NETWORK 'PUBLIC CONTRACTS IN LEGAL GLOBALIZATION'

Research Project Proposal
for discussion at the Amsterdam workshop on 22-23 June 2017

The impact of competitive tendering and its regulation on the formation and execution of public contracts and concessions

1. Research topic and research questions

Contracting authorities[1] award public contracts[2] and concessions[3] to economic operators[4] by means of competitive tendering procedures. In the European Union, and also in many countries outside the Union, the statutory duties of contracting authorities regarding such procedures are regulated by public procurement law.[5] One important objective pursued by public procurement law is the opening-up of the market of public contracts and concessions for economic operators. In order to achieve this objective, public procurement law imposes duties upon contracting authorities to treat economic operators equally and without discrimination, and to act in a transparent and proportionate manner when awarding public contracts and concessions.

Once a competitive tendering procedure has resulted in an award decision, the contracting authority and the economic operator[6] to whom the public contract or concession has been awarded may get entangled in issues related to either the formation or execution of the subsequent contract or concession. These issues can, for example, be framed in terms of one of the following legal concepts:

(i) Formation (*e.g.* offer and acceptance; liability for negotiations);
(ii) Invalidity (*e.g.* mistake; inaccuracy in communication; illegality; unfair terms);
(iii) Interpretation;
(iv) Contents and effects (*e.g.* implied terms; change of circumstances);
(v) Non-performance and remedies.

1 See Article 2(1)(1) Directive 2014/24/EU and Article 6(1) Directive 2014/23/EU.
2 See Article 2(1)(5) Directive 2014/24/EU.
3 See Article 5(1) Directive 2014/23/EU.
4 See Article 2(1)(10) Directive 2014/24/EU and Article 5(2) Directive 2014/23/EU.
5 See for instance in the European Union: Directives 2014/23/EU, 2014/24/EU and 2014/25/EU.
6 In case of a concession: the 'concessionaire', see Article 5(5) Directive 2014/23/EU.

Sometimes, the parties will be able to solve these issues in an amicable manner. Occasionally, however, the issues will amount to disputes that must be decided by a third party, most likely a court. Resolving these issues will involve the application of rules of substantive law applicable to the formation and execution of the public contract or concession. These rules are part of either general administrative law, general private law, or common law, depending on the legal system concerned. Moreover, in some legal systems, these rules of substantive law are embraced by a broad definition of the notion 'public procurement law', whereas in other legal systems the latter notion is only used to indicate those rules that relate to the award of public contracts and concessions by means of competitive tendering procedures.

In this project it is assumed that the framework, within which the aforesaid issues related to either the formation or execution of the contract or concession will be resolved, is somewhat peculiar for two coherent reasons.

In the first place, the framework is peculiar from a *factual* point of view. In order to understand this, one has to take into account that there are still situations to be conceived where a contracting authority, similar to a private procuring entity, awards the public contract or concession without any call for tenders. In this situation – which, for the purpose of this project, will from now on be referred to as: 'the baseline situation' – the subsequent contract or concession is the result of preceding bilateral negotiations conducted between the contracting authority and one single economic operator without competition. This is different from the situation where the public contract or concession has been awarded following a competitive tendering procedure. The implications of this difference are twofold. First of all, given that there are more than two actors appearing on the scene in the event of a competitive tendering procedure, multiple differing and competitive interests become involved in comparison to the baseline situation, including interests inherent in the opening-up of the market of public contracts and concessions. Secondly, it is more likely that the parties will have had equal bargaining power in the baseline situation than in the situation where the public contract or concession has been awarded following a competitive tendering procedure. In the latter situation, the contracting authority is more capable of dominating the content of the subsequent contract or concession. The corollary of this is that, during the competitive tendering procedure, and unlike in the baseline situation, the contracting authority can usually determine to a large extent whether and how the interests involved in the said procedure will be achieved during the execution stage of the contract or concession.

Secondly, the framework is peculiar from a *legal* point of view. In the baseline situation, issues between the parties regarding the formation or execution of such contract or concession are to be resolved by applying substantive rules of either general administrative law, general private law, or common law, depending on the legal system concerned. This approach will not be different, at least not in principle, in the event that the public contract or concession under debate has been awarded following a competitive tendering procedure. There is, however, one important difference. In the latter situation, the competitive tendering procedure and the award decision that precede the formation and execution

stage are subject to specific public procurement regulation, taking into account the particular interests that are involved in the award of public contracts and concessions by means of competitive tendering procedures.

Given the aforesaid particular framework, in which issues related to the formation or execution of the public contract or concession are to be resolved, it is further assumed in this project that this framework will have an influence on how rules of substantive law (*i.e.* general administrative law, general private law, or common law, depending on the legal system concerned) are to be applied in order to resolve these issues. If this assumption turns out to be correct – the investigation of which is the central theme of this project – it would mean that the resolving of issues through the application of rules of substantive law has an impact on the achievement of the objectives pursued by specific public procurement regulation, particularly the opening-up of the market of public contracts and concessions. If that is indeed proven to be the case, the results of the project could be relevant for the further debate on public procurement regulation.

Based on the aforesaid assumptions, this project seeks to answer the following three main research questions.

(1) To what extent does the particular factual and legal framework of competitive tendering and its regulation influence the application of rules of substantive law (general administrative law; general private law; common law, depending on the legal system concerned) when issues regarding the formation and execution of a public contract or concession are to be resolved?

(2) To what extent is it possible to problematize and/or unify the various approaches that are found in the answers to question (1)?

(3) Based on the aforesaid analysis, to what extent is it possible and necessary to give recommendations to national courts, legislators and perhaps even the supranational legislators (*e.g.* the European Union) as regards the subject matter?

2. Research approach

The general idea is to answer research question (1) on the basis of an analysis of national case law, legal doctrine and (if any) regulation. This analysis is to be carried out following a questionnaire. The results of the analysis are to be presented in a national report based on a set format. The joint national reports are subsequently to be developed into ideas for so called transnational papers, the focus of which is to contribute to the answering of the research questions (2) and (3).

This general idea regarding the research approach can further be explained as follows.

The project focuses on the formation and execution of public contracts and concessions awarded on the basis of a competitive tendering procedure regulated

either by national, international and/or supranational legal instruments. Although the project takes as a starting-point the definitions of public contracts and concessions to be found in the EU Directives 2014/24/EU and 2014/23/EU, it is stressed here that the project is not confined to contracts and concessions that have been awarded following a tendering procedure subject to EU public procurement law and its implementation in the national laws of the EU Member States. This means that there are no restrictions as to the choice of the countries to be included in the project. It is intended, however, to actively search for the involvement in the project of researchers from EU countries to the extent that they seem to be underrepresented in the Network.

As explained in section 1 above, the contracting authority and the economic operator to whom the public contract or concession has been awarded, may get entangled in issues related to either the formation or execution of the contract or concession. As said, these issues can be framed in terms of one or more legal concepts. One of the major challenges of this project is to draft a questionnaire that will enable the researchers involved to explain how the rules of substantive law of their legal system are applied in order to resolve the said issues – see question (1) – and to do so in such a manner that the research results can be used as a basis for the answering of questions (2) and (3). Experience with comparative legal research carried out by large networks in the past shows that it is not advisable to phrase questionnaires from the perspective of particular legal concepts and constructs, given that these are not always understood in the same manner in the various legal systems involved. This is already the case in the event that the object of research belongs to either private law, or public law, in all the countries covered by a project, leave alone if the object of research – as is the case with public contracts and concessions – is regarded to be part of private law in some countries, and considered to belong to public law in other countries.

Hence it seems more advisable, when drafting the questionnaire for the underlying project, to present descriptions of the problematic issues that may occur between the parties to a public contract or concession and to do so not in terms of legal concepts, but in terms of facts that have been stripped of their legal connotation. Such factual descriptions – case studies, as they might be called – should provide the researchers with ample flexibility to explain how the rules of substantive law of their legal system are (to be) applied in order to resolve the said issues.

For the purpose of answering research question (1), the analysis of each case study as presented by the questionnaire will involve the following. If one seeks to establish and evaluate the impact of the factual and legal framework of competitive tendering as well as its regulation on the application of rules of substantive law, it is required to first establish how the latter rules are applied in the baseline situation. The national reports should therefore first clarify for each case study how the rules of substantive law of the legal system concerned are (to be) applied in order to resolve the underlying issue for the baseline situation. Subsequently, the national report should clarify whether, to what extent, and why the outcome of the application of the rules becomes different – in comparison with the baseline situation – in the peculiar situation where the public con-

tract or concession under debate is the result of a regulated competitive tendering procedure.

As has been explained above, the national reports will be used as a basis for the answering of research questions (2) and (3). This requires the joint national reports to be developed into ideas for papers dealing with transnational topics. There are two types of transnational topics that can be discerned for the purpose of this project.
Papers on transnational topics may first of all provide for a comparative legal analysis of the information presented in the national reports on the resolving of a particular case study as found in the questionnaire. These papers may try to problematize and/or unify the various approaches found in the national reports as regards the particular case study and the resolving of its underlying issue (see also research question (2)). These papers may also investigate to what extent it is possible and necessary – again: as far as the particular case study is concerned – to give recommendations to national courts, legislators, and perhaps even supranational legislators (see also research question (3)).

Secondly, papers on transnational topics may abstract from the particular case studies by taking a more generic, overall approach. One could think, for instance, of the differing impact that the rules of substantive law of the countries involved may have on the answers to research question (1), given the differing nature of these rules (*i.e.* general administrative law, general private law, or common law). Another possible transnational generic topic could be the development of a general theory on the impact that competitive tendering and its regulation may have on the application of rules of substantive law to issues involving the formation and execution of public contracts and concessions (see also question (2)). Finally – based on how the research questions (1) and (2) can be answered – transnational generic topics could be related to the possible desirability – or: undesirability – of the improvement and/or supplementation of the public procurement regulatory framework.

It follows from the above that the underlying project envisages a two-stage approach. Research questions (2) and (3) cannot be answered properly without national reports providing adequate information required for the purpose of answering research question (1). This means that the focus of the project during its first stage must be on the design of the questionnaire and on the composition of the national reports. It is tentatively suggested that researchers who are interested in getting involved in the project create national teams and jointly prepare the national report for their country. The advantage of working with national research teams during the first stage of the project is that it can facilitate both a swift and a qualitatively adequate and thorough answering of the questionnaire. This will subsequently provide for a good basis for the second stage of the project: the development of ideas for the transnational topics and the preparation of transnational papers dealing with these topics. Given the differing nature of the rules of substantive law of the countries involved (general administrative law; general private law; common law) it is suggested to have the transnational papers written by research teams consisting of (at least two) researchers with dif-

fering legal backgrounds. It is assumed that these researchers also have contributed to the national report of their country.

3. Provisional project planning

The project consists of the following stages:

(i) Project kick-off at the workshop of the Network on 22-23 June at *Vrije* Universiteit Amsterdam.

After a short introduction by the project coordinators, researchers from several countries will be asked to reflect on section 1 of this project proposal from the perspective of their legal system.

The purpose of these preliminary national reflections is first to allow all attendees to familiarize themselves with the central topic of this project on a more concrete level. Secondly, it is expected that the national reflections will make evident why it is crucial to jointly develop a common orientation as regards the scope, definition and methodology of the project, before we start working on questionnaires and papers. A considerable part of the workshop will be reserved for the discussion of such common orientation. The underlying document as well as the preliminary national reflections can facilitate the debate.

The end goal of the workshop is to provide the project coordinators with sufficient input that will eventually enable them to develop a common orientation as regards the scope, definition and methodology of the project. This can then serve as a basis for the preparation of a questionnaire with case studies for the next stage.

(ii) Preparation by the project coordinators of questionnaire with case studies.

(iii) Preparation by (national teams of) researchers of national reports, dealing with research question (1) on the basis of the questionnaire.

(iv) A workshop will be organized, following the preparation of national reports, for the purpose of developing and discussing ideas for papers on transnational topics.

(v) Preparation by the project coordinators of draft Introductory Chapter and Table of Contents for the book, as well as instructions for the (international teams of) researchers for the purpose of drafting papers on transnational topics.

(v) Preparation by (international teams of) researchers of papers on transnational topics, dealing with research questions (ii) and (iii), on the basis of national reports and having regard to the draft Introductory Chapter and instructions.

(vi) Editing of all papers on transnational topics and finalising the Introductory and Concluding Chapter by the project coordinators.

(vii) Publication of the book.

Amsterdam/Vigo, 19 May 2017,

Chris Jansen and Patricia Valcárcel Fernández