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EVALUATION OF THE RENEUAL MODEL RULES ON CONTRACTS (BOOK IV) FROM THE POLISH PERSPECTIVE

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1. INTRODUCTORY REMARKS

Similarly to Hungary, the publication of the results achieved by the ReNEUAL working group – Model Rules on EU Administrative Procedure – generated keen interest among the legal doctrine of public law in Poland.[1] It is crucial that the debates concerned with the ReNEUAL Model Rules held in Poland overlap with debates concerned with reforms of the Polish law of administrative procedure. The Polish administrative procedure is currently regulated by the Code of Administrative Procedure of 1960. Although it remains widely appreciated because of the high quality of its provisions and high standard of security granted to the parties to proceedings, many representatives of the legal doctrine assess that it needs to be gradually modernised. It is enough to say that the Code essentially lacks provisions concerned with contracts concluded by the public administration, which are the subject of Book IV of the ReNEUAL Model Rules. The provisions of the Polish Code of Administrative Procedure focus on the traditional scope of activities conducted by the public administration – the procedure of issuing administrative decisions.

2. ASSUMPTIONS AND FUNDAMENTAL REGULATORY FEATURES OF BOOK IV OF THE RENEUAL MODEL RULES

Discussions held among the Polish legal doctrine concerned with Book IV of the Model Rules on EU Administrative Procedure focus on some more general issues which constitute a background for analysing assumptions and fundamental features of the regulation proposed by the authors of the Model Rules. To simplify, it can be said that the debate touches on six such issues: axiology of the proposed regulation, its legal basis in the Treaties, scope of the Model Rules, scale of the proposed regulation, its structure and the types of contracts referred to in the Model Rules on EU Administrative Procedure.[2]

First of all, referring to the axiology of the regulation, it is noted in Poland that in line with the assumptions adopted by the authors of the Model Rules, the regulation of the draft act serves to implement and strengthen the efficiency of the general principles of EU law. In this context, particular importance is assigned to two principles: the rule of law and the right to good administration.[3] The remaining general principles of EU law – including such fundamental ones for the area of public contracting from the perspective of the Treaties as: equal treatment and non-discrimination, transparency, proportionality,

[1] An academic conference on this project (model) was held in April 2016 at the University of Wrocław. See Supernat, J. – Kowalczyk, B. eds. (2017): Kodeks postępowania administracji Unii Europejskiej. Warszawa, passim.

[2] See Cieślik, Z.: Księga IV modelu kodeksu postępowania administracyjnego UE: umowy – założenia i cechy regulacji In Supernat, J. – Kowalczyk, B. eds. (2017): *op. cit.* 363–373.

[3] Wierzbowski, M. – Kraczkowski, A. eds. (2015): *ReNEUAL. Model kodeksu postępowania administracyjnego Unii Europejskiej.* Warszawa. 5.

subsidiarity and sincere cooperation – were presented at the background of the first two principles as "detailed principles", "additional, important guidelines for administrative activities."[4] Moreover, the authors of the Model Rules intended those principles of EU law – referred to in the preamble of the document – to determine the normative horizon for interpretation and developing the content of its provisions. This remark fully applies to the provisions of Book IV. The general principles of EU law are therefore the justification for – and simultaneously determine the content of – detailed measures concerned with contracts, as proposed by the authors of the Model Rules. The drafted law of public contracts is therefore – also in terms of its axiological assumptions – a law of EU public contracts. In consequence, the normative horizon of the regulation is not determined by other regulations of fundamental character. Therefore, it is not determined in particular by constitutional principles for the functioning of the public administration applicable in the Member States (except their recognition in Article 6 (3) of TEU as fundamental rights resulting from constitutional traditions common to the Member States). This objection resonates particularly loud when the solutions of the ReNEUAL Model Rules are compared to local measures adopted in the area of public contracting.

With regard to the legal basis for regulation, it is carefully noted that the authors of the Model Rules assume that the codification of the EU administrative procedure would have to be based on a principle specified in Treaties which provides for the creation of regulations of a general, non-sector-specific nature.[5] Also in Poland it is analysed whether the rule-making competency laid out in Article 298 of the Treaty on the Functioning of the European Union includes the right to impose obligations on administrative bodies of the Member States and not only on EU entities. Due to doubts on this subject, many people advocate for the solution proposed by the authors of Book IV – which is rather reserved in its regulatory ambitions and focuses on the legal relationships engaging mostly EU administrative authorities.

Doubts regarding whether the Model Rules are based on the legal basis of Treaties have direct impact on the considerations related to the regulatory scope of Book IV. It is pointed out in this context that Book IV goes gradually beyond the traditional area of the EU law on public contracting – beyond the law of public procurement and concessions. Firstly – provisions of this Book apply to all contracts and legally binding agreements concluded by the EU administrative authorities with private entities (and administrative bodies of the Member States when such a body acts as a service provider on the market and concludes the contract as a private entity). Therefore, they are actually not exclusively

[4] Ibid. 31.

[5] Discussions on the possibility of creating a general regulation in administrative law, also in procedural law, have been held in the legal doctrine for a long time. Before the Treaty of Lisbon entered into force, they had been focused on the flexibility clause included in Article 358 of TFEU (former Article 308 of TEC). See Schwarze, J. (1988): *Europäisches Verwaltungsrecht.* Baden-Baden, Nomos. 47; Craig, P. (2012): *EU Administrative Law.* Oxford. 259; Kahl, W. (1996): *Hat die EG die Kompetenz zur Regelung des Allgemeinen Verwaltungsrechts?* NVwZ. 869. See also Wierzbowski–Kraczkowski (2015): *op. cit.* 19.

limited to public procurement and concession contracts. Secondly – the regulation of Book IV covers all three phases of the life of a contract: 1. procedure leading to the conclusion of a contract, 2. conclusion of the contract and 3. execution and end (expiration) of the contract. Therefore, it is not limited, as in the EU law of public contracts and concessions, generally to the first phase, but it also addresses the next phases, especially dealing with the subject of a contract's validity (and the right to invoke its invalidity) and the execution of contractual obligations, including the question of subcontractors.

Attention of the Polish legal doctrine is also drawn to the scale of the drafted regulation in the area of contracts concluded by public entities. It is striking that Book IV is one of the most extensive parts of the ReNEUAL Model Rules. From the Polish perspective it is particularly symptomatic that this part is longer (although not significantly: by three provisions) even than the Book devoted to typical issues of local administrative procedures, that is – in accordance with the nomenclature adopted in the project – single case decision-making. At this point one should point out that the Polish Code of Administrative Procedure which has been in force (with many amendments thereto) since January 1961, generally does not contain any provisions regarding consensual forms of public administration activities (with the exception of a limited regulation regarding the so-called administrative agreement).[6]

The normative structure of Book IV is also interesting from the Polish perspective. The detailed regulation contained in this Book is complemented by numerous legal rules referred to by the provisions of the Book. Firstly – the provisions of Book IV provide for an adequate application of the provisions contained in Book II, that is provisions on administrative rulemaking (Article IV-6). This solution is based on an assumption that in public contract law, drafting general terms of contracts may act as a substitute to issuing administrative rules. In line with this assumption, applying procedural rules which determine the rulemaking process is supposed to guarantee the observance of general EU principles in this field: equal treatment, transparency, participatory democracy.[7] Secondly – each of the three detailed chapters of Book IV relating to subsequent stages of a contract's life contains a provision which requires the application of numerous, explicitly stated provisions of Book III to the subjects mentioned therein, that is rules regarding single case decision-making (Article IV-7, Art. IV-21, Art. IV-39). This solution is in turn based on an assumption that all decisions made by administrative authorities in relation to the execution of a contract are subject to the rules of administrative proceedings and

[6] Articles 114 and 116 of the Polish Code of Administrative Procedure: In any case being dealt with by proceedings before a public administration body, the parties may reach an agreement – if the nature of the case supports it, if it would simplify or quicken proceedings and if it is not contrary to the provisions of law. The agreement has to be authorised by the public administration body before whom it was concluded (the body is not a party to the agreement).

[7] Wierzbowski– Kraczkowski (2105): *op. cit.* 179.

the rule of good administration – on terms analogical to those which apply to individual administrative acts.[8]

At last, it is also characteristic how types of contracts are distinguished in the drafted regulation. Book IV divides EU contracts into two basic categories, distinguished with regard to the legal regime which is applied to them: contracts concluded by the EU administrative authorities which are regulated exclusively by EU law and contracts concluded by EU administrative authorities which are regulated by the law of a Member State (or of another state). This way, the authors wish to achieve a duality of legal regimes for EU contracts;[9] the indicated distinction of the two contract categories is necessary in the Model Rules for the matters of validity of contracts, invoking their invalidity and court control (phase two of a contract's life) – all of which are covered by the Model Rules. This distinction is virtually of no importance in the administrative procedure leading to the conclusion of a contract (phase one of a contract's life – matters regulated by the law of public orders) or in the subject of executing and ending contracts (phase three of a contract's life – matters regulated by the law of obligations).

In view of these remarks which relate to the most important elements, assumptions and fundamental features of the ReNEUAL Model Rules, the impact of the proposed solutions on the local debates is being assessed in Poland – debates which (also) relate to matters important from the perspective of the local administrative procedure. The first such matter consists in the criteria for qualification of public contracts; the second one – the scope of the regulation for the public contracting law.

3. CRITERIA FOR QUALIFICATION OF PUBLIC CONTRACTS IN THE EU LAW

Regardless of the above-mentioned discrepancies in the axiological assumptions of the regulations, the solutions of the Model Rules on EU Administrative Procedure impact the discussions on the law of public contracting which are held in Poland. From this perspective, the provisions of the Model Rules which govern the qualification of given contracts to the category of public contracts are the most interesting ones.[10] The category of public contracts which is present in various acts of the EU law and is connected by the authors of the ReNEUAL Model Rules to the notion of "EU contracts" refers, if only nominally, to the fundamental distinction between the public and private law regulations in local law. This distinction generally reflects the method of regulation which the local lawmaker adopts

[8] Ibid. 180, 186, 196

[9] Ibid. 149. See HOFMANN, H.C.H. *et al.* (2011): *Administrative Law and Policy of the European Union*. 651.

[10] See Szydło, M. (2017): Kryteria kwalifikacji i kategoryzacji umów publicznych w prawie Unii Europejskiej. In Supernat–Kowalczyk eds. (2017): *op. cit.* 375–383; Różowicz, K.: Umowa publicznoprawna a umowa prywatnoprawna w świetle rozwiązań modelu kodeksu postępowania administracyjnego Unii Europejskiej. In Supernat–Kowalczyk eds. (2017): *op. cit*. 385–392.

in a given field of legal relationships: distinguishing between a method of administrative law and civil law – and it is a starting point for the organisation of the entire legal system. It is therefore not surprising that discussions related to the criteria of qualifying contracts concluded by the public administration in Poland are held in the context of a broader debate on the general criteria for distinguishing public law (and administrative law being its primary branch). The solutions related to the criteria of qualifying contracts adopted in the ReNEUAL Model Rules may be inspiring in this regard. They are of particular importance in the context of debates on regulating the general rules of public contracting and introducing a notion of an administrative contract to the administrative law – which is not used in Poland but is known in many other countries (a contract concluded between an administrative body and a private entity in the field of administrative law).

From this perspective, specified by regulatory challenges faced by public administration in Poland, the question on criteria for qualifying contracts to the public contract category in the ReNEUAL Model Rules reveals certain difficulties. There are many indications that in singling out the category of EU contracts, the creators of the Model Rules have adopted the view assumed in in EU legislation which concerns public contracting (in particular in directives on public procurement). And those acts typically qualify public contracts by means of subjective criteria, granting such a nature to contracts where one of the parties is an entity which is a representative of the European Union or of a Member State. Such a conclusion results from an analysis of EU law provisions which apply to different categories of contracts, which the EU legislator calls public agreements[11] and the definition of an EU contract, specified in Article IV-2 (c) of the ReNEUAL Model Code. In EU regulatory framework, the entity concluding the contract is more essential than the subject matter of the contract. The aforementioned view is fundamentally different from the view adopted in the Polish doctrine – and as it seems, many other national doctrines – with regard to qualification of legal actions against the background of the criteria differentiating between public law and private law. It is far from qualifications which refer to the subject of the steps taken and are made in accordance with criteria such as "performing public tasks" or "public service".

From the national perspective it seems that the subjective approach to the public contracts category is too conventional and does not fully meet the regulatory objectives expected from administrative law. Those objectives are in particular of protective and structural nature – and they apply to all actions of the public authorities, regardless of the entity. To a large extent they are determined by the national constitution – rather than EU law. Apart from this last reservation, which refers to differences in the axiological framework of regulations, one should note a certain difficulty associated with solutions adopted by creators of the Model Rules, related to their reference to national regulations. Namely it is not clear whether the EU definition of a contract adopted on the basis of the ReNEUAL Model Rules,

[11] See Szydło, M. (2017): *op. cit.* 377. Compare Article 2 section 1 point 5 in conjunction with Article 2 section 1 point 1 of Directive 2014/24/UE and Article 101 section 1 b) in conjunction with Article 117 and Article 190 of Regulation 966/2012.

which emphasises subjective selection criteria, guarantees a similar standard of protection to solutions which are characteristic of national legislation in the area of public contracts. In this context it is worth to point out – to follow the doctrine – certain features of the ReNEUAL Model Rules. On the one hand, contracts which are the model solution of the model: "public contracts governed by the EU directives on public procurement, called and qualified by these directives that way do not lose their qualification due to the fact that the purpose or object of the contract is not to perform public tasks."[12] On the other hand, the notion of "administrative activity" indicated in the introduction to Book IV of the Model Rules as an obligatory subject of public contracts is not present in the content of the proposed regulation and does not specify the scope of the concept of an "EU contract".[13] As a result – at least potentially – some contractual activities taken on behalf of a public authority and in connection with the implementation of public tasks, however not by public entities, can get beyond the scope of the regulations on public contracts. It is indicated in the doctrine that the reported qualification difficulties associated with public contracts can have far-reaching practical significance. This happens "particularly in the cases when EU provisions regulating a given contract category are applied – including also after their implementation into the national legal order – by specific national bodies or entities, and the relevant provisions of national law applied which associate specific legal consequences with whether a case (issue) of a given contract is a public matter or a public administration matter. In Polish law the question of qualification of a given contract (regulated by EU law) as a public contract can be legally relevant even on the basis of provisions of the Law on proceedings before administrative courts or the Act on access to public information."[14] It seems that structural differences which exist between the selection criteria applied to legal systems of the EU and the Member States (Poland) constitute a significant challenge for the national legislator. After all, the national legislator is obliged, on the one hand, to comply with EU law in accordance with the requirements of the Treaty, and on the other hand, to provide individuals with protection in accordance with the rule of law standard arising from the national constitution. The indicated difficulties – resulting from the need to find a common denominator for the EU and Polish protection system in the area of public contracts – lead the doctrine to considerations about the (desired) scope of public contract law regulation which would meet both the objectives laid down in the Treaties and in national constitutions.

4. SCOPE OF PUBLIC CONTRACT LAW REGULATION

The discussions on the scope of regulation of national public contract law held in Poland are strictly connected with regulatory concepts which have been developed in connection

[12] Szydło, M. (2017): *op. cit*. 378.
[13] Introduction to Book IV of the ReNEUAL Model Rules, point 14 In Ibid.
[14] Ibid. 383.

with the postulated reform of the Polish administrative procedure law. In contrast to the applicable public administrative procedure, which – notably – draws solutions from the March 1928 regulation on administrative procedure (calling to mind the Austro–Hungarian Empire tradition),[15] all significant proposed amendments that are the subject to debates contain chapters on contractual forms of operation of public administration. Two such projects should be mentioned. The first of them is a bill on general administrative procedure dated 2010. In accordance with the assumptions of its creators, General provisions would constitute a parallel legal instrument in relation to the code of administrative procedure and will regulate basic principles and institutions of administrative law in Poland.[16] The second project is a project of the administrative procedure law reform dated 2016, assuming a thorough revision of the Code of Administrative Procedure.[17] The status of both these projects is similar to the status of the ReNEUAL Model Rules. Those projects are the result of the administrative law doctrine and the case law of the national administrative courts – and have been submitted to the authorities responsible for law-making as analytical material for their legislative work.

From the viewpoint of the considerations in question it should be noted that both projects of reforming the Polish administrative procedure refer differently to the scope of regulation of public contract law. In the newer project, contracts are referred to solely as an alternative to an individual administrative act. It is therefore a typical administrative contract – and that is the name used in the project. Pursuant to the project assumptions, an administrative case can be settled not only by way of issue of an administrative act, but also by the conclusion of a contract between the authority conducting the proceeding and the party to this proceeding. The older project provides for a broader scope of public contract law. A basis for the conclusion of administrative contracts by public authorities – which is currently not applicable in Poland –can also be found in its stipulations. However, additionally this project provides for the introduction of the general competency of administrative bodies to conclude administrative agreements with other bodies in order to carry out public administration tasks. Such agreements could – optionally – apply to taking actions (of the administration in its sovereign capacity) agreed upon by the parties thereto. Thus it would also be possible to conclude agreements in situations where the implementation of a specific public task did not require the undertaking of any actions of the administration in its sovereign capacity. It should therefore be considered that the scope of regulations of that project will cover both administrative agreements and agreements which the Polish doctrine currently classifies as civil law contracts. Such a qualification concerns

[15] Regulation of the President of the Republic of Poland of 22 March 1928 on administrative procedures (*Journal of Laws,* 1928, No. 36, item 341, as amended).

[16] Commission bill – General provisions of administrative law, Sejm paper No. 3942 dated 29 December 2010, Sejm of the 6th term. Compare the draft chapter No. 6 of the Act: Administrative agreements and contracts.

[17] Expert report on Administrative procedure law reform available at: www.nsa.gov.pl/wydarzenia-wizyty-konferencje/raport-ekspercki-nt-reforma-prawa-o-postepowaniu-administracyjnym,news,24,313.php (Downloaded: 12.05.2017.) Compare the draft chapter 7b of the Code of Administrative Procedure: Administrative contract.

contracts under which an administrative authority entrusts the performance of a public task to a public entity (thus meeting the criteria of functional privatisation of a public task). It is important to note that this broader definition of the scope of public contract law is associated – on the basis of the draft General administrative proceedings provisions – with guarantees of protection of the public interest which, in turn, are typical for administrative and legal solutions. The project in particular specifies the means of supervision for the parties to the agreement (Article 39–40 of the draft act).

The debates on the scope of public contract law which are ongoing in Poland in connection with the aforementioned bills touch upon an issue which was taken also in the ReNEUAL Model Rules. Regulating both public law contracts and private law contracts with this law is inspiring from Poland's perspective. One assumption which seems to have been adopted by creators of the ReNEUAL Model Rules seems particularly important: "administration, adopting the form of private law, continues to be bound and limited by public law, since the application of private law does not change the administration into an autonomous entity and thus does not exempt it from the rules and obligations of public law, since private law, in the situation in question, is not the basis, but a measure of the administration's operation".[18] This assumption can be reflected in a statement from the introduction to Book IV of the Model Rules: "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."[19] A similar point is justified by the view expressed in the Polish doctrine on the criteria of separating public contracts under EU law. In line with this view, "the criterion of formal qualification by the EU legislator of certain categories of contracts governed by EU law as public contracts – and certainly one of the criteria which the legal education could potentially present as a criterion for the classification of certain categories of contracts as public contracts, not only those regulated by EU law – is the criterion used by the EU legislator to regulate a given category of contracts, the so-called hybrid regulation method."[20] This method consists in combining public law elements with civil law elements, i.e. the linking of the authority of a particular entity to take unilateral acts with the authority of a particular entity to undertake non-authoritative actions. Such a situation is the case of regulation in Book IV of the ReNEUAL Model Rules, which – in provisions on general terms and conditions of the contract – assumes i.a. that the renewal of a particular right or obligation of one party to a contract takes place by mutual consent of the parties, but the content of that right or obligation is determined exclusively, though not authoritatively, by the other party – an administrative authority.[21] It is worth noting that this type of criterion for the qualification of contracts as public contracts – and thus the criterion for separating

[18] Różowicz, K. (2017): *op. cit.* In Supernat–Kowalczyk: *op. cit.* 390; Strzyczkowski, K. (2007): *Prawo gospodarcze publiczne.* Warszawa. 189.

[19] Point 24 of Introduction to Book IV. Wierzbowski, M. – Kraczkowski, A. eds. (2015): *op. cit.* 150.

[20] Szydło, M.: Ibid. 383.

[21] Szydło, M.: Ibid. 382.

the field of regulation of public contract law – would eliminate the aforementioned (in the statement on the criteria for qualification of public contracts in EU law) difficulties with regard to different assumptions regarding such qualifications under the EU law and national law.

The scope of regulation of the IV Book of the ReNEUAL Model Rules can be compared to the draft codification projects of public contract law which are formulated in Poland, not only – as was just the case – because of the legal nature of the contracts, to which their provisions apply, but also in other regards. Important results can also be obtained by combining these acts in view of the normative objectives of the individual solutions. The axiological perspective for the regulation of these acts reveals an important pattern. The issues raised with respect to public contracts at European Union level do not fully coincide with the issues which the national lawmakers are confronted in the same regulatory area. This is justified by differences in the admissible regulation of national legal orders and the EU law. The scope of the impact of national law is much broader – also with regard to public contracts, as the EU's regulatory policy is limited to specific areas and focuses on those areas which are important for the functioning of the internal market. This, in turn, means that issues which are essential for national legislators, in particular the problem of providing public-legal guarantees of protection of the rights of individuals against abuse of public authority remain outside of the focus of the EU legislator – and beyond the competence of the EU legislator. In the European Union, public contract law is primarily an expression of the Treaties rules which protect competition in the field of internal market freedoms: the principles of equality, transparency, proportionality and mutual recognition. In EU Member States, the role of this law is different. The national public contract law is primarily a formula for incorporating constitutional guarantees of the rule of law into the field of public administration contracts. The axiology of regulation determines its scope. From this point of view, it is not surprising that the EU and national regulations of public contract law differ in terms of which aspects are emphasised. In the EU law, regulation of public procurement and concession rights, with its development for the purpose of implementation of the general budget of the European Union, like the one which can be found in the provisions of the EU Financial Regulation[22] and its (proposed) generalizations is of pivotal importance – as the one specified in Book IV of the ReNEUAL Model Rules. From this perspective, stipulations on the obligation to publish advertisement of contract the contract, use of the negotiated procedure, equal access for economic operators from all Member States or subcontracts (Article IV-11, 13, 14, 37), elaborated on in the ReNEUAL Model Rules are not surprising. The proposed national codifications of public contract law do not take into account these issues – they treat them as matters belonging to a special area of law – public procurement law. In the national law, the basic public contracting instrument is an administrative contract which is one of form of public

[22] Title V of 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. (*Official Journal,* L 298 of 26.10.2012. 1.)

administration operation, frequently used in national administrative procedures. The form of administrative operation plays a role in the legal system called the "guarantee of the rule of law vehicle". Thanks to the form of administrative operation, these guarantees refer to various areas of public authority activity. Without doubt, Book IV of Model Rules reveals regulatory ambitions regarding those areas of regulation which are typically the domain of Member States, which is evidenced i. a. by rules regarding termination to avoid grave harm to the common good (Article IV-29). However, those ambitions are restrained by axiological assumptions of this regulation which are expressed in its legal basis in Treaties. As a result, the scope of the said authorisation is limited solely to EU administration authorities.

The different horizon of EU and national regulations on public contract law leads to the conclusion that the final and comprehensive form of regulation applicable in the EU in this area is the result of a complex medley of patterns which are presented by different – EU and national – regulatory authorities. It can even be said that the public contract law in the EU is created as "crossroads" of different legal orders and fits into the process of the emergence of a "multilevel" public administration in the EU – and describing the principles of its functioning in the European law of administrative cooperation. The submitted regulation in Book IV of ReNEUAL Model Rules, which assumes a differentiation between EU contracts governed by the EU law and EU contracts which are governed by the Member State law takes these phenomena into consideration.

5. SUMMARY

To summarise and generalise remarks on Book IV of the EU administrative procedure Model Rules developed by ReNEUAL, it can be assumed that – as assessed by the Polish doctrine – the proposed unification of the rules of the administrative procedure in the EU strengthens the rule of law – it defines the instruments of effective performance of public tasks, at the same time protecting the rights of individuals. The requirements of the rule of law and good administration apply equally to administrative law-making and application of law – and that applies also to the contracts concluded by the public administration.

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