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Amendments to Procurement Contracts: Estonian Law in the Light of the *Pressetext* Ruling

1. Introduction

The traditional approach divides the Estonian legal regulation of procurement contracts into two distinct parts: relationships preceding the award of procurement contracts are subject to national public law—to the Public Procurement Act¹ that is implementing EU procurement law—while following the award, procurement contracts are equalled to any private law contracts without substantial exceptions.²

However, by now a significant shift in the sphere of influence of European procurement law has occurred. Namely, recent decisions of the European Court of Justice—especially in the *Pressetext*³ and *Commission v. Germany*⁴ cases—have indicated that general principles of the EU procurement law also apply to private law relations and have, in case of a conflict, supremacy over the national private law.⁵ Therefore, even though (procurement) contract law falls within the competency of Member States, formation and application of national private law to procurement contracts must follow the general principles of procurement set out in procurement directives⁶ as well as the fundamental principles arising from the EC Treaty.⁷

¹ Riigihangete seadus. – RT I 2007, 15, 76; 2008, 14, 92 (in Estonian), hereinafter ‘the PPA’. The English text of the PPA is available but not updated at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXX0005&keel=en&pg=1&ptyyp=RT&tyyp=X&query=riigihangete>.

² PPA § 4 (1). The sole exceptions to this rule are the clauses restricting amendments to procurement contracts (§§ 69 (3) and (4) of the PPA) that will be studied in this article.

³ ECJ C-454/06, *Pressetext Nachrichtenagentur GmbH v. Austria*. – ECR 2008, p. I-4401.

⁴ ECJ C-503/04, *Commission of the European Communities v. Federal Republic of Germany*. – ECR 2007, p. I-6153.

⁵ *Commission v. Germany*, paragraphs 31, 32, 36. This rule is developed further by the new remedies’ directive—Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007—amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. – OJ L 335, 20.12.2007, pp. 31–46. In order to transpose the directive, the Estonian legislator has passed an amendment that entered into force on 1 July 2010—The Act Amending the Public Procurement Act and Related Acts (Riigihangete seaduse ja sellega seonudvate seaduste muutmise seadus). – RT I 2010, 20, 102 (in Estonian). See also S. Treumer. Towards an obligation to terminate contracts concluded in breach of the E.C. public procurement rules—the end of the status of concluded public contracts as sacred cows. – Public Procurement Law Review 2007/6, p. 376.

⁶ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. – OJ L 134, 30.04.2004, pp. 1–113; special edition in Estonian: Ch. 6, Vol. 7, pp. 19–131; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. – OJ L 134, 30.04.2004, pp. 114–240; special edition in Estonian: Ch. 6, Vol. 7, pp. 132–262.

⁷ On the interaction between the general principles of procurement and the EC Treaty, see D. Pachnou. The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece 2003, pp. 42–43.

The freedom to amend procurement contracts and restrictions applicable to that freedom provide a characteristic example of the interaction of national private law and EU-law-based public law norms in private law relations of procurement. On the one hand, the private law principle of freedom of contract, including the freedom to amend a contract, applies to procurement-contract-related relationships. A key characteristic of modern contract law is the concept of contract as a dynamic phenomenon—as opposed to the classical approach’s considering of contracts to be static.^{*8} The option to amend a contract may not, therefore, be considered merely a threat to the results of a properly conducted procurement but rather as an **inevitable need**. Amending provides for the flexible and dynamic contractual relations and as such (a) helps achieve the end result at a reasonable price, (b) promotes fairness in contractual relations^{*9}, and (c) avoids obstructions upon performance that may arise from an overly restrictive and rigid legal regime.^{*10} With regard to the above, the option to amend procurement contracts cannot be completely excluded.

On the other hand, an **unlimited** freedom to amend a procurement contract may easily conflict with the general principles of procurement (e.g., the principles of equal treatment and transparency). Excessive freedom to amend a procurement contract would also create a controversy with the significant public interest (mainly to avoid corruption) that is present on the national level.^{*11} That is why many countries, including Estonia^{*12}, have established rules for preventing arbitrary amendment of procurement contracts.^{*13}

Following, I will analyse the possible criteria for balancing the freedom of amendment of a procurement contract and the restrictions arising from public interests, in order for the regulation of contract amendments to be consistent with the EU general principles of procurement.

2. Exclusion of *de facto* new procurements

2.1. The *Presetext* ruling: Prohibition of material amendments

Under the general principles of procurement, a contracting body (authority or entity) is prohibited from amending a procurement contract if the amendment will essentially, or *de facto*, constitute a new award of a contract. If facing such a situation, the contracting body must, instead of making the amendment, award a new contract. The procurement directives do not specify when an amendment is prohibited in consequence of this rule. A communication of the European Commission^{*14} stipulates that a new contract must be awarded only in the event of a **material** amendment to a contract. The decision of the European Court of Justice in the *Presetext* ruling sheds some light on what kind of amendment is deemed to be significant enough to constitute a new procurement.^{*15}

The latter case involved amendments to the other contractual party, the price and the period of the contract concluded in 1994 between the Republic of Austria and the Austria Presse Agentur (APA) agency.^{*16} In 2004,

Available at http://www.nottingham.ac.uk/shared/shared_procurement/theses/Despina_Pachnou_thesis.pdf (28.02.2010); T. Ojasalu. Euroopa Ühenduse asutamislepingu põhivabadused ja neist tulenevad põhimõtted Euroopa Ühenduse riigihankeõiguses (The Fundamental Freedoms of the Treaty Establishing the European Community and the Principles of European Union Procurement Law arising Thereof). Master’s thesis. Supervised by Prof. A. Reenumägi. Tallinn 2006 (in Estonian).

^{*8} I. Kull. Lepinguvabaduse põhimõte Euroopa ühtlustavas tsiviilõiguses ja Eesti tsiviilõiguse reform (The Principle of Freedom of Contract in the Harmonising Civil Law and the Reform of Estonian Civil Law). – Riigikogu Toimetised 2000 (2), p. 4 (in Estonian).

^{*9} P. Vincent-Jones. The New Public Contracting. Regulation, Responsiveness, Relationality. Oxford University Press 2006, p. 356.

^{*10} J. Beermann. Administrative-Law-Like Obligations on Private(ized) Entities. – UCLA Law Review 2001–2002 (49), p. 1718.

^{*11} S. Arrowsmith. Judicial Review of Government Procurement: a Study of Contract as a Public Function. York University (Canada) 1987.

^{*12} Subsections 69 (3) and (4) of the PPA limit the freedom to amend procurement contracts.

^{*13} S. Arrowsmith. Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard. – International and Comparative Law Quarterly 2004 (53), pp. 44–45.

^{*14} Interpretative Communication of the Commission C (2007)6661 on the application of Community law on Public Procurement and Concessions to Institutionalised Public–Private Partnerships, p. 8. Available at http://ec.europa.eu/internal_market/publicprocurement/docs/pp/comm_2007_6661_et.pdf (27.02.2010).

^{*15} On a thorough analysis of the case, see A. Brown. When Do Changes to an Existing Public Contract Amount to the Award of a New Contract for the Purpose of the EU Procurement Rules? Guidance at last in case C-454/06. – Public Procurement Law Review 2008/6, pp. NA 253–267. The argumentation of the *Presetext* ruling was based on the previous procurement Directive (92/50/EEC) but the conclusions reached also apply according to Directive 2004/18/EC. See Brown, p. NA 267.

^{*16} In 2000 a new party—APA-OTS, a 100% APA owned affiliated company—joined the contract on APA’s side. APA-OTS was “integrated financially, organisationally and economically within APA”, had to conduct and manage its business on the basis of instructions from APA and was jointly and severally liable with APA. The price of the contract was amended three times: (a) the price was converted and rounded off in 2001 upon changeover to the euro (the rounding off resulted in a price reduction of 0.3%); the calculation of the indexation was decided to be based on the consumer price index calculated for 2001, not on the index for 1986 which was intended initially. At the same time, it was agreed to fixate prices, instead of indexation, for 2002–2004 which also resulted in a small reduction in prices for the contracting body; (c) in 2005 the reduction given on the price for some services, fixed at 15% in the basic agreement, was increased to 25%. The basic agreement was concluded

Pressetext Nachrichtenagentur GmbH, a competitor of APA, unsuccessfully proposed to conclude a procurement contract with the contracting body. *Pressetext* then contested the lawfulness of the amendments by referring to them as *de facto* awards. The *Bundesvergabamt* (the Federal Procurement Office of Austria), in turn, referred questions to the Court of Justice for a preliminary ruling, asking, *inter alia*, in which circumstances amendments to an existing procurement contract might be regarded as awards of new contract.

The ECJ noted that “[i]n order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract [...] when they are **materially different** in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract”¹⁷. Therefore, a new contract should be awarded instead of making an amendment to the initial one if the amendment is materially different from the initial contract and demonstrates the intention of the parties to renegotiate the essential terms of that contract. The court gave the following **examples** of when an **amendment** may be regarded as being **material**¹⁸:

- “an amendment [...] introduces conditions that [were] not part of the initial award procedure and that would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted”;
- “an amendment extends the scope of the contract considerably to encompass services not initially covered” or
- an amendment “changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the terms of the initial contract”.

Next, the issue of acceptability of amendments to procurement contracts is studied separately in cases of change to a contractual partner, the price and the term (time period) of a procurement contract.

2.2. Change concerning the other contracting party

As a rule, acceptance of a new contractual partner instead of the one to which the contract had initially been awarded must be regarded as constituting a change to one of the essential terms of the procurement contract, unless that substitution was provided for in the terms of the initial contract.¹⁹ However, in the *Pressetext* ruling, joining the procurement contract by a new party was not regarded as a material amendment to the contract, as the new contractual partner (APA-OTS) was an affiliated company of the initial one and wholly owned by it; the initial contract partner (APA) had the right to instruct the new partner, they had concluded a contract of profit and loss transfer, and the initial contractual partner together with the new partner remained jointly and severally liable before the contracting body.²⁰ The ECJ held that this was an internal reorganisation of the contractual partner, not a material amendment to the initial contract.

For the purposes of the Estonian private law, **joining in** obligation took place in the case of *Pressetext* (Law of Obligations Act²¹, hereinafter ‘LOA’, § 178 (1)), i.e., the initial contracting party assumed a joint and several obligation before the contracting body (§ 178 (4) and § 65 (1) of the LOA). Even though, as a result of joining in, a third person, who may not meet the qualification requirements, is joining the procurement contract, the initial—i.e., qualified—person will also remain liable. An absolute prohibition on joining in obligation would therefore not be justified, as it may create an unfounded prejudice to the constitutional freedom of enterprise as well as to the fundamental principle of free movement. However, a contractual obligation to notify the contracting body of such an intention in good time and with sufficient thoroughness would probably be justified.

As an exception, a contracting body may occasionally have a valid interest in refusing to accept the joining in obligation—for example, if personal performance by the initial party is warranted on account of the object or nature of the procurement contract. Joining in could also be excluded if the third party (intended new contracting party) fails to meet the mandatory qualification requirements set forth by the law, e.g., has participated in a criminal organisation or money laundering).²²

for an indefinite period, subject to a clause by which the parties waived the right to terminate the agreement until 31 December 1999. In 2005, the waiver of the right to terminate the contract was extended until 31 December 2008.

¹⁷ *Pressetext*, paragraph 34.

¹⁸ *Ibid.*, paragraphs 35–37. The ECJ has referred to the same rationale in later rulings: *Wall AG v. La ville de Francfort-sur-le-Main and Frankfurter Entsorgung- und Service (FES) GmbH*, case 91/08, – OJ C 148, 5.06.2010, p. 4–5, paragraphs 37–38; *European Commission v. Federal Republic of Germany*, case 160/08. – OJ C 161, 19.06.2010, p. 4–4, paragraph 99.

¹⁹ *Pressetext*, paragraph 40.

²⁰ *Ibid.*, paragraph 44.

²¹ *Võlaõigusseadus* – RT I 2001, 81, 487; 2010, 7, 30 (in Estonian).

²² The 54th recital in the preamble to the Directive 2004/17/EC (Note 13); the 43th recital in the preamble to and Article 45 (1) of Directive 2004/18/EC (Note 13).

The ECJ found that if a contracting party remains the same but goes through an internal reorganisation or a change concerning the holding of the company, this is not deemed to be a material amendment.^{*23} As an exception, internal reorganisations may be unacceptable if carried out for the purpose of circumventing Community rules governing public contracts.^{*24} For example, the court noted that if, in the circumstances of the *Presstext* ruling, the shares of the joined-in party were transferred to a third party during the currency of the procurement contract, there would be an amendment to the essential terms and hence an award of a new contract (unless the substitution of a party had been planned already during transfer of the relevant activities).^{*25} At times however, even internal reorganisations of legal persons may conflict with the general principles of procurement, for example, if the form of the legal person or the composition of shareholders had been a basis for qualification of tenderers. This may bring about a situation where “an amendment [...] introduces conditions that [were] not part of the initial award procedure and that would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted”^{*26}. The appearance of such circumstances, however, is probably unlikely and rare.

A situation is different when a procurement contract as a whole or a part of it is subject to transfer (§ 175 (1) and § 179 (1) of the LOA) to a third party—such assumption of procurement obligation(s) by a new contracting party must be distinguished from joining in and internal reorganisations. In the event of an assumption, as opposed to joining in, the new contracting party would be the only one liable for the procurement contract, with no joint and several liability of the initial contracting party. Under the Law of Obligations Act, a contracting body can preclude transfer of obligations by refusing to accept it (§ 175 (1) and § 179 (1) of the LOA). Such a refusal would also be justified with a view to the principle of equal treatment. However, the law does not provide an express duty to refuse from accepting such transfer of procurement obligations. Here it is essential to note that qualification of tenderers is an essential part of legal relations preceding any award of procurement contract. The contracting body must make sure that the economic and financial conditions as well as technical and professional competence of a tenderer meet the qualification requirements set forth in the contract notice (§ 39 (1) of the PPA). Some of the qualification requirements are set out by law and some are determined at the discretion of the contracting body (§§ 4, 38, and 40 of the PPA). The qualification procedure is one of the means for ensuring equal treatment of persons and transparency of procedures. These purposes cannot be achieved and the qualification requirements would become essentially meaningless if an unqualified person, who has or would have been refused the award of a contract initially, could later on manage to assume the contractual obligations. Such a situation would be unacceptable.^{*27} With regard to the above, any transfer of a procurement contract or a part of it to a third person must be considered unlawful, and in the event of such need (e.g., if it is impossible for the initially chosen contracting party to continue performance of the contract), a new contract must be awarded.

In conclusion, (a) **as a rule**, entering into procurement contract by a new contractual partner is a material amendment to the contract that the contracting body is prohibited from accepting without a new contract award; (b) **as an exception**, the change of the contractual partner is allowed if such a change had initially been provided for in the terms of procurement; (c) the ECJ has confirmed the lawfulness of joining in a procurement contract when the new contractual party was an affiliated company of the initial contracting party and in close relationship with it; (d) reorganisation or change in holding of a legal person who is a contracting party is presumably allowed, unless acceptance of the new situation in the procurement procedure would have enabled the admittance of other tenderers; and (e) assumption (transfer) of a procurement contract or a part of it is not in conformity with the general principles of the EU procurement law.

2.3. Change of price of a procurement contract

The price is a material term of any contract, and unless such option is specifically provided in the initial procurement conditions, amending the price may violate the principles of transparency and equal treatment of tenderers. However in *Presstext*, the ECJ did not consider the conversion into euros and rounding of the contract price to be a material change: “[T]he conversion of contract prices into euros during the course of the contract may be accompanied by an adjustment of their intrinsic amount without giving rise to a new award of a contract, provided that the adjustment is minimal and objectively justified; this is so where it tends to facilitate the performance of the contract—for example, by simplifying billing procedures.” Yet the court noted that if the rounded-off contract fees exceeded the level set forth by law, this would be regarded as a change in the actual value of the contract fee and it would be necessary to determine whether this constitutes a material

²³ *Presstext*, paragraph 51.

²⁴ *Ibid.*, paragraph 52.

²⁵ *Ibid.*, paragraph 47.

²⁶ *Ibid.*, paragraph 35.

²⁷ M. Lind. Avaliku ja erasektori institutsionaliseeritud partnerlusprojektid ja hankelepingute üleandmine (Institutionalised Partnership Projects of the Public and Private Sector and Transfer of Procurement Contracts). – *Juridica* 2009/6, p. 364 (in Estonian).

amendment.^{*28} Connecting the price with a new index in the *Presstext* case did not constitute a material amendment either, as an option for such amendment had been provided in the initial contract. The court did not consider the increase in the discount a material amendment because, *inter alia*, it applied for only some of the services and did not shift the economic balance of the contract in favour of the contractor.^{*29}

The issue of lawfulness of a price amendment relates to the third example of material amendments that the European Court of Justice provided: “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 that was not provided for in the terms of the initial contract”. In the case of *Presstext*, both of the price amendments were made **in favour of the contracting body** and were therefore, presumably, lawful changes. A more complicated problem occurs if and when the price is increased—i.e., the contractual balance shifts to the detriment of the contractual authority (entity).^{*30} Can a price increase be justified or is it always unacceptable as a material amendment?

An absolute increase in price may be justified when the increase takes place on conditions set forth prior to the awarding of the contract. If the exact terms and conditions of a price increase were disclosed in the procurement procedure, all the tenderers had equal opportunities in that regard, and any actual enforcement of such amendment option cannot be considered to be in conflict with the general principles of procurement. A simple factor justifying price increase is, for example, inflation.^{*31} Amendment of price according to previously determined terms and conditions may also be necessary if the fluctuation of expenditure on material and staff, the exact scope of the contract, or the delivery period cannot be predicted. On these occasions, a price amendment formula serves the purpose of a fair distribution of risk. Otherwise, the contracting party would have to include incidental expenses in its price offer^{*32}; however, the exclusion of expenditure subject to distribution of risk may, depending on the circumstances, cause delay in performance or even the insolvency of the contracting party. Fixed price tenders can be made on most occasions if performance of the contract takes place within a year or less. In this case, tenderers are able to pre-plan expenses, which is why price amendment formulas are usually not a part of short-term contracts.^{*33} However, there may be exceptions to this rule, for example, in the event of considerable fluctuations in material prices.^{*34} In the case of long-term contracts, the possibility of change in circumstances has to be taken into account, and the right to claim for adopting the contract with the changed circumstances should be set forth.^{*35} Considering the above, a price fluctuation formula turns a contract into a flexible legal instrument and should not be considered to be in contradiction with the EU general principles of procurement (the requirements of equal treatment and transparency). Thus, an increase in price may be justified if it follows an amendment scheme initially set forth in the procurement procedure.

Without a doubt, not all potential changes in circumstances are predictable when compiling a contract. The more complex and specific the contract and the longer the term of contract, the more difficult it is. If the contract provides no indexation or if it is insufficient in view of the actual economic situation and a need to increase the price arises, it will be more complicated to estimate the lawfulness of amendments to the procurement contract. The evaluation of lawfulness of amendments may in this case look into the relative balance of the parties' contractual obligations. Examples of changing the balance of a contract in favour of the other contracting party include increasing the price without increasing the corresponding obligations of the other contracting party, as well as supplementing PPP-agreements (agreements on public-private partnership projects) with generously priced obligations that would compensate for damages arising for the other contracting party in other parts of the project. In such cases, the contract no longer reflects the result of the initial procurement procedure^{*36} and favours corrupt relationships.

²⁸ *Presstext*, paragraphs 60, 61 and 63.

²⁹ *Ibid.*, paragraphs 85–86.

³⁰ In comparison, the possibility of a price increase is precluded, for example, by the law on state assets' transfer: a precondition justifying the increase in price is not to change the contract to the detriment of the state. Clause 49 (3) 1) of the State Assets Act (Riigivaraseadus. – RT I 2009, 57, 381; 2010, 17, 94 (in Estonian)).

³¹ P. Trepte. *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation*. Oxford University Press 2004, pp. 334–335.

³² *Presstext*, paragraph 335.

³³ An example from Estonian judicial practice: A Harju County Court judgment of 21 October 2008 in civil matter 2-08-1770 established a contracting body's right to withdraw from a short-term procurement contract when the other party to the procurement contract had refused to perform the contract for the tender price. On 6 August 2007, the contracting body (the Republic of Estonia through the Rescue Board) awarded a contract to a tenderer who notified on 30 August 2007 that it was unable to perform the contract at the offered price because the subcontractors had changed their price offer. The contract did not set forth a formula for price amendment. The contracting body had the right to withdraw from the contract and award the contract to another tenderer who had offered a higher price. The contracting body had the right to claim damages by way of compensation for the price difference from the initial tenderer.

³⁴ P. Trepte (Note 31), p. 335.

³⁵ I. Kull (Note 8), p. 50.

³⁶ S. Arrowsmith. *The Law of Public and Utilities Procurement*. London: Sweet & Maxwell 2005, p. 288.

If a price amendment serves the purpose of maintaining the balance of the contract^{*37}, an increase in price may be justified in a situation of general increase in market prices.^{*38} Also, an example of material amendment provided by the European Court of Justice in the *Pressetext* ruling should be taken into account—i.e., the amendment ‘extends the scope of the contract considerably, to encompass services not initially covered’.^{*39} This means that an amendment of a procurement contract is not justified if, as a result of the amendment, the balance of contractual obligations remains the same but the scope of the contract is extended considerably.^{*40}

From the case law of the ECJ and opinions published in literature, I have concluded the following: (a) a **price amendment** is presumed to be a **material (and therefore a prohibited) amendment**, except if an option for the amendment was provided in the initial contract; (b) a price reduction (a change in favour of the contracting body or entity) is presumably lawful; (c) any price increase (amendment to the detriment of the contracting body) must be examined to ascertain if the change is essential, *inter alia*, whether the balance and/or the scope of contract changed; and (d) in addition to the change in the absolute value of the contract price, the establishment of balance of contractual relations and change in the scope of the contract help determine an amendment’s lawfulness.

2.4. Change of procurement contract term

The *Pressetext* ruling also examined whether the conclusion of a new waiver of the right to terminate the procurement contract—basically, extension of the time limit—constitutes an award of a new procurement contract. The Court noted that “the practice of concluding a public services contract for an indefinite period is in itself at odds with the scheme and purpose of the Community rules governing public contracts. Such a practice might, over time, impede competition between potential service providers and hinder the application of the provisions of Community directives governing advertising of procedures for the award of public contracts”. On the other hand, the applicable Community law does not prohibit the conclusion of public services contract for an indefinite period or agreements obliging the parties to waive the right to terminate the contract.^{*41}

Evaluation of acceptability of an extension must in any specific case follow the general guidelines for evaluating an amendment: i.e., does the amendment bring about a ‘material’ change of the procurement contract. A time limit that, if it had been set in the initial procurement procedure, would have allowed the admittance of other tenderers is not permitted. For example, if the new contract period is significantly longer than the initial one, it is possible that competitors who would have been interested in the longer term contract decided not to compete for the initial contract period that was unreasonably short and thus not cost-efficient. Also, a change in the contract period must not affect the balance of the contract to the detriment of the contracting body, unless such conditions of change were already provided for in the initial terms of procurement.

The contract dealt with in the *Pressetext* ruling initially included a clause stipulating waiver of the right of termination, and it was established that regardless of the option of termination, the parties had no actual intention to terminate the contract. The court also found that the three-year time limit for waiver of the right of termination was not too long. From the above-stated findings, it was established that the new waiver of the right-of-termination clause did not restrict competition to the detriment of other potential tenderers. This conclusion, however, is valid only if the contract is not constantly supplemented with such provisions.^{*42}

Upon evaluating lawfulness of a change to the contract period, attention must be paid both to restrictions concerning contract changes and to possible restrictions that apply towards determining the initial contract period. An unjustifiably long contract period as well as changing a fixed term into an indefinite period may bring about a conflict with the rule of encouraging competition. The PPA or the procurement directives do not set specific time limits for procurement contracts, even though a maximum time limit for a framework contract is determined. As a rule, a framework contract may be awarded for no longer than four years, and a longer period

³⁷ Here, the ‘balance of contractual relations’ must not be applied in the meaning of applying the *clausula rebus sic stantibus* doctrine as provided in § 97 of the Estonian LOA. Instead, it is a wider concept. It may be that the balance of obligations arising from the procurement contract has changed and therefore justifies the increase in price even though no preconditions for applying § 97 of the LOA, which give contractual parties a private law right to claim for amendment of the contract, are present. And *vice versa*: even in a situation when § 97 of the LOA is applicable, the procurement law may mandate that a new contract should be awarded instead.

³⁸ A. Brown (Note 15), p. NA 262.

³⁹ *Pressetext*, paragraph 36.

⁴⁰ In comparison, under the French law, the lawfulness of an amendment of a procurement contract is established based on whether the amendment concerns the main financial arrangement or objective of the contract, how the new scope of the contract is determined and whether the new arrangement shifts the balance of contractual obligations. A 15% or larger change in price is deemed to be a material, and therefore an unacceptable, price amendment. See *Ville de Paris v. Societe Clear Channel France*. Conseil d’État, Section du Contentieux, 11/07/2008, 312354, Publié au recueil Lebon. Available at <http://www.legifrance.gouv.fr/rechJuriAdmin.do?reprise=true&page=1> (13.09.2009).

⁴¹ *Pressetext*, paragraph 73. In this aspect, it is interesting to compare the *Pressetext* ruling with a rationale in a later ECJ’s decision, namely *Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben*, case 451/08. – OJ C 134, 22.5.2010, p. 7–7, paragraphs 79 and 97.

⁴² *Pressetext*, paragraphs 74–79.

is allowed if objectively necessary and well grounded (§ 70 (1) of the PPA). The four-year time limit could be a yardstick for the determination of justified time limits for other procurement contracts. An appropriate term for long-term public service contracts according to legal literature is 3–5 years. A longer time limit must either be justified by economic or technical circumstances, or a new procurement contract must be awarded periodically, instead of a longer term.^{*43} In addition, the character of the specific procurement must be taken into consideration. Any (amended) period of a procurement contract should be justifiable in view of the tax issues, investments related to performance of the contract, and the complexity of the service provided.^{*44}

Public–private partnerships (PPP), which, depending on the nature of the partnership, may need a significantly longer term, may constitute an exception. In order to optimise the performance of a PPP, the contractual relationship should last at least for the amount of time necessary for the private partner to earn back the investments made on the basis of the partnership.^{*45} For example, an average term for PPPs concluded for design, construction, and building maintenance has been suggested as 25–30 years.^{*46}

In conclusion: when making amendments to the contract period of procurement, award of contracts for indefinite or unreasonably long periods of time should generally be avoided. The suggested contract period, together with any amendments, should generally not exceed 3–5 years, while longer terms may be justified for PPP-projects or in case of specific economic or technical conditions.

3. A critical analysis of the current Estonian regulation on amending procurement contracts

3.1. A prohibition stipulated in § 69 (4) of the Public Procurement Act

As was shown above, the general principles of EU procurement law exclude amendments to procurement contracts that constitute *de facto* new awards. In the same way, § 69 (4) of the Estonian Public Procurement Act prohibits amending a procurement contract if the purpose of the amendment could be achieved with the award of a new procurement contract instead.

Admittedly, the meaning of the said provision is expressed somewhat vaguely. Verbatim interpretation may lead to the conclusion that, instead of any amendment, a new contract should be awarded, as awarding of a new contract instead of amendment is always possible. Clearly, this could not be the actual purpose of the provision.^{*47} Therefore, it follows that § 69 (4) of the PPA should be given a narrower meaning and enforced according to the *Presetext* rule: any **material** amendments to a procurement contract are to be excluded, instead a new contract must be awarded.

As indicated above, material changes include any amendments establishing terms and conditions that had not been set forth in pre-contractual relations and that would have allowed admittance of other tenderers or acceptance of another tender.^{*48} An amendment to a procurement contract that extends the scope of the contract to a significant extent when compared to the initial scope^{*49} also constitutes an award of a new contract. Instead of such amendments, a new contract shall be awarded—as is stated in § 69 (4) of the PPA.

⁴³ S. E. Hjelmberg, P. S. Jakobsen, S. T. Poulsen. *Public Procurement Law—the EU Directive on Public Contracts*. Djof Publishing 2006, pp. 135–136; C. D. Tvarno. Does the Danish Interpretation of EC Public Procurement Law Prevent PPP? – *Public Procurement Law Review* 2010/2, p. 76.

⁴⁴ C. D. Tvarno (Note 43), p. 76.

⁴⁵ *Ibid.*, p. 86.

⁴⁶ C. D. Tvarno. *Public Private Partnership in the European Union*. – R. Nielsen, S. Treumer. *The New EU Public Procurement Directives*. Djof Publishing 2005, p. 191.

⁴⁷ The initial version of the draft Public Procurement Act contained, instead of the current restriction, a prohibition to make **amendments substantially separable** from the contract. The explanatory memorandum of the draft stated that a contracting body shall award a new contract if the planned amendments are **substantially separable** from the procurement contract. This wording, in the author's opinion, is in better conformity with the ban of *de facto* restriction under the EU procurement law. The purpose or content of this wording is not explained in the minutes of discussions regarding the draft or the explanatory memorandum. See minutes No. 1, 18.01.2007 of a meeting of Economic Affairs Committee of the *Riigikogu*, available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=070150002&login=proov&password=&system=ems&server=ragne11> (28.04.2010) (in Estonian). Still, the author assumes that the initial wording of the prohibition in conjunction with the applicable procurement law of the EU is justified.

⁴⁸ *Presetext*, paragraph 35.

⁴⁹ *Ibid.*, paragraph 36.

The principles of equal treatment and transparency require that a contracting body be bound by the terms and conditions disclosed in the procurement procedure until the end of performance of the procurement contract^{*50}, and that the scope of the procurement contract and the terms and conditions thereof be established explicitly.^{*51} If a contracting body wishes to retain the right to amend terms and conditions of a procurement contract after having chosen the contractual party, the procurement documents must expressly state both the option for as well as detailed rules of such amendment.^{*52} The framework set forth for making amendments should allow all persons interested in participating in that particular procurement, to be aware of the option from the start, so that the tenders would be submitted from equal positions.^{*53} For example, the European Commission has initiated infringement proceedings and brought a suit with the ECJ against Spain because, according to the Spanish law, a contracting body is allowed to amend material terms after awarding the procurement contract without having stipulated the amendment requirements clearly and expressly in the procurement documents. Such a legal regime for amending procurement contracts is not in line with the principles of equal treatment, non-discrimination, and transparency.^{*54} Before awarding the procurement contract, the contracting body may establish the circumstances and rules for amending contractual payment conditions. In this case, the contracting body follows the principle of equal treatment and transparency.^{*55} Otherwise, if contracting bodies were free to later amend the terms and conditions indicated in the contract notice, the amendment of contract would constitute a violation of the principles of transparency and equal treatment.^{*56}

The above leads to the conclusion that regardless of the restrictions concerning amendments as prescribed by the Estonian PPA, a procurement contract can be lawfully changed if such option has been, specifically enough, provided for prior to the award of the contract. Even when possible additional works or any new terms or conditions of a procurement contract cannot be stipulated in the initial contract, it may often be possible to determine the bases for amendments—a price amendment formula, for example.

Changes that a party is entitled to **claim** either under the law or according to the contract, have a greater probability of being justified—as opposed to changes that are based solely on the agreement (discretion) of the parties.^{*57} For example, § 97 of the LOA provides a claim to amend a contract in order to restore the original balance of obligations.^{*58} If the bases for amendments are provided for by law or in the contract, all of the tenderers are aware of the risks of amendment of the procurement contract beforehand, and objective amendment mechanisms reduce the risk of abuse of such a right. However, the right of claim arising from law or the contract does not have supremacy over the general principles of procurement. Thus, even a right to claim an amendment may not necessarily ensure the amendment's lawfulness. Rather, the existence of a claim is just one of the circumstances to be taken into account when evaluating an amendment's acceptability.

Even if a contract or law does not specifically provide for the right to amend the contract, changing contractual balance in favour of the contracting body may be acceptable without the need to award a new contract according to § 69 (4) of the PPA. Amendments to long-term, innovative, and complex contracts that restore the balance of the procurement contract may be justified: in such cases, the planning of contract performance is more complicated and awarding a new procurement contract may prove significantly more expensive.^{*59} This relates to another factor that may have relevance in evaluation of the justifiability of an amendment: namely, the **cause of amendment**. Many countries accept redistribution of risks to a certain extent if needed because of extraordinary or unforeseeable circumstances. That balances the need to prevent abuse of the freedom to amend and the need to continue the performance of contract.^{*60} If a change stems from an unforeseeable event or is justified in terms of public order, security, or public health, then according to an interpretive communication of the European Commission even an amendment of a material term is justified, regardless of its provision in the procurement documents.^{*61} However, the possibility of amending a procurement contract should not be limited to such situations.

⁵⁰ ECJ C-496/99 P, *Commission v. CAS Succhi di Frutta SpA.* – ECR 2004, p. I-3801, paragraph 115.

⁵¹ ECJ C-340/02, *Commission of the European Communities v. the Republic of France.* – ECR 2004, p. I-9845, paragraph 34.

⁵² Under Estonian law, there is a corresponding right to amend a contract in case of transfer of state property, except if the amendment “is in conflict with the requirements for public auction or selective tender”. See § 49 (3) 2) of the State Assets Act.

⁵³ *Succhi di Frutta*, paragraphs 110, 118 and 125.

⁵⁴ Public procurement: Commission refers Spain to Court of Justice over modification of contracts after award. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1752&format=HTML&aged=0&language=EN&guiLanguage=en> (23.01.2010).

⁵⁵ *Succhi di Frutta*, paragraph 126.

⁵⁶ *Ibid.*, paragraphs 120–121.

⁵⁷ S. Arrowsmith (Note 36), pp. 288, 290.

⁵⁸ For interaction of § 97 of the LOA and the norms of the PPA, see M. A. Simovart. *Lepingu muutmise nõue riigihankelepingu kohustuste vahekorra muutmise korral* (The Requirement of Amendment of Procurement Contract in the Event of Alteration of Balance of Contractual Obligations Arising from Procurement Contract). – *Juridica* 2008/4 (in Estonian).

⁵⁹ S. Arrowsmith (Note 36), p. 289.

⁶⁰ *Ibid.*

⁶¹ Interpretative communication of the Commission C (2007) 6661 (Note 14), pp. 8–9.

Upon establishment of the admissibility of an amendment, the conformity of the amendment to the **reasonable practice of the field of activity** may prove important. If amending contracts is an ordinary course of business in a specific field of activity, changes proposed to a procurement contract in the same field are more likely to be permissible. For example, it is a common practice to amend the terms of construction contracts and software development contracts.^{*62} Contracts regulating development and implementation of computer software may prove so complicated that it is impossible to prepare a detailed and comprehensive yet flexible contract.^{*63} Construction involves many risks that are often unforeseeable and impractical to regulate in the contract yet which bring about a significant change of circumstances making the amendment (supplementation) of the procurement contract inevitable.^{*64} Also, it is often not possible to foresee the specific preferences of the contracting body concerning construction parameters. It is a common practice for the contracting body to alter or specify the initial requirements of design or construction in the course of the design process. Such changes cause the increase of the expenses for the contractor.^{*65} In the case of an ordinary construction contract (i.e., when the person performing the procurement contract did not participate in the design process), the contractor should not have to incur the costs arising from changes to and/or shortcomings in the design, or of completing the design. Where long-term and complicated procurements are concerned, public–private partnerships have become more commonplace in many fields of activity^{*66}—this applies also to Estonia (although in not as large scale as in some other countries).^{*67} As a public–private partnership is mostly established to provide services over quite a long span of time, it should be able to adapt to changes in the economic, legal, and/or technical environment.^{*68} This, however, relies on the assumption that, at least in certain circumstances, terms and conditions of the contract may be amended.

In conclusion: If interpreted in combination with the *Presetext* ruling, § 69 (4) of the Public Procurement Act precludes those amendments to a procurement contract that constitute *de facto* awarding—i.e., material amendments. In addition to the criteria set forth in the *Presetext* ruling, the practices of the economic field concerned, the nature of the contract, and whether the amendment is made on the basis of a lawful claim of a party or solely by agreement of the parties could be taken into account when assessing lawfulness of an amendment.

3.2. Evaluation of restrictions stipulated in § 69 (3) of the Public Procurement Act

According to § 69 (3) of the Estonian Public Procurement Act, the contracting body may agree to amend a procurement contract only if the amendment (a) is due to objective circumstances that (b) could not have been anticipated by the contracting body during the awarding of the public contract and (c) if left unchanged, achievement of the purpose of the procurement contract would be jeopardised.

As mentioned above, this provision regulates a situation wherein amendment of a procurement contract actually is justified.^{*69} However, the current legislative solution, which establishes the presence of extraordinary circumstances as the **only** factual situation warranting amendments of procurement contracts, is not justified. The restrictions in the current wording of § 69 (3) of the PPA preclude practically all amendments that are common in the course of contract performance, except in the event of unforeseeable circumstances with a relatively significant effect (jeopardising achievement of the objective of the contract). Moreover, the situation must be unforeseeable for namely the contracting body.^{*70}

⁶² S. Arrowsmith (Note 36), pp. 288–292.

⁶³ K. E. Davis. *The Demand for Immutable Contracts: Another Look at the Law and Economics of Contract Modifications*. – New York University Law Review 2006 (81) 2, p. 505.

⁶⁴ J. Murdoch. *Construction Contracts: Law and Management*. Routledge 2000, pp. 83–84.

⁶⁵ M. L. Macaulay, L. E. Ramsey. *Construction and Procurement Law*. Sweet & Maxwell 2002, pp. 60–61, 64.

⁶⁶ Interpretative communication of the Commission C (2007) 6661 (Note 14), p. 2. See also M. Freeland. *Government by Contract – Functional Issues*. – P. Craig, R. Rawling. *Law and Administration in Europe*. Oxford University Press 2003, pp. 126, 133.

⁶⁷ M. Käerdi *et al.* *Ettevõtja õigus* (Right of Entrepreneur). – *Juridica* 2006/4, p. 231 (in Estonian); T. Saul. *Võistlev dialoog Euroopa Liidu ja Eesti riigihankeõiguses* (Competitive Dialogue in the European Union and Estonian Public Procurement Law). Master's thesis. University of Tartu 2007, p. 68 (in Estonian).

⁶⁸ Interpretative communication of the Commission C (2007) 6661 (Note 14), pp. 8–9.

⁶⁹ *Ibid.*, pp. 8–9.

⁷⁰ In the proceeding of the draft Public Procurement Act the meaning of the phrase “in case of leaving the procurement contract unchanged, the achievement of the objective set with the procurement contract would be fully or in material part in danger” was discussed, and it was explained that the situation shall be evaluated by the contracting body. Thus, the wording of the provision intended to provide the right of interpretation to the contracting body: the danger to the purpose of the procurement or the possibility to foresee the circumstances should not be evaluated objectively but according to the understanding of the contracting body. See minutes No. 1, 8.01.2007 of a meeting of Economic Affairs Committee of the *Riigikogu* (Note 48).

The current regulation lacks the flexibility needed for dynamic contractual relations, the unnecessary restrictions to the freedom to amend a contract hinder the normal functioning of contractual relations, and the refusal of a contracting body to make amendments to the contract may contradict with the general private law principle of good faith.^{*71} Moreover, enforcement of § 69 (3) of the PPA may easily create a conflict with the right to claim contract amendment under the private law *clausula rebus sic stantibus* doctrine as established in § 97 of the LOA.^{*72}

The purpose of the prohibition to amend contracts as stipulated in § 69 (3) of the PPA is not commented on in the explanatory memorandum of the draft law.^{*73} If one compares the restrictions provided for in § 69 (3) of the PPA with the general principles and objectives of EU procurement law, it appears that regulations of such a strict nature are not necessary. Even though the professional literature and judicial practice has occasionally indicated that a new procurement contract should **presumably** always be awarded^{*74} instead of amending an existing contract, that position cannot be deemed equivalent to an absolute prohibition on amendments. Rather, the presumption concerns the burden of proof: in case of a dispute, the contracting body must be able to prove that the amendment was justified and not in conflict with the general principles of procurement.

Based on the above, instead of or in addition to the rules currently in force under § 69 (3) of the Estonian Public Procurement Act, a more balanced solution for regulating amendments of procurement contracts would be based on the approach of the EU procurement law—i.e., that an amendment of a procurement contract is justified if (a) the option and the terms and conditions of amendment were disclosed in the course of the initial procurement procedure; (b) the amendment does not constitute a material change; or (c) the amendment is necessitated by an unforeseeable event or is justified in terms of public order, security, or public health.

4. Conclusions

The EU procurement law excludes material amendments to procurement contracts and obliges contracting bodies to award new contracts instead of such amendments. An amendment is considered material if it (a) brings into the procurement contract material terms and conditions that were absent during the procurement procedure and that, if present, would have allowed for the admission of tenders other than those initially admitted or for the award of the contract to a tenderer other than the now contracting party, (b) extends the scope of the procurement contract significantly, or (c) changes the economic balance of the contract to the detriment of the contracting body (in line with the *Presetext* ruling).

Subsection 69 (4) of the Estonian Public Procurement Act prohibits amendment of a procurement contract if a new contract may be awarded instead. The prohibition should be interpreted in the light of the *Presetext* ruling: i.e., the prohibition applies to material amendments only. In addition to the above-mentioned three examples indicated in the jurisprudence of the Court of Justice, material and immaterial amendments can be differentiated by establishing the following: the reasons for the amendment, whether a party has a right to claim for the amendment, whether the bases for the amendment were stipulated in the initial procurement contract, and whether the amendment is in harmony with the common practices in the relevant field of activity.

As set forth in § 69 (3) of the PPA, the grounds for the only acceptable amendment reflect a situation in which amendment of a contract really is warranted. However, EU procurement law does not restrict the possibility of contract amendments solely to situations that are in conformity with the preconditions set forth in § 69 (3) of the PPA. Such a restrictive regime for contract amendments fails to consider the principle of contractual freedom and the need for amendments in actual economic circumstances, and is, therefore, unjustified. Parties to a procurement contract must retain the right to amend the contract on other occasions as well, provided that to do so is not to award a *de facto* new contract.

⁷¹ In comparison, for example, the German regulation of amending procurement contracts expressly reflects the case law established in relation to construing the contents of the principle of good faith, and provides the person performing a construction related procurement contract with the right to request adjustment of construction contract in case of altered circumstances. – T. Ax. The new contract and contract award legislation in Germany following the adoption of the ordinance on the award of public contracts (Vergabeverordnung). – Public Procurement Law Review 2007/4, pp. NA 102–111.

⁷² M. A. Simovart (Note 58), pp. 219–229.

⁷³ Eelnõu 816 SE I, seletuskiri (Explanatory memorandum of draft 816 SE I). Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?ite mid=063210004&login=proov&password=&system=ems&server=ragne11> (in Estonian).

It should be pointed out that the explanatory memorandum is prepared for the initial draft of the act which restricts amending a procurement contract as follows: “A contracting body may only agree upon amendment of an awarded contract if the contract is amended, considering the balance of rights and obligations arising from the contract, in favour of the contracting body or if the amendment is necessary due to objective circumstances which could not be anticipated by the contracting body or the effect of which could not be assessed.”

⁷⁴ S. Arrowsmith (Note 36), pp. 289–290. See also the proposition of Advocate-General – Fennelly – April 2, 1998. *Walter Tögel v. Niederösterreichische Gebietskrankenkasse*. Case C-76/97. – ECR 1998, p. I-5357, paragraph 63.