Rainer Arnold and Valentina Colcelli
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Contributors

Rainer Arnold (University of Regensburg)
Jean Monnet Chair ad personam; Full Professor

Susana Sanz Caballero (University CEU-Cardenal Herrera)
Jean Monnet Chair; Full Professor

Katharina Cardone (University of Regensburg)
Doctorand

Cippitani Roberto (University of Perugia)
Jean Monnet Chair; Senior lecture

Hedley Christ (University of Brighton)
Senior Lecturer

Valentina Colcelli (National Research Council)
Jean Monnet Module Leader; Researcher

Antonio Palazzo (Academie Des Privatistes Europeens)
Editor in Chief of "Diritto e processo" International Annual Review

Calogero Pizzolo (Universidad de Buenos Aires)
Jean Monnet Chair; Full Professor

Andrea Sassi (University of Perugia)
Full Professor

David Zammit (University of Malta)
Senior Lecturer and Head of the Civil law Department of the University of Malta

Nevila Saja (University of Regensburg)
Doctorand

The different functions of the "exchange" within the European Union public contracts law and the traditional private law

Roberto Cippitani

"Contract law instruments such as tort or contract appear only as a small part of many possible tools harnessed in the pursuit of allocative efficiency or distributive justice, synthetically described as the correction of market failures" (F. Cafaggi, H. Muir Watt, The Regulatory Function of European Private Law, Cheltenham, 2009, p. XI)

1. *The expressions concerning "exchange" within the EU law.* Within the European Union ("EU") law there are several expressions, which make reference to the exchange of performance between the parties of a contract.

The discipline of public contracts (Article 1, par. 2, letter a, Directive 2004/18/EC) is referred to the contracts with "pecuniary interests".

The legislation concerning the Value Added Tax (the "VAT", see article 2 Directive 2006/112/EC) is applicable to the supplies of goods and services made "for consideration". Nevertheless the exchange is useful to define the field of application of many other matters governed by the EU law. For example the Regulation of the European Parliament and the Council of 24 September 2008 on common rules for the operation of air services (Recast) defines the "air service" as "a flight or a series of flights carrying passengers, cargo and/or mail for remuneration and/or hire" (Article 2, let. 4).

According to the legal sources in other European languages, different from the English, similar expressions are used as "*a titolo oneroso*", "*entgeltlich*", "*a titulooneroso*", "*à titre onéreux*".

Among the legal sources above mentioned, those concerning the public contracts assume a relevant position, due to the impact both at European and National level, and for the important elaboration in the case-law of the Court of Justice.

In this field, the EU law is applicable to a broad set of relationships through which a public body (a "contracting authority") purchases goods and services from an economic operator (see the definitions under the Article 2 of the Directive 2004/18/EC).

For example, it is subject to the Directive concerning the public contracts the selection, by the municipal authorities, of a contractor implementing a development plan, concerning several infrastructure works, when the public authority concerned, in return for the execution of the works, provides a total or partial set-off against the taxes to be paid by the contractor (infrastructure contributions)[1].

[1] C-399/98, Ordine degliArchitetti and others, ECR 2001 p. I-5409.

The discipline of public contracts also applies to "framework agreements"[2], joint ventures[3], or the instruments of incorporation with the scope to establish a corporation providing works or services[4].

By way of illustration, in compliance with this approach, the Italian Law, implementing the EU Directive, provides that "in cases where laws and regulations allow the establishment of, joint ventures for the construction and / or the management a public work or service", the selection of the private partner has to be subject to the public procurement procedures (Article 1, para 2, Legislative Decree No. 163/2006)[5]. In consideration of the notion of contract with pecuniary interest, the relationship between a public body and a contractor will develop social housing units which are subsequently to be sold at capped prices to a public social housing institution, or with substitution of that institution for the service provider which developed those units[6]. It is not relevant "the fact that the development of social housing units is a requirement imposed directly by national legislation and that the party contracting with the authorities is necessarily the owner of the building land"[7].

Also with regard to the VAT legislation, it is possible to consider as subject to the Tax contracts, legal relationships or other facts very different from each other.

This is the case of the partnership contracts, under which are taxed the allocation of assets to the members, and it is also the hypothesis where the shareholder transfers the individual assets to the company[8].

The case law considers as subject to the VAT the fees received by the organiser of a competition[9].

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2 ECJ, 4 May 1995, C 79/94, Commissione/Grecia, Racc. 1995, p. I 1071, paragraph 15.

3 As stated under by ECJ, 22 December 2010, C-215/09, Mehiläinen Oy, Terveystalo Healthcare Oy, formerly Suomen Terveystalo Oyj, v Oulunkaupunki, ECR 2010, p. I-1374, the "Directive 2004/18 must be interpreted as meaning that, where a contracting authority concludes with a private company independent of it a contract establishing a joint venture in the form of a share company, the purpose of which is to provide occupational health care and welfare services, the award by the contracting authority of the contract relating to the services for its own staff, the value of which exceeds the threshold laid down by that directive, and which is severable from the contract establishing that company, must be made in accordance with the provisions of that directive applicable to the services in Annex II B thereof" (point 47).

4 See European Commission, Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, 30 April 2004, COM (2004) 327 final.

5 Also see the judgement of the Consiglio di Stato. See for example, Consiglio di Stato, Sez. V, 30 April 2002, n. 2297, in Foro Italiano, 2002, III, 553 with the commentary of Scotti; Cons. Stato, Sez. V, 3 Septemebr 2001, No. 4586, in Rivista della Corte Conti, 2001, 5, 258.

6 ECJ, 8 May 2013, joined cases C-197/11 and C-203/11, Eric Liber, et al., not published yet in ECR points 108 ff., in particular 119.

7 See the judgement ECJ, Eric Liber, ref. point. 113, and also ECJ, C-399/98, Ordinedegli Architetti and others, ref. para 69 and 71.

8 The Article 19, para 1, of the Directive 2006/112/CE provides that "In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor".

9 C-498/99, Town & County Factors Ltdc. Commissioners of Customs & Excise, ECR 2002, I-07173.

It is also subject to VAT the use by a taxable person "of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible" (see Article 16, Directive 2006/112/EC) or "the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation;" (see Article 14, para 2.a, Directive 2006/112/EC).

2. *The exchange according to the legal sources: the advantage for the public administration*. In order to identify the contractual relationships, which may be covered by the expressions as mentioned above, several subjective and objective conditions have to be met.

For the purposes of public contract law, it is necessary to determine if the activity object of the contract falls within the definition of work, supply or service established by national and EU legislation (see Article 1, para 2, Directive 2004/18/EC). In the case of the services, they have to be included within the list of the Annex II enclosed to Directive 2004/18/EC.

However, several hypotheses may occur when the qualification of the relationship is not so obvious and it is therefore necessary to identify otherwise the proper meaning of exchange ("the pecuniary interest", "the patrimonial interest", "the consideration" and so on) according to the EU law.

What emerges from the application of procurement law, even in the examples given in the first paragraph, is that those relationships have in common an exchange of values between the subjects.

The case law and administrative practice often make reference to the fact that, in those cases, a "direct counter-performance" ("*controprestazione diretta*"; "*contraprestación directa*", "*contrepartie direct*")[10] is put in place.

Similarly, the EU case law concerning the VAT refers to the "direct link" between the performances of the parties[11].

The case law of the Court of Justice emphasizes that the exchange is relevant for the purposes of procurement law or the VAT, only when it is mandatory and not merely possible. Indeed, as the Advocate general Paolo Mengozzi observes "Thus, public contracts are clearly mutually binding. It would obviously be inconsistent with that characteristic to accept that, after being awarded a contract, a contractor could, without any repercus-

[10] See in France, the Conseil d'État, 6 luglio 1990, Comité pour le développement industriel et agricole du Choletais – CODIAC, in D.F. 11 May 1991, p. 573, observations by ARRIGHI DE CASANOVA, pp. 497 et f. For the administrative practice, see the document drown up by CNRS (Centre National de la Recherche Scientifique) del 1 dicembre 1999 "Instruction de procédure no 990310BPC définissant les modalités et les circuits d'attribution des subventions, les principals règles de gestion et les documents types applicables", para 1.1. See the Annex 1 (La notion de contropartie pour la livraison de biens et le prestations de services) del documento del CNRS, Secrétariat Général Direction des finances, Le régime fiscal du CNRS en matière de TVA.

[11] C-154/80, Cooeperatieve Aardappelenbewaarplaats, ECR 1981, 445.

sions, simply decide unilaterally not to carry out the specified work. Otherwise, it would mean that contractors were entitled to exercise discretion with regard to the requirements and needs of the contracting authority"[12].

The direct counter-performance or the direct links will occur when the relationship produces two kinds of benefit[13] in favour of the administration[14].

Firstly, the relationship will satisfy the needs related to the functioning of the public entity (for example, purchases of office supplies, computers for their employees, insurance for their premises).

Secondly, the relationship will be able to supply goods or services useful for the citizens (for example, the contract for the school transport service).

Another criterion for determining the benefit for the contracting public authority is the discipline of the ownerships of the results[15].

It may be considered as "results" either material (work) or immaterial assets (economic rights in patents, copyrights or other forms of legal protection of the intellectual property), arising from the activities carried out by the contractor.

There is a benefit for the contracting administration, also when it will obtain the right to make use of the property. It is considered a benefit also the case when the right is attributed to a subject belonging to the public body[16].

In the matter of public contracts, in contrast to other relationships such as grants, normally these rights belong exclusively to the administration. However, there is a pecuniary interest, even when the ownership of the results is jointly owned by both the administration and the contractor.

The rules provided under the Article 19 of Directive 2004/18/EC, which refers to the so-called "pre-commercial" contracts for services of research[17], can be extended to all public contracts.

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12 See the Opinion of the Advocate general Paolo Mengozzi, delivered on 17 November 2009, in the case C 451/08, Helmut Müller GmbH/Bundesanstaltfür Immobilienaufgaben, point 80.

13 It could be make reference to the French administrative practice concerning the public contracts, and in particular see para 4.1 of the Circulaire du 3 août 2006 portant manuel d'application du code des marchés publics; see also the décret n. 2001-210 of 7 March 2001 relating to the Instruction pour l'application du code des marchés publics, elaborated by the French Minister of the Economy, Finance and Industry.

14 C 399/98, Ordinedegli Architetti and others, ECR 2001, p. I 5409, para 77, stating "It must be pointed out that the pecuniary nature of the contract relates to the consideration due from the public authority concerned in return for the execution of the works which are the object of the contract referred to in Article 1(a) of the Directive and which will be at the disposal of the public authority". See also DANIEL DÜER J.L., "Le traitement fiscal des aides des collectivités locales aux Entreprises", in Annuaire des collectivités locales, book 12, 1992, p. 61 ff.

15 See the Opinion of the Advocate general Mengozzi, in the case C 451/08, Helmut Müller GmbH/ Bundesanstaltfür Immobilienaufgaben, ref. point 55.

16 See the Opinion of the Advocate general Wathelet, delivered on 11 April 2013, in the Case C-576/10, Commission/ Kingdom of the Netherlands, point 120.

17 According to the European Commission: "Where no commercial solutions exist on the market, pre- commercial procurement can help public authorities to get technologically innovative solutions developed according to their needs. In pre-commercial procurement public procurers do not pre-

The aspect that characterizes the pre-commercial procurement is, in fact, that the developer does not assume the exclusive ownership of the results, but shares them with the contractors[18].

3. *The exchange according the legal sources: the advantage for the economic operator*. This exchange will takes place only when it involves a patrimonial decrease of the contracting authority.

This reduction can be achieved directly or indirectly. In particular "Direct financing will occur when the contracting authority uses public funds to pay for the works or services in question. Indirect financing will occur when the contracting authority suffers economic detriment as a result of the method of financing the works or services"[19].

The direct economic detriment may consist in the payment of a sum or the granting of a right to use[20].

The indirect mode can be represented by the waiver to receipt of sum, which the public authority would have the right to collect, as in the case of infrastructure contribution, mentioned above.

But it is also the case, where the public authority compensates the activities carried out by the contractor not with a price, but with a grant[21].

Another hypothesis of indirect financing will occurs if "the economic benefit may also lie in the economic advantages which the contracting authority may derive from the future use or transfer of the work, in the fact that it contributed financially to the realisation of the work, or in the assumption of the risks were the work to be an economic failure"[22].

There is also a patrimonial interest, if the administration does not suffer a direct economic detriment, but the contractor will receive prices or other kinds of advantages by third parties.

In this case, however, it shall apply the discipline of the public works concessions, defined as "contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to

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scribe a specific R&D solution to be developed, but solicit alternative solutions that could address a problem of public interest". European Commission, Communication, Putting knowledge into practice: A broad-based innovation strategy for the EU, COM(2006) 502 final, 13 September 2006, para 2.6.

18 See the Communication of the European Commission "Pre-commercial procurement: driving innovation to ensure sustainable high-quality public services", COM(2007) 799 final, of 14 December 2007.

19 See the Opinion of the Advocate general Niilo Jääskinen, delivered on 16 September 2010, concerning the case C-306/08, European Commission/Kingdom of Spain, para 86 and 89.

20 This is the problem faced by the Advocate general Paolo Mengozzi under his Opinion in the case C 451/08, Herbert Müller. See in particular the para 76,

21 See the judgment Helmut Müller, cited above, paragraph 52. Furthermore, see the Opinion of the Advocate general Wathelet in the Case C-576/10, Commission/Kingdom of the Netherlands, ref. para 124.

22 See C-451/09, Helmut Müller, ECR 2010, I- I-2673, para 52.

exploit the work or in this right together with payment". (Article 1, para 3, Directive 2004/18/EC).

The procedures applicable to the concessions are slightly different from those of public procurements[23], while respecting the same underlying principles (see Articles 3, 17, 56 ff. Directive 2004/18/EC)[24].

As already mentioned, what is important for the purposes of the definition of patrimonial interest are the exchange and not the payment of a price[25].

However, without a doubt, the cases in which the public administration pays an amount to the other party are the most important ones.

In these cases, it is necessary to distinguish between relationships for pecuniary interest, subject to the provisions of the public contracts, and relationships without consideration, such as the grants[26].

The latter have many points of contact with the public contracts: the legal base of the grants also provides the carrying out of an activity (the project concerning topics as research, education, protection environment, culture, etc.); even for the grant the public body pays a sum (see the definition provided by the Article 121 of the Regulation (UE) No. 966/2012). Nonetheless, according to the grants scheme, the contribution will be calculated as a percentage of the costs actually incurred by the beneficiary (see Article 125, para 3 Regulation 966/2012). In agreement with the co-financing rule, beneficiaries are required to cover the portion of costs not funded by the grant, through its own resources, financial transfers from third parties, in-kind contributions, if allowed (Article 183 Regulation (UE) No. 1268/2012).

The beneficiary, to obtain the contribution, has the obligation to justify and to document the costs incurred, unless it is the hypothesis where the grant is determined as lump sums or flat rates (see Article 124 of the Regulation (UE) No. 966/2012).

The same discipline of the public procurements law refers to the co-financing as a criterion of demarcation, although not explicitly mentioning the grants and apparently only with respect to a specific case that is the research services.

Indeed, the 23rd recital of the preamble and the Article 16, para 1, letter f) of the Directive 2004/18/EC, exempts from the application of the Directive the services of research and technological development, where the costs are not fully covered by the contracting authority.

As a matter of the fact, these provisions appear as an expression of the general criterion to distinguish between procurement and grants.

In support of this interpretation, it is also possible to make reference to the case law of

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23 The interpretation of the application of this exemption must be very strict, in accordance, for example, C-382/05, Commission/Italy, ECR 2007, I-6657.

24 See the Opinion of the Advocate general Paolo Mengozzi, delivered on 20 October 2009, concerning the case C-423/07, Commission /Spain, para 52 ff.

25 As the Advocate general Niilo Jääskinen argues under the Opinion cited above, para 81.

26 In relation to the grant under the EU and the domestic legislations, see CIPPITANI R., "La sovvenzione come rapporto giuridico", ISEG, Roma-Perugia, 2013.

the Court of Justice, in particular the recent judgment Azienda Sanitaria Locale di Lecce of the December 2012[27].

In this case, as reported by the Opinion of the Advocate General Verica Trstenjak "The notion of "pecuniary interest" requires that the service provided by the tenderer is subject to a remuneration obligation on the part of the contractor. This means that, in addition to participation by two persons, reciprocity in the form of the material exchange of consideration. Such reciprocity of the contractual relationship is necessary for the requirement of a tendering procedure to apply" (para 30).

The existence of a remuneration is not excluded either by the lack of a profit for those who perform the service, or, on the contrary, if the price is limited to cover all the costs incurred by the contractor (paragraphs 32 and 33).

Another case law considers falling under the contracts for patrimonial interest only those cases in which the administration will pay a sum higher than the costs incurred by the contractor[28].

Anyway, it is very clear that the condition "pecuniary interest" is met only if the sum paid by the contracting authority is equal or higher than the costs incurred by the contractor to carry out the activity.

According to the case law Azienda Sanitaria di Lecce, a mere formal reference to the costs which will be incurred by the beneficiary, afterwards not actually justified, is not sufficient to exclude the exchange (the arrangement between the Azienda Sanitaria and the University of Salento provided a vague link between the sum transferred by the public body to the University with the value of the stipends of the employees involved in the activity. Subsequently the actual expenditure of those costs was not provided by the University).

This position implicitly confirms that, in the absence of co-financing, the relationship should be considered within the context of public procurement.

4. *The exchange within the contracts between public administrations.* The exchange is not excluded in case of the arrangements between public entities.

Or is the case of the public-private or public-public partnerships, which establish forms of cooperation between public bodies or, respectively, between the latter with legal entities from the private sector[29].

In particular, this is the cases of public-private partnerships to implement the programs of research and technological development (see the Article 2, para 4 and 5, Regulation (UE) n. 1291/2013 of the European Parliament and of the Council)[30], the Structural

[27] C-159/11, Azienda Sanitaria Locale di Lecce not yet published in the ECR; see also ECJ, 13 June 2013, C-386/11, PiepenbrockDienstleistungen GmbH & Co. KG, KreisDüren, not published in ECR yet.

[28] See C-119/06, Commission/Italy, ECR 2007, p. I-168, para 48 ff.

[29] See Commission, Green Paper on public-private partnerships and Community law on public contracts and concessions, of 30 April 2004, COM (2004) 327.

[30] According to the mentioned provision 'public-private partnership' means a partnership where private sector partners, the Union and, where appropriate, other partners, such as public sector bodies,

Funds and the operations of the European Bank of the Investments[31].

Due to the broad definition of contract with pecuniary interests, those relationships are not excluded from the application of the discipline concerning the public contracts[32].

As a matter of fact, the communitarian legislation itself provides that public-public and public-private partnerships may be used either for the public contracts, either for relationships without consideration, as the grant.

Thus, these agreements may be a considered with patrimonial interest, unless are applicable exceptions provided for by law or identified in the case law.

In these hypotheses, the exceptions to the application of procurement law do not arise from the lack of the pecuniary nature of such agreements, but from other kinds of needs.

An exception to the principle that the procurement law applies also to relations between public bodies is established by the Article 18 of Directive 2004/18/EC, according to which "This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty".

Another hypothesis of exclusion of the procurement law identified by the EU case law is the case of the "in house" provisions.

This is the hypothesis that when the supply of the good or service is performed by a legal entity, subject either to public or private law, on which the contracting public administration exercises a control similar to that regarding its services and the external entity is wholly controlled[33].

A further exception to the application of procurement law to agreements between public bodies is grounded on a recent case law of the Court of Justice[34].

As matter of fact, the judgment Commission vs. Germany states that the legislation on the public contract is not applicable to procurement contracts between public bodies, which set up a collaboration in order to accomplish with a public mission (for example supplying a service) common to the bodies involved in the agreement (see the judgment in Commission vs. Germany, paragraph 37).

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commit to jointly support the development and implementation of a research and innovation programme or activities. On the other hand 'public-public partnership' means a partnership where public sector bodies or bodies with a public service mission at local, regional, national or international level commit with the Union to jointly support the development and implementation of a research and innovation programme or activities.

31 See the Communication of the European Commission, Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships, of 19 November 2009, COM(2009) 615 final, especially the para 3 "The EU Contribution to PPP Projects".

32 See the See European Commission, Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, cited above.

33 See European Commission, White Paper on the Public Procurement in the European Union, COM (98) 143 def., 1 March 1998, note 46. The leading case was ECJ, 18 November 1999, C-107/98, Teckal, ECR 1999, p. I-8121, in particular para 30 and 50; see also ECJ, 11 January 2005, C-26/03, Stadt Halle e RPL Lochau, ECR 2006, p. I-1, para 49. Most recently see ECJ, 29 November 2012, C-182/11 and C-183/11, Econord SpA et al., not published yet in ECR-

34 ECJ 9 June 2009, C 480/06, Commission / Germany, ECR 2009, p. I 4747.

The Court of Justice recognizes, as it also did in the case law Coditel Brabant[35], that a public administration can fulfil its tasks in the public interest through forms of collaboration with other public bodies. Such cooperation may consist in the establishing both of a specific body and a contractual partnership (which does not create a new legal entity).

This exemption, according to the case-law cited above, applies where contracts are concluded solely between the public bodies, without the participation of any private party.

5. *Exchange within EU law and civil law concepts.* The terminology used by the EU law and by the European case-law seems to suggest that the exchange to which the legal sources make reference can be considered equivalent to the notions of traditional civil law, provided both by the Civil Codes and the Common Law, as "*corrispettività*", in the Italian law, or "bilateralité", according to the French Code Civil.

The traditional contract law belongs to a legal framework which regulates the circulation of patrimonial element (rights in rem and obligations) from a subject to another[36]. Such perspective was inspired moreover by the Pandectists of XIX century like B. Windscheid and F.C. Savigny. Indeed, the set of the legal relationships organised by the System des heutigen römischen Rechts of Savigny is properly a system of patrimonial relationships.

Today the private law in the European countries is built from a patrimonial perspective.

In this context, the contracts are the main instruments in order to allow the circulation of the assets and of rights, as provided by European Civil Codes (see, for example the definitions set out by the Articles 1321 *Codice Civile*; 1101 of *Code Civil*; 1254 of the Spanish Código Civil) (see also the Chapter IV of this book "*Contracts and obligations as tools of the European integration*").

Whatever is the national law, the discipline of the contract is based on the concept of "exchange", although such a concept can be expressed in different ways.

In line with the Italian and French Civil Codes, the exchange is conceived as the mutual interdependence of the performances (the "corrispettività" for the Italian *Codice Civile*)[37] or the obligations (the "*bilateralité*" or "*synalagmaticité*" within the *Code Civil*)[38] between the parties under the same contract.

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35 C-324/07, Coditel Brabant, ECR 2008, I-8457, para 48 and 49.

36 CAPRIOLI S., "Il Codice civile. Struttura e vicende", Milano, 2008; HALPERIN J.L., "L'impossible Code Civil", Presses universitaires de France, Paris, 1992

37 See among the others: GALGANO F., "Il negozio giuridico", in Trattato di diritto civivle e commerciale, directed by Cicu and Messineo, Milano, 1988, 465 ff.; MESSINEO F., "Dottrina generale del contratto", Milano, 1948, 234). See also the Relazione al Re sul Codice civile, para n. 660.

38 According to the Article 1102 Code Civil "Le contrat est synallagmatique ou bilatér allors que les contractants s'obligent réciproquement les uns envers les autres". Here is not important to establish if the two terms are synonymous or they have a different meaning. Anyway it can be noted that the two expressions took the same meaning in the Napoleon Code, through the work of Pothier who derived it from Labeon as cited in the Digest, under D. 50.16.19.

The two concepts are not overlapping[39]. In particular the differences arise when one considers the contracts between more than two parties with a common scope, which according to the Italian *Codice Civile* are regulated in a specific manner[40], in particular for that which concerns the termination of the contract[41].

Within the French, Italian and Spanish Law at least other concepts are considered in order to represent the exchange. It is the case of the terms "onerosità" and "*onerosité*" ("burden")[42], which is opposed to the notion of gratuity ("*gratuità*" and "*liberalità*", "*gratuité*" and "*bienfaisance*", "*liberalidad*" and "*beneficiencia*").

Just as the French, Italian Civil and Spanish Codes the contracts are "onerosi"/"onereux"/"onerosos" if they determine the patrimonial equilibrium between the parties. In order to enrich such equilibrium the parties are able to use not only the contracts "corrispettivi"/"bilaterales"/"onerosos", but also by means of other legal instruments such as the links between different contracts or acts.

On the contrary, the gratuitous acts, including donations, are those ones determining a patrimonial disequilibrium between the parties, leading to a prejudice of other creditors, since they cause a decrease of the patrimony of the debtor (See the Article 809 of the Italian *Codice Civile*)[43] without exchange.

For this reason the gratuitous acts shall be subject to a specific regulation in order to avoid the prejudice for the creditors or other third parties. It is the case of the "Paulian" or revocatory action (see Article 2901 *CodiceCivile*; Article 1167 *Code civil*; Article 1111 *Código Civil*) which is more easy for the creditors in case of gratuitous acts, taking into account that the prejudice for the creditor is considered as "implicit" (see Article 2901, No. 2, Codice Civile; Article 1297 Código Civil)[44].

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39 About the difference between the "corrispettività" e "bilateralité", see PINO A., "Il contratto con prestazioni corrispettive", Cedam, Padova, 1963, p. 12 ff.

40 According to the *Codice Civile* the contract plurilateral (with more than two parties) with a common scope (so called "contratti pluri soggettivi con comunione di scopo") are regulated by the Articles 1420, 1446, 1459, 1466. The Report of the Ministry of Justice concerning the Civil Code clearly stated that the discipline of this kind of contract has been introduced, because of the precedent Italian Code of 1865 (which was a translation of the Napoleon Code) did not considered the specific topic.

41 The dispositions regulating the contracs "plurisoggettivi con comunione di scopo", like the partnership or the consortia, provide that in case of breach of one party (by default, force majeure or hardship), the entire contract will not be automatically terminated, if the performance of the defaulting party is not necessary.

42 According to the Article 1106 "Le contrat à titre onéreux est celui qui assujettit chacune des parties à donner ou à faire quelque chose". On the contrary the Article 1105 provides that "Le contrat de bienfaisance est celui dans lequell'une des parties procure à l'autre un avantage purement gratuit".

43 As some scholars the patrimonial decrease is not always needed, as it happens for the donation of objects with affective, moral, historic, ect., value (CHECCHINI A., Liberalità, (atti di), in Enciclopedia giuridica, 1989, p. 1 ff., in part. 3). Furthermore, other authors point out that in some case to the decrease of the patrimony of the donor does not correspond the increase of the patrimony of the beneficiary, as it occurs in the case above mentioned and in case of "modal donation", from which the obligations for the beneficiary arise (see ARCHI G.G., Donazione (diritto romano), Enciclopedia del diritto, Milano, vol. XIII, 1964, p. 930 ff., in part. 935 f.

44 See the French case-law, for example, Cour de cassation, civile, Chambre civile 1, 16 May 2013, 12-13.637, in legifrance.gouv.fr.

In other European legislation, the hints of the concepts regulating the exchange may be different.

Therefore, the burden, as a gratuity, should not be determined at the level of individual contract, such as the "*corrispettività*" or "*bilateralité*". The burden and gratuity make reference to the overall structure of interests between the parties involved.

Within the German BGB, the *Gegenseitiger Vertrag* ("the reciprocal contract", see § 320 ff. BGB) faces the problem of the time differences in the performing of the parties. Thus a party of the *GegenseitigerVertrag* is entitled to "refuse his part of the performance until the other party renders consideration, unless he is obliged to perform in advance. If performance is to be made to more than one person, an individual person may be refused the part performance due to him until the complete consideration has been rendered" (§ 320). The party who is obliged to perform in advance, as under this kind of contract, has a "Defence of uncertainty" because he/she "may refuse to render his performance if, after the contract is entered into, it becomes apparent that his entitlement to consideration is jeopardised by the inability to perform with the other party. The right to refuse performance is not applicable if consideration is rendered or security is given for it" (§ 321).

Also under the reciprocal contract, similar to the French "contrat bilateral" "if the obligor does not render an act of performance which is due, or does not render it in conformity with the contract, then the obligee may revoke the contract, if he has specified, without result, an additional period for performance or cure" (§ 323, para 1), or when, without the specification of the additional period, other conditions will be met (according to, for example, § 323, para 2).

Some legal systems, as those of common law, the concept itself of "contract" is inseparably linked to the concept of exchange (bargain)[45], which should normally be the consideration of a promise enforceable. The difference between "bilateral" and "unilateral" contracts is based on the moment the contract will become grounded on the consideration, and therefore enforceable[46].

6. *The function of the exchange within EU law.* However, despite the similarities, the expressions used within EU have different legal meanings.

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[45] Cfr. ALPA G., "Il contratto tra passato e avvenire", cit., XIX ff.; FURMSTON M.P. (edit by), "Cheshire, Fifoot and Furmoston, Law of Contract", 4a ed., Oxford University Press, Oxford, 1989, p. 71 ff.; see also the definition of "gift" within BLACKSTONE W., MORRISON W., "Blackstone's Commentaries on the Laws of England: In Four Volumes", Routledge Cavendish, 2001, p. 438 f.: "The English law does not consider a gift, strictly speaking, in the light of a contract, because it is voluntary, and without consideration ; whereas a contract is defined to be an agreement upon sufficient consideration to do or not to do a particular thing".

[46] According to ATIYAH P., "An Introduction to the Law of Contract", 4a ed., Oxford, 1989, p. 124 ff., for the unilateral contract "the promise only becomes binding when the consideration has been actually executed, that is, performed". On the other hand the bilateral contract la consideration arises from mutual promises. Each promise takes a double, indeed it "is at once a promise and a consideration for the other promise". Thus, in this case "mutual promises must stand or fall togheter".

According to the examples given in the first paragraph, the relationships subject to the public contract law or to VAT discipline do not represent an exchange, from the same perspective of the domestic contract Law.

Therefore, it is possible to observe some contracts for pecuniary interests within EU law, which are not contracts establishing an exchange in accordance with the Civil Codes or the common law, and vice-versa[47].

As a matter of fact, the exchange under the private law cannot be considered a sufficient condition in order to identify a contract with pecuniary interest according to EU law.

Further subjective and objective qualifications will be needed, which are not requested by the domestic private law.

It is the case of qualifications as of "economic operator", as well as of "contracting authority" required by the legislation on public procurement, or the exercise of a professional activity provided under the VAT legislation.

In addition, the EU rules do not apply to contracts, which provide the exchange according to the contract law, but they are exempt in order to comply with other needs, as it occurs for certain types of agreements between public administrations.

But even in this case, the burden certainly cannot overlap with the concepts of EU law, being completely different with the function of civil law (which is to protect the patrimony of the settler in favour of the creditors).

Anyway, also such concepts are not useful to elaborate the meaning provided under the EU public contracts law.

Indeed under the EU legislation is not relevant the equilibrium of the exchange of values between the parties, in order to avoid the prejudice against of the creditors.

Also an exchange disproportionate, which according to the traditional civil law, has to be considered as gratuitous (see the case of the so called *negotium mixtum cum donatione)* may be considered with pecuniary interest or with consideration from the perspective of the EU disciplines.

Therefore, the notions linked to the idea of exchange (pecuniary interest, consideration, etc.) provided by the EU law have other goals and then it expresses another legal meaning in respect to the traditional private law[48].

The construction of the EU legal system needs a teleological approach to the interpretation in order to achieve the aims of the Treaties[49].

From the perspective of the theological approach, the legal interpreter, in particular the judge has to elaborate "autonomous meanings" of the words used under the EU legal sources.

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47 According to the function of the price under the VAT legislation, see FILIPPI P., "Le cessioni di beni nell'imposta sul valore aggiunto", Cedam, Padova, 1984, p. 79 ff.

48 See more in general, CIPPITANI R., "Onerosità e corrispettività: dal diritto nazionale al diritto comunitario", in Europa e Diritto Privato, 2009, pp. 503-556.

49 About the importance of the teleological interpretation in the activity of ECJ, see JOUSSEN J., "L'interpretazione teleologica del diritto comunitario", in Rivista critica di diritto privato, 2001, p. 499.

The autonomous meaning are necessary to ensure the survival of regional law, which otherwise would be applied differently in each member State. It is needed to comply with principles such as the equal treatment of legal subjects regardless of their national origins[50].

Therefore, when a legal text of the EU uses terms apparently linked to concepts traditionally belonging to the domestic law, probably the meaning of those terms should not be the same provided by a national legal system.

On other hand, the EU laws have other objectives, different from those of the domestic private law.

At the present stage of the development of the EU law, the exchange is not seen as a notion to establish the existence of the enforceable agreement (as for the consideration under the common law), nor as quality of a specific category of contracts with obligations/performances interdependent (as it is in the cases of "*bilateralité*" or "*corrispettività*"), or the patrimonial equilibrium between the parties in order to protect the creditors (see the notion of the contract "oneroso" or "*onereux*").

Surely, the elaborations of the common rules in the contract law at the European level face the problems typically relevant for the private law. In particular the "Principles of the European Contract Law", the Code of the European Contract Law and the Draft of Common Frame of Reference, are focused on the exchange provided under the same legal instrument and on the remedies in case the bargain will no longer put in place[51]. Other aspects of the exchange according the private law, like as the patrimonial equilibrium or the sufficient ground to justify the existence of the contract, are not considered yet.

Anyway, the perspective of the European law is, at the moment, different.

The present EU law regulates a legal and economic area. The focus is not the discipline applicable to the relationships between the parties, but their interrelationships and their reciprocal effects in the internal market.

Matters as competition, public contracts, VAT, consumer protection and so on, are regulated from the viewpoint the theological approach, in order to determine of the "useful effect", that's to say to reach the maximum implementation of that legal system[52].

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50 ECJ, 9 November 2000, C-357/98, The Queen / Secretary of State for the Home Department, ex parte Nana Yaa Konadu Yiadom, ECR 2000, p. 9256, par. 26; Id. 19 September 2000, C-287/98, Luxebourg/Linster, ECR 2000, p. 6917, par. 43; Id. 4 July 2000, C-387/97, Commision/Grece, ECR 2000, p. 5047; Id. 18 January 1984, 327/82, Ekro/Produktschapvoor Vee en Vlees, ECR 1984, p. I-107, para 11. The rule is applicable also to the relationships in the Civil Law: v. ECJ 23 January 2000, C-373/97, Dionisios Diamantis/ Elliniko Dimosio, Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE), ECR 2000, p. I-1705, par. 34; Id. 12 dMarch 1996, C-441/93, Pafitis and others/TKE and others, ECR 1996, p. I-1347, par. 68-70.

51 See the Article 9:301 of the PECL which takes into account the case of the termination due to the no compliance of one party or in case of delay; within the DCFR in relation to the reciprocal obligations (see Article III. – 1:102, para4), the no compliance of the duty of a party allow the other one to claim the termination; the termination in case of breach is also regulated by the Article 107 of the European Code of Contracts.

52 See for example ECJ 4 October 2001, C-403/99, Italy/ Commission, ECR 2001, p. I-6883; Id. 13 February 1969, Walt Wilhelm and others/ Bubdeskartellamt, 14/68, ECR 1969, p. 1; Corte IDH, Opinión Consultiva OC-1/82, 24 September 1982, "Otros tratados" objeto de la function consultiva de la Corte, ref. See also CARDONA LLORENS J., "Memoria del Seminario "El siste-

The discipline coordinating the public contracts "is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving thereof such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency" (2nd recital of the Directive 2004/18/EC).

Thus, the EU public procurement law is devoted to guarantee the application of these principles and in particular the opening-up to the competition the public contract within the internal market (2nd recital; see also Article 179 Treaty on the Functioning of the European Union).

As noted by the Advocate General Niilo Jääskinen cited in Commission vs. Spain: "Pecuniary interest has been given a wide meaning by the Court, in view of the aims of the public procurement directives, namely, the opening up of national procurement markets to competition and the avoidance of barriers to the exercise of fundamental freedoms recognised in the Treaty" (paragraph 80)[53].

As recently stated by the Court of Justice, the eventual exemptions in the application of procurement law are to be interpreted as tight as possible[54].

It is believed that the use of the instrument of the public contract ensures that there is no distortion of competition in the spending of public funds[55].

Indeed, the discipline of state aid normally does not consider public procurement as a means of distorting the competition within internal market (pursuant to art. 107 Treaty on the Functioning of the European Union)[56], if they are awarded on market conditions[57].

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ma interamericano de protección de los derechos humanos en el umbral del siglo XXI"", Tomo I, San José, Costa Rica, 23 and 24 November 1999, II ed., p. 321, in http://www.corteidh.or.cr/docs/libros/Semin1.pdf.

53 See the 2nd recital of the Directive of the Directive 2004/18/EC and also the Opinion of the Advocate general Kokott in the case C-220/05, Auroux, para 57

54 See the above mentioned judgment Azienda Sanitaria Locale di Lecce and the, especially, Opinion of the Advocate general Verica Trstenjak, para 33.

55 See the Opinion of Advocate General Jäskinen mentioned above, paragraph 88

56 The definition of State aid is huge and it not applicable only to the grants. Ideed, according to the case law of the Court of Justice, the aid are the "Unilateral and autonomous decisions, undertakings or other persons resources or procure for them advantages intended to encourage the attainment of the economic or social objectives sought" (ECJ, 27 March 1980, 61/79, Amministrazione delle finanze dello Stato / Denkavit italiana, ECR 1980, p. 1205. See also, for example, ECFI, 5 April e 2006, T-351/02, Deutsche Bahn / Commission, ECR 2006, p. II-1047.

57 It occurs, only if there will be not a advantage, that is to say that the price "charged properly covers all the additional, variable costs incurred in providing the logistical and commercial assistance, an appropriate contribution to the fixed costs (…) and if, second, there is nothing to suggest that those elements have been underestimated or fixed in an arbitrary fashion" (ECJ, 3 July 2003, 83/01 P, Chronopost / Ufexe.a., ECR 2003, p. I-6993, para 40). Indeed as the judgements of the European judges affirm "It must be stated in that regard that the fact that the transaction was of a commercial nature is not in itself sufficient to show that it does not amount to State aid within the meaning of Article 92 of the Treaty, since such a transaction may none the less be effected at a rate which gives (…) a special advantage by comparison with its competitors" (Tribunal of first Instance, 28 September 1995, T-95/94, Chambre Sindacale Nazionale des Entreprises de Transport de Fonds et Valeurs

et al. /Commission, ECR1995, p. II-02651).