

# Changes during performance A case for revising the extension of competition

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## § I. Introduction

The performance stage in public procurement is crucial for achieving projects awarded after going through numerous meticulous legal requirements. It is the moment when public money is exchanged against works, goods or services, and the fit between what has been promised and what is delivered is examined. It is the moment when all the uncertainty surrounding the contracting stage may materialise as risks to be borne by one of the parties. It is also the moment when public money is injected into the economy and thus procurement's contribution to economic growth materialises. For instance, public procurement currently amounts to ca. 16 % of the GDP in Europe,<sup>2</sup> which includes 14 % to 16 % in the United Kingdom,<sup>3</sup> 14 % in Belgium, 15 % in France and 21 % in the Netherlands (in 2013).<sup>4</sup>

Moreover, the performance stage in public procurement is the moment when public authorities and their contractors may want to depart from their original commitment. Between the moment when a public official dreams of opening a magnificent bridge or a state-of-the-art hospital and the actual delivery of this project, with the management of road works and tolls or intakes and discharges of patients, years may pass, budgets may soar. For instance, the Jubilee Line extension in the London Underground was delivered

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(2) [http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/index\\_en.htm](http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/index_en.htm).

(3) <https://www.gov.uk/government/publications/2010-to-2015-government-policy-sustainable-development/2010-to-2015-government-policy-sustainable-development>.

(4) <http://www.oecd-ilibrary.org/docserver/download/4215081ec042.pdf?expires=1454953490&id=id&accname=guest&checksum=CE9FC9A3687D90A21988CB5807128B24>.

two years late and cost £1.4bn more than the original estimates.<sup>5</sup> One option could be to fine-tune the legal procedures available for procurers to tender works, supplies and services. Another option is to understand how public procurement is actually performed and what causes these delays and over-budgets: for instance, public authorities may alter their requirements for a hospital and ask for a new floor with new services during the construction phase. In another instance, private contractors may seek to obtain a different use for spaces in an urban redevelopment project, ensuring that more commercial stores will bring additional profit to the project.

Until recently, the EU Directives mentioned very little about the actual performance of public contracts as economic transactions. Indeed, the role of the law in fostering or hindering competition when public bodies ask economic actors to provide them with goods, works or services currently deeply divides legal scholarship. On the one hand, proponents of an extended reach for competition, such as Albert Sanchez-Graells, argue that European and domestic public procurement distorts competition and the normal functioning of the markets as both private actors and/or public authorities may collude among themselves.<sup>6</sup> On the other hand, Sue Arrowsmith and Peter Kunzlik contend that public procurement directives have limited purposes, such as prohibiting discrimination, implementing transparency and removing barriers to access to markets. Other purposes, such as providing value for money or defining shared standards for goods and services, are not included in the powers of the EU, and should thus only be pursued by Member States.<sup>7</sup> Therefore these discussions are closely connected to debates about the freedom that Member States retain to decide the objectives that they want to pursue with the purchasing and economic powers that are attached to government contracts (such as developing their own industrial policy, value for money, etc.).

The new EU Directive 2014/24 brings arguments supporting both sides of this discussion.<sup>8</sup> Yet, this debate does not stop with the award phase of procurement. Under the 2004 EU Directives, this part of the contractual relationship was very much left as falling under the sole remit of the Member States,

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(5) HM Treasury, *Public Private Partnerships: The Government Approach*, 2000, p. 18.

(6) A. SANCHEZ GRAELLS, *Public Procurement and the EU Competition Rules* (Hart, 2011).

(7) S. ARROWSMITH, "The purpose of the EU procurement directives: Ends, means, and the implications for national regulatory space for commercial and horizontal procurement policies", (2011-12) *Cambridge Yearbook of European Legl Studies* pp. 1-47. P. KUNZLIK, "Neoliberalism and the European Public Procurement Regime", (2013) *Cambridge Yearbook of European Legal Studies* pp. 283-356.

(8) For a restatement of their respective theses after the 2014 Directives see A. SANCHEZ GRAELLS, *Public Procurement and the EU Competition Rules* (Oxford: Bloomsbury, 2015, 2<sup>nd</sup> edn) esp. author's note to the second edition, and P. KUNZLIK, "The 2014 public procurement package – One-step forward and two back for green and social procurement ?", contribution in this edited collection (pp. 139-196).

leaving them to organise performance as they wished.<sup>9</sup> The ECJ, however, has highlighted that some changes triggered the re-opening of the contract to a competitive procedure,<sup>10</sup> so that awarding entities do not seek to circumvent the application of the strict award procedures by changing key features such as the price, duration, subject-matter etc. of the contract once the private contractor has been selected. Allowing such bypassing in bad faith would deprive the award process requirements of their efficiency.<sup>11</sup>

The new EU Directive seeks to consolidate the ECJ case law on this very point.<sup>12</sup> The assumption underlying article 72 Directive 2014/24, the provision dealing with changes during the performance of public contracts, is thus that public authorities and private contractors are likely to collude and seek to stray away from a contract resulting from the competition, transparency and non-discrimination rules set by the EU Directives for the procurement process.<sup>13</sup> The solution reached in article 72 Directive 2014/24 is particularly ambiguous about cases when changes trigger a re-tendering requirement. The extent to which public authorities can be trusted with seeking adaptations to their contracts without creating undue advantages for their private contractors is uncertain. However, this paper argues that renegotiations during contractual performance need to be seen as normal in the ordinary life of a contract and should not be over-regulated. Discretion, cooperation and control between the contracting parties should be given more careful attention. Therefore, this paper argues that competition should be limited to exceptional cases. Otherwise, competition causes more trouble than is reasonable for balancing the economic interests and public interests involved in public procurement. With this departure point in mind, cooperation between the European Union and the Member States regarding regulating the performance stage with appropriate techniques should be organised according to the principles of subsidiarity.

After identifying the specificities connected to the *Presstext* case law in § 2, this paper explains the ambiguity in the solution provided in Article 72 (§ 3).

(9) There were only very limited exceptions to this silence in the EU Directive prior to 2014: e.g., Art. 31 (4) 2004 Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

(10) *Presstext Nachrichtenagentur GmbH v Austria* (C-454/06) [2008] E.C.R. I-4401 (ECJ).

(11) M. COMBA, “Principles of EU law relevant to the performance of public contracts”, in M. TRYBUS, R. CARANTA and G. EDELSTAM (eds), *EU Public Contract Law – Public Procurement and Beyond* (Bruylant, 2014), pp. 317-337, spec. p. 322.

(12) Recital [2] Directive 2014/24 on public procurement [2014] OJ L094/65.

(13) This paper only deals with article 72 Directive 2014/24. Article 90 Directive 2014/23 on the award of concession contracts [2014] OJ L094/1 and article 89 Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors [2014] OJ L 94/243 are nearly a cut and paste of article 72, with only a little difference that has no relevance for the discussions in this paper.

It goes on to discuss the limits of competition for policing contractual changes during the contract's lifetime in § 4, mapping the ground for § 5 to explore alternative ways to achieve a better understanding of contractual changes. The Conclusion suggests that Article 72 relies on a distorted notion of competition: a more sophisticated toolbox for assessing when contracting authorities can usefully resort to competition needs to be carefully developed in the future in order to develop a genuine European market for public contracts.

## **§2. Extending competition to open the market to competitors**

The procurement stage and performance stage maintain a very complex relationship. They are connected; they are also miles apart. They are connected because the efficient and correct performance of a contract is only possible if the contract is well thought through during the procurement phase. They are connected because all the efforts invested in awarding and getting the most economically advantageous bid are only worthwhile if the performance confirms the promises of the contract. Efficiency is thus a feature common to both stages.

However, the procurement and performance stages are also miles apart. Procurement requires the public authority to select its contracting party from among a pool of competing bids, while the performance stage is, or at least can be, about developing a working relationship and cooperation between the public authority and the private contractor in order to ensure the success of a project to the benefit of its users. Procurement and performance are also miles apart because the procurement stage is mainly an “abstract thinking” exercise (by lawyers, by engineers, by architects, by officials etc.) while the performance stage involves a large portion of “concrete doing” (constructing, delivering, providing, addressing concrete obstacles etc.).

The thinking exercise in the procurement process may be focused on securing a contract at a given time, with limited visibility on the future of this contract once the contract is agreed. In the concrete doing of the performance stage, strict adherence to the contractual terms may be an option, in as much as strict adherence and perfect control over compliance can ever be possible. Another option could include on-going adaptations: regular variations following discussions between the parties may be accepted as natural and ordinary features of contractual life. The gap between procurement and performance is often clear as different teams are responsible for the procurement stage and the performance of the contract, especially on the public authority side. In short, the procurement phase is very much governed by

competition, transparency and non-discrimination; the performance phase brings into the picture other logics, especially of cooperation and control between the public party and its contracting partners. How can the two stages of procurement and performance be best articulated?

Historically, the relevant EU Directives focus on the procurement stage and leave the performance stage very much unchartered, with some limited exceptions.<sup>14</sup> However, this has led to difficulties: in its *Presstext* decision decided in 2008, the European Court of Justice – as it was then – mapped the limits of contractual changes in the performance stage of public contracts<sup>15</sup> and decided that competition and the general principles of EU law (transparency and non-discrimination especially) applied when contractual changes expressed parties' intention to renegotiate contracts.<sup>16</sup> This ECJ decision is very pedagogic as it explains the justification for this solution, defines “material” modifications and illustrates this concept before applying it in a sophisticated way to the circumstances of the cases. Yet, uncertainty and questions remained around the crucial notion of “material changes”.

The facts of this case arose in 1994, when, prior to joining the European Union, Austria signed a contract with APA, the main Austrian operator of new agencies. This contract allowed the Austrian government to access a range of services provided by APA (such as historical information, previous press releases and use of services allowing the dissemination of press releases). The contract was for an unlimited time-period. Over time, three types of changes were made to the contract: changes to the contracting party, changes to the price and changes to the terms related to the duration. Due to all these changes, a newcomer in the media landscape, *Presstext*, challenged the contract and sought to have it retendered. In its preliminary ruling, the ECJ distinguishes between substantial (or material) and non-substantial (or non-material) changes for the first time. Parties may bring non-substantial changes to their contracts without any duty to retender the contracts. When substantial changes are carried out, however, a duty to reopen the tendering process arises.

The ECJ starts by connecting amendments to contracts with the need to ensure that this technique is not used to circumvent the transparency of procedures and equal treatment of tenderers required during the tendering process. Therefore any amendments which would make the contract “*materially different in character from the original contract and, therefore, such as to*

(14) E.g.: Art. 31 (4) 2004 Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

(15) *Presstext Nachrichtenagentur GmbH v Austria* (C-454/06) [2008] E.C.R. I-4401 (ECJ).

(16) *Presstext Nachrichtenagentur GmbH v Austria* (C-454/06) [2008] E.C.R. I-4401 (ECJ).

*demonstrate the intention of the parties to renegotiate the essential terms of that contract*” would be considered as a new awarding of the contract.<sup>17</sup>

The ECJ then illustrates such “material” amendments with three cases. A first type of “material” change is an amendment which “*introduces conditions which, had they been part of the initial award procedure, 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*”.<sup>18</sup> A second illustration of a “material” amendment is an amendment “*extend[ing] the scope of the contract considerably to encompass services not initially covered*”.<sup>19</sup> A third illustration is the case of an amendment “*chang[ing] 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*”.<sup>20</sup>

In these illustrations of material changes, the ECJ tries to balance two approaches. On the one hand, it seeks to pinpoint objective elements that could help demonstrate that there has been an intention to renegotiate the contract: i.e. potential different economic partners available, changes in the subject-matter of the contract, changes in the economic balance of a contract. The subjective intention of the parties, difficult to grasp clearly from outside, is thus made objective if one of these three cases happens: then, a different contract exists and a new tendering process is required. On the other hand, the ECJ seeks to give some leeway about how its approach needs to be interpreted: the three cases mentioned are only illustrations, some concepts need to be interpreted according to the circumstances of each case (e.g. “considerably”, retrospective construction of the potential competition, “economic balance” etc.).

In this vein, the ECJ shows a flexible approach to interpreting the intention of parties to renegotiate contracts when it looks at the three types of changes arising in the *Pressetext* case: substitution of the contracting party, changes in the price and changes to the termination clause.

In relation to the substitution of the contracting party, the ECJ finds that the arrangement under the specific case circumstances (including that the new contracting party is a wholly-owned subsidiary of the initial contracting party and that the initial contracting partners remain jointly and severally liable with the new contracting party) amounts only to an internal re-organisation of the contracting party. There is thus no fundamental modification of the initial contract.<sup>21</sup> The ECJ here shows a benevolent approach, looking at

(17) *Pressetext*, at [34].

(18) At [35].

(19) At [36].

(20) At [37].

(21) At [45].

the economic reality of the substitution and not at the changes in the legal entities.

In relation to changes in the price, the ECJ sets out that “*the price is an important condition of a public contract*”.<sup>22</sup> In this case, the changes (conversion of prices to euros without changing their intrinsic amount; secondly the conversion of prices to euros entailing a small reduction in their intrinsic amount and, thirdly, the reformulation of a price indexation clause) are very small and should not be considered material changes.

In relation to the changes to the termination clause, and especially the waiving of the right to terminate the contract for a period of three years, the ECJ considers again that in the circumstances of the case (i.e. the absence of real risks of termination), the changes do not amount to a new award of the contract.<sup>23</sup>

The *Pressetext* solution, however, needs to be explained within the specificities of the case and the limits of the ECJ’s jurisdiction. The ECJ cannot invent rules and principles out of the blue and had to deal with a problematic situation where the risks of limiting competition due to the specific circumstances of the case were real due to the unlimited duration of the contract. The EU law applicable at the time did not formally forbid such unlimited-time contracts, so the ECJ needed to accept the principle of their existence.<sup>24</sup> It could only try to ensure that extensions of contracts or changes in the duration of contracts did not develop into means of obstructing competition. Therefore the ECJ sought to place its decisions within the general objectives of EU public procurement; i.e. “*to ensure the free movement of services and the opening-up to undistorted competition in all the Member States*”.<sup>25</sup> Therefore, the general principles of transparency, non-discrimination and equal treatment needed to be applied.

In this decision, the ECJ opts for a careful balancing act between the economic and legal dimensions of changes. It focuses on the economic effect of the changes on the potential distortion of competition; it does not look at the legal processes leading up to these changes. Yet it focuses on individual changes, one at a time, and does not bundle them in order to compare the

(22) At [59].

(23) At [80].

(24) At [73] “*First of all, as regards the conclusion of a new waiver of the right to terminate the contract during the period of validity of a contract concluded for an indefinite period, the Court observes 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.*”

(25) At [31].

overall initial contract with the current overall contract. The discussion of the substitution and changes in the contracting partner also seems to blur the distinction between the legal and economic aspects of changes. Indeed, the ECJ renders equivalent to material changes economic modifications in shareholding which would not amount to legal changes,<sup>26</sup> while it discounts as material changes the changes in the legal personality when the new contracting party retains a strong economic link with the initial contractor.<sup>27</sup>

Part of the scholarship welcomed the use of flexible notions such as “economic balance” because it left scope for the judge to assess whether a change was material, i.e. if there had been an intention to substitute a new contract for the initial one under the specific circumstances of the case.<sup>28</sup> Albeit drafted in a pedagogic fashion, the *Presstext* decision triggered a range of practical questions. For instance, the guidelines given *obiter dictum* on substitution of the contracting party through shareholding selling mentioned above were not clear and logical.<sup>29</sup> Questions were also raised about the practical implementation of a new tendering process: when does the new procedure start? How it should be done? What needs to be retendered?<sup>30</sup> The ECJ leaves several legal aspects of the changes unexplored. It does not take into account the reasons why these changes happen (unforeseen circumstances, recklessness of one of the parties, regulatory changes etc.). It does not take into account how the change is carried out: by unilateral decision of the public authority or by consensus. It does not look at the time when the change happens: a change two months after the award seems to require the same treatment as a change fifteen years later etc.

In its subsequent decisions, the ECJ maintained the key principles enounced in *Presstext*, extended them in the case of concessions and specified that changing a sub-contractor might amount to substantial modifications if the identity of the sub-contractor was a determining factor in the contract being awarded to the bidder.<sup>31</sup> However, the practical questions related to the application of *Presstext* remained and clarification of the legal principles was needed. The EU proposals to reform procurement attempted to do so.

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(26) At [47]-[51].

(27) At [44]-[45].

(28) H. HOEPFNER, “La modification des contrats de la commande publique à l’épreuve du droit communautaire”, *RFDA*, 2011, p. 98.

(29) *Ibid.*, spec. para 29.

(30) J.M. HELBY and P. HEIJNSBROEK, “Wezenlijke wijzigingen na Europese aanbesteding”, *NtEr*, april 2012, nr. 3, pp. 94-106.

(31) *Wall AG v Stadt Frankfurt am Main and Frankfurter Entsorgungs- und Service (FES) GmbH* (C-91/08) E.C.R. 2010 I-02815 (ECJ).



### §3. Searching for principles: competition or stability?

The EU proposal related to contractual change did not look for innovation. One of the main aims of the reform was to address “*a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union*”.<sup>32</sup> It mainly looked at the available case law and sought to codify it in order to provide legal certainty for economic actors.<sup>33</sup> Article 72 retains the marks of this approach in its wording but the solution provided is long-winded. Here, it is worth reproducing the structure of Article 72, divided into five paragraphs, before discussing the ambiguities that it causes to arise at the level of principles.

Paragraph (1) opens the provision with this statement: “[c]ontracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases”.<sup>34</sup> It then proceeds by listing five cases, namely:

- a) when the initial procurement documents provide for modifications in clear, precise and unequivocal review clauses, which may include price revision clauses or options;
- b) when additional works, services or supplies by the original contractor have become necessary and were not included in the initial procurement, provided technical and economic requirements are met;
- c) in the case of unforeseen circumstances provided that they could not have been foreseen by a diligent contracting authority and provided that the increase in price is not higher than 50 % of the value of the original contract and that the overall nature of the contract is not altered;
- d) in the case of substitution of the initial contractor by a new contractor, 1/ when the contract provides for the change or 2/ after corporate restructuring provides that the new contractor meets the criteria for qualitative selection initially established or 3/ when the contracting authority takes over from the initial contractor;
- e) for modifications, regardless of their value, that are not substantial. Substantial modifications are defined in paragraph (4).

Paragraph (2) adds a sixth case to this list, “small-scale” (*de minimis*) modifications; namely, when the modification in the contract value is below the thresholds triggering the application of the EU procurement directives and is

(32) Recital [2] Directive 2014/24 on public procurement [2014] OJ L094/65.

(33) Recital [2] Directive 2014/24.

(34) In the remainder of this paper, framework agreements will not be discussed.

*“10 % of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts”.*

Paragraph (3) explains how increases in price need to be calculated.

Paragraph (4) defines “substantial change” as a modification which “*renders the contract [...] materially different in character from the one initially concluded*”. It states that at least four situations will be considered as such, building strongly on the previous *Presstext* case law. These are:

- a) modifications which would have altered competition in the initial procurement procedure (“*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*”);
- b) modifications of the economic balance of the contract;
- c) modifications extending the scope of the contract considerably;
- d) modifications of the initial contractor which do not fall within the cases provided for in article 72 paragraph (1)(d).

Paragraph (5) states that, in all other cases not listed in paragraphs (1) and (2), a new procurement competition needs to be organised.

Article 73 Directive 2014/24 provides that the domestic legal system needs to make it possible to terminate the contract in cases of substantial modifications requiring a new tendering procedure to be opened. If a change is challenged and the court finds that it breaches the EU Directive, the contract may be declared “ineffective”.

Under Article 72, two sets of ideas regarding the principles that should govern changes in the contractual performance cohabit uneasily. On the one hand, Article 72 provides for a range of cases insulated from competition and re-tendering despite changes being made to the contract: public authorities and economic actors keep their freedom to agree on contractual changes. On the other hand, it requires new tendering when changes are introduced to the contract. It limits the contractual freedom of public authorities and economic actors by imposing a situation in which competition frames how contractual changes are organised. The overall structure of Article 72 is particularly unhelpful as it suggests two possible readings for the principles contained in Article 72.

In the first reading of Article 72, the principle is that modifications to contracts during performance are possible without a new tendering procedure, the exception being “substantial modifications”, which require new tendering. This reading could be justified by the fact that the first paragraph starts with the lines “[c]ontracts [...] may be modified without a new procurement

*procedure*". However, this reading is problematic in two ways. First, this very line continues with "*in any of the following cases*", which would suggest that the principle is limited to the very clearly and technically developed five cases mentioned in paragraph (1) (and the explicit addition of paragraph (2)). If the principle was that in general modifications do not require new tendering procedures, why is this not simply written down and why is a list of cases added? Secondly, paragraph (5) seems to set out a different principle in the form of a default provision, namely "[t]hat a new procurement [...] shall be required for other modifications of the provisions of a public contract [...] during its term than those provided under paragraphs 1 and 2". This seems to relegate paragraph (1) to a mere list of exceptions to the principle, following which any modification requires a retendering process. However, Treumer argues that the list in paragraph (1) should be read as illustrative and that, despite the wording, room for other exceptions to paragraph (5) exists.<sup>35</sup>

In the second reading of Article 72, the principle is that there is a need for re-tendering when there are changes, as specified by paragraph (5). According to some authors, the general rule contained in Article 72 means that "*it is forbidden to make a substantial modification to a contract*".<sup>36</sup> Paragraphs (1) and (2) contain six exceptions to this principle: six cases when modifications do not require starting a competitive procedure. Against this reading, one can argue that the definition of "substantial modification" is then not required because it would be any cases other than the ones listed in paragraphs (1)(a) to (d) and (2). A benevolent reading would then be to suggest that paragraph (4) is only a reminder of *Presstext* as the origin of Article 72, providing a list of examples of what may be considered as substantial changes. This list in paragraph (4) is thus not expressed in an exhaustive way.

This discussion shows the inconsistency of the drafting of Article 72 because the directing principle is not clearly formulated. There are two lists of circumstances, one being clearly illustrative (paragraph (4)) and the other less so (paragraph (1)). There are two default provisions: one in paragraph (1)(e), catching the cases which are not encompassed by paragraph (4), "substantial changes" and illustrations, and the other in paragraph (5), catching up all the cases not encompassed by paragraphs (1) and (2). Such complexity and indecisiveness thwart the aim of Recital [2] to consolidate case law and bring legal certainty into public procurement.

Parties will face changes which do not fall neatly within the cases of paragraph (1)(a) to (d) and paragraph (2) or within the definition of "substantial modification" in paragraph (4). How do they act, then, when they arrive

(35) S. TREUMER, "Contract changes and the duty to retender under the new EU public procurement directive" (2014) P.P.L.R., pp. 148-155, spec. p. 148.

(36) J. BRODEC and V. JANEČEK, "How does the substantial modification of a public contract affect its legal regime?" (2015) P.P.L.R., pp. 90-105, spec. p. 94.

within this grey area? Is a duty to retender applicable? Recital [107] may give part of the answer as it explains that a new procurement procedure is required for changes demonstrating “*the parties’ intention to renegotiate essential terms of conditions of [the] contract*”. However, such an intention can be difficult to demonstrate, while the aim of Article 72 had been to clarify when new tendering was required.

Circumstances falling into this grey zone would, for instance, include modifications aiming to address breaches of contract,<sup>37</sup> modifications to sub-contracts or aggregation of changes over time. Successive change is only mentioned in relation to successive increases in price and not in relation to a variety of other changes (such as in the case of *Presstext*). One can think of a small-scale increase in price and/or the adoption of new techniques and/or changes according to contractual terms and/or changes to the contracting partner within the scope of Article 72 paragraph (1)(d) that may all in all change the overall contractual performance, alter the essential contractual conditions and make it different from what was initially negotiated. The system included in Article 72 seems to suggest that the changes should not alter the overall substance of the contract. Indeed, this condition is mentioned at least twice as a requirement for changes to fall within the scope of Article 72 paragraph (1).

That these two readings coexist mostly shows the ambiguity of Article 72 regarding the principles to be applied in cases of changes during contractual performance. The EU Commission and the Member States had conflicting interests: Article 72 is a composite of their various positions.<sup>38</sup> The European Commission and interested competitors will find arguments in Article 72 to push for extending competition during the contractual performance, while EU Member States and public contracting authorities will have a large pool of interpretative resources to argue that no duty to retender exists whilst changes are carried out. Clarification is thus needed. Domestic courts, the European Commission and the European courts will need to flesh out Article 72. Future litigation will help to map the applicable principles. Some attention to the limits of competition may be useful before we turn, in § 5, to discussing a potential alternative to competition and look at roads towards a more balanced assessment of the need to use competition to police changes during contractual performance.

(37) TREUMER, see above (n 35) spec. p. 149.

(38) H. HOEPFFNER, “L’exécution des marchés publics et des concessions saisie par la concurrence: requiem pour la mutabilité des contrats administratifs de la commande publique”, *Contrats et Marchés publics* (France), n° 6, June 2014, dossier 16.

## §4. Troubles ahead when extending competition

The implementation of Article 72 Directive 2014/24 will cause trouble because its linchpin – “competition” – is replete with difficulties. Adding a competition exercise to an already uncertain contractual environment may have costs. Although the costs of renegotiations have been recognised in economic theories, especially in transaction costs theory, for a long time, empirical research from an economic perspective is limited on these issues.<sup>39</sup> Thorough concrete information about the benefits and/or costs of introducing competition in the performance stage was thus not available to the European Commission, the Member States or the pressure groups answering the European Commission’s consultation when Article 72 was discussed. Against this background of limited information, this section surveys some of the most obvious issues likely to arise from the extension of competition during the performance stage. Addressing problems with Article 72 goes beyond clarifying its drafting. Further steps in implementation, interpretation, application and advising on Article 72 need to map carefully how competition relates to some of the key features that contractual changes require.<sup>40</sup>

### I. Comparing competition

The starting point in *Presstext* was that public procurement directives seek to increase competition in the internal market. Therefore, *Presstext* required a new award when any practice carried out during contractual performance would have had an impact on the potential competition during the bidding process. This clearly connected competition in the tendering process with competition in the performance stage, meaning that the objectives of the Directive were complied with. However, comparing competition when the initial contract was agreed with the competition that could have been possible with the modified contract is not easily empirically tested: how can the past be reconstructed?

(39) H.-J. PRIESS and S. SAUSSIER, “Re-tendering a contract for breach of procurement rules or changes to contract – Dialogue”, in G. PIGA and S. TREUMER (eds), *The Applied Law and Economics of Public Procurement* (Abingdon: Routledge, 2013) pp. 147-162, spec. p. 151 and p. 153. For one example of limited research on renegotiations, see: J. BEUVE, J. DE BRUX and S. SAUSSIER, “Renegotiations, discretion and contract renewals – An empirical analysis of public-private agreements”, 2014, available at: [http://chaire-eppp.org/files\\_chaire/beuve\\_et\\_al\\_wp\\_2014\\_0.pdf](http://chaire-eppp.org/files_chaire/beuve_et_al_wp_2014_0.pdf).

(40) For a full technical discussion of the areas where doubts arise: see S. ARROWSMITH, *The Law of Public and Utilities Procurement* (Sweet and Maxwell, 2014, 3<sup>rd</sup> ed) paragraph 6-267 ff.

Judges may be used to make hypotheses in public procurement, such as, for instance, when a competitor argues that he lost a chance to win a contract due to specific irregularities. Changes add layers of complexity, however. It becomes a speculative undertaking for a judge or review body to reconstruct what competition would have been like when the contract – let us say the concession – was awarded four, ten, fifteen or twenty years before. Similarly, a judge may grapple with issues in reconstructing competition when there has been no competition exercise. This absence may be fully justified under the law. For instance, the contract may have been awarded for a price below the thresholds but successive changes bring it above the thresholds. Equally, a contract may have covered exempted services at first (such as water in the Directive 2014/23 concession) but then moved into incorporating regulated services.

This difficulty in reconstructing the past is highlighted in a recent UK case, *Gottlieb*,<sup>41</sup> where the city council of Winchester entered into a development agreement with a developer. There had been no tendering exercise at the outset but changes happened across a number of discussions, leading to the modification of some spaces into commercial spaces and to reductions in the number of affordable housing units and car park spaces. Mr Gottlieb, a resident of the local area and a city councillor, decided to challenge these changes. The judge found that the claimant simply needed to show “*on the balance of probabilities, that a realistic hypothetical bidder would have applied for the contract, had it been advertised, but he is not required to identify actual potential bidders*”.<sup>42</sup> According to the judge, the various changes made the contract far more commercially attractive, so these changes had to be seen as major.

In the *Gottlieb* case, the judge was willing to accept probabilities. However, public procurement decision making is complex. One of the procurement reforms that the UK government has brought forward is pre-procurement engagement and early consultation with the market actors.<sup>43</sup> Equally, the 2014 procurement directives seem to accept that this step can be important for securing successful procurement. This is so, it is claimed, because one of the issues with procurement and its protracted duration is that public authorities do not assess well the options available on the market and the likely bidders. If public authorities are not in a good position to do so, how could the individual citizen or individual councillor be? Competitors may be in a different position to challenge changes during contractual performance. However, a risk of opportunism should not be overlooked: would it not be

(41) *R. (on the application of Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin).

(42) At [137].

(43) Efficiency and Reform Group, *Procurement Policy Note – Procurement Supporting Growth: Supporting Material for Departments*, Action Note 04/12, 9 May 2012, annex 2.

possible for a competitor to come up once a project is going on in a reasonably successful way, once the teething issues of the beginning of contractual performance, difficulties in securing financing, planning permits etc. are over? In many public contracts, risks are lower once buildings have been delivered. Changes may happen either during the construction phase or after the construction phase but they will happen within a given framework that maps far more clearly what is working with the project and what is not working, hence altering risk identification and potential risk management. Therefore, competitors who did not want to take up the full risks during the procurement could quietly wait to see if opportunities to join a successful project arise, such as contractual changes. Such a scenario may depend on specific markets and/or countries and/or projects. Yet it highlights that imagining what competition might have been should the changes have been integrated in the initial bidding process may become a very intricate exercise that is likely to need more than probabilities.

## II. Proper access to information as a condition for competition

For competition to regulate changes in contractual performance, competitors need to access information about this contractual performance. Article 72 provides that notice of changes needs to be published in the official journal of the European Union in two cases: 1) when additional works, services or supplies have become necessary (article 72 paragraph (1)(b)), and 2) when changes becomes necessary following unforeseen circumstances (hypothesis of Article 72 paragraph (1)(c)).<sup>44</sup> However, in those two cases, no duty to retender arises. Therefore, competition and access to information in order to police contractual changes trigger at least three problems. Access to information is needed but it does not suffice. It needs to be well organised.

First, Article 72 paragraph (4) causes trouble with its organisation: it does not require public authorities to publish a notice about substantial changes negotiated between the public authority and the economic actor. The Directive does not provide competitors with information related to these substantial changes, while these cases are the ones that are interesting to competitors: it is clear that a duty to retender exists and that not complying with this duty should be open to challenge by competitors if they are willing to bid to gain the new award.

Secondly, Article 72 does not answer the problem it is supposed to address. The legal issue that it aims to tackle is the one of bad faith entities seeking to

(44) Article 72 paragraph (1) *in fine*.

circumvent the legal requirements (of transparency, non-discrimination and transparency) set for the award phase. Article 72 assumes that compliance with these requirements will be monitored in a decentralised fashion: that competitors willing to win the contracts will do the necessary investigations into public contracts so that they can gather information on the evolution of contractual performance and map it against the tender documents. One illustration of this can be found in the case of *Presstext* itself, when one competitor sought to break the factual monopoly of a contractual arrangement.

While some competitors may indeed be willing and able to carry out these investigations, generalising the assumption and making it the working principle of Article 72 is, however, a very long shot. Obstacles abound here. Competitors, especially SMEs, may not have the resources to carry out these investigations in the first place or may prefer to make use of their resources to more productive ends, such as developing their internet website. Only the biggest firms may be able to develop entities equipped to carry out these investigations in a more or less systematic way. Even then, they will face practical issues: how will they gain access to the necessary documents? As explained earlier, the notice requirements in Article 72 paragraph (1) only pertain to cases when retendering is not required! This means that when retendering is legally required, the information will not be publicly available. What are competitors supposed to do? Relying on freedom of information regulation may not be effective, as the key elements for assessing the need for retendering may be protected by commercial confidentiality exceptions in a range of cases, such as ones involving the economic balance of a contract. So, organising access to information is needed but it needs to be organised for meaningful cases of substantial changes as well.

Thirdly, organising access to information is necessary but it does not quite fully capture bad faith entities that are purposefully attempting to circumvent the application of the EU procurement Directive (as the EU Directive supposes is the case). Entities complying with a duty to publish a notice are likely to be good faith entities who genuinely face a real need to change their contracts during performance. Using competition to police their behaviour (due, for instance, to their lack of experience during the award stage or a slightly optimistic assessment of their proportionality test, see below on this in § 5.3) may not be the best pedagogic tool for them. What may be needed is better understanding and better transparency of changes, what drives them, their context, their consequences and their negotiation process, so that gradually this practice informs judges having to deal with contractual changes, legislators (in the broad sense) having to draft appropriate legislation (or guidelines), and other public authorities seeking to procure works, goods and supplies. Bad faith entities would need to be dealt with through other means, as discussed below in § 5.3.



### III. Discontinuity in expectations between procurement and performance

At a general level, there is discontinuity between key reforms introduced for the award stage by Directive 2014/24 and the ways in which performance reflects the older model of procuring public contracts based on relying as much as possible on competition in a very economic sense. Reforms related to innovation or social and environmental policies are absent from Article 72's wording. This does not mean, however, that such consideration may not have a role to play during the performance stage as well. However, this role is kept silent in the Directive. This section discusses the case of innovation but similar points could be made in relation to horizontal policies.

The *Europe 2020 Strategy* highlights the importance of public procurement to support innovation, and hence to contribute to economic growth within a single European market in the making.<sup>45</sup> At the centre of innovation are “*the concepts of imagination and creativity, the intellectual leap that marks a development out as progressive rather than ‘business as usual’*”.<sup>46</sup> Innovation has been very much fostered in the new directives.<sup>47</sup> Therefore innovation needs to receive favourable treatment within the award phase. It is defined in a more technical sense as “*the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth*”.<sup>48</sup> It is thus striking that innovation is not mentioned in Article 72 Directive 2014/24 as a possible justification for triggering changes during contractual performance.

It may be argued that innovation needs to be integrated within the contractual terms during the award stage. Once a building is built, it is too late to change the construction materials to rely on techniques that are friendlier in terms of energy use, for instance. Similarly, once highways are built, it becomes difficult to change their layout to improve road safety.<sup>49</sup> It may also be argued

(45) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Europe 2020 Flagship Initiative – Innovation Union*, Brussels, 6 October 2010, COM(2010) 546 final, pp. 16-17.

(46) Science and Technology Committee, *Public procurement as a tool to stimulate innovation* (2010-2012 HL Paper 148) para 10.

(47) E.g.: Directive 2014/24, recitals [47]-[49]; [95].

(48) Directive 2014/24, article 2 paragraph (1), alinea 22.

(49) My thanks to Professeur Kalfliche for this argument.

that innovation is mostly addressed in innovation partnerships.<sup>50</sup> However, two problems arise here. First, the performance of these innovation partnerships is not regulated in terms other than those of Article 72. Secondly, innovation partnerships may be focused on highly innovative projects; namely, when public authorities have defined a need for an “*innovative product, service or works that cannot be met by purchasing products, services or works already available on the market*”.<sup>51</sup> What happens with all the not so highly innovative products, services or works, where innovation may exist on a smaller scale? In short, do we need to have a black and white distinction: innovation is dealt with in innovative partnerships and all other projects are supposed to be unable to develop innovation?

Circumstances arise when innovation would be possible and welcome in nearly any kind of project. Contracting parties learn from the way a contract is performed and develop innovative techniques (e.g. to avoid flooding or incidents), and integrate new technologies, protocols or methodologies as the contract is progressively performed. Regular exchanges with public authorities and daily challenges may need to be acted upon in creative ways. Recommendations from audit bodies (such as the National Audit Office<sup>52</sup> or *Cour des comptes*) or parliamentary committees investigating the use of public monies, such as the Public Accounts Committee in the UK (on the project itself or other similar projects), could be implemented in contracts. The lack of specific provisions to encourage innovation during contractual performance implies that any innovative change needs to fall within one of the six grounds providing for the absence of retendering. Recital [111] Directive 2014/24 seems to suggest that technological changes need to be addressed in “*sufficiently clearly drafted review or option clauses*”. This may indeed work out well but it may also trigger cautious behaviour from risk-averse contracting parties and does not address the fact that parties’ ability to map out potential technological changes may be limited before entering into the actual implementation of the contract.

Overall, changes triggered by innovation and new technologies may fall within the lists of paragraph 1 (a)-(d) or paragraph (2). However, innovation is full of risks and mapping the ways in which a contract may have to be adjusted when innovation has been implemented more explicitly (outside the specific cases of innovation partnership) may bring to the attention of public authorities and economic actors the importance of innovation and the specific recognition that this entails. Investment aimed at innovation (even on a small scale) needs to be encouraged (and the need for suitable organisation of the potential issues that may arise acknowledged). If innovation is a leap of faith

(50) Directive 2014/24 article 31.

(51) Directive 2014/24 article 31 paragraphe (1) alinea 2.

(52) E.g. NAO, *Innovation across central government* (12 HC 2008-2009).

to think outside the box, it does not have to be a huge leap into the deep end. The incremental small changes implemented in materials, processes and human practices may also help towards the ultimate jump. Competition may be a spur in this process but it may also be an obstacle if there is not enough legal protection for those entities willing to take this route.

#### **IV. Is competition necessarily equivalent to an efficient use of public money?<sup>53</sup>**

The benefit of competition for the good use of taxpayer money needs to be looked at carefully. Sue Arrowsmith, for instance, clearly distinguishes the competence of the EU to regulate public procurement so that access to market is not restricted from the competence of the Member States to decide how best to spend their money.<sup>54</sup> This distinction between the two aspects of competition and value for money has also consequences in the performance stage of public contracts. The idea that a new tendering procedure brings new bidders interested in tendering for new aspects of contracts also needs to be nuanced. Clearly, in some circumstances, such as in the *Presstext* case, competitors seek to seize opportunities to gain new contracts. However, opening an existing contract to competition triggers a series of difficulties and questions and may entail economic risks and large costs for contracting parties.

First and foremost, a new contract means starting a relationship all over again, with all the uncertainty that this entails, while the initial contractor may perform the contract in a satisfactory way. It knows the public authority and its needs regarding the provision of services, goods or supply. It already has the suitable organisation in place, including the administration systems, the staff, the technologies, the institutional memory of the project (what has been tried, tested, failed, rectified successfully etc.) etc. All this side of it can be fairly well ascertained by both the public authority and the incumbent.

A new bidder may come up with fresh ideas, other experiences and/or more up-to-date technologies. It may (or may not) accurately assess what it will be required to provide. All this side of things is subject to uncertainty as the performance of a newcomer is as yet unknown. It may also entail risks, costs or loss of expertise. The retendering process may be costly and resource-intensive as the new contract may entail costs associated with a new contractor (including risks of challenges), in a way that negotiations may not be. If the retendering process leads the public authority to select the incumbent, all the costs and energy spent in the tendering process might have been saved by

(53) ARROWSMITH, see above (n 40) paragraph 6-267.

(54) ARROWSMITH, see above (n 7) and KUNZLIK, see above (n 7).

savvy negotiations. Re-starting the contract may have benefits both for the public authority (if it secures better conditions in some ways or efficiency gains) and for the private contractor (for the same reasons). The private contractor may also have demonstrated to the public authority that it really was the best entity to perform the contract if the public authority was as yet unconvinced of this. However, re-starting the contract may have just the opposite effects and may sour relationships if the private partner feels mistrusted by the public authority. In balancing these advantages and uncertainty, a reasonable and diligent authority may not find retendering to be the most “efficient” solution to its needs in adapting the contract. Backing up its position with actual comparable data would therefore be hugely useful.

Secondly, the incumbent is in a privileged position as it enjoys an information advantage. Retendering the contract needs to take this into account. For the retendering process to be meaningful, competitors need to have access to the same information as the incumbent. Systems will need to be implemented to guarantee this. Case law relating to conflicts of interest between advising public authorities and bidding for a contract shows that organising a level playing field between an incumbent and potential new bidders may be difficult for public authorities,<sup>55</sup> as well as costly.

Of course, in some circumstances, competition may be a good way to ensure that public authorities are not tied up with their current contractor so that they can indeed properly negotiate the terms and conditions for changes. In other circumstances, if the tendering exercise results in no new bidder for the changes, it can just have the opposite effect and put the public authority far more at the mercy of the conditions desired by the contractor.

Finally, when a new bidder is awarded the new contract, issues of interfaces between the initial and the new contract need to be organised: will the initial contract be maintained? If so, how? How will the new contractor relate to the initial contractor in terms of access (to premises, infrastructure, services and information)? These issues will need to be addressed: it may cost money, utilise human resources and leave open questions of liability if something goes wrong. All these factors need to be factored into the decision to open up a new tendering procedure. If new tendering procedures are required for the sake of avoiding the development of monopolies, techniques other than imposing competition through public procurement could be developed. § 5 turns to exploring some of the available alternatives.

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(55) ARROWSMITH, see above (n 40) paragraph 12-137 ff.

## §5. Alternatives to competition

Competition as a way to police contractual changes during the contractual lifetime may thus have a limited role to play, supportive of a range of other techniques which need to be organised. The Directive itself encourages contractual planning – which can lead to rigidity and may have adverse effects on competition. Implementation and interpretation of the Directive will have a crucial role to play. The United Kingdom has opted for guidelines related to changes in contracts.<sup>56</sup> France also chose to leave the details of Article 72 to be transposed “par voie réglementaire”.<sup>57</sup> Case law at domestic and European levels will also flesh this out. This will need to map out the details of the discretion that public authorities enjoy in adapting public contracts. Competitors may challenge how contractual changes fall within the contractual planning required in paragraph (1)(a) and (1)(d). S. Treumer calls for “[n]ational courts and review boards [to] scrutinize such clauses and options carefully in order that they do not undermine the duty to retender the contract in practice”.<sup>58</sup> Options other than contractual planning may need to be developed, however, to strike a balance between competition and cooperation within public contracts. Two such options are briefly surveyed here, although they will require further thinking.

### I. Contractual planning: a rigid escape strategy

Article 72 Directive 2014/24 sees contractual planning positively: contractual terms should reflect the outcome of the competition between bidders during the procurement phase. It therefore encourages parties to anticipate their future relationships carefully and to embed this planning in their contracts. Before the contract is signed, parties need to plan the possible events that may arise and cause the parties to decide to modify their agreement. This solution offers the most secure means of avoiding the contract having to be retendered. Indeed, article 72 paragraph (1)(a) Directive 2014/24 expressly mentions that such terms can apply regardless of monetary value. This applies to all kinds of changes, including change of contracting party.<sup>59</sup> This may be seen as bringing good practice into the EU Directives, as many long term and complex public contracts already include sophisticated variations mechanisms.<sup>60</sup> This incitation

(56) Crown Commercial Service, *The Public Contracts Regulations 2015 – Guidance on Amendments to Contracts during their Term*, 9 p.

(57) Ordonnance n° 2015-899, 23 July 2015 *relative aux marchés publics*, article 65.

(58) TREUMER, see above (n 35), spec. p. 150.

(59) Directive 2014/24, article 72 paragraph (1)(d)(i).

(60) HOEPFFNER, see above (n 38).

goes beyond the normal practice of contractual planning in three respects however: first, what needs to be planned; secondly, how it needs to be planned; thirdly, when agreement on changes is needed between parties. All these differences may tighten the freedom and discretion of parties or at least call on them to approach contractual planning from a different perspective.

First, contractual planning draws attention to what needs to be planned for. Parties' information on the future is limited because the future is always unpredictable to some extent. Parties may try to be as diligent as possible to develop contingency plans for a range of circumstances, especially events that are known to happen in specific areas or are usual in long-term contracts, although outside parties' control. Here, one can think about strikes and especially long strikes, rain and fire, sudden high price rises in some materials etc. A very important area for changes would be to map how innovative technologies could lead to changes in contractual performance. It can be burdensome for the parties to map ahead all these potential changes for the coming thirty years so as to attain the security that they would like to reach. It is not clear how far Article 72 could influence actual "good" contractual practice nor how "good" general practice in contractual planning is used in all industry sectors across all EU Member States. Strikingly, procurements under Directive 2014/24 and concessions under Directive 2014/23 are subject to the same provisions,<sup>61</sup> while differences in duration and nature would probably justify seeing changes in concessions as a natural way for the contract to evolve, even more natural than in public procurement. However, the mere fact that a contractual practice becomes encapsulated in the Directive as an escape route from the risks of a duty to retender may encourage parties to opt for the safest option possible. The duration and costs of the award process would then be extended and increased, which does not seem to square with the general aim of improving procurement efficiency that Directive 2014/24 seeks to pursue.

Secondly, Article 72 specifies how contractual planning needs to happen: for the variation clauses to fall within paragraph (1) requirements the contractual terms need to be "*clear, precise and unequivocal review clauses*". This comes from the *Pressetext* case law. Scholarship has already questioned the interpretation that has to be given of this requirement. For instance, Sue Arrowsmith highlights that the variation clauses cannot be a form of blank cheque enabling parties to avoid the application of the EU procurement directives.<sup>62</sup> English judges have explicitly endorsed such an interpretation.<sup>63</sup>

Thirdly, Article 72 transforms the agreement between parties on changes. So far, next to contractually agreed change protocols, changes during public

(61) The only drafting difference does not address the issue discussed here.

(62) ARROWSMITH, see above (n 40) paragraph 6.267.

(63) *R. (on the application of Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin), at [56].

contracts are also often carried out through a unilateral decision made by the public authority. However, this decision reflects a discussion and agreement between the parties at one point during contractual performance. In all these frequent cases, the unilateral public decision does not come as a surprise to the private contractor. Article 72 moves the moment when agreement between public and private partners will need to be reached on potential changes forward in time: now, this agreement needs to be secured at the time of the award in order for the duty to retender not to apply. This makes the whole exercise of agreeing more challenging.

There are events that arise outside parties' planning. Article 72, paragraph (1) (c) acknowledges that events arise outside parties' planning despite them having been diligent in the procurement process. Recital [109] specifies that this diligence needs to be assessed "*taking into account [a contracting authority's] available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value*". This thus calls for contracting parties to use proportionality in assessing the extent of contractual planning that will be best adapted to their contracts. § 5.3 comes back to this assessment.

## II. Opening up discretion: flexible implementation and interpretation

Contractual planning relates to the need to encapsulate public discretion adequately, especially regarding the issue of how political considerations should be organised in public contracting. The margin of discretion left to contracting parties for adapting contracts needs to be further defined by domestic implementation and interpretation as well as European case-law.

This question is key to the understanding of "public contracts" and their legal consequences. Indeed, domestic legal systems need to find ways to accommodate the specificity of the public party in public contracts and recognise powers that are not used in private law. This happens regardless of a specific legal category, labelled, for instance, "administrative contracts" in the French model.<sup>64</sup> For this reason, the *Presstext* solution and its principle of competition caused trouble for Member States, which wanted to have protected areas in which their public authorities could use their discretion when needed to keep public contracts alive and adjusted to changing circumstances. Discretion is needed because public authorities are not only pursuing private interests

(64) M. FROMONT, "L'évolution du droit des contrats de l'administration – Différences théoriques et convergences de fait", in R. NOGUELLOU and U. STELKENS (eds), *Comparative Law on Public Contracts* (Bruylant, 2010) pp. 263-278.

and profit, as economic parties in commercial contracts would be. The difficulty here is to identify how much discretion is helpful for pursuing public interests, how it can be exercised and when.

One illustration of this issue can be drawn from a UK recent case. In the *Edenred case*,<sup>65</sup> HM Treasury and National Savings and Investments (NS&I) wanted, in 2014, to enter into an agreement by which NS&I delivered a government policy of tax-free childcare. NS&I, a non-departmental body, is a retail savings and investment organisation borrowing money to the government's benefit. In 1999, it outsourced a large part of its operational services (such as back office, transaction management, printing, accounting, IT development and management etc.) to a private provider. The current outsourcing partnership was entered into with Atos in 2013.

In the whole procurement process leading to selecting Atos, NS&I included information on the potential expansion of the contract to other departments, local government and private sector entities. The notice in the OJCE mentioned this expansion, a specific schedule was devoted to managing changes resulting from such expansion, and the publication of the award in the OJCE again mentioned this potential expansion during the lifetime of the contract. The government was interested in using the services provided by NS&I because the organisation was already operational, which would enable quick implementation of its new policy. In order for NS&I to administer the government policy of tax-free childcare it became necessary to amend the contract with Atos. Two competitors, Edenred and the Childcare Voucher Providers Association, challenged this modification on the ground that it would be a violation of EU procurement law.

The judge decided that:

“36 [...] In short, the question is whether the services were covered by the contract resulting from the procurement between 2011 and 2013, including its provisions for amendment of the contract. Were it otherwise, it is difficult to see how a Government department or other public body could outsource services that were essential to support its own operations and accommodate the occurrence of events and the changes of policy that are part of public life. There may be circumstances in which a court could conclude that a public authority had designed a contract as a means of avoiding its obligations under EU law. In such cases the contract might be open to challenge under EU law as an abuse of right. But here there is no challenge to the validity of the Atos contract itself. Edenred goes no further than to suggest that public authorities could use contracts framed in this way as a device for

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(65) *Edenred (UK Group) Limited and another v Her Majesty's Treasury and others* [2015] UKSC 45.



avoiding their public procurement obligations by allowing for the future provision of unspecified services of a much greater value. Whether or not that is so, the focus must be on the particular contract. The scale and nature of NS&I's stated aspirations for the use of its infrastructure and other resources in providing B2B services to public sector bodies as well as its own retail financial services, which the Atos contract was designed to support, appear to be within a reasonable compass.”

In this case, the judge acknowledges that changes may be related to avoidance but dismisses the idea that the mere possibility of avoidance should lead to rejection of changes. Each contract needs to be looked at within its specific circumstances to assess whether changes are made according to its economic or political logic, and if public authorities are using their discretionary powers in accordance with their need to carry out their policies, which can change over time. Here the whole procurement process had integrated the possibility of expanding the services. There was no question that bidders knew of this potential expansion. Therefore, the judge accepted that changes in policy, and thus use of public discretion, might have had an impact on agreed contracts. Even more so, he accepted that public contracts need to evolve to integrate such policy change. This leads to a discussion of how such assessment may need to be carried out.

### **III. Subsidiarity, proportionality and cooperation: towards developing assessment strategies and compliance monitoring systems**

Beyond the implementation and transposition of article 72 Directive 2014/24, public authorities need to assess if, how and when changes are required: they have a range of tools available, being able to choose between contractual planning and discretion, between competition and cooperation. Monitoring of how these tools are used needs to be possible, so that distortion of competition may be prevented. However, it may be useful to see if and how principles of subsidiarity<sup>66</sup> and proportionality<sup>67</sup> that are developed in EU procurement case law and in some EU Member States (such as the Netherlands and Belgium) could be helpful for a more nuanced identification of when article 72 Directive 2014/24 does or does not fit the needs of public authorities and their contractors, and when competition or discretion may be most suitable. No one

(66) See especially in Directive 2014/23, recital [87]; Directive 2014/24, recital [136].

(67) See on the principle of proportionality the contribution of Professor P. KUNZLIK, “The 2014 public procurement package – One-step forward and two back for green and social procurement ?”, contribution in this edited collection (pp. 139-196).

single solution may be right. A range of strategies may help to collect information about changes and clarify the needs of public parties and economic actors alike. Two options spring to mind: an active database and an assessment of the required changes.

The first strategy would be to develop a database at domestic or European level that could be made available for the kind of changes considered. A public authority could then have confidential access to the data related to costs, the likely duration of the negotiation or retendering, the supervening issues etc. Such data would not only be useful for contractual changes but would surely offer concrete benchmarks. The system would need to go beyond a mere collection of (outdated and de-contextualised) data and figures but should be organised in such a way as to make it live and build a community of procurers across the EU, sharing experience with colleagues dealing with similar issues. For instance, a public authority which awarded a concession for water sewage twenty years ago may need to upgrade the technologies and methodologies to comply with new EU water directives. It may need to have access to comparable information, which may only be available in other EU Member States. If public authorities may, more or less, have access to similar information within their own country (which is not that straightforward), economic actors are likely to have that information on their side. For some sectors, there are only a very limited number of economic actors acting across the EU Member States. Consultancies and experts may have developed such databases or may be hired to provide this kind of information. It may, however, be the kind of data that should be at the core of public missions and it may need to be gathered in an independent way so as to ensure that public purchasing is truly informed, and thus made efficient.

This should not be seen as an additional bureaucratic burden but as a welcome measure of openness – once the terms of transparency are carefully designed. We are not talking here of general openness for all citizens but, in the first place, about information sharing in an honest, open and cooperative manner across Europe. This could be done step by step, between a few key Member States, first targeting some key sectors (such as highways, water services or IT), with more or less support from the European Commission, and then extended to all Member States and more sectors.

A second strategy for approaching contractual changes would be to ask public authorities to engage in an assessment of the modifications to be performed, including an audit of the possible costs, and to do a market study providing them with a realistic idea of the competition. A robust procedure regarding the information communicated to potential bidders and their commitment to engaging in a tendering procedure under the conditions they would offer if it was opened would need to be developed.

## §6. A call for more imagination, transparency and justification

In analysing the approach to contractual changes adopted by article 72 Directive 2014/24, this paper argued that competition was part of the solution but only a part, and that there was a risk of Article 72 making it part of the problem as well. Once a public contract has been agreed, public authorities face a range of possibilities. Public authorities and private contractors may thus be placed along a very long spectrum of configurations.

At one extreme, public authorities and private contractors may seek changes that were actually intended during the whole procurement process just to circumvent the public procurement regulations. These would be “bad faith” entities. The solution of Article 72 is intended to prevent them reaping the rewards of their distortion of competition. In this case, re-opening of the tendering process is logical as the first tendering was not really transparent, equal and honest. However, in that case, decentralised control may be needed yet not sufficient. Other monitoring mechanisms at domestic or European level would be required to ensure that the objectives of the procurement directives and competition are met.

At the other extreme, a public authority and its contracting partner may accept that a duty to retender has arisen from changes they are contemplating. However, they ponder the costs, risks, durations, challenges, interfaces and confidentiality terms that this retendering will cause. The public authority wonders how a new contractor will be able to take over, and an economic actor may reconsider the investments it has made over the years in this specific project. Was it really worthwhile? What lessons can be drawn for other such projects? The retendering process may be more or less successful, the outcome more or less in line with parties’ expectations. In some cases, at least, competition may not be the most efficient and economically advantageous route, albeit the legal framework requires it to be done.

Between these two extreme cases there is a variety of situations in which “competition” may be needed and bring more experienced, innovative and efficient solutions to the changing needs of public authorities and their projects. However, this paper has argued that competition is not a “one-size-fits-it-all” solution. A more sophisticated assessment of the initial bidding process, developments in the contractual relationships and the potential future of the contracts after amendments for the parties, as well as potential market competitors and users, need to be developed so that economic, social and environmental interests are also integrated during the performance stage.

The new directives are starting to recognise that competition only plays one part in the procurement of contracts: other considerations have been

integrated so that the whole awarding process is becoming more flexible and hopefully efficient in the use of public monies. This paper has demonstrated that a similar evolution is needed at the level of the performance stage in general, and especially when it comes to contractual changes.

Simplification is not achieved with a single ambiguous provision. Simplification may require the development of two kinds of tools. First, some key legal principles may need to be applied in the performance stage, mapping how public discretion may make its assessment and choice between negotiations with the incumbent and retendering. Secondly, some institutional control over compliance with these principles needs to be organised – such as a transparent justification of the outcome of the assessment, the development of databases as means of providing live information about such assessment, and monitoring of how changes are actually carried out. This may be a long way from using contractual planning as an escape strategy. However, contractual planning has also a role to play in this picture as it can be a very useful map for parties in specifying their needs, expectations, commitments for the management of the relationship, and a benchmark for any supervening event.

Overall, designing suitable regulation for changes in the performance stage of procurement thus contributes to the on-going debates about the role of the law in the market and the functions that states have to provide within the economy. This paper thus hopes that such design could be made more attuned to economic realities thanks to further empirical research in economic terms assessing the benefits of competition and cooperation for economic growth, competition and the good use of taxpayer's money. Once more robust information became available, informed discussions about the level – European, domestic or a combination – at which this design would be best conducted would then be possible. For the moment, the political compromise struck during the negotiations leading up to Directive 2014/24 is lacking a coherent, logic and convincing economic, political or social rationale: the objectives of legal certainty and simplification are further away than ever.