Permitted Modifications of Public Contracts in the EU Court of Justice Case Law and in the New Directives of Public Procurement Law

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Abstract The new EU directives of public procurement law, which the implementation period expires in April 2016, for the first time in the history of regulation this area of the EU internal market introduced rules concerning the exercise of public contracts. The legal framework of this regulation also covered the issues modification of public contracts during their execution. The rules defining the scope of the admissibility of such changes represent an attempt to find the right formula between the striving for effective execution of the contract in the situation of the need to adapt to changing conditions and requirements of equal treatment and procedural transparency to entities interested in the execution of contracts a given type. The importance of this issue for the protection of the public procurement market competitiveness and fairness to compete for contract in the procurement procedures was noticed in the case law of the Court of Justice of the European Union (CJEU) for many years. The importance of this issue for the protection of the public procurement market competitiveness and fairness to compete for order in the proceedings for many years noticed in the case law the CJEU. The aim of the article is to illustrate the development and evolution of EU jurisprudence on these issues and to show what effect this process has received in legal regulation of the new law on public procurement directives.

Keywords Public Procurement • EU • Procurement Directives • Modifications of Public Contracts • EU Court of Justice Case Law

1 Introduction

For the first time in the history of EU legislation, regulations on modification and termination of public procurement contracts was introduced in new 2014 Directives on Public Procurement Law governing public procurement market. They form

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separate chapters of the directives entitled "Contract Performance" [see Chapter IV of the Directive 2014/24/EU (Articles 70–73) and Chapter IV of the Directive 2014/25/EU (Articles 87–90)]. Introduction of these regulations changes the status quo where the EU (Community) public procurement law governed only the procedures for awarding public procurement contracts and for handling complaints (Sołtysińska 2006), disregarding the stage of performance of awarded contracts. Before the regulations forming a legal framework for modifying already executed public procurement contracts had been introduced in the EU secondary law, the rules on admissibility of such modifications were formulated in EU judicature. It is the EU Court of Justice judicature that developed the notion of "a material modification" of a public procurement contract and identified the circumstances (situations) where a planned or made modifications can be classified as material. The present discussion is set in the context of a mandatory nature of regulations governing public procurement procedures and aims at demonstrating the need to perceive material contract modifications as a form of awarding a public procurement contract outside the relevant procedural framework. Not only did the judicature serve as a starting point for a discussion on legal framework for modifying public procurement contracts, but also highlighted the significance of this issue from the perspective of basic principles of EU legislation, such as non-discrimination due to national origin, equal treatment, transparency, and competition protection (Horubski 2013). Hence, the discussion below will begin with presentation of key conclusions contained in the relevant EU judicature.

2 Modifications to Public Procurement Contracts in the Light of Judicature of the Court of Justice of the European Union

The first EU court decision defining the basic assumptions that underlie subsequent rules on admissibility of modifications in public procurement contracts was the judgement rendered on 5 October 2000 in the case C-337/98 *Commission of the European Communities versus French Republic*. The issues addressed in the judgement by the EU Court of Justice included the nature of modification of the object of the contract in the course of the proceedings as a factor determining whether a given procedure still remains one and the same procedure. The case pertained to the procedure having a form of negotiations without publishing tender notice, which, with interruptions, lasted several years and involved the same contractor with whom negotiations had been conducted on a contract for organisation and operation of urban district light railway transport (see the C-337/98 judgement, paras 9–14, 29–34). Due to the fact that, in the course of negotiations between the contracting authority and the supplier of automatic light railway system the object of the contract (object of negotiations) was also modified to some degree, it was necessary to establish whether (at some point) as a result of such modifications, the object of

negotiations and the original object of the contract were no longer identical. This in turn, was relevant for determining the moment in time when the negotiations procedure actually commenced—without a call for proposals addressed to competitors—and concluded with a contract for the supply of a specific urban transport system. With regard to the above-mentioned issue, it was concluded that if the object of negotiations evolved in the course of negotiations so that it became substantially different in character from the initial object of the contract, thus demonstrating the intention of the parties to renegotiate the essential terms of the future contract, it would be impossible to declare equivalence of the contract awarding procedure (see the C-337/98 judgement, paras 44, 46).

The C-337/98 judgement, although not directly pertaining to a modification in executed contract, served as a reference point for subsequent the Court of Justice of the European Union (CJEU) judgements expressly addressing modifications of the contents of already executed contracts. This pertained, in particular, to the assumption that it was necessary to determine how much a contract modification diverged from the original intentions of the procurement contract in order to establish whether the modification was substantial or not. The judgement also impacted subsequent ones by highlighting the issue of substantial modifications as those demonstrating the intention of the parties to renegotiate the essential terms of the contract.

The rules on modification of public procurement contracts were further developed in another judgement—significant in the light of the discussed problem—rendered on 29th April 2004 in the case C-496/99 *Commission of the European Communities versus CAS Succhi di Frutta SpA*. In the case concerned, the European Commission implementing a support programme of free supply of food to non-EU countries published, pursuant to its own earlier regulations, announcement on initiating an award procedure for the supply of fruit juices and fruit jams, assuming that in consideration for the supply the suppliers would receive a specific quantity of specific types of fruit (apples or oranges) in the intervention stocks, withdrawn from the markets of Member States. Tender terms did not contain any provision allowing for the possibility to perform the contract by offering other fruit types (see the C-496/99 judgement, para 82). However, modifications to that effect were introduced in the course of contract performance. The Commission, as contracting authority, allowed for the possibility to perform the contract by providing the already selected suppliers with peaches, and subsequently also other types of fruit instead of apples or oranges originally prescribed in the contract terms. Also, coefficients of equivalence of certain fruits were laid down for the purpose of "converting" the quantities of fruits indicated in bidder's offers to substitutes (other types of fruit) for the purpose of contract performance by successful bidders (see the C-496/99 judgement, paras 2.13–2.14). Consequently, a complaint was filed by a tender participant *Succhi di Frutta SpA* seeking invalidation of the Commission decision introducing the above-mentioned modifications on the grounds that they infringed the equal treatment principle and transparency requirement.

The CJEU judgement concerned was particularly important as it expressly highlighted the fact of the awarding entity being bound by the equal treatment and transparency principles also in the course of contract performance, i.e. after the relevant contract had been awarded and executed (see the C-496/99 judgement, paras 115–116). In other words, the individual interest of a bidder was recognised, protected under EU law, in demanding compliance with these principles also during contract performance so as to afford equality of opportunity to all bidders participating in the procedure. The interest stems from the very fact of submitting a tender (see the C-496/99 judgement, paras 82–83). Hence, the Court dismissed the opinion presented by the contracting authority in the proceedings that after executing a contract with the successful bidder, the above-mentioned principles provided for in the primary EU legislation no longer applied. And so, the EU Court of Justice postulated the necessity to provide for the possibility to modify the tender terms and also to identify, in advance, the circumstances, contents, and procedure for modifying contracts at a later stage (see the C-496/99 judgement, para 118). Consequently, modifications to the essential terms of contracts would be permitted only if they do not derogate from conditions originally specified in invitation to tender (see the C-496/99 judgement, paras 117–119). Should the contracting authority and the successful bidder be granted total freedom in making such modifications, the impartiality of the whole procedure would be at risk, while its original conditions setting the framework within which the entire procedure must be carried out, could become distorted (see the C-496/99 judgement, paras 120–121). The view on the issue adopted in the C-496/99 judgement should be considered strict, as it excludes the possibility to introduce any modifications in situations that could not be reasonably foreseen by the contracting authority and which are beyond its control. In the light of the foregoing judgement, any modification would necessitate initiation of a new award procedure under new tender terms adapted to the changes circumstances.

To end the discussion on the importance of the C-496/99 judgement for the legal framework governing modification of public procurement contracts, one more assumption made there should be mentioned, namely on treating the contract performance phase as a stage of broadly understood process which does not end, by any means, with contract award. Hence, in the judgement concerned, as already mentioned above, the necessity to respect the equal treatment and transparency principles is highlighted in order to protect the interests of all bidders and not only of the successful one. Furthermore, it is emphasised that the principles are applicable and binding "up to the end of the stage during which the relevant contract is performed", which means that the contracting authority is at all times bound by the terms provided for in the invitation to tender (see the C-496/99 judgement, para 115), although the nature of this binding relationship changes and serves to safeguard the arrangements made in the course of the contract awarding procedure, both in terms of subject-matter and object thereof.

Apparently crucial for the evolution of judicature rules on admissibility of modifications in public procurement contracts was the CJEU judgement of 19th June 2008 in the case C-454/06 *pressetext Nachrichtenagentur GmbH versus the*

Republic of Austria. The theses formulated there were, on the one hand, in line with the approach adopted in the judicature discussed above, yet, on the other hand, they introduced significant elements of novelty. The said judgement laid down, against the background of the case, the rules constituting the major point of reference for defining a substantial modification in a public procurement contract. It defined circumstances in which a contract modification could not be considered in compliance with basic principles of EU public procurement law. The judgement, for the first time, provides an interpretation of the term "public contract award", both in the context of modifications of a public contract wording and change of parties to the contract (Sołtysińska 2006), pointing out that a contract may be deemed awarded in breach of the requirements of EU public procurement law not only as a result of failure to publish invitation to tender, but also due to a material modification of the contract itself. Both situations have the same effect—they deprive other prospective bidders of an opportunity to compete for the contract.

As already mentioned above, the C-454/06 judgement defined the detailed content-related criteria of the term "substantial contract modification", thus expanding the term itself, compared to earlier judgements. The Court of Justice pointed out that "an amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of bidders other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted" (see the C-454/06 judgement, para 35). Moreover, according to the Court, "an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered" (see the C-454/06 judgement, para 36). Finally, the Court stated that "an amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract" (see the C-454/06 judgement, para 37). Consequently, the concept of a material modification should cover public contract modifications which trigger at least one of the following effects: (1) conditions are introduced which would expand the circle of possible bidders or result in selection of a different tender; (2) the initial scope of the contract to be performed by the contractor is considerably extended; (3) the economic balance of the contract is changed in favour of the contractor in a way not initially provided for (Wicik 2009). Yet, it should be emphasised here that the Court did not prioritised the rules in any way, nor did it comment on mutual relations among them as regards their application for the purpose of determining the nature of specific contract modifications. However, the importance of formulating these rules for determining the material nature of substantive modifications to the procurement contracts, in the process of adjudicating on their admissibility, is of extreme importance.

The basic point of reference for applying the first rule is surely the process of competing for the contract in the course of the procedure preceding the contract award (Wicik 2009). The purpose of this rule is to avoid distortion (warping) of the process and its result which is the selection of the best tender. To do that, the

introduced or contemplated modification needs to be tested for compliance with effective competition protection requirements. The test would include hypothetical comparison of the tender presented by the contractor in the modified wording with the tenders of other entities participating in the contract awarding procedure (Olivera 2015). The purpose of such comparison would be to establish whether the tender of successful bidder would still be the best or, given the modified tender conditions, a different tender would have been selected, i.e. whether the modification would affect the actual result of the contract awarding procedure.

The second of the above-mentioned rules on modification of public procurement law seems to serve the purpose of safeguarding competition on the public procurement market. It is intended to prevent considerable expansion of the scope of contract through contract modification, i.e. based on agreement between the parties to the initial contract, without allowing other bidders to compete for such an extended contract under a procedure respecting broadly understood transparency principle. Yet, the rule may be also regarded as ensuring effectiveness and integrity of the competition process under contract awarding procedure, as it can be assumed a priori that the result of the procedure would be different, had all bidders been able to compete from the very beginning for a contract much broader in scope. Generally, such situation is reflected in the prices offered in tenders or in other tender conditions affecting the final awarding decision.

The third rule should be perceived as pertaining to both competition areas discussed above. Significant changes in the economic balance of the contract, as reflected in the initial contract to be awarded, may distort the competition for public contract award, as they would substantially modify the contract terms, compared to the initial ones, thus suggesting the necessity to initiate a new (repeated) transparent contract award procedure open to competition. Material modification of the contract, changing the economic balance in favour of the contractor and to the detriment of the contracting authority, lead to favouring the contracting authority's contractual partner as against other possible service providers, both those participating in the original contract awarding procedure and others operating on the relevant market (see the opinion of Advocate General Julianne Kokott in the case C-454/06, para 76). Having admitted that contract modifications affecting the initial economic balance of the contract pose a significant threat to the competition protection in the contract awarding procedure, the Court expressly provided for the necessity to envisage such modifications. Here, therefore, a reference should be made to the predictability requirements laid down in the C-496/99 judgement. The rule at issue, when applied in practice, would in many cases overlap with the rules discussed above. For, quite often, a substantial modification affecting the economic balance between the parties to a contract will also adversely affect effectiveness and integrity of the competition in the contract awarding procedure.

To sum up the significance of the rules discussed above for broadly understood protection of competition in the area of performing and awarding public procurement contracts it is worthwhile to mention the view presented in the opinion of Advocate General J. Kokott in the case C-454/06, where she claimed that the purpose of the rules is to eliminate modifications of such contracts, which "may

materially distort competition on the relevant market and favour the contracting authority's contractual partner as against other possible service providers", since such modifications "justify conducting a new procurement procedure" (see para 76 of the opinion of the Advocate General J. Kokott in the case C-454/06).

To date, the last CJEU judgement concerning admissibility of modifications in a contract executed by a public authority after conducting competition based contract awarding procedure was the judgement rendered on 13th April 2010 in the case C-91/08 *Wall AG versus Stadt Frankfurt am Main* (see the C-91/08 judgement, paras 33, 37–38). The case examined by the Court concerned the procedure for the award of the service concession for the operation, maintenance, servicing and cleaning of municipal public lavatories. The service provider under the contract *FES* referred in the proceedings to the capabilities of another entity (*Wall*) which also participated in the tender procedure, but was excluded, which resulted in rejection of its tender (see the C-91/08 judgement, paras 14–16, 33). *Wall* was indicated in the tender submitted by *FES* as a subcontractor for the supply of lavatories and organisation of advertising services in the lavatories. The contract provided for the possibility to change the subcontractor with respect to both contract tasks upon consent of the entity granting the concession. Prior to commencing the work being the object of the concession and without evoking specific financial or technical reasons, the concession-holder asked the entities selected at its discretion, including the sub-contractor identified in the contract, to present their offers concerning the performance of the above-mentioned works. As a result of a competition, the works were entrusted to an entity other than *Wall*. The city, as the authority granting the concession, approved the substitution of a sub-contractor. Then, the existing subcontractor filed a case with domestic court in order to prevent the performance of the works concerned for the concession-holder by another entity selected by it after execution of the contract (see the C-91/08 judgement, paras 21–25, 27).

The Court examined the facts from the perspective of broadly understood transparency requirement which covers the obligations to: open the concession granting procedure to competition, ensure adequate level of openness of the proceedings, and enable control over impartiality of the proceedings (see the C-91/08 judgement, para 28). This obligation, in turn, constitutes materialization and a guarantee of equal treatment principle as a basic EU right (see the opinion of Advocate General Yves Bot in the case C-91/08, paras 67, 72). It was assessed that the substitution of the subcontractor identified in the contract after executing the concession contract, was—as a matter of principle—immaterial; however, a reservation was made that in exceptional circumstances is may be considered inadmissible. The Court decided that this particular case was exceptional on the grounds that the fact of mentioning a specific subcontractor in the tender submitted by concession-holder affected the final decision on the contract award. For, "where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract" any such modification to the content of the contract cannot be considered immaterial (see the C-91/08 judgement, para 39). Identifying a specific

subcontractor in a tender, due to its reputation, experience and technical expertise has, therefore, become an essential element of the tender due to its significance for the result of the procedure (see the opinion of Advocate General Y. Bot in the case C-91/08, paras 72, 73). Hence, the Court highlighted also a problem of particular characteristics of the service concerned—also in the context of their impact on the final result of the procedure—that could be provided only with the participation of that specific subcontractor due to its resources and capabilities (Kunkiel-Kryńska 2014). Moreover, certain doubts should be mentioned here, concerning a situation where a change of the subcontractor playing in the contract award procedure a role similar to the one described above, would take place without any financial or technical reason, and *de facto*, before commencement of contract performance. A change made in such circumstances would be a sign of fictitious character of the tender submitted in the procedure, intended only to win the contract, which is clearly contradictory to competition protection requirements (fairness in competing for contracts), and, consequently, to the transparency requirement (see the opinion of Advocate General Y. Bot in the case C-91/08, paras 67, 72).

In the C-91/08 judgement, the above modification was found to be "materially different in character from those on the basis of which the original concession contract was awarded, and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract" (see the C-91/08 judgement, para 37). Hence, it was concluded that "where modifications to the provisions of a service concession contract are materially different in character from those on the basis of which the original concession contract (. . .) all necessary measures must be taken (. . .) to restore the transparency of the procedure, which may extend to a new award procedure." (see the C-91/08 judgement, para 43). In the judgement concerned, the CJEU found the modification described above inadmissible despite the fact that the contract provided for the possibility to substitute the subcontractor upon the consent of the party granting the concession. However, the relevant clause could not have been considered satisfying the foreseeability standards with respect to contract modifications in the course of award procedure (see the C-91/08 judgement, paras 19–20, 33), laid down in earlier judicature (see the C-469/99 judgement, paras 118, 120), as the contract did not specify the situations justifying the change of the subcontractor identified in the contract.

To sum up the above theses found in CJEU judicature, first, it should be noted that material contract modifications necessitate initiation of a new award procedure. The conclusions of the EU judicature concerning material contract modifications, aimed at preventing and sanctioning awarding of public contracts with the omission of the procedures laid down in relevant directives led to equating material modification with awarding a new contract or with awarding the original contract under a new contract procedure. Consequently, material modifications are subject to award procedure and cannot be introduced otherwise. Relevant CJEU judicature rejects automatic categorisation of modifications as material ones merely on the grounds that they pertain to apparently essential conditions of any public procurement contract, being a contract involving consideration—namely to remuneration due to the contractor and the services to be provided in return (Kunkiel-Kryńska 2014).

On the contrary, specific contract modifications should be tested for their compliance with multi-dimensional competition protection principle. The rule serves as a basic point of reference in determining materiality of a public contract modification. Competition protection dimensions referred to above cover, both competing in the same award procedure (actual competing for a contract) as well as possible scale of the competition in reference to the procedure as such and to the moment in which the modification is made. Evaluative analysis of the circumstances of the implemented or contemplated contract modification referred to above should encompass a number of conditions, such as: the scope of modification, circumstances justifying or necessitating it, position of the contractor *vis-a-vis* other potential bidders (if it is possible to assess it), and the impact of the modification on the contract position of the contractor *vis-a-vis* the awarding authority (Moras 2013). Only such a multi-dimensional analysis based on above-mentioned modification admissibility requirements should allow for classification of a given change as material or immaterial. It should eventually eliminate the risk of competition distortion on the public procurement market or the risk of a contractor enjoying a privileged position as a party to the contract vis-a-vis its actual or potential competitors.

Undoubtedly, the judicature discussed above had a law-making quality. Starting with a general assumption excluding contract modifications which *de facto* would result in awarding a new contract, it developed detailed rules on admissibility of contract modifications. By addressing the issue of contract modifications, which is a crucial aspect of contract performance, the CJEU judicature became the primary instrument safeguarding effective realisation of internal market freedoms and, consequently, of cross-border competition. Subsequent introduction of contract modification determinants derived from general principles was a clear manifestation of a need to enact a normative act governing these issues. This was one of the arguments justifying commencement of works on new public procurement law directives.

3 Admissible Public Contract Modifications in New EU Public Procurement Directives

During the works on new public procurement directives, EU legislator has decided that the conclusions found in CJEU judicature should become normative provisions, so that the newly enacted regulation define the permitted scope of contract modifications and, at the same time, specify situations in which a new award procedure is mandatory (Kunkiel-Kryńska 2014). In this way, the rules developed in judicature on determining materiality of modifications in public procurement contracts have been codified and have become a part of broader legal regulation covering certain aspects of public contract performance. In view of these facts, there is not doubt that evoking relevant above-mentioned CJEU judgements in

interpreting specific provisions of directives is fully justified (Semple and Andrecka 2015).

Given the above assumptions, the directive regulations on admissibility of contract modifications have been based on general notion of substantial modification in a public procurement contract. The core of the notion is the nature of the contract as the basic point of reference for the contemplated or implemented modification (Semple and Andrecka 2015). Accordingly, the basic limit of freedom enjoyed by parties to a public procurement contract is the situation where, following such modification, "the contract would be materially different from the one initially concluded" (art. 72 (4) of the Directive 2014/24/EU). The ban on modification of the initial character of a contract without conducting a new award procedure was supplemented by reference to judicature rules on contract modifications, quite similar in wording to those contained in C-454/06 judgement (Olivera 2015). Hence, it is provided for in art. 72 (4) of the Directive 2014/24/EU that in any event a modification shall be considered to be substantial where one or more of the following conditions is met: (1) "the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure"; (2) "the modification changes the economic balance of the contract (. . .) in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement"; (3) "the modification extends the scope of the contract or framework agreement considerably"; (4) "where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1". And so a legal definition of a substantial modification in a contract was formulated. By codifying the rules on determining materiality of modifications, developed in the judicature, the general ban on modification of initial character of a public procurement contract was further clarified.

Apart from generally negative definition of lawful substantial modification, the EU legislator provided also positive premises permitting modifications in certain situations. The analysed regulation specifies five such situations. First of all, minor modifications of value, compared to initial contract value, should be mentioned (Art. 72 (1)(a) of the Directive 2014/24/EU). The modifications are permitted in any situation, without the need to satisfy any additional criteria. This means that only after the value exceeds certain threshold amounts, it is necessary to prove that the premises pertaining to other instances permitting contract modifications are met. Pursuant to art. 72 (2) of the Directive 2014/24/EU, the value of the contract modifications should be below the general thresholds set out in the directive (see art. 4), and below 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts. Such approach to regulating that issue reflects one of the views (aspects) of the notion of substantial modifications present in the CJEU judicature discussed above. According to this view, a substantial change is the one characterised by certain noticeable degree of

intensity (thoroughness, scale of interference), assessed from the perspective of the contract as a whole (see the C-337/98 judgement, paras 44, 46 and the C-454/06 judgement, para 34). Hence, the fact that EU legislator allows for contract modifications below certain fixed threshold values, by principle, in any circumstances and without any obligation to foresee in advance the object, scope, or direction of such changes, reflects the approval for the above-mentioned view that such modifications have generally little impact on the contract as a whole. Nonetheless, also in this case a reservation has been made that such modifications must not render the contract substantially different and if, with respect to a given public procurement contract, this provisions serves as a legal basis for a number of modifications, their total value cannot exceed the fixed thresholds.

Another specifically defined legal basis allowing for modifications in public procurement contracts is founded on broader spectrum of conditions, but not in every case they cover restrictions on the value of services to be provided by the contractor under the modified contract. This is the case when it is permitted to introduce modifications envisaged in initial contract terms in specific review/option clauses (art. 72 (1)(a) of the Directive 2014/24/EU). Such clauses should define the scope of possible modifications and the conditions in which they can be introduced. These requirements apparently reflect the conclusions formulated in the judicature, concerning the equal treatment and transparency standards applicable to award procedures in order to safeguard the interest of bidders participating in the procedure as well as of those potentially interested in participation. This refers to the obligation to provide all interested entities, at the same time, with the same information on the object, scope, and directions of as well as on the circumstances justifying any future modification in the contract (see the C-469/99 judgement, paras 118, 120). Recital 111 of the preamble to the Directive 2014/24/EU contains a reservation that review or option clauses concerning envisaged modifications should not give contracting authorities "unlimited discretion".

Another two legal bases setting the framework for relevant contract modifications pertain to situations which have not been foreseen in initial contract terms. A situation mentioned in art. 72 (1) (b) of the Directive 2014/24/EU refers to the notion of additional works present in the provisions of former EU procurement law directive (Cf. art. 31 (4)(a) of the Directive 2004/18/EC). In the present legal situation this instrument, consisting in awarding a contract under negotiations procedure, without publication of a tender notice, for additional works/services not previously envisaged, but necessary to complete the initial contract for works or services, is substituted by relevant legal basis permitting contract modification (Horubski 2013). The scope of works/services and the contractor's remuneration in the situation where such previously unforeseen works/services become necessary to complete the contract will no longer be extended through formal award of a new contract (under a single-source procedure), but through modification of the contract. Whether a modification will be permitted in a given case depends on occurrence of the circumstances where the change of the initial contractor cannot be made for economic or technical reasons which would cause significant inconvenience or substantial duplication of costs for the contracting authority. A significant

inconvenience referred to above should be understood as pertaining to the costs or technical difficulties related to substitution of the present contractor with another one, and not to the necessity to conduct another award procedure. This requirement may be interpreted as giving primacy to economic effectiveness of a contract assessed from the perspective of the awarding entity over competition protection issues, which is very rare in legal regulations governing the public procurement system (Dzierżanowski 2015). This basic requirement is accompanied by a threshold amount restricting the permitted increase of contract price (up to 50% of the initial contract value) and a reservation that such modifications cannot be aimed at circumventing directive provisions. When the said requirements are met, the additional construction works or additional supplies may be entrusted to the present contractor without conducting a new procedure open to competition. This does not mean that the discussed legal basis for public procurement contract modifications can be perceived as ignoring the obligation on the part of the contracting authority to exercise due diligence in defining the scope of the contract. It certainly cannot be used to eliminate the consequences of intentional acts or negligence of the contracting authority as regards clear and precise description of the object of the contract (Dzierżanowski 2015). Modifications stemming from the failure by the contracting authority to comply with its obligations concerning adequate preparation of the procedure should be considered substantial modifications, as they favour the contracting authority's contractual partner as against other existing or possible competitors.

The second of the above-mentioned legal bases for modifications in public procurement contracts, which has not been foreseen in the initial contract terms, has some connection with relevant provisions of former directives, which opened a possibility for awarding contracts without publishing a tender notice due to circumstances beyond the contracting authority's control, justifying the prompt need to award or perform the contract (see art. 31 (1)(c) of the Directive 2004/18/EC). Recognising the need to enact a legal instrument that allows for necessary modifications in a contract in order to account for unforeseeable (despite due care and diligence exercised by the contracting authority—see the recital 109 of the preamble to the Directive 2014/24/EU) circumstances, also in this case the EU legislator additionally limits the possible modifications. This is done through reference to the obligation to respect the overall nature of the initial contract, underlying the discussed regulation as a whole. Moreover, it also introduces a maximum threshold of permitted increase of the contract price and repeats the restriction forbidding evasion of the directive provisions by introducing a number of such modifications in the same public procurement contract (art. 72 (1) (c) of the Directive 2014/24/EU).

The fact that EU legislator included in the regulation providing a legal framework for permitted contract modifications the provisions laying down the basis for introducing modifications in unforeseeable situations constitutes a deviation from the standard prevailing in the EU judicature, namely the transparency (predictability) of changes, yet it is a sign of recognition of actual problems strongly present in the practice of awarding public procurement contracts. At this point it is worth

reminding that in the light of the overall analysis of the EU judicature it cannot be concluded that it is necessary to predict the basis for every modification in order for such modification to be considered in compliance with basic EU legal principles. Such a requirement has been expressly defined for modifications resulting in a change of economic balance in favour of the contracting authority (see the C-469/99 judgement, para 37); consequently, satisfaction of the predictability requirements determines, as a matter of principles, the possibility to qualify the same as immaterial. However, there are examples in the judicature of unpredicted modifications which have been found permitted due to their immateriality (see the C-454/99 judgement, paras 60–64), and changes which have been actually foreseen (and are thus permitted) in the initial contract terms, but are considered substantial as they resulted in distortion of the results of the procedure and, consequently, of the competition in the award procedure (see the C-91/08 judgement, para 39). Rejection by the EU legislator of the concept of full predictability of modifications should be perceived as positive, as the regulation based on such a requirements would be too strict and formal. The predictability requirements ignores the fact it is the unpredictable affecting the contract performance reality that necessitates introduction of modifications in public procurement contracts. A regulation governing these issues cannot be in opposition to market reality, fast technological changes, economic crises, and specific nature of long-term contracts (Wieloński 2012).

Worth mentioning in the discussion on contract modification of specific types is also a characteristic feature of these regulations, namely the presence of the premises defining, in general, the scope of their application. They include such factors as: overall nature of a public procurement contract (art. 72 (1)(a-b) of the Directive 2014/24/EU), ban on using modifications to circumvent the directive (when a number of modifications is made during the contract term; art. 72 (1)(c-d) of the Directive 2014/24/EU), exclusion of subject-related modification, should they trigger off other substantial modifications of the contract (art. 72 (1)(d) of the Directive 2014/24/EU). The relevant notions, not clearly defined, coexist in the discussed regulation of categorised modifications permitted in public procurement contracts with very precisely defined requirements concerning e.g. maximum value thresholds for contract modification. The use of such unclear notions is necessary (see the opinion of the Advocate General J. Kokott in the case C-454/06, footnote 29 (para 49) of the opinion) due to very broad scope of the public procurement system, allowing for virtually unlimited number of possible situations justifying the need to modify a contract, also due to specific features of the object of a contract (Gola 2013). Their purpose is to seal the public procurement legal system. Through reference to practitioners interpreting law, they are intended to prevent breaches of basic principles of public procurement law or, in more general terms, of internal market freedoms, in situations where detailed premises permitting a modification are met. Undoubtedly, unclear notions make judicature more important as it becomes an area where the provisions using these notions gain contents, including more detailed (clearer) rules.

4 Conclusions

The findings show how important the regulations concerning admissibility of modifications in public procurement law are for the internal EU market, specifically as regards the provisions of supplies, services and works to public entities. Clear legal framework for modifying public procurement contracts must be considered a necessity ensuring competition on the public procurement market. Fair and competitive access to public procurement contracts is protected in two dimensions. First of all, limitation of freedom in modifying public procurement contracts through agreements between the parties to such contracts ensures fair competition of the contract awarding procedure preceding contract conclusion. Secondly, regulations limiting contract modifications prevent awarding new contracts outside public procurement system—through far-reaching modifications of objects of contracts or material extension of their scope. While the first of the above-mentioned dimensions of competition protection on public procurement market covers mainly economic operators who has taken part in a given contract award procedure, the second one affects all public procurement market participants who could be potentially interested in a given type of procurement contract. Introduction of the notion of contract modifications based on ECJ judicature into secondary EU legislation is also a sign of treating the phase of contract performance as a complex (multi-stage) process serving purposes and values that form the foundations of the EU public procurement law as a whole. For, the need to safeguard competition, equal treatment of economic operators and transparency on the public procurement market does not end with contract execution, but continues until the contract is performed in full.

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