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Contract Compliance for Sustainable Public Procurement

To Monitor or Not to Monitor

Ezgi Uysal

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Contract Compliance for Sustainable Public Procurement

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Ezgi UYSAL[1]

I. Introduction

Compliance is "*the interaction between rules and behaviour*".[2] Accordingly, contract compliance in sustainable contracting practice is the behaviour of the contracting parties conforming to the norms set with the contract. Depending on what sustainability clauses are incorporated in a public contract, compliance might mean compliance with public regulation and/or private standards. Though non-compliance with different types of standards has different consequences, for this paper (non-)compliance with these regulatory standards is to be assessed based on their implications for the said contractual relationship, regardless of the extra-contractual implications that might arise.

In the award of a procurement contract, checking compliance aims to ensure that the tenders correspond to the procurement documents. In the contract performance, it aims to ensure that performance corresponds to the offer of the successful tenderer. While the former is solved under the principles of procurement; the application of the principles to the latter was not intrinsic in the harmonisation of the public procurement rules. Rules applicable to performance are primarily left to the contract law applicable. Under the regime applicable, non-compliance with the regulatory requirements incorporated with sustainability clauses does not always amount to non-conformity in the final product, let alone fundamental non-performance, allowing the contract to be terminated.[3] However, the incorporation of such obligations under public contracts, which fall under the scope of the Public Sector Directive[4], calls for an intervention also from the public procurement side beyond Sustainable Public Procurement (SPP). As a follow-up to the previous inquiry of whether EU public procurement rules allow

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[1] PhD Researcher at Università degli Studi di Torino, Italy. Early-Stage Researcher at SAPIENS Network. The SAPIENS Network has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 956696.

[2] Benjamin Van Rooij and D Daniel Sokol, 'Introduction: Compliance as the Interaction between Rules and Behavior' in Benjamin Van Rooij and D Daniel Sokol (eds), *The Cambridge Handbook of Compliance* (1st edn, Cambridge University Press 2021) 2.

[3] Ezgi Uysal, 'Sustainability Clauses in "Public" Contracts' (2024) 20 European Review of Contract Law 105.

[4] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

the limits of contract law to be removed in SPP,[5] this paper aims to answer whether public buyers are required to make sure what is promised by the successful tenderer is delivered during the performance of a public contract, including green and social commitments.

This paper, first, explains the role of compliance in the contract award under the 2014 Public Sector Directive. Then, it provides an analysis of if and how contract compliance is regulated under the EU public procurement rules by focusing on the ban on contract modifications. It analyses whether non-compliance falls under the ambit of contract modification and whether non-compliance with green and social commitments requires an additional layer of analysis. It concludes with the pre-emptive duty of public buyers in contract performance.

II. Compliance in Contract Award

Contracting authorities are given the discretion to set the criteria to define what they are buying. However, they do not have the same freedom when it comes to ensuring compliance with the criteria set when awarding a contract. Under Article 56 of the Public Sector Directive, the contracting authorities are under the obligation to verify amongst other things that the tender complies with "*requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents*".

Compliance is not only an obligation on the interested economic operators for their bids to be taken into consideration; but also a duty on the contracting authorities to have the intention to verify compliance of the submitted bids with the criteria they set. This is one of the ways in which the principle of equal treatment is safeguarded in an award procedure.[6] Primarily, contracting authorities "*must comply strictly*" with the criteria they established.[7] They cannot disregard conditions they established since compliance with the conditions of the tender allows objective comparison of the offers.[8]

The requirements that would make up the contractual obligations can be divided based on the criteria they arise as absolute or relational. While awarding a contract, the contracting authority

[5] Uysal (n 3).

[6] Pascal Friton and Janis Zöll, 'Article 56 Choice of Participants and Award of Contracts' in Roberto Caranta and Albert Sanchez-Graells (eds), *European Public Procurement Commentary on Directive 2014/24/EU* (Edward Elgar Publishing 2021) 570.

[7] Case C-336/12 *Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S* [2013] ECLI:EU:C:2013:647 para 40; Case 42/13 *Cartiera dell'Adda SpA v CEM Ambiente SpA* [2014] ECLI:EU:C:2014:2345 para 42-43; Case C-27/15 *Pippo Pizzo v CRGT Srl* [2016] ECLI:EU:C:2016:404 para 39.

[8] Case C-243/89 *Commission of the European Communities v Kingdom of Denmark (Storebaelt)* [1993] ECLI:EU:C:1993:257 paras 37-40; Case C-278/14 *SC Enterprise Focused Solutions SRL v Spitalul Județean de Urgență Alba Iulia* [2015] ECLI:EU:C:2015:228 para 27 specifically said for technical specification.

is to ensure adherence to absolute requirements; it should verify the conditions offered in response to award criteria, as there cannot be an exact requirement to be complied with directly arising from the award criteria under Article 67. Yet, objective and transparent tender assessment relies on the contracting authority's ability to verify *how* the tenders respond to the award criteria. [9] When a contracting authority establishes an award criterion that "*it neither intends, nor is able, to verify the accuracy*" of the tenders submitted in response to, it breaches the principle of equal treatment.[10] The contracting authorities are obliged to verify the information that the tender is based on to ensure what is promised in the tender corresponds to what is required under the contract documents.[11] Nevertheless, this should be balanced with the principle of proportionality.[12] The principle of equal treatment does not require verification to be factually carried out during the tendering process.[13] However, if no verification tool accompanies the criteria this breaches the principles of public procurement.[14]

It needs to be emphasized that the mere fact that an award criterion incorporates conditions which can only be factually substantiated once the contract isawarded does not prejudice the freedom of the contracting authority in setting award criteria.[15] This is already the case for performance requirements under Article 42 and performance conditions under Article 70. For all criteria and conditions concerning "what to buy" actual compliance can only be factually confirmed when the contract is being performed.

III. Compliance in Contract Performance: Ban on Contract Changes

The failure to abide by the principles of non-discrimination, equal treatment and transparency after the award could render the observance of these principles in the competition devoid of their effect.[16] In this light, in contract performance non-compliance to the conditions advertised during the tender procedure is in tension with the competitive procedure held to award the contract. The failure of the successful tenderer to comply with the standards constitutes an "undue profit"; it is detrimental to the competition and breaches the principle of non-

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[9] Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* [2003] ECLI:EU:C:2003:651 para 50; Case C-54/21 *ANTEA POLSKA and Others* [2022] ECLI:EU:C:2022:888 para 91.
[10] Case C-448/01 *EVN* para 51.
[11] ibid para 124.
[12] ibid para 122.
[13] Case C-19/00 *SIAC Construction Ltd v County Council of the County of Mayo* [2001] ECLI:EU:C:2001:553 para 38.
[14] See E-16/16 *Fosen-Linjen AS v AtB AS (Fosen Linjen I)* [2017] EFTA Ct. Rep. 617.
[15] Case C-19/00 *SIAC* para 38.
[16] Piotr Bogdanowicz, 'The Application of the Principle of Proportionality to Modifications of Public Contracts' (2016) 11 European Procurement & Public Private Partnership Law Review 194, 199.

discrimination.[17] Accordingly, it also falls on the contracting authority to ensure compliance with the criteria it established until the end of the contract performance. [18]

As briefly mentioned, the obligations to be performed by the successful tenderer are not always set in an absolute manner in the tendering phase. It is only when the MEAT is chosen and -if allowed- when the negotiations are finalized that the obligations to be performed are set. Therefore, once the contract is concluded, the reference point for the determination of compliance becomes the contract itself not merely the contract documents or criteria. This is inherent in the system designed for competitive tendering. For instance, in a contract where MEAT is to be determined based on price and quality, the compliance of the winning tenderer with the quality criteria would be irrelevant if the tenderer was awarded the contract though it received no points from that sub-criterion.

Accordingly, while compliance during the tendering stage assesses the compliance of the tender with the advertised criteria and conditions on a document level, once the contract is awarded compliance to be checked should be the comparison of the performance actually delivered with the performance promised under the contract. The Public Sector Directive harmonizes the rules on the "award" of public contracts; the rules that apply to the performance remain mostly regulated under national laws. That has been the case for so long and in principle still is. Since 2014, changes to concluded contracts have been regulated with the Directive as the legislator decided to codify the CJEU case law on the matter. For the first time Article 72 of the Public Sector Directive clarifies under which circumstances changes to a contract during the execution require a fresh tender procedure.

In principle, freedom of contract includes also the freedom to modify an existing contract.[19] However, contracting parties of public contracts do not have the same freedom to change the terms of the contract following its conclusion because contract changes may amount to a new contract awarded without holding the necessary procedure, *de facto* a direct award. The codification of the contract changes in the Directive does not necessarily mean that the Directive also regulates the performance of a contract. On the contrary, contract modifications are regulated because of the risk of "revised" terms to amount to the "award" of a new contract.

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[17] Roberto Cavallo Perin & Gian Luigi Albano Gabriella M. Racca, 'Competition in the Execution Phase of Public Procurement', (2011) 41 Public Contract Law Journal 89, 90–91.
[18] Case C-337/98 *Commission of the European Communities v French Republic* [2000] ECLI:EU:C:2000:543 para 115.
[19] Eike Hosemann, 'Art 1:102: Freedom of Contract', *Commentaries on European Contract Law* (Oxford University Press 2018) 31 fn 8.

Changes to a concluded contract can be considered a new award, because had the contract been advertised with the revised conditions from the beginning, this would have altered the result of the procedure. As a result, other interested economic operators are robbed of the chance to tender and subsequently, be awarded the contract with the "revised" terms. Due to the discrepancy between transparency in the contract award and contract performance, modifications are seen as the "*dark side of procurement*".[20]

Article 72 opts for negative wording and first spells out the instances where changes to a concluded public contract do not require the contracting authorities to carry out a new procurement procedure. Accordingly, modifications are permissible if: (a) provided that it does not alter the overall nature, the initial contract contains a "*clear, precise and unequivocal*" review clause or options which spell out the scope, nature and conditions of use; (b) provided that the price increase is not more than 50% of the value of the original contract when additional procurement, which was not foreseen, by the same contractor becomes necessary but the change of contractor is not feasible due to "*economic or technical reasons*" and it would cause "*significant inconvenience or substantial duplication of cost*"; (c) provided that it does not alter the overall nature and the price increase is not more than 50% value of the original contract, the need for change is due to circumstances that a diligent contracting authority could not have foreseen; (d) the contractor is replaced due to a review(option) clause or succession of a contractor by an economic operator that fulfils the selection criteria or contracting authority assumes its obligations towards subcontractors; or (e) changes -irrespective of their value- are not substantial, the meaning of which will be explained below.

Permissible modifications made pursuant to the need for additional procurement by the same contractor (paragraph b) and unforeseen circumstances (paragraph c) oblige contracting authorities to publish a notice in the OJEU. Pursuant to Annex V part G such notice is to state, amongst other things, a description of procurement before and after the change and the circumstances necessitating the change.

Provided that it does not alter the overall nature, -regardless of any other condition- Article 72(2) provides a *de minimis* threshold. Contracts can be modified without a new procedure, if the change in the contract is below (i) threshold amounts that render the Directive applicable and (ii)10% and 15% of the initial contract value, respectively for service/supply contracts and

[20] Dacian C. Dragos and Bogdana Neamtu, 'Introduction: Why the "Dark Side of Procurement"?' in Dacian Dragos and others (eds), *Contract Changes* (Edward Elgar Publishing 2023) 1.

works contracts. Yet, the application of the threshold presupposes that the changes to contracts can be given a monetary value, which is not always the case.

Pursuant to the first sentence of Article 72(4), modification is substantial if the contract is rendered "*materially different in character from the one initially concluded*". Under the second sentence, in any case, without prejudice to permissible modifications and below de minimis modification, the following modifications are to be considered substantial, if (a) modified conditions were included in the initial procedure, they would have allowed the interest of other participants or participation of other candidates or selection of another tender (hypothetical new procurement), (b) it alters the economic balance of the contract in favour of the contractor, (c) it extends the scope of the contract or (d) the contractor is replaced but the change does not fall under one of the permissible contractor changes. Though not provided, it is argued that with reference to subparagraph b, changes in favour of the contracting authority do not rule out the chances of material amendments as they may also have the potential of distorting competition.[21]

On the one side, under Article 72(5) changes to contracts that are not permissible require a new procurement procedure. On the other side, pursuant to Article 73 contracting authorities should have the possibility to terminate a contract if it has been subject to a modification that would have required retendering. No obligation in and of itself arises from 73 of the Directive following non-permissible contract modification. Article 73 merely provides a "possibility" to terminate; the contrary would mean that the Public Sector Directive provides a stricter fate for an illegally modified contract without any decision from CJEU or a national court/review body without the Commission or any interested party alleging illegality.

Arrowsmith suggests that while Article 73 does not prejudice the rights of interested parties under the Remedies Directive[22], it might be aimed at allowing the contracting authority to take action without waiting for review proceedings.[23] However, if the provision aims to give the opportunity to the contracting authority to retender it would have made sense if it were drafted also to allow the contracting authority to end a contract before the modification materializes.

[21] Kristian Hartlev and Morten Wahl Liljenbøl, 'Changes to Existing Contracts under the EU Public Procurement Rules and the Drafting of Review Clauses to Avoid the Need for a New Tender' (2013) 2 Public Procurement Law Review 51, 56 The authors argue that price reductions are often offered in order to disincentivize contracting authorities from terminating contracts which would have been re-tendered.

[22] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33 as amended with Directive 2007/66/EC.

[23] Sue Arrowsmith, *The Law of Public and Utilities Procurement Regulation in the EU and UK* (Sweet & Maxwell 2014) 604.

In that way, a contracting authority would have a way out of a contract that, if modified would breach Article 72.

Neither Article 72(5) nor Article 73 regulates what a contracting authority can do when circumstances that might give rise to a contract modification arises. Rather Article 73 is based on the premise that the contract has been illegally modified. Article 72(5) suggests that there is a duty to retender for non-permissible modifications. At the outset, it reasonably appears that - at least for the changes that cannot be separated from the original contract *e.g.* change of contractor- termination should precede the new procedure. However, regardless of whether the change could be separated or not, Article 73 implies that termination follows the non-permissible contract modification. The sequence of events can be explained because (non-)permissibility of the modification can only be judged ex-post. This means, Article 72(5) could never give rise to an "obligation" to retender before it is already late.

This conclusion is also in line with the wording used in Article 73(1)(a) providing for the possibility of terminating for a substantial modification, which *would have required* a new procurement procedure under Article 72 and not for a modification which *required* a new procedure. It suggests that the contracting authority can proceed with the modification separable or not -*e.g.* change of contractor, extending the term or increase in price- then can terminate because it was not a permissible modification and retender.[24] Both the obligation to retender and the possibility to terminate do not materialize before the illegal modification is realized.

IV. Tacit Modifications and Non-Compliance with Sustainability Clauses

This section aims to untangle the ambiguity concerning tacit modifications and non-compliance with contract clauses in public contracts. Previously, Telles and Klingler put an overview of different legal systems on the relationship between modification and non-compliance to "*build the first step towards setting clarity regarding the rules on non-compliance*".[25] The current author wishes to follow and contribute to the discussion following the recent CJEU case law and adding sustainability clauses into the dialogue.

[24] Halonen suggests that it could be argued that the contracting authority does not have to wait; however, terminating without a decision on the existence of substantial modification would be open to challenge, see Kirsi-Maria Halonen, 'Article 73 Termination of Contracts' in Roberto Caranta and Albert Sanchez-Graells (eds), *European Public Procurement Commentary on Directive 2014/24/EU* (Edward Elgar Publishing 2021) 803.

[25] Désirée Klingler and Pedro Telles, 'Non-Compliance with Government Contract Terms: A Comparative View on Procurement Regulation and Contractual Remedies' in Dacian Dragos and others (eds), *Contract Changes* (Edward Elgar Publishing 2023) 48.

1. The Scope of Article 72

Alterations to a concluded contract do not always take place as explicit contract amendments. However, Article 72 does not stipulate what is required for a new *arrangement* to be considered a modification. It is possible for such variations to take place as underperformance or not living up to expectations. Whether Article 72 can be interpreted to cover instances where what is delivered under the contract does not correspond to what is promised by the successful tenderer should be assessed.

Before moving on to the analysis, one thing is worth attention. In the proposal for the 2014 Directive, Article 72 had a different wording where reference was made to deficiencies in performance. Later omitted paragraph 7 provided that:

> "*Contracting authorities shall not have recourse to modifications of the contract in the following cases:*
>
> *(a) where the modification would aim at remedying deficiencies in the performance of the contractor or the consequences, which can be remedied through the enforcement of contractual obligations*
>
> *(b) […]"*[26]

As explained by Treumer, this provision was to the benefit of the competitors as "*changes needed to settle disagreements on […] deficiencies in the performance will frequently be substantial because other tenderers would have been selected or awarded the contract had the terms of initial contract been changed from the start*."[27] Though this provision was later omitted during the negotiations, at the time, Treumer had argued that it would have been preferable if the Directive had opted for a more flexible approach and provided a way out for deficiencies in the performance to be remedied without holding a new procedure.[28] As it currently stands Article 72 is silent on deficiencies *i.e.* non-compliance in the performance.

2. Beyond Amendments "*in Writing*"

Under the definition given in Article 2(5), public contracts are contracts for pecuniary interest concluded "in writing" between economic operator(s) and contracting authority(ies) and for

[26] Article 72(2) European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Public Procurement COM(2011) 896 Final'.

[27] Steen Treumer, 'Regulation of Contract Changes Leading to a Duty to Retender the Contract: The European Commission's Proposals of December 2011' (2012) 5 Public Procurement Law Review 153, 160–161.

[28] Steen Treumer, 'Contract Changes and the Duty to Retender under the New EU Public Procurement Directive' (2014) 3 Public Procurement Law Review 148, 149.

works, supplies and services. Under Article 2(18), "in writing" means "*any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information transmitted and stored by electronic means*". Regardless of an arrangement being considered a contract under the national laws, it is a contract under the Directive if it is for "*obtaining works, supplies or services*".[29] Accordingly, if an authority falling under the scope of the Directive were to purchase supplies or services merely through written communications that fall under the definition of Article 2(18), there is a public contract under the definition of Article 2(5).

Going a step further, neither Article 2(5) nor Article 2(18) mentions purely oral arrangements. The main objective behind the requirement to be "in writing" is transparency to ensure the legal rules are respected.[30] As argued by Hamer, it is very unlikely that because the requirement to be "in writing" should be interpreted strictly oral agreements do not fall under the Directive's scope.[31] An argument to the contrary would mean that if contracting authorities can directly award procurement "deals" without any written document such arrangements would not fall under the scope of the Directive. This cannot be the intention of the legislator with Article 2(5). Considering the reason why contract modifications are regulated under the Directive is the risk of a *de facto* new award, the same possibility cannot be ruled out for modifications.

In *Finn Frogne*, the Court addressed a similar question where a settlement agreement is deemed to modify the initial public contract by way of waiver.[32] The Court concluded that due to changes it foresees it *de facto* leads to a different arrangement for the public contract; therefore, calls for retendering. Following *Finn Frogne*, it was already argued that tacit changes are covered by the EU procurement rules regardless of "*the intention of the parties, the special circumstances, or the fact that the modification was made via a settlement agreement*".[33] However, *Finn Frogne* did not answer if an agreement "in writing" is required to amend the original contract. At last, this question made its way to Luxemburg. As already anticipated by

[29] Arrowsmith (n 23) 388.

[30] Carina Risvig Hamer, 'The Concept of a "Public Contract" within the Meaning of the Public Procurement Directive' [2016] Upphandlingsraettslig Tidskrift 179, 186.

[31] ibid.

[32] C-549/14 *Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation* [2016] ECLI:EU:C:2016:634 para 11.

[33] Carlos Sebastián Barreto-Cifuentes, 'Alteration of Public Contracts and Its Interface with Public Procurement Objectives: A Comparative Analysis' (the University of Nottingham) 78 <https://eprints.nottingham.ac.uk/69341/1/Alteration%20of%20public%20contracts.pdf>.

Halonen, the Bulgarian preliminary references detailed below have indeed provided long-awaited guidance on the line between non-compliance and contract modifications.[34]

In C-441/22, *Obshtina Razgrad*, the issue is whether a non-complied deadline for a construction procurement by the Municipality of Razgrad, which was a part of the evaluation under the award criteria amounts to an illegal contract modification. [35] Though the contract in question provided for a damages clause for late performance, it was not claimed by the contracting authority.[36] The head of the supervisory authority decided that the said circumstances should be considered contract modification even without a "*written agreement or agreeing on a written annex*" and accordingly imposed a financial correction to the municipality.[37]

Following a challenge of the decision, the court of first instance annulled the financial correction on the basis that a contract modification cannot have been realized without a "*written agreement*".[38] The court held that though there was improper performance, there was no modification. In the appeal brought by the authority, the respondent argued that "*improper performance of the contract does not have the characteristics of a modification of the contract*".[39] In the preliminary question referred to the CJEU, the Supreme Administrative Court of Bulgaria noted that while there was no "*written agreement*" there was a communication between the contracting parties where "*amendment of material terms*" can be "*inferred*".[40]

Similarly in Case C-443/22, *Obshtina Balchik*, the same authority imposed a correction, this time to another municipality, Municipality of Balchik, for a contract for the extension of the promenade (construction contract) for similar reasons. The authority based its correction on the fact that the time-limit for performance was determined in the procurement documents as between 45 to 90 days where the failure of the tenderers to submit tenders that are not compliant amounted to exclusion.[41] Following the award, the completion took 250 days due to weather conditions -which the contractor declared in its tender that these were taken into consideration in the planning- and the statutory prohibition on works on the seaside during a certain period.

[34] Kirsi-Maria Halonen, 'Fundamentals of Contract Modifications in EU Procurement Law' in Dacian Dragos and others (eds), *Contract Changes* (Edward Elgar Publishing 2023) 34.
[35] Case C-441/22 Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice lodged on 5 July 2022 para 9.
[36] ibid para 13.
[37] ibid paras 9-11.
[38] ibid para 13.
[39] ibid para 17
[40] ibid para 20.
[41] Case C-443/22 Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice lodged on 5 July 2022 para 13.

The financial correction imposing authority argued that these were conditions that should have been taken into consideration by "*any experienced contractor*" and did not constitute "*unforeseeable circumstances*.[42] The decision on financial correction has been challenged and the court of first instance annulled it with the same reasons in C-441/22.[43] Different from the first case, in the appeal proceeding, the appellant based its arguments that failure to comply was subjective rather than objective impossibility.[44] The Administrative Supreme Court also focused on the issue of "unforeseeable circumstances" with reference to Article 72(1)(c) of the Directive.

In both cases, the applicants argued that a contract modification should be made by way of a written agreement. The case law on the application of the rules on contract modification in Bulgaria is not uniform. On the one side, there is a Supreme Administrative Court decision which holds that the relevant provision of public procurement law does not solely depend on the existence of a written agreement, but all evidence in its entirety should be assessed to determine whether a contract is modified, including statements and conduct of the parties during the performance.[45] On the other side, there also exists another Supreme Administrative Court decision which establishes that failure to assert contractual penalty is not a contract modification; modification of a contract can only be realised when parties agree to amend a clause by way of written agreement.[46]

Leaving the issue of unforeseeable circumstances in Case C-443/22 *Obshtina Balchik* aside, in summary, the questions asked by the Bulgarian court were (i) whether Article 72 "permits" a national rule/practice which stipulates that rules on contract modification can only be invoked if there's a written contract; (ii) if no, whether it permits a national rule/practice which stipulates that rules on contract modification can be invoked in case of the joint act by parties which there exist a written communication that incorporates the intention of modification and lastly, (iii) whether it permits a national rule/practice which provides performance contrary to contract terms to is merely "improper performance". In sum, the CJEU was asked to interpret Article 72 in order to determine formal requirements applicable to contract modification and enlighten the relationship between modification and non-compliance to an extent. These questions have been recently answered.

[42] ibid paras 14-17.
[43] ibid para 19.
[44] ibid para 24.
[45] ibid paras 31-33.
[46] ibid.

In its assessment, due to the importance of execution periods, the Court started from the presumption that the changes to deadlines are substantial under Article 72(4). Combining the questions received from the Bulgarian court, the Court answered whether Article 72 requires a written agreement or other written communication where the parties' desire to modify can be detected.[47] After focusing on the definitions of "public contract" and "in writing", it stated that with reference to Recital 58, oral communications are also possible during the procedure.[48]

For a modification to qualify as substantial, Article 72 does not require the change to a public contract to be made with a written contract amending the contract.[49] The existence of a substantial modification cannot be made conditional on a written agreement that modifies the contract, because this would mean allowing the circumvention of the rules concerning contract modifications.[50] The common intent of the contracting parties to renegotiate can be deduced from communications between the parties, *in particular* written elements.[51]

To begin with, the order of the Court's arguments is puzzling. Instead of first checking if there is a modification that would fall under the ambit of Article 72 and if yes, whether it is permissible or not, it started from the presumption that there is a modification and checked whether the requirement to be in writing had an impact on whether the change is substantial. However, this appears to be somewhat perplexing; because had the Court concluded that the formal requirements are not complied with there would not be any modification to begin with. Accordingly, in my opinion, the assessment should have started with whether the issue of non-compliance with the deadline falls under the scope of Article 72, and it should then leave the assessment whether it is substantial or not to the national court based on the facts.

However, regardless of how it arrived at this conclusion, the CJEU concluded that a contract amendment in writing is not required under Article 72; the intention of the parties can also be deducted from other elements *in particular* from written elements. The existence of written communications between parties concerning the change is one way of ascertaining the modification of the contract; however, as the literal wording indicates (*notamment, d'autres éléments écrits émanant de ces parties*) it is not the only way. Subjecting the application of Article 72 to an agreement in writing or even to written communications would mean that if

[47] Joined cases C-441/22 and C-443/22 *Obshtina Razgrad* [2023] ECLI:EU:C:2023:970 para 55.
[48] ibid para 58.
[49] ibid para 59.
[50] ibid para 62.
[51] ibid para 65, *notamment* in French.

contracting parties can manage to leave no written trace behind, they can circumvent the application of Article 72.

3. Tacit Modifications and Non-Compliance

"Lower-than-promised" performance constitutes alteration to the contractual balance in favour of the successful tenderer.[52] However, just like an economic operator's unilateral conduct cannot amount to a public contract *e.g.* simply leaving scrubs at the front desk of a public hospital free of charge, contract modification cannot merely be the automatic result of under-performance or non-compliance of the contractor.

According to *Finn Frogne* -which was rendered before Article 72 took effect- a modification does not require the "*intention of the parties to renegotiate*"; the "*intention to reach a settlement*" suffices.[53] However, pursuant to *Simonsen & Weel* contract modifications -*by definition*- need to be consensual.[54] Accordingly, while the intention to modify is not required, consent is. However, considering the facts of the case it needs to be emphasized that in *Simonsen & Weel*, the consent required was the consent of the successful tenderer. The authority's tacit agreement to the new conditions should be covered by Article 72.

Accordingly, non-compliance can only fall under Article 72 if it constitutes a tacit modification. Whether non-compliance of the contractor amounts also to contract modification depends on the contracting authority's agreeing to consequences thereof, without necessarily requiring such accord to be documented in writing. Explicit acknowledgement of the change should not be a pre-requisite; a common intent to proceed should suffice. Even before the adoption of the Directive, Treumer held that "*implicit acceptance of changes of the contract*" would be under scrutiny to prevent "*abuse and circumvention*."[55] Similarly also Arrowsmith put forward that "*failure to enforce existing terms […] no doubt constitute a change requiring a new contract when the de facto effect is to produce a change of a kind that is not permitted without a new award procedure*."[56]

[52] Gabriella M. Racca (n 17) 90.
[53] C-549/14 *Finn Frogne* paras 30-31.
[54] Case C-23/20 *Simonsen & Weel A/S v Region Nordjylland og Region Syddanmark* [2021] ECLI:EU:C:2021:490 para 70.
[55] Treumer (n 27) 163.
[56] Arrowsmith (n 23) 597.

The fate of concluded contracts is a “chess game” between private law and public law.[57] For tacit modifications, the game is specifically between national contract law applicable to public contracts and EU public procurement law. The failure of the contracting authority to “*enforce compliance with*” obligations undertaken by the successful tenderer in its offer may amount to the award of a new contract under EU public procurement law.[58] The consequences of non-compliance under contract law depend on the contract law rules applicable to public contracts. Depending on whether non-compliance amounts to non-conformity, or whether it amounts to fundamental non-performance contractual remedies to be taken differ.[59]

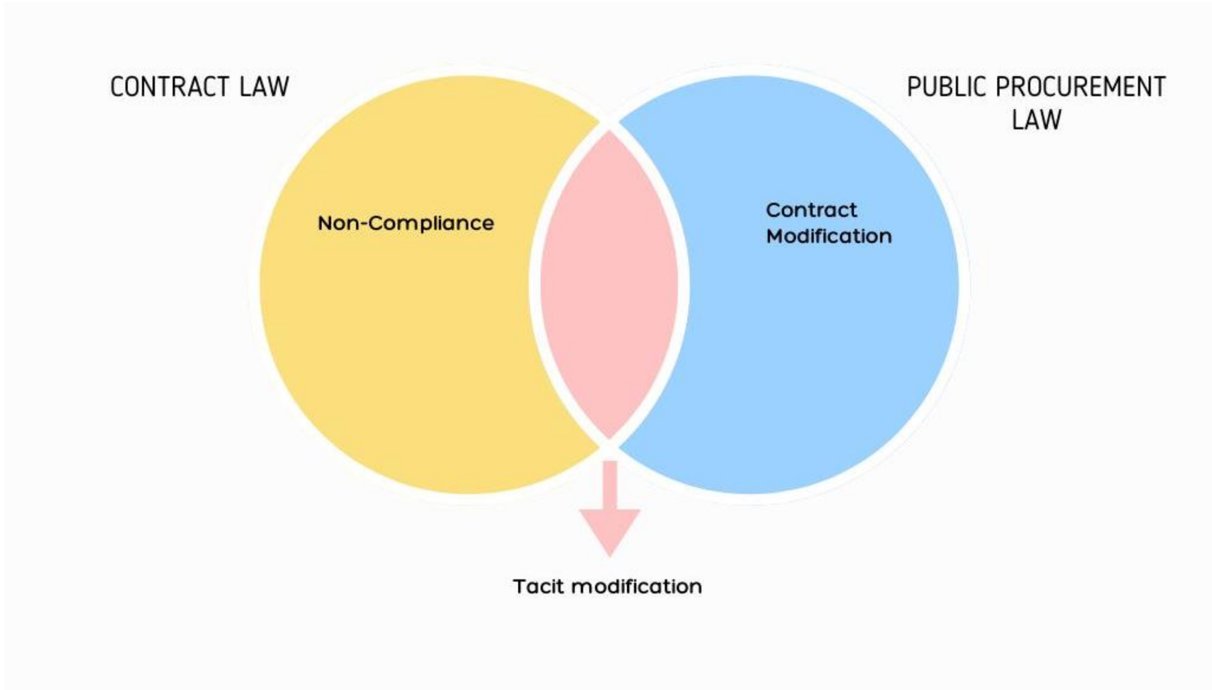

Figure I: Non-compliance as tacit modification[60]

The contracting authority’s (in)action determines where a case falls in the Venn diagram above. For instance, in a contract for office supplies, the delivery of the supplies 30 days after the original deadline in the contract can be considered non-compliance, contract modification or

[57] Roberto Caranta, ‘Key Issues for Effective Procurement Remedies’ (2022) 31 Studia Iuridica Lublinensia 101, 105; Roberto Caranta, ‘Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation’ (2015) 8 Review of European Administrative Law 75, 80.
[58] Arrowsmith (n 23) 774.
[59] Uysal (n 3).
[60] This figure is based on a figure developed by Klingler and Telles by integrating minor changes Klingler and Telles (n 25) 53 Figure 4.1. Additionally, during Kirsi-Maria Halonen’s presentation at the 2nd PURPLE Project Anthology seminar on 21-22 September 2023 in Torino, her insights into the difference between non-compliance and tacit modification were particularly enlightening. I found her clarification to be instrumental in deepening my understanding of the topic.

both *i.e.* tacit modification. If the contracting authority and the supplier amend the contract to alter the delivery date before the date arrives -regardless of its permissibility which is not relevant at this stage-, there is a contract modification that falls under Article 72. If the supplier delays in delivering or supplies are of lower quality than expected, whether this can be considered tacit modification depends on how the contracting authority reacts.

On the one side, it would seem that if the supplier fails to comply and the contracting authority applies the contractual penalty/liquidated damages foreseen, it could be argued that this should not be considered tacit modification in the first place as the application of the penalty demonstrates that the contract is being enforced as advertised; the contracting authority does not accept the alteration and the competitive procedure is not prejudiced as the possibility of penalty/liquated damages has been already incorporated in the contract documents.[61] There would be the presumption that the risk undertaken by the contractor remains and the contractor was not advantaged by its non-compliance. However, a lack of such remedial action from the contracting authority may signal a common intent to proceed with a late delivery or lower-quality supplies which would mean that the contract is tacitly modified.

The existence of contract modification can be claimed only when non-compliance is combined with the contracting authority's failure to enforce. To prevent tacit modifications, contracting authorities are under the obligation to "ensure compliance" with the contract also during the performance. To a large extent, what this encompasses cannot be established as a single rule but requires assessment of different legal systems. However, the relationship between non-compliance and contract modifications is not yet made in every EU/EEA jurisdiction. The administrative review system and dual court system may preclude the link between non-compliance and contract modifications to be made during review proceedings.

In jurisdictions where the first-instance review bodies are administrative bodies, they would lack jurisdiction over contract law, as is the case in Denmark and Finland.[62] In jurisdictions where courts are the review bodies, if the dual system is in place the courts that have the jurisdiction on contract performance and contract modification would not be the same, as is the case in Italy. Though tacit modifications are also a matter of procurement law, the reluctance

[61] While it seems that the application of remedies stipulated in the contract may prevent tacit modifications, whether this should apply to default contract law remedies too is another issue. The answer depends on whether default contract law remedies (e.g. price reduction) or grace periods can be considered implied contract terms under the contract law applicable.

[62] See Carina Risvig Hamer, 'Modification of Contracts in Denmark' in Dacian Dragos and others (eds), *Contract Changes* (Edward Elgar Publishing 2023) 100; Merja Kortesuo and Pilvi Takala, 'Contract Changes in Finland' in Dacian Dragos and others (eds), *Contract Changes* (Edward Elgar Publishing 2023) 129.

would prevail. Accordingly, jurisdictions which opted for a court system under the Remedies system without a dual court structure on the issue of public procurement become a suitable arena for such assessment, such as the Netherlands.

In Dutch law, limited case law seems to suggest that contractual penalties following non-compliance prevents it from being considered a modification.[63] Though a single court system makes this determination easier it is not a pre-requisite. For instance, in Hungary "the principle of responsible management of public funds in the course of contract performance" calls for contracting authority to enforce a claim for non-performance to prevent it from being considered a modification.[64] The relationship between non-compliance and contract modifications is also established in KOFA case law in Norway where the determining factor is the contracting authority's efforts to follow up on compliance.[65]

In sum, under the Public Sector Directive, the failure of the contracting authority to ensure compliance with the clauses should be considered a contract modification. However, when a contracting authority is deemed to have failed cannot be normatively established for all jurisdictions. Accordingly, though there is a duty on the contracting authority to ensure compliance what ensuring compliance may mean depends on the national law.

4. Non-compliance with Sustainability Clauses as Illegal Tacit Modification

As argued, the failure of the contracting authority to ensure compliance with contract clauses might fall under the radar of Article 72. Having established that non-compliance should be subject to the test under Article 72 in case of tacit modification, it should be tested when it is permissible. One specific issue is the impact of contract compliance in the incorporation of sustainability clauses. It is a missed opportunity that the impact of horizontal policies, which are visible in the rest of the Directive, is not reflected in Article 72.[66]

Contract law remedies do not always provide the required protection in the cases of sustainability clauses. If that is the case, their non-compliance leads to the same result as their non-incorporation. Practically, non-compliance with such clauses would not fall under Article

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[63] Erik Plas and Willem A. Janssen, 'Contract Modifications in the Netherlands: Understanding the Law, Jurisprudence and Practice' in Dacian Dragos and others (eds), *Contract Changes* (Edward Elgar Publishing 2023) 240–241.
[64] Section 142 of Hungarian Public Procurement Act.
[65] See for instance KOFA 2015/27.
[66] Yseult Marique, 'Changes During Performance A Case for Revising the Extension of Competition' in Yseult Marique and Kris Wauters (eds), *EU Directive 2014/24 on Public Procurement A New Turn for Competition in Public Markets* (Larcier 2016) 213 Though the author mainly argues in favour of exceptions to Article 72 for reasons of innovation, she adds other horizontal policies can be also relevant in this regard.

72(1)(b)-(d) or unless a monetary value can be given -which is neither feasible nor desired- *de minimis* threshold is not relevant. Thus, whether non-compliance with sustainability clauses would lead to illegal tacit modification depends on the analysis to be made under Article 72(4).

The game turns into a game of bridge, rather than chess, as it requires managing incomplete information, *i.e.,* the potential effect on the competition. The test to be applied becomes if the initial contract has been procured without sustainability clauses, regardless of the criteria they arise from, whether this have allowed more other candidates in the procedure or selection of different tender or does non-compliance alter the economic balance of the contract. In most instances, sustainable criteria arising from technical specifications, award criteria or performance conditions incorporate detailed requirements, which require a case-by-case analysis. However, due to their effect on competition, the answer is more likely to be yes compared with any other contract clause.

Sustainability in European public procurement has been always assessed as opposed to competition.[67] For instance, Halonen suggests mandatory green requirements diminish the number of interested economic operators; the same can also be extended to voluntary clauses.[68] Similarly, Sanchez Graells suggests that labour standard clauses affect SME participation negatively. [69] These seems also empirically confirmed. For instance, in a recent study by Carreras, it has been concluded that both environmental and social award criteria diminish the number of bids received.[70] The effect on the number of bids received or the number of interested economic operators changes more in the case of absolute requirements rather than award criteria, specifically because non-compliance with absolute requirements during the tender phase would amount to the rejection of the tender in the first place.

It can be argued that when a tender procedure for electric busses was held but diesel buses were delivered, or the tenderer undertook to employ apprentices in the contract performance but failed to do so would be covered by Article 72(4)(a).[71] The given examples are the least

[67] See Sanchez-Graells, 'Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?' (2016) 22 European Public Law 377, 377.

[68] Kirsi-Maria Halonen, 'Is Public Procurement Fit for Reaching Sustainability Goals? A Law and Economics Approach to Green Public Procurement' (2021) 28 Maastricht Journal of European and Comparative Law 535.

[69] Albert Sanchez-Graells, 'Competition and State Aid Implications of " Public " Minimum Wage Clauses in EU Public Procurement after RegioPost' in Albert Sanchez-Graells (ed), *Smart Public Procurement and Labour Standards: Pushing the Discussion after RegioPost* (Hart Publishing 2018) 105.

[70] Enrique Carreras Sustainable Public Procurement, Bidding Behavior and Costs: Evidence from Spanish Contracts (forthcoming)

[71] Treumer (n 28) 150 Though he does not necessarily approach the issue from SPP perspective, Treumer argues that 'an alteration requiring a new tender would occur if, for example, the works, supplies or services to be procured are replaced by something different or where the type of procurement is fundamentally changed, since in such a

complicated instances where the effect on competition would be relatively easy to determine which is rarely the case for SPP. Accordingly, a contracting authority's failure to ensure compliance with sustainability clauses could amount to illegal tacit modification.

V. A "Working" Conclusion

As observed above, principles of public procurement require tenders to correspond to the advertised criteria in order to ensure that the contract is awarded with the same conditions as advertised. Since the harmonization of the rules applicable to public contracts concerns their award, whether principles can also be extended to the performance of public contracts has not always been obvious. Nevertheless, with the rules of contract modifications under the Directive, to a limited extent, the principle of equal treatment and to an even more limited extent principle of transparency extend to performance. However, still, the reason is the risk of "award" of a new contract.

The fate of an illegally modified contract following infringement proceedings depends on several factors such as the terms of the contract, time limits due to legal certainty, overriding interests and most importantly the knowledge of the modification. There is no obligation to terminate an illegally modified contract as such. The duty to retender emerges once the non-permissible modification is realized when it is already too late to ensure the legality of the procedure. Therefore, the only duty to be derived is the duty of a contracting authority to not modify a contract in breach of Article 72.

Unlike the definition of a public contract, there is no definition of contract modification, therefore it is not evident which arrangements can give rise to the application of Article 72. Though the definition of a public contract requires a procurement "deal" to be in writing in the broadest sense, excluding oral arrangement from the scope of the Directive cannot be the legislator's intention. Similarly, excluding arrangements that are not in writing from the scope of Article 72 contradicts the same objective. The CJEU rulings seem to confirm this broad scope of Article 72 in a way that covers also tacit modifications. Though it does not require the contracting parties to intend to modify the contract, still it necessitates contracting parties to come to a mutual understanding.

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situation an influence on the outcome may be assumed. Such a change could, for instance, be the introduction of a requirement for halal butchering concerning supplies of meat or a special requirement for labelling or colouring of a given product'.

In case of non-compliance of the contractor, tacit modification can result from implicit acceptance of the contracting authority of delivery/performance falling short of what is promised in the contract. The failure to ensure compliance during the contract performance combined with the contracting authority's deficiency in requiring its contractual partner to correct it in case of non-compliance signifies acceptance of performance that does not adhere to the promised standards. The risk of this implicit acceptance to lead to an illegal contract modification is more probable when it concerns sustainability clauses. Accordingly, for a contracting authority to prevent tacit contract modification due to its failure to take action, it should be able to pre-emptively ensure that the contract is being performed as it was promised.

Ensuring compliance with the contract is ensuring compliance with the public procurement rules. Accordingly, as much as there is an obligation to observe the rules under the Directive, there is an obligation to observe compliance with the contractual obligations of the contractor. Preventing tacit modification necessitates knowledge and information on (under-) performance. Since SPP rarely concern characteristics that are "visible" whether contracting authorities can prevent illegal tacit modification depends on their scrutiny of the contract performance and ability to ensure compliance through contract monitoring. This implies that in order to prevent an illegal tacit modification contracting authorities should be able to ensure compliance and detect contract (non-)compliance. Though detecting compliance calls for monitoring contract performance, how to ensure compliance depends on each jurisdiction.