to have an idea of what a public contract is. However, in the absence of a specific and common definition, the classification of contracts as ‘public’ varies from one state to another, making any comparison difficult. In fact, the term ‘public contract’ is mostly used for simplicity of language. It is a convenient means of referring to contracts which, from a comparative law perspective, follow common rules. Incidentally, these rules are generally developed as a result of European Union law or international law, although they may also be established independently by each state according to its legal tradition. This problem was raised by Rozen Noguellou and Ulrich Stelkens in their work on comparative law on public contracts published in 2010. Noting the ‘relative lack of research on comparative law on public contracts’, the authors believe that this could be explained by ‘the very subject of the study, the concept of ‘public contract’’, because it ‘has not been universally identified’<sup>2</sup>. The problem therefore stems from the fact that not all states assign the same meaning to the term ‘public contract’. Thus, a study of national laws within the European Union demonstrates various uses of the term ‘public contract’ that overlap but never coincide.

Firstly, the term ‘public contract’ may be used as a synonym for the concept of administrative contract. In this regard, public contracts are distinct from private law contracts, but only in systems where the *summa divisio* in contractual matters is expressed by drawing a distinction between public law contracts and private law contracts. ‘Public contract’ is understood as a concept encompassing all contracts subject to a public law legal

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<sup>2</sup> R. NOGUELLOU and U. STELKENS, ‘Introduction’, in *Comparative Law on Public Contracts*, Bruylant, 2010, p. 5

regime. This use of ‘public contract’ as a synonym for ‘administrative contract’<sup>3</sup> or, more broadly, ‘public law contract’ is sometimes found in French legal theory<sup>4</sup>. The use of ‘public contract’ as a synonym for ‘public law contract’ is also found in other states that are familiar with the concept of administrative contract<sup>5</sup>. It can also be found in some publications regarding Austria, where there is a concept of administrative contract similar to the French<sup>6</sup>. However, the equating of ‘public contract’ and ‘administrative contract’ does not require the concept of administrative contract to tally with the French concept. Thus, some Croatian scholars use the term ‘public contract’ as a synonym for administrative contract. Yet the Croatian concept of administrative contract, arising from a 2010 law, does not tally with the French concept of the same name. One need only note that, although concession contracts may be considered as administrative contracts, this is not the case for public procurement<sup>7</sup>. In any case, the equating of public contracts and administrative contracts has the advantage of simplicity, because it is based on the current state of affairs. The problem is that it is difficult to adopt this approach in states where the *summa divisio* between ‘administrative contract’ and ‘private law contract’ does not exist.

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<sup>3</sup> It is also used in this way by Nicolas GABAYET: ‘French Report’, in Stéphane DE LA ROSA, Patricia VALCAREL FERNANDEZ et Romélien COLAVITTI, *Principles of public contracts in Europe*, Bruylant (to be published in 2021), part. II of the book: national studies

<sup>4</sup> Examples of this include the book by F. LICHÈRE (*Droit des contrats publics*, Dalloz, 3<sup>e</sup> éd., 2020) and the journal *Contrats publics* (Le Moniteur)

<sup>5</sup> See: R. VORNICU, ‘National study: Romania’, in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies, where there is a ‘concept of administrative or public contract’.

<sup>6</sup> M. STEINER, ‘Austria’, in *Comparative Law on Public Contracts*, as aforementioned, pp. 383 et seq. The author compares the concept of public contract to that of administrative contract, which has existed in Austrian law for ‘around 150 years’.

<sup>7</sup> M. TURUDIĆ, ‘Croatian Report’, in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

Furthermore, in states where this *summa divisio* does exist, this understanding of public contracts is not always relevant and other approaches may also be used. Above all, this meaning of the term ‘public contract’ cannot be used for comparison purposes, if only because the concept of administrative contract does not exist in all states.

Another use of the term ‘public contract’ is to refer to all contracts entered into by public bodies. In France, this approach was developed by Michel Guibal and ‘the Montpellier school’ in the 1990s<sup>8</sup>. The aim was to propose a concept of public contract that goes beyond the concept of administrative contract by basing it solely on an organic definition criterion. In this regard, the concept of public contract should highlight specific rules related to the presence of a public body as a party to the contract. It has the advantage of being broad enough to be applied in different European states without the need for a *summa divisio* between administrative contracts and private law contracts. However, there are two drawbacks to this definition. Firstly, categories of public bodies are not necessarily the same from one European state to another, which makes comparison difficult. Secondly, and more importantly, this definition of a public contract does not include contracts entered into by private individuals acting in the public sphere. Yet it is now understood that public contracts are not limited to public bodies and include contracts entered into by certain private individuals acting in the public sphere.

Finally, the term ‘public contract’ may be used to refer to contracts covered by the European regulations applicable to public procurement<sup>9</sup> and concession contracts<sup>10</sup>. In fact,

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<sup>8</sup> Cf. M. GUIBAL, ‘Le dualisme des contrats passés entre personnes publiques et personnes privées’, *Cahiers de droit de l’entreprise*, 1993; M. GUIBAL, *L’avant contrat*, ed. Francis Lefebvre, 2001; M. GUIBAL, ‘A propos d’une incertitude: la notion de personne publique contractante’, in *Environnement, Les mots du droit et les incertitudes de la modernité. Mélanges en l’honneur du Professeur Jean-Philippe COLSON*, Presses universitaires de Grenoble, 2004, p. 230.

<sup>9</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC; and Directive 2014/25/EU of the European Parliament and of the Council of

this is the most common use in legal theory. In France, many authors therefore use the term ‘public contract’ as a synonym for the concept of ‘public procurement’, which includes both public procurement contracts and concession contracts<sup>11</sup>. Some, however, prefer to specify by referring to these contracts as ‘public business contracts’, implying that the concept of public contract is too broad<sup>12</sup>.

The equating of public contracts, public procurement and concession contracts also arises from the regulations applicable in some states, in particular the Iberian Peninsula. Thus, since 2008, Portugal has had a ‘Public Contracts Code’<sup>13</sup> whose scope of application goes beyond just contracts classified as administrative and also encompasses private law contracts covered by the European regulations applicable to public procurement and concession contracts. Similarly, the Spanish law on ‘public sector contracts’<sup>14</sup> is intended to

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26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

<sup>10</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts

<sup>11</sup> There are many examples: cf. M. KARPENSCHIF, ‘Le contrat public européen’, *Revue des contrats*, 2014, no. 3, p. 539; O. GUEZOU, ‘Contrats publics et politique de concurrence’, *RFDA* 2014, p. 632; Lucien RAPP, ‘Contrats publics et politiques économiques, la porte étroite: relance et encouragements sectoriels’, *RFDA* 2014, p. 623; M. TRYBUS, R. CARANTA and G. EDELSTAM, ‘European Union Law on Public Contracts: Public Procurement and Beyond’, *EU Public Contract Law*, Brussels, Bruylant, 2013, p. 1-12

<sup>12</sup> A. LOUVARIS, ‘La dénomination de ‘contrats publics d’affaires’’, *AJCA* 2015, p. 152; S. BRACONNIER, ‘La typologie des contrats publics d’affaires face à l’évolution du champ d’application des nouvelles directives’, *AJDA* 2014, p. 832

<sup>13</sup> ‘Código dos contratos públicos’, [http://www.base.gov.pt/mediaRep/inci/files/ccp2018/CCP-DL\\_111-B.pdf](http://www.base.gov.pt/mediaRep/inci/files/ccp2018/CCP-DL_111-B.pdf)

<sup>14</sup> Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014; <https://www.boe.es/buscar/act.php?id=BOE-A-2017-12902>

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apply to contracts entered into for a fee by public sector entities. Yet these entities are defined in accordance with the European definition of contracting authorities. The law therefore applies to public procurement and concession contracts within the meaning of European Union law, which ultimately makes sense insofar as the purpose of the law is to transpose European directives. This approach is not, however, exclusive to south-west Europe: in Denmark, for example, there is no clearly recognised concept of public contract, but the term may be used to refer to European legislation and to explain that these are contracts by which a public entity purchases works, supplies or services; to indicate that one of the contracting parties is a public body; or to refer to contracts related to an administrative policy to describe the public interest goals to be met<sup>15</sup>. The term ‘public contract’ may therefore refer to public procurement and concession contracts covered by European regulations, although these contracts are more often referred to as ‘public procurement’<sup>16</sup>. Some authors come to the same conclusion for Slovenia. They state that, although Slovenian law does not enshrine a concept of public contract, it is used as a common term to describe public procurement and concession contracts<sup>17</sup>.

This definition of public contracts by reference to public procurement contracts<sup>18</sup> has the advantage of precision. Furthermore, it facilitates comparison between European Union Member States insofar as it is based on common concepts (public procurement and

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<sup>15</sup> S. TREUMER, ‘Denmark’, in *Comparative Law on Public Contracts*, as aforementioned, p. 543

<sup>16</sup> Cf. the report on Denmark written by C. RISVIG HAMER ‘Danish Report’, in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

<sup>17</sup> B. FERK, P. FERK, K. HODOŠČEK, ‘Slovenian Report’, in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

<sup>18</sup> According to language versions and translations, the concept of ‘public procurement’ may be translated as ‘approvisionnement public’, a concept that encompasses public procurement and concession contracts, or ‘marché public’. This second translation does not, however, automatically exclude concession contracts, which are sometimes considered as a specific type of public procurement.

concession contract) arising from sectoral directives. However, the disadvantage of this use is that it limits the scope of comparison to just these categories of contract. Defined in this way, the concept of public contract has no more to offer than the concept of public procurement and continues to exclude all contracts that are neither public procurement nor concession contracts. Yet it is now understood that some of these contracts excluded from the scope of application of the 2014 directives nevertheless remain subject to the common principles arising from the Treaties<sup>19</sup>.

The use of the term ‘public contract’ is therefore far from new, but none of the uses identified are fully satisfactory. Furthermore, use varies from one state to another – even from one author to another – without the term ever reaching the status of concept by being enshrined in national law. Even the Portuguese ‘public contracts’ code does not give a specific definition of these contracts. In fact, if there is one thing the various European states have in common, it is actually the lack of a definition of the concept of public contract!

However, national classification is not the only problem where identifying and classifying public contracts is concerned. The European Union also does not have a concept of ‘public contract’, which does not promote convergence towards a common concept. The only established concepts are those laid down by ‘public procurement’ and ‘concession’ directives. These are contracts entered into in writing and for a fee awarded by one or more contracting authorities for the purpose of having work carried out, purchasing supplies and/or having services provided by one or more economic operators<sup>20</sup>. The directives therefore apply only to ‘public procurement’ contracts. Incidentally, when the term ‘public

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<sup>19</sup> Consider, for example, public property occupancy agreements, in accordance with the well-known *Promoimpresa* case: CJEU, 14 July 2016, C-458/14 and C-67/15, *Promoimpresa*; *AJDA* 2016, p. 2176, note R. NOGUELLOU; *AJCT* 2017, p. 109, obs. O. DIDRICHE; *RTD com.* 2017. 51, obs. F. LOMBARD; *RTD eur.* 2017. 843, obs. A. ZIANS; *Contrats-Marchés publ.* 2016, comm. 291, note F. LLORENS

<sup>20</sup> Art. 5 of Directive 2014/23 and art. 2 of Directives 2014/24 and 2014/25

contract' appears in certain documents drawn up by the European institutions, it refers to public procurement contracts<sup>21</sup>. Thus, there is no European concept broad enough to include other categories of contract that work on similar principles, such as the aforementioned public property occupancy agreements.

Therefore, the question arises as to whether the variety of national approaches and the lack of a common concept constitute insurmountable obstacles to comparison. The use of different concepts actually calls into question the value of comparing legal regimes and the rigour of such an approach.

These obstacles should not, however, be a deterrent; without them, any comparison would be pointless. In fact, comparison is difficult but not impossible if the variety that characterises national approaches can be overcome. There are two possible, non-mutually exclusive solutions. The first involves overcoming the variety of national classifications through systematisation: it has its advantages but is not fully satisfactory (2). The second involves ignoring national classifications by building a common concept: this solution appears to be more satisfactory, even if its implementation is more uncertain (3).

## **2. BEYOND THE STATUS QUO: SYSTEMATISATION OF NATIONAL CLASSIFICATIONS**

The variety of classifications does not require recognition of as many models as there are European Union Member States. It is possible to draw parallels, allowing for a partial overcoming of the variety and thereby promoting comparison. However, differentiating between states where there is a *summa divisio* between public law contracts

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<sup>21</sup> This observation was made by L. FOLLIOT-LALLIOT and S. TORRICELLI to limit their field of study to public procurement contracts only. L. FOLLIOT-LALLIOT and S. TORRICELLI, 'Introduction', in *Oversight and Challenges of Public Contracts*, Bruylant, 2018, p. 2



and private law contracts, and those where is only a single category of contract, is not enough. In order to refine the systematisation, three models must be identified according to an approach focused on scale and progressivity based on the contractual *summa divisio*.

***2.1. Model one: states where the *summa divisio* is expressed as a clear distinction between public law contracts and private law contracts***

Model one draws the most significant conclusions from the *summa divisio* in contractual matters<sup>22</sup>. This model includes French law, but significant differences remain from one state to another.

In France, the distinction between administrative contracts and private law contracts may result from two types of classification. The first case is legal classification. It is in fact possible for a text with legislative value to classify a contract (or rather, a category of contract) as either administrative or private law. Contracts classified by law thereby avoid having their classification decided by a judge, which allows contracts that may have been classified as administrative contracts or private law contracts according to criteria established by case law to be subject to the same legal regime. In addition to legal classifications, the second case involves classification according to case law. It can therefore only take place in the absence of legal classification and is based primarily on material considerations. In fact, it is the unconscionability of the contract<sup>23</sup>, or the link

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<sup>22</sup> It is important not to confuse the significance attributed to *summa divisio* in general and that attributed to it in contractual matters, even though the two may be linked.

<sup>23</sup> Unconscionable clauses are now defined in accordance with case law: TC, 13 October 2014, *SA Axa France IARD*, no. 3963; BJCP no. 98/2015, p. 11, concl. F. DESPORTES; AJDA 2014, p. 2180, chron. J. LESSI and L. DUTHEILLET DE LAMOTHE; DA 2015, comm. 3, note F. BRENET; Contrats-Marchés publ. 2014, comm. 322, note G. ECKERT; RFDA 2015, p. 23, note J. MARTIN. As for unconscionable legal regimes, they are defined by traditional case law: CE, 19 January 1973, *Société d'exploitation électrique de la Rivière du Sant*, no. 82338; CJEG 1973, p. 239, concl. M. ROUGEVIN- BAVILLE; AJDA 1973, p. 358, chron. D. LÉGER and M. BOYON; Rev. Adm. 1973, p. 633, P. AMSELEK

between the contract and public service,<sup>24</sup> that justifies its classification as an administrative contract provided, however, that it is entered into by a public body. Nevertheless, legal classifications and classifications according to case law are generally based on the same logic. Thus, the French Public Procurement Code specifies that public procurement and concession contracts are administrative contracts, but this classification only applies when they are entered into by public bodies<sup>25</sup>. In any event, and even though it is not strictly speaking a classification criterion, the public interest goal of the contract is key in determining whether it can benefit from the special legal regime applicable to administrative contracts. The latter give special privileges to contracting public entities and fall within the jurisdiction of the administrative courts. The concept of administrative contract therefore offers protection to the contracting public entities and, most importantly, the goals pursued through the contract.

This understanding of the concept of administrative contract as offering protection to public bodies and the goals they pursue is found largely in the Iberian Peninsula, whether in Spain or Portugal. In both these states, it is also to some extent the public interest goal pursued that justifies the distinction between administrative contracts and private law contracts. However, both Spain and Portugal have added a new category beyond the distinction between administrative contracts and private law contracts. In Spain, this is the generic category mentioned earlier that encompasses ‘public sector contracts’. Yet the creation of this category tends to make the strict distinction between administrative

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<sup>24</sup> The public service criterion appeared early on (CE, 6 February 1903, *Terrier*, rec p. 94, concl. ROMIEU; D. 1904.3.65, concl. ;S. 1903.3.25, concl., note M. HAURIOU and CE, 4 March 1910, *Thérond*, Rec. 193, concl. PICHAT; D. 1912.3.57, concl. ;S. 1911.3.17, concl., note M. HAURIOU; RD publ. 1910.249, note Gaston JÈZE) and has been subject to many changes.

<sup>25</sup> French Public Procurement Code, art. L. 6

contracts and private law contracts less relevant<sup>26</sup>. It notes that Spanish legislators refer to specific obligations that apply when a public authority is a party to the contract but, in fact, the principles applicable to public procurement matters apply to all public sector entities, whether public bodies or private individuals. A similar problem applies in Portugal. The Public Contracts Code lays down the rules applicable to contracts that are public procurement or concession contracts within the meaning of European Union law, thereby going beyond the distinction between administrative contracts and private law contracts<sup>27</sup>. In fact, the gradual overstepping of the distinction between administrative (or public law) contracts and private law contracts is driven by the development of European Union law<sup>28</sup>. It is, however, only partial and does not prevent the maintenance of a clear distinction between administrative contracts and private law contracts, if only from the perspective of disputes. Thus, in France, the development of public procurement law and the adoption of the code of the same name has not resulted in the disappearance of the distinction: not all administrative contracts are public procurement contracts, and public procurement contracts may be administrative contracts or private law contracts. This ‘French’ approach is also found in other states such as Romania. Thus, the link to French law is emphasised by scholars, especially with regard to the exorbitant rules applicable to administrative contract matters<sup>29</sup>. In fact, the distinction has implications for the legal regime of contracts

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<sup>26</sup> This is the conclusion, for example, of the paper written by P. VALCÁRCEL FERNÁNDEZ on the principles of public contracts in Spain: P. VALCARCEL FERNANDEZ, ‘Spanish Report’, in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies.

<sup>27</sup> Incidentally, in his report on Portugal, P. CERQUEIRA GOMES refers to the ‘Código dos contratos públicos’ as ‘the Public Procurement Portuguese Code’: P. CERQUEIRA GOMES, ‘Portuguese Report’, in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies.

<sup>28</sup> European regulations ignore this traditional division and apply regardless of the classification usually given by national law to a particular contract. Consequently, when the *summa divisio* is particularly marked, the transposition of European directives involves going beyond traditional divisions.

<sup>29</sup> See, in particular: R. VORNICU, National study: Romania’, as aforementioned

considered as such, which is particularly the case for public procurement and concession contracts, even though disputes are still shared between the administrative and ordinary courts (the latter retain jurisdiction with regard to performance).

Finally, this model, which attaches particular importance to the contractual *summa divisio*, also exists in other states, where the consequences and scope of public law are just as important as under the French approach. The Croatian and Estonian examples can be cited in this regard. Thus, in Croatia, the concept of administrative contract exists but it is not defined as it is in French law, despite the link highlighted by Marko Turudić in his report<sup>30</sup>. It refers to contracts entered into by public bodies provided they are related to an administrative procedure preceding the contract and a special law classifies them as administrative contracts. It is therefore not the goal pursued but the procedure implemented that justifies the classification. Yet in the case of public procurement contracts, these criteria lead to the belief that only concession contracts are administrative contracts, even though Marko Turudić argues against this approach and believes that public procurement and public-private partnership contracts should be also considered as administrative contracts. They nevertheless remain subject to private law rules. In Estonia, the distinction between administrative contracts and private law contracts is also based on specific criteria. Apart from cases in which the nature of the contract is determined by legal provisions, it is actually the purpose of contracts entered into by public bodies that determines whether they are administrative contracts or private law contracts. Yet this criterion differs from French law. In fact, a contract shall only be classified as administrative if it transfers prerogatives of public authorities or regulates the rights of third parties to the contract<sup>31</sup>.

Thus, although it is not possible to identify a 'French model', it should be recognised that there is a model in Europe that clearly differentiates between the concepts

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<sup>30</sup> M. TURUDIĆ, 'Croatian Report', as aforementioned

<sup>31</sup> C. GINTER and Nele PARREST, 'Estonia', in *Comparative Law on Public Contracts*, as aforementioned, p. 600

of administrative contract and private law contract deriving from different legal regimes. This model is different from the second because the *summa divisio* exists, with no significant implications for contractual matters.

***2.2. Model two: states that acknowledge the *summa divisio* but only partially express it in contractual matters***

States that fall within this model are similar to those in the first group insofar as they are also familiar with jurisdictional dualism and the distinction between public law and private law. The difference, however, arises with regard to contractual matters. In fact, in these states, jurisdictional dualism has only limited repercussions where contracts are concerned, although a clear distinction can be drawn between unilateral administrative acts and acts of private law.

These states appear to constitute a majority within the European Union. They include Germany, Austria, the Netherlands, Belgium, the Czech Republic, Slovenia, Finland, Poland, Sweden and Italy. Beyond the *summa divisio* that also characterises states that fall within the first model, it is the understanding of contractual instruments that allows these states to be considered as a 'separate' group. In fact, one thing they have in common is the belief that a contract is *by nature* an act of private law. Therefore, the public or private classification of the originator of the contract does not really matter: as a matter of principle, contracts fall under private law, including when they are entered into by public bodies. However, this does not mean that there are never administrative or public law contracts in these legal systems. These contracts are in fact recognised in some of these states, although they remain relatively rare. There are two cases that justify limited exemptions from the principle of classification as private law contracts.

Firstly, certain contracts that equate to administration contracts may be classified as administrative contracts<sup>32</sup>. These are specific contracts for the distribution of competences between public bodies or to organise the implementation of public action in accordance with contracting procedures. Thus, in Germany, coordination contracts between public bodies, those entered into by social security bodies with social service providers and ‘relationship development contracts under public law’ are considered as public law contracts<sup>33</sup>. These are, however, exceptions to the principle: most contracts entered into by public bodies fall under private law, starting with public procurement. The same applies in Czech law: contracts are, as a matter of principle, private law contracts, but there are administrative law contracts that equate to administration contracts. In this regard, some scholars of the Czech Republic cite ‘coordination contracts’ and ‘subordination contracts’<sup>34</sup>. The same approach is also found in Finland: contracts are, as a matter of principle, acts of private law, but there is a concept of administrative contract that ‘includes all contracts used for the performance of administrative tasks, as well as contracts used to replace unilateral administrative decisions’<sup>35</sup>. Similarly, in Poland, among public contracts (defined as contracts entered into by public bodies), there are ‘administrative agreements [...] used to coordinate the actions of public bodies, for the joint exercise of powers or to organise the transfer of powers’, whereas other public contracts are considered as private law contracts<sup>36</sup>. In such cases, the classification of administrative contracts therefore remains

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<sup>32</sup> As opposed to cooperation contracts, according to the distinction established by A.DE LAUBADÈRE, ‘Administration et contrat’, in *Mélanges offerts à Jean BRÈTHE DE LA GRESSAYE*, Bière, 1967, p. 453

<sup>33</sup> U. STELKENS and H. SCHRÖDER, ‘Germany’, in *Comparative Law on Public Contracts*, as aforementioned, p. 309

<sup>34</sup> A. HAVLOVÁ, M. RÁŽ, J. PETROVÁ, B. FIKAROVÁ, ‘National Study: Czech Republic’, in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

<sup>35</sup> O. MÄENPÄÄ, ‘Finland’, in *Comparative Law on Public Contracts*, as aforementioned, p. 661

<sup>36</sup> M. SPYRA, ‘Poland’, in *Comparative Law on Public Contracts*, as aforementioned, p. 759

anecdotal and seems to result from the substitution of contracts where unilaterality typically applies.

The classification of administrative contracts in states that fall within this second model can also result from the implementation of specific criteria. In this case, the classification procedure is similar to that implemented in states that fall within the first model. The difference is that the criteria used are ‘stricter’ and only deviate from the principle that contracts are acts of private law in exceptional circumstances. Thus, Austrian law, like French law, believes that public bodies can enter into either administrative contracts or private law contracts. However, the principle remains that contracts are acts of private law and only contracts in which the contracting public body is acting as a ‘sovereign administration’ shall be considered as administrative<sup>37</sup>.

Nevertheless, the option to classify contracts as ‘administrative’ or ‘public law’ is not routinely considered and some states that fall within this second model believe that contracts are always acts of private law. This is the case, for example, in Slovenia: some scholars clearly explain that the concepts of ‘public contract’ and ‘administrative contract’ are not defined by Slovenian law and therefore cannot be used from a comparative law perspective<sup>38</sup>. Similarly, Dutch law does not appear to acknowledge the existence of public law contracts. It has been highlighted that contracts are, as a matter of principle, acts of private law, regardless of whether one of the contracting parties is a public body, and regardless of whether a ‘specific procedure’ is implemented prior to its signing<sup>39</sup>. Jessy Emaus and Tom Swart came to the same conclusion in 2010: contracts remain acts of

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<sup>37</sup> M. STEINER, ‘Austria’, in *Comparative Law on Public Contracts*, as aforementioned, p. 384

<sup>38</sup> B. FERK, P. FERK, and K. HODOŠČEK, ‘Principles of Public Contracts in Slovenia’, in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

<sup>39</sup> S. SCHOENMAEKERS, ‘Principles of Public Contracts in Europe: Report on the Netherlands’, in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

private law even when they apply certain public law rules and the term ‘public contract’ is therefore only used for purely explanatory purposes, to indicate the presence of a public body as a party to the contract<sup>40</sup>. This is also the case in Sweden, where there is no legal category of public or administrative contract<sup>41</sup>. This does not mean that administrative law is totally absent in these states where contracts are concerned. It may be expressed in the procedure that precedes the adoption of the contract, through certain clauses, or even by special prerogatives implemented during performance. However, even when administrative law rules apply, the contract remains an act of private law. This approach also seems to prevail in Belgium, although ‘the classification of administration contracts remains a challenge’<sup>42</sup>. Contracts identified as ‘administrative’ or ‘public’ are in fact governed by special rules that may be considered as administrative law rules, which explains why ‘the majority view is that there is a ‘special’ legal regime for administrative contracts and although the Civil Code remains applicable in principle to these contracts, it is only under ‘suppletive ordinary law’<sup>43</sup>. However, strictly contractual disputes fall within the jurisdiction of the ordinary courts; administrative judges only intervene through the theory of detachable acts<sup>44</sup>. Therefore, contracts classified as public or administrative may in fact be better viewed as private law contracts, but partly governed by administrative law rules. The same applies in Italy, where public contracts follow ‘two legal frameworks’<sup>45</sup>. A

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<sup>40</sup> J. EMAUS and T SWART, ‘Netherlands’, in *Comparative Law on Public Contracts*, as aforementioned, p. 741 et seq.

<sup>41</sup> G. EDELSTAM, ‘Sweden’, in *Comparative Law on Public Contracts*, as aforementioned, p. 887

<sup>42</sup> A. L. DURVIAUX, ‘Rapport sur le droit belge’, in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

<sup>43</sup> P. FLAMME, ‘Belgium’, in *Comparative Law on Public Contracts*, as aforementioned, p. 403

<sup>44</sup> A. L. DURVIAUX, ‘Rapport sur le droit belge’, as aforementioned

<sup>45</sup> A. MASSERA, ‘Italy’, in *Comparative Law on Public Contracts*, as aforementioned, p. 718



distinction must be drawn between two phases in the life of these contracts: the phase prior to their signing, which follows administrative law rules, and the phase that occurs once the contract has been signed, which falls under private law<sup>46</sup>. Thus, although public contracts are not actually ‘public law contracts’, the *summa divisio* is expressed through the rules applicable and the contentious jurisdiction.

Incidentally, in states that fall within this second model, the special legal regime for public contracts is often found in litigation proceedings. In Italy, when a contract is entered into by a public body, only the second phase falls under private law and the jurisdiction of the ordinary courts. Disputes relating to the contract awarding phase fall under administrative law and the jurisdiction of the administrative courts in accordance with the distinction between the protection of individual rights and the protection of legitimate interests<sup>47</sup>. Without claiming to be exhaustive, it can be noted that in Belgium, award procedures are often reviewed by the administrative courts through the theory of detachable acts, whereas the interpretation and performance of contracts is reviewed by the civil courts<sup>48</sup>. Similarly, Czech law states that disputes relating to the rules laid down in the ‘public procurement act’ fall within the jurisdiction of an agency responsible for competition protection whose decisions may be challenged in the administrative courts, whereas disputes between contracting parties fall within the jurisdiction of the civil courts<sup>49</sup>. Sometimes, the distribution of contentious jurisdiction is even more specific. Thus, in Poland, public procurement disputes are primarily a matter for a non-judicial body, but

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<sup>46</sup> The report written by Matteo PIGNATTI comes to the same conclusion: M. Pignatti, ‘The Italian legal framework on Principles in Public Contracts’, in *Principles of public contracts in Europe*, as aforementioned, part. II of the book: national studies

<sup>47</sup> A. MASSERA, ‘Italy’, in *Comparative Law on Public Contracts*, as aforementioned, p. 718

<sup>48</sup> P. FLAMME, ‘Belgium’, in *Comparative Law on Public Contracts*, as aforementioned, p. 399 et seq.

<sup>49</sup> A. HAVLOVÁ, M. RÁŽ, J. PETROVÁ, B. FIKAROVÁ, ‘National Study: Czech Republic’.

they may subsequently be brought before the ordinary courts<sup>50</sup>. However, concession disputes are divided between the administrative and ordinary courts: the administrative courts have jurisdiction for the contract award and signing phases, while the ordinary courts have jurisdiction for the performance phase.

Whether from the perspective of disputes and/or the perspective of the applicable legal regime, states that fall within this second model do not deny the *summa divisio*. Its implications for contractual matters are merely different to those observed for states that fall within the first model because contracts remain, in theory, acts of private law. Therefore, the existence of the *summa divisio* requires these states to be differentiated from those in the third group.

### ***2.3. Model three: states where the summa divisio typically does not exist***

*Summa divisio* and jurisdictional dualism does not exist in all European states, although this does not prevent them from creating specialist administrative courts. This approach is relatively rare, but is found notably in Denmark. In this Member State, there is no jurisdictional dualism as it is commonly understood, and contracts are considered as acts of private law, even when they are entered into by public bodies<sup>51</sup>. For a long time, the approach was not to develop special rules applicable to contracts entered into by public bodies, including in public procurement matters. European directives were in fact transposed ‘as is’ and a ‘Public Procurement Act’ did not exist until 2016, it being understood that the ‘concessions’ directive is not affected and continues to be applied as is<sup>52</sup>. Contracts entered into by public bodies are therefore considered as acts of private law, and only those covered by the European regulations are subject to special regulations.

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<sup>50</sup> M. Spyra, ‘Poland’, in *Comparative Law on Public Contracts*, as aforementioned, especially p. 772

<sup>51</sup> S. TREUMER, ‘Denmark’, in *Comparative Law on Public Contracts*, as aforementioned, p. 543

<sup>52</sup> C. RISVIG HAMER, ‘Danish Report’, as aforementioned

These are found in litigation proceedings, with a special institution responsible for ruling on compliance with the European regulations: ‘the Complaints Board for Public Procurement’<sup>53</sup>. The ‘Danish model’ is, however, an isolated case within the European Union, particularly since Brexit. In the United Kingdom, there is also not really a *summa divisio* or jurisdictional dualism in the civil law sense. Therefore, there is no official category of administrative or public contracts, even though, in order to apply European Union law, procurement and concession contracts are governed by specific regulations<sup>54</sup>.

This third ‘model’ exists nevertheless, although it is not widely used. It completes the overview of the different national classifications of ‘public’ contracts, while demonstrating the magnitude of the differences in understanding that exist from one state to another.

This systematisation, sadly incomplete, allows for the identification of broad trends among the approaches taken in European Union Member States where contracts are concerned. It may facilitate comparison, particularly between states that fall within the same model, but it rapidly reaches its limits when it comes to comparing states that fall within different models. Therefore, a common concept must be developed to enable comparison.

### **3. ENABLING COMPARISON: BUILDING A NEW CONCEPT**

Works of comparative law agree that the use of the concept of public contract is essential to enable comparison, without agreeing on its definition. In 2010, Rozen Noguellou and Ulrich Stelkens chose to use a broad definition of public contract focused on an organic criterion. The idea was ‘to understand by ‘public contracts’ all contracts that

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<sup>53</sup> Ibidem

<sup>54</sup> Cf. P. CRAIG and M. TRYBUS, ‘England and Wales’, in *Comparative Law on Public Contracts*, as aforementioned, p. 339 et seq.

may be entered into by all administrative bodies (state, sub-state, etc.), regardless of their purpose’, while ‘the term ‘public contract’ does not refer [...] to a legal regime’<sup>55</sup>. On the other hand, in 2018, Laurence Folliot-Lalliot and Simone Torricelli preferred to equate the concepts of public contract and public procurement contract in order to have a ‘more clearly defined field that allows for a better understanding of the globalisation of law’<sup>56</sup>. However, both of these options have their limits: the first because it is not specific enough, the second because it is probably too specific. A ‘third way’ therefore needs to be found by choosing a relevant framework and criteria.

### ***3.1. The need to use a European framework***

It has been stated that neither national laws nor European Union law provide a definition of the concept of public contract that is sufficient to enable comparison<sup>57</sup>. The question therefore arises as to whether a framework is required to define this concept. In fact, it would probably be easier not to link the concept of public contract to positive law and to develop it ‘outside the framework’. Firstly, because by taking an approach ‘outside the framework’, it is easy to export the concept to apply it in different situations, whether in the legal systems of different Member States or at European Union level. Secondly, because the use of a concept ‘outside the framework’ allows it to be applied beyond the single European framework, and therefore enables a more extensive comparison<sup>58</sup>.

The problem with a definition ‘outside the framework’ is that it inevitably lacks precision. Thus, when authors choose to use an organic criterion that refers to ‘administrative bodies’, the question immediately arises as to how to define these bodies.

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<sup>55</sup> R. NOGUELLOU and U. STELKENS, ‘Introduction’, as aforementioned, p. 5

<sup>56</sup> L. FOLLIOU-LALLIOT and S. TORRICELLI, ‘Introduction’, as aforementioned, p. 2

<sup>57</sup> Cf. developments in the introduction

<sup>58</sup> This is in fact the meaning of the definition adopted by R. NOGUELLOU and U. STELKENS

The lack of a framework therefore leads to a repeat of the shortcomings related to the variety of concepts: in fact, when the definition of public contract is detached from any framework, it becomes a generic category<sup>59</sup> that encompasses a variety of situations but can no longer seriously claim the status of concept. Furthermore, as noted by Guillaume Tusseau, *‘the political, social, economic, intellectual and other contexts in which legal arrangements apply are, if not decisive, at least important factors in their configuration. Also, the idea of everlasting and perfect legal concepts seems unlikely in itself’*<sup>60</sup>. Therefore, the idea of defining the concept of public contract outside of any framework seems difficult to implement.

A relevant framework must therefore be found to develop a concept that enables comparison. Yet, in this regard, national frameworks are not satisfactory. The legal traditions adopted are in fact too different from each other and therefore, the concepts developed in the 27 Member States can only converge without tallying fully. The only solution is to develop a common concept used consistently in national legal systems. The European Union seems like the perfect framework for this, particularly as European concepts have already been developed in contractual matters. Initially inspired by national laws, the concepts of ‘public procurement’ and ‘concession contract’ have evolved in their definition to become autonomous concepts different from their national namesakes. The high degree of harmonisation brought about by the directives has led to the adoption of these concepts in different Member States, sometimes substituting the European definitions for the old national definitions. This evolution in the concepts of public procurement and concession contract make a similar development possible if a European concept of public

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<sup>59</sup> Thus, S. BOYRON and A. C.L. DAVIES believe that ‘the generic category of public contract may help bridge legal systems which characterise and regulate in different ways the contracts agreed to by public bodies’, but they explain that at the same time, this generic category does not allow for necessary distinctions to be made between deeds that benefit from the ‘contract label’. S. BOYRON and A. C.L. DAVIES, ‘Accountability and public contracts’, in *Comparative Law on Public Contracts, as aforementioned*, p. 209, especially pp. 210-211

<sup>60</sup> G. Tusseau, ‘Critique d’une métanotion fonctionnelle’, *RFDA* 2009, p. 641

contract is adopted. As an autonomous concept, it could be used to overlap with national concepts or to replace them.

Furthermore, the development of a European concept of ‘public contract’, which encompasses and goes beyond the concept of public procurement contracts, would allow for refinement of the *summa divisio* at the European Union level. The distinction between European public law and private law would be strengthened. It seems, in fact, that, as described by Loïc Azoulay, in European Union law as ‘in all structured legal systems, there is a fundamental split between two types of legal relationships, which can be called ‘public law situations’ and ‘private law situations’<sup>61</sup>. Yet the development of a European concept of public contract would foster the development of a European public contract law distinct from European private contract law. The latter is in fact commonly considered as European contract law<sup>62</sup>, without including or taking into account the European regulations applicable to public procurement and concession contracts, or even the existence of contracts awarded by the European Union administration<sup>63</sup>. The development of a European concept of public contract would allow for reflection on the goals pursued by the European legislature

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<sup>61</sup> L. AZOULAI, ‘Sur un sens de la distinction droit public/droit privé dans le droit de l’Union européenne’, RTDE 2010 p. 842. However, the author identifies a ‘triangular structure of EU law’ with a ‘social’ ‘branch’ ‘alongside two public and private branches’.

<sup>62</sup> Existing harmonisation projects are in fact focused on private law and are not concerned with the possible existence of ‘public contracts’, although effective harmonisation exists for some of them (e.g. public procurement and concession contracts). Cf. *La notion de contrat administratif. Droit de l’Union européenne*, Bruylant, 2014. For a comprehensive overview of European contract law through an approach focused on private law, cf. N. JANSEN and R. ZIMMERMANN (ed.), *Commentaries on European Contract Laws*, Oxford University Press, 2018

<sup>63</sup> For more on this issue, cf. D. RITLÉNG, ‘Les contrats de l’administration de l’Union européenne’, in Jean-Bernard AUBY and Jacqueline DUTHEIL DE LA ROCHERE (ed.), *Traité de droit administratif européen*, Bruylant, 2<sup>nd</sup> ed. 2014, p. 219; M. AMILHAT, ‘Les actes contractuels de l’Union’, in M. BLANQUET and G. KALFLECHE (ed.), *La codification de la procédure administrative non contentieuse de l’Union européenne*, Presses de l’Université Toulouse 1 Capitole, Cahiers Jean MONNET, 4/2019, p. 191

through the regulations developed in this respect: should they allow greater powers to be granted to public bodies in order to facilitate their activities (as in the French model) or should they instead emphasise a framework for this public action in order to protect the activities of private individuals and their market freedoms? More generally, the concept of public contract would make it possible to structure European public contract law and make it easier to understand by specifying the persons who may enter into these contracts, the categories of contract that may be considered as ‘public’ and even the common principles that may be applicable. Finally, the strengthening of the *summa divisio* between public law and private law at the European Union level would contribute to broader discussions on the basis of this *summa divisio*: prevalence of a European public interest or European public authorities, pursuit of European public service goals, competition protection on the market, etc.

Thus, the use of the European framework to develop the concept of public contract is becoming a perfect framework, as much to ensure the use of a concept common to different Member States as to achieve the goal of building a real European public contract law. Therefore, criteria must be found to define this concept.

### ***3.2. One option is to use two definition criteria***

In order to use the concept of public contract, care must be taken not to reproduce the shortcomings of the current uses of the term ‘public contract’<sup>64</sup>. Thus, its definition must be broad enough not to be limited only to administrative contracts or public procurement contracts. However, it should not be so broad that it risks becoming unclear. The aim of this concept is in fact to identify common principles, or even a common regime, which is impossible if it encompasses all categories of contract entered by public bodies or persons in the public sphere. Therefore, this twofold demand makes it necessary to find a happy medium by using both an organic criterion and a material definition criterion. The

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<sup>64</sup> Cf. developments in the introduction

first is part of an expansive approach, whereas the second leads to a tightening of the definition.

Among these two criteria, the organic criterion is therefore the one that makes it possible to achieve a broad enough definition of public contract. It is in fact impossible to limit the definition of public contract only to contracts entered into by public bodies because this would set aside all contracts awarded by private individuals when acting in the public sphere. Furthermore, the definition of private individuals is not necessarily the same from one European Union Member State to another and the mere fact that a contract is entered into between private individuals should not be enough to exclude it from the classification of public contract<sup>65</sup>. Therefore, rather than defining public contracts as contracts entered into by public bodies, they should be considered as contracts signed by persons in the public sphere within the meaning of European Union law, whether they are public law bodies or private law bodies. The question, therefore, is how to determine which persons are in the public sphere.

In fact, European Union law already provides a definition of persons in the public sphere through the sectoral regulations applicable to public procurement and concession contracts. The concept of contracting authorities may actually result in an organic definition criterion broad enough to refer to persons in the public sphere. Because it incorporates contracting authorities, this criterion includes primarily states, ‘regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law’<sup>66</sup>. Thus, persons in the public sphere may be public bodies as well as private individuals through the concept of public law body. This category in fact encompasses ‘entities, under public law or private law, that are found in the

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<sup>65</sup> This is the position of the Court of Justice with regard to the concept of public procurement and, more specifically, the definition of public law bodies among contracting authorities: ECJ, 13 January 2005, *Commission v Spain*, C-84/03, ECR p. I-155

<sup>66</sup> Art. 2 of Directive 2014/24 cf.



public sphere and have a direct or indirect link to a contracting authority by definition'<sup>67</sup>. Furthermore, by incorporating contracting authorities among persons in the public sphere, the organic criterion includes public companies as well as entities that 'benefit from special or exclusive rights granted by a competent authority of a Member State'<sup>68</sup>. Therefore, by defining persons in the public sphere as encompassing contracting authorities, it is possible to adopt a working definition of the organic criterion for defining the concept of public contract that is broad enough to go beyond national classifications. This working definition of persons in the public sphere is, incidentally, similar to the working definition of an administration, which considers that 'all bodies exercising administrative functions make up the administration'<sup>69</sup>. However, using the organic criterion is not enough to develop a sufficiently clear concept of public contract. It is in fact necessary to add a material criterion based on the purpose of the contract in order to maintain a certain consistency and not to encompass all contracts entered into by these entities, some of which are not 'public'.

The material criterion for the definition of the concept of public contract should therefore allow its scope to be tightened, in contrast to the organic criterion. It is, however, essential to think differently and not to adopt the material criterion used by the 'public procurement' and 'concession' directives. The material criteria adopted in these directives, combined with the organic criterion that has just been presented, in fact allow for the definition of public procurement contracts. Yet the concept of public contract is intended to encompass these contracts without being limited to them. Therefore, it is necessary to develop a material definition criterion that is broader than the one used by the sectoral

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<sup>67</sup> S. DE LA ROSA, *Droit européen de la commande publique*, Bruylant, 2017, p. 135.

<sup>68</sup> There are, however, conditions, in accordance with the definition of contracting authorities given in article 4 of Directive 2014/25

<sup>69</sup> M. FROMONT, 'L'évolution du droit des contrats de l'administration – Différences théoriques et convergences de fait', in *Comparative Law on Public Contracts*, as aforementioned, p. 263

directives, while taking into account the goals pursued by European Union law with regard to public contracts.

It is thus possible to define as public contracts those entered into in order to meet a public interest and/or economic interest. In fact, the concept of the need for a public interest has the advantage of emphasising the public nature of these contracts, as long as the public action is aimed at meeting this public interest. In addition, the concept of economic interest allows the common approach developed at the European level to be taken into account: contracts entered into by persons in the public sphere should not distort market competition or, more specifically, hamper free movement. However, it does not matter if the needs met are those of the person in the public sphere or a third party. This would include complex distinctions that are not necessarily relevant, particularly as these distinctions do not currently exist with regard to public procurement and concession contracts. Defining public contracts as all contracts entered into by persons in the public sphere that aim to meet a public interest need and/or economic need is sufficient to establish a clear distinction from ordinary law contracts, taking into account the specific understanding of public action as developed at the European Union level.

Beyond mere systematisation, building this European concept of public contract would allow for going beyond national approaches and the formidable challenges posed by their variety. In fact, it is only through this common and autonomous concept that finding principles common to public contracts in Europe seems possible.