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Old remedies for new violations? The deficit of remedies for enforcing public contract modification rules

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An important and long due adjustment introduced to the EU public procurement law by the new directives is the regulation concerning modification of public contracts. Deriving from the case-law of the CJEU, the rules equals any amendment that is materially different from the initial public contract, to a de facto new contract award that is considered to be an unacceptable procurement practice. The said materiality criterion has received general acceptance and good attention in legal literature.

However, legal issues related to the enforcement of the new rules and their compatibility with the remedies system currently in place under the EU public procurement law have not received equal attention. Following, I will look at the possibilities that third parties have of challenging unlawful public contract modifications.

The analysis is divided into two parts, presenting firstly the result of ineffectiveness of *de facto* new (modified) public contracts and secondly, considering the option to rely on other remedies, in order to outline possible legal difficulties and questions concerning enforcement of the new rules on public contract modification.

1. Ineffectiveness of unlawfully amended public contracts

1.1 Modifications subject to ineffectiveness

For the purpose of legal certainty, the new directives first catalogue the types of modifications considered as acceptable procurement practices that can always be lawfully made without having to conduct a new award procedure.\(^5\) Such examples include any modifications clearly and unambiguously published in the initial award procedure;\(^6\) amendments for additional works or services under certain circumstances;\(^7\) changes necessary due to unforeseeable circumstances, subject to additional restrictions;\(^8\) modifications replacing the contractor under certain conditions;\(^9\) and any amendments with a value under a specific threshold.\(^10\)

Last but not least, any other changes are acceptable unless included among the definition of substantial modifications under section 4 of the same article.\(^11\)

The directives then define amendments to be regarded as substantial modifications, or renegotiations of essential terms, of public contracts.\(^12\) These are changes that render the contract *materially different in character from the one*

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\(^5\) Art.71 (1)–(2), (5) of the Public Procurement Directive, Art. 89 (1) – (2), (5) of the Utilities Directive and Art. 43 (1)–(2), (5) of the Concessions Directive.

\(^6\) Concessions Directive Art. 43 section 1 (a); Public Procurement Directive Art. 72 section 1 (a); Utilities Directive, Art. 89 section 1 (a).

\(^7\) Concessions Directive Art. 43 section 1 (b); Public Procurement Directive Art. 72 section 1 (b); Utilities Directive, Art. 89 section 1 (b).

\(^8\) Concessions Directive Art. 43 section 1 (c); Public Procurement Directive Art. 72 section 1 (c); Utilities Directive, Art. 89 section 1 (c).

\(^9\) Concessions Directive Art. 43 section 1 (d); Public Procurement Directive Art. 72 section 1 (d); Utilities Directive, Art. 89 section 1 (d).

\(^10\) Concessions Directive Art. 43 section 2; Public Procurement Directive Art. 72 section 2; Utilities Directive, Art. 89 section 2.

\(^11\) Concessions Directive Art. 43 section 1 (e); Public Procurement Directive Art. 72 section 1 (e); Utilities Directive, Art. 89 section 1 (e).

\(^12\) Public Procurement Directive, recital 107; Utilities Directive recital 113; Concessions Directive, recital 75.
initially concluded, including (a) changes introducing conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of different participants or for the acceptance of a different tender other than the original ones; (b) modifications changing the economic balance of the public contract in favour of the contractor unless so provided for already in the original contract; (c) any modifications that considerably extend the scope of the public contract and (d) replacing the contractor in cases other than those listed as acceptable under the directives. Changes belonging to any of the mentioned categories or any other material amendments always require a new procurement procedure in accordance with the corresponding Directive.

Thus, the directives divide public contract amendments into three categories: (i) substantial (material) modifications that clearly do require conduct of a new award procedure, (ii) explicitly allowed modifications that do not create a need for a formal award, and (iii) all other modifications that do not belong to either of the above categories and also do not require a new award procedure unless evaluated to be substantial. Any modification that is substantial in the meaning of the directive needs a new award procedure.

The failure to conduct a new award procedure in such cases is equal to entering into a public contract via an illegal direct award and as such, may cause the unlawfully modified contract to be declared ineffective. Under the terms established by the Remedies Directives, which would mean – depending on the national law – either retroactive cancellation of all contractual obligations or cancellation of obligations which still have to be performed, in the latter case together with the application of other penalties. Ineffectiveness is thus intended to be the primary consequence of unlawful contract modification and the claim to establish ineffectiveness the main pursuit of third party competitors interested in the contract award.

14 Concessions Directive Art. 43 section 5; Public Procurement Directive Art. 72 section 5; Utilities Directive, Art. 89 section 5.
15 Concessions Directive Art. 43 sections 1, 5; Public Procurement Directive Art. 72 sections 1, 5; Utilities Directive, Art. 89 sections 1, 5.
However, not every unlawful direct award will lead to ineffectiveness. The main substantive exception that may exclude establishing ineffectiveness of a public contract is the presence of overriding reasons to a general interest.

1.2 Exemption of ineffectiveness for the benefit of overriding general interests

National review bodies can exclude the result of ineffectiveness of an unlawfully awarded public contract if continuation of the performance of the contract is needed for overriding reasons relating to a general interest.\footnote{Art. 2d (3) of the Public Remedies Directive, Utilities Remedies Directive.} Enforcement of the exception requires the presence of some overriding reasons of a general interest that is dependent on the effects of that particular public contract. Member States must provide for alternative penalties to be applied in such cases.

According to a settled case-law, some examples of justified general interests include e.g. the general need to preserve public order\footnote{E.g. Joined Cases Placanica and Others, C-338/04, C-359/04 and C-360/04, ECLI:EU:C:2007:133, paragraph 46.} or to protect environment;\footnote{Ålands Vindkraft AB v Energimyndigheten, C573/12, ECLI:EU:C:2014:2037, paragraph 77; Commission v Austria, EU:C:2008:717, paragraph 57 and the case-law cited.} protection of public health\footnote{Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung and Oberösterreichische Landesregierung, C-169/07, ECLI:EU:C:2009:141, paragraph 46.} – including the specific example of the provision of medicinal products of reliable and good quality;\footnote{Instituto Portuário e dos Transportes Marítimos (IPTM) v Navileme – Consultadoria Náutica Lda and Nautizende – Consultadoria Náutica Lda., C-509/12, ECLI:EU:C:2014:54 paragraph 20; Commission v Germany, C546/07, ECLI:EU:C:2010:25, paragraph 49.} the objective of security and public policy when a genuine, sufficiently serious threat affects a fundamental interest of society;\footnote{Laboratoires Fournier v Direction des verifications nationales et internationales, C-39/04, ECLI:EU:C:2005:161, paragraph 23.} the promotion of research and development\footnote{Valentina Neri v European School of Economics, C-153/02, ECLI:EU:C:2003:614, paragraph 46.} or standards of education.\footnote{J Golding, P Henty. The new Remedies Directive of the EC: standstill and ineffectiveness. P.P.L.R. 2008, 3, 146–154, pp 146, 151, 152.} An important sporting and cultural event – Olympic Games, for instance, has been mentioned by Golding and Henty\footnote{J Golding, P Henty. The new Remedies Directive of the EC: standstill and ineffectiveness. P.P.L.R. 2008, 3, 146–154, pp 146, 151, 152.} as a possible example. Any of such examples can constitute a general interest able to avoid
the result of public contract ineffectiveness if pursuit of that overriding interest requires keeping the contract in force.

Protection of intellectual property rights is an interesting objective that has been considered to constitute an overriding reason in the public interest and can justify a restriction on the freedom to provide services.\textsuperscript{26} For example, the need to protect an architect’s intellectual property rights with regard to a design created in the course of performing a public design and works contract could be established to constitute an overriding reason relating to a general interest that justifies preserving the effect of – albeit illegally – modified contract.

On the other hand, considerations of administrative,\textsuperscript{27} economic\textsuperscript{28} or financial\textsuperscript{29} nature have consistently been excluded from among overriding reasons in public interests by the CJEU. The remedies directives, however, allow recognition of economic interests as overriding reasons – provided that takes place \textit{in exceptional circumstances} where the contract ineffectiveness would have \textit{disproportionate consequences} and as long as such economic interests are not \textit{directly linked} to the contract.\textsuperscript{30}

Drawing the line between acceptable and unacceptable general interests might prove to be problematic here for two reasons. Firstly, as the earlier case-law has clearly rejected the idea of regarding economic interests as overriding reasons in general interest, understanding the meaning of the word ‘economic’ in the context of the remedies directive may present some challenges. Secondly, the acceptable limits of enforcing this rule could be open to different interpretations as continued performance of a modified contract (when justified for an overriding reason relating to a general interest) is mostly accompanied by directly linked economic and administrative incentives as well. With the view to the inescapable

\textsuperscript{26} OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s., C-351/12, ECLI:EU:C:2014:110 paragraph 71; Football Association Premier League and Others, joined Cases C403/08 and C429/08, ECLI:EU:C:2011:631, paragraph 94.

\textsuperscript{27} Stanley International Betting Ltd and Stanleybet Malta Ltd v Ministero dell’Economia e delle Finanze and Agenzia delle Dogane e dei Monopoli di Stato, C463/13, ECLI:EU:C:2015:25, paragraph 50; Zentralbetriebsrat der gemeinnützigen Salzburger Landeskrankenhäuser GmbH v Land Salzburg, C-514/12, ECLI:EU:C:2013:799, paragraphs 42–43; Joined cases Arblade and Others, C369/96 and C376/96, ECLI:EU:C:1999:575, paragraph 37.

\textsuperscript{28} Belgacom NV v Interkommunale voor Teledistributie van het Gewest Antwerpen (INTERGAN) and Others, C-221/12, paragraphs 41, 44; Joined Cases Costa and Cifone, C72/10 and C77/10, ECLI:EU:C:2012:80, paragraph 59; Joined cases Staat der Nederlanden v Essent NV, Essent Nederland BV (C-105/12), Eneco Holding NV (C-106/12) and Delta NV (C-107/12), C-105/12 to C-107/12, ECLI:EU:C:2013:677, paragraph 51; Kranemann, C109/04, ECLI:EU:C:2005:187, paragraph 34; Commission v Italy, C388/01, ECLI:EU:C:2003:30, paragraph 22.

\textsuperscript{29} Andreas Ingemar Thiele Meneses v Region Hannover, C-220/12, ECLI:EU:C:2013:683, paragraphs 43–44.

\textsuperscript{30} Art. 2d (3) of the Public Remedies Directive; Art. 2 d (3) of the Utilities Remedies Directive.

Even when the primary reason of continued effectiveness is of non-economic nature, the exception would often be accompanied by economic interests. For instance, in a case of public works contract for repairs of a schoolhouse in a dangerous state,\footnote{For example, in the case No 3-3-1-51-09 of the Supreme Court of Estonia, the Court refused to apply an interim measure that would have banned the contracting authority from entering into a public works contract for repair works of a schoolhouse. The decision was based on the need to quickly repair the constructional and fire safety situation of the schoolhouse that would have otherwise endangered the life and health of the children, teachers and other personnel, and as such constituted an overriding general interest.} economic reasons directly linked to the public contract often accompany non-economic ones of e.g. health and safety, as entering into a new public works contract undoubtedly requires additional efforts and brings about larger costs than continuing with the initial contract. In a similar situation concerning the settled rule that purely economic interests could not constitute overriding reasons in the public interest, the CJEU nevertheless found that a restriction on a fundamental freedom may be justified when it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest.\footnote{Joined cases C-105/12 to C-107/12 referred to above, paragraph 52; Commission v Germany, C141/07, ECLI:EU:C:2008:49, paragraphs 60–61 and the case-law cited.}

Following the same logic, a reasonable interpretation of the clause on directly linked economic interests should be understood to relate to the primary reason of the need for continued effect of the contract. The exception should thus be applicable if it in fact serves an acceptable general interest, despite possibly benefiting some directly linked economic interest as well.

It can also be argued that the farther on the time-scale the performance of a particular public contract reaches, the closer and more (time-) critical the achieving of the desired result of the contract becomes. This applies particularly in case of longer term contracts where the contracting authority’s need for timely delivery and hence the need to continue keeping the public contract in force, is more crucial than it would have been during the beginning of the performance period. For the same reason, the possibility of an overriding need in general interest and the resulting exclusion of ineffectiveness appears relatively more probable in the case of unlawfully modified public contracts than in the case of initial direct awards.
1.3 Exclusion of ineffectiveness due to lack of information

The result of ineffectiveness can also be lost for the simple reason of no claims being successfully submitted in time. In contrast to the classical notion of voidness that in many jurisdictions accompanies illegal circumstances of contracting (e.g. being contrary to good morals) automatically, without any need for action by the concerned parties or a respective court decision, public contract ineffectiveness only follows a respective timely submitted claim and a positive decision by the national review body.\(^{34}\)

Moreover, Member States are free to establish a final deadline of six months from the date of the conclusion of the contract – in case of a new award through an illegal modifications, this would mean six months from such modification.\(^{35}\)

Therefore, timely learning of and promptly challenging any unlawful awards (modifications) is of critical importance.

However, a genuine opportunity to timely challenge a contracting authority’s (entity’s) failure to conduct a proper award procedure presumes the competitors’ knowledge of such illegal award – incl. through unlawful modification. Obstacles to submitting a claim will clearly arise if no publicly disclosed information about amendments made to a public contract is available. At present, the (mostly) private law contracts awarded in public procurement can be subjected to unjustified confidentiality agreements. Typically, competitors do not have any information about a modification or its content and thus are not aware of the occurring breach.\(^{36}\) In effect, substantial modifications may easily go unchallenged and remain in force for the reason of lack of information about the same.

Even though a default requirement of disclosure of information about a public contract and their modification can be argued to result from the general principles of EU procurement law, the duty to provide access to a public contract is not yet a clearly established or universally followed rule in all Member States.\(^{37}\)

Under the new directives, some contract modifications are subject to reporting by contracting authorities. This obligation applies to modifications for additional works, services or supplies listed as acceptable in section 1 (b) as well as modifications caused by unforeseeable circumstances mentioned in section 1 (c) of the relevant article.\(^{38}\) The obligation to advertise does however not apply to all cases of modifications.

The default disclosure rule has *inter alia* been recommended with the purpose

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\(^{34}\) Art. 2d (1) of the Public Remedies Directives and Utilities Remedies Directive.

\(^{35}\) Art. 2f of the Public Remedies Directives and Utilities Remedies Directive.

\(^{36}\) See also: S Treumer. 2012, p. 153.


\(^{38}\) Art. 72 (1) of the Public Procurement Directive, Art. 89 (1) of the Utilities Directive and Art. 43 (1) of the Concessions Directive.
of improving anti-corruption policies in public procurement\(^{39}\) as implementing high transparency standards and strengthening control mechanisms during the contract performance period. Establishing reasonable restrictions on drafting and enforcing confidentiality clauses in public procurement contracts under national law is therefore advisable. Otherwise, modifications made in the contract performance phase may be left out of reach of third party claims.

1.4 Enforcement of ineffectiveness in cases of *aim to circumvent*

Some of the new rules on contract modification refer to the *aim to circumvent* the law as the criterion differentiating acceptable modification practices from the unacceptable.\(^{40}\) Under the Public Procurement Directive and the Concessions Directive, modifications for additional works (services, supplies) if done under certain circumstances, are acceptable – however, such consecutive modifications may not be aimed at circumventing the directive.\(^{41}\) Similarly, a modification brought about by unforeseeable circumstances may be acceptable, subject to additional conditions – unless aimed at circumventing the directive.\(^{42}\) Also in case of replacing the initial contractor through succession and corporate restructuring, the directives prescribe that the modification should not be made with the aim of circumventing the directive.\(^{43}\)

The aim of circumventing the law seems to refer to situations where formally, all the preconditions justifying a modification are present, but the subjective ill will of the contracting parties nonetheless excludes that particular modification. However, certain ambiguities relate to establishing the aim of circumvention and may present practical difficulties upon enforcing the criterion.

Firstly, there is a lack of clarity as to the interaction between some of the criteria referring to, the aim of circumvention on the one hand, and the rules determining the substantial nature of modifications on the other. When a modification is regarded illegal but for the aim of circumvention, does that automatically make the modification a substantial and illegal one? Or does the conclusion depend on other factors describing the modification? It seems that where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a result of a corporate restructuring but the aim at circumventing

\(^{39}\) R. Williams. Anti-corruption measures in the EU as they affect public procurement. PPLR 2014, 4, p. NA 99.

\(^{40}\) On this subject see also S. Treumer. Transfer of contracts covered by the EU public procurement rules after insolvency. PPLR 2014/1.

\(^{41}\) Art. 72 (1) (b) of the Public Procurement Directive and Art. 43 (1) (b) of the Concessions Directive.

\(^{42}\) Art. 72 (1) (c) (iii) of the Public Procurement Directive and Art. 43 (1) (c) (iii) of the Concessions Directive.

\(^{43}\) Art. 72 (1) (d) (ii) of the Public Procurement Directive, Art. 89 (1) (d) (ii) of the Utilities Directive and Art. 43 (1) (d) (ii) of the Concessions Directive.
the application of the Directive is detected, the modification is always regarded as substantial and as such prohibited – this is prescribed by the directives in harmony with the CJEU’s reasoning in the case of Pressetext. However, it seems that in other cases where the aim of circumvention removes the modification from the category of explicitly acceptable amendments, the nature of the modification should be subjected to a materiality test under the Section 4 of the modifications’ clause. Thus, sometimes the presence of the aim of circumvention may cause the modification to be unlawful but not necessarily in other cases.

Further, the expression aim of circumventing is open to different interpretations in the course of application under the Member States’ national laws. For instance, the presence of such an aim could either be interpreted to refer to an intent to circumvent the law or a (grossly) negligent behaviour or a relation to some objective (incl. monetary) benefit.

Alternatively, the aim of circumvention may be assumed, taking into account the circumstances of making the particular modification. An example illustrating such possible set of circumstances can be found in Estonian national case-law: in the administrative law matter No 3-3-1-31-11, the Supreme Court considered a concession contract for waste collection awarded by a local municipality. The performance of the contract was tied to the price of waste collection that the contractor was entitled to receive from the consumers (residents of the municipality) and that was established by the same municipality. Soon after the award of the concession – even before the start of the performance period (!), the municipality increased the established price, making it more favorable for the contractor to perform the concession. A competitor who had been unsuccessful at the award procedure challenged the municipality’s decision, claiming that if it had known of the possibility of the price increase, it would have submitted a different tender. The Supreme Court declared the municipality’s decision unlawful and the concession contract ineffective. In literature, a similar suggestion has been submitted by Hartlev and Liljenbøl: a change made to an uncomplicated contract immediately after its conclusion would indicate that the change had been made to contrive to circumvent the procurement rules. If, on the other hand, the change is made in a complex contract several years after the contract has been concluded, the change would seem attributable to circumstances which could not have been taken

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44 Art. 72 (4) (d) of the Public Procurement Directive and Art. 43 (4) (d) of the Concessions Directive.
45 Pressetext, ECLI:EU:C:2008:351, paragraph 51.
46 Section 1 (b) and (c) of the modification articles of the Directives.
47 Note that the presence of the aim of circumvention was not a legally relevant factor and therefore not analyzed in the referred case. Also, the case would evidently have a different result if decided according to the new rules of modification due to the small value clause – section 2 (ii) of article 43 of the Concessions Directive – as the price increase amounted to a 5.7 per cent only.
into account at the time of the award of the contract. The time scale can thus serve as a valid even though indirect indicator of the aim of making a modification.

Related to the substantial issues of defining the aim to circumvent is the procedural issue of dividing the burden of proof. When circumstantial evidence – as in the case of the above example the timing of a modification – is regarded sufficient to establish the aim of circumvention, third party claimants might be able to challenge the making of such modifications. Otherwise, leaving the burden of proof entirely for the claimant to carry would make it unlikely for a third party applicant to actually ever meet the standard. Establishing the (unacceptable) aim of a contract modification can therefore be based on objective circumstances accompanying the making of the modification.

Independent from the difficulties related to establishing the aim of circumvention, the justified consequences of making a modification with such aim may be disputed as well. The clauses of directives on contract modification have been referred to in the context of anti-corruption policies. While the primary purpose of the EU legislation on public procurement is doubtless maintenance of the fundamental principles of the TFEU, the rules on public contract modification can be described as being directly relevant for anti-corruption purposes as well. In particular, the clauses that tie the issue of a modification’s acceptability to the aim of making the modification, seem to be designed at such purpose more than other amendment criteria. Keeping the anti-corruption purposes in mind, enforcement of these rules through alternative or additional remedies besides the remedy of ineffectiveness could prove successful and should be taken into consideration.

2. Other remedies for unlawful public contract modifications

Any unacceptable procurement practice should have some legal consequences in a way of applicable remedies, otherwise the enforcement of the EU public procurement law cannot be efficient. While in many cases of unlawful amendments, ineffectiveness of the amended contract and the obligation to conduct a new award are both justified and obtainable, the above examples suggest that other remedies – either alternatively or in addition to ineffectiveness – might occasionally serve the actual purpose of enforcing the new directives better. These may include national administrative measures or – in the most serious cases – even criminal law sanctions, or the traditional public procurement remedies of the set-aside and interim measures.

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48 Hartlev, Liljenbøl. Changes to existing contracts … PPLR 2013/ 2, p. 57.
49 See also: R. Williams. Anti-corruption measures in the EU as they affect public procurement. PPLR 2014, 4, p. NA 97.
2.1 Types of remedies provided under the public procurement remedies’ system

The current system of remedies for public procurement cases consists mainly of so-called peer review or supplier remedies, to be conducted by private enforcement through competent national bodies – domestic courts or other institutions – so designated by the Member States. Any decision by a contracting authority or entity must be reviewable, the term ‘decision’ to be interpreted to include any act of a contracting authority adopted in relation to a contract within the material scope of the procurement directives, if capable of producing legal effects. Whether the decision is expressed or adopted outside a formal award procedure or as a part of such a procedure is irrelevant. No other restrictions apply with regard to the nature and content of a decision made by a contracting authority (entity) in order for that decision to be reviewable. Thus, a decision by a contracting authority to not to undertake a new award procedure and instead to enter into a modification of a public contract, is among decisions subject to review.

Besides the consequence of ineffectiveness, the remedies directives list three types of measures: the set-aside of unlawful decisions, interim measures, and damages. The national laws must make the said types of remedies available whenever a breach of the public procurement law occurs and circumstances so justify. The text of remedies’ directives has been interpreted to order that the three types of remedies be available for any and all breaches of public procurement regulation. The Remedies’ directives that introduced the specific supplier review system into the EU public procurement law, have not been significantly changed in the course of the latest reform that introduced the new substantive directives. While the ‘old’ substantive directives did not contain any clauses on contract modification, there was no need to test the suitability of the remedies system for contract modification cases. But now that the explicit clauses on

51 Remedies Directive Art. 1 (1).
52 Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, C-26/03, ECLI:EU:C:2005:5, paragraphs 38, 41.
53 Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr, C-81/98, CLI:EU:C:1999:534, paragraph 35.
54 Public Remedies Directive Art. 2 (1); Alcatel, CLI:EU:C:1999:534, paragraphs 30–35.
55 The only changes to the Remedies directives concern references to the scope of application of the directives – instead of the earlier substantive directives, reference is made to the new ones – Art. 46–47 of the Concessions Directive.
modifications form a distinct part of the new substantive directives, decisions infringing those rules must be subject to review and the suitability of these remedies for a functioning system of protection should be tested with regard to the new contract modification rules.

In essence, some of the remedies might be suitable to prevent unlawful modifications and might sometimes even avoid the more time- and resource-consuming result of ineffectiveness and new award procedure. For instance, a timely set-aside of a contracting authority’s decision to modify a public contract would take away the legal basis of the modification and a suitable interim measure might delay (and possibly result in avoiding) the making of such modification. Both of these remedies could influence the contracting authority (entity) to reconsider the need for modification.

Depending on the case, the contracting body might subsequently decide either (i) to abort the modification, (ii) to change the terms of the modification to make it acceptable without an award procedure, or (iii) to conduct the new award procedure for achieving the modification. Obviously, giving up on a genuinely necessary modification is not the desired result as no contracting authority (entity) should be forced to perform a contract on terms that make little or no economic sense. However, it may be a justified choice in some cases, for instance where the modification was in fact caused by ill considerations such as the aim to circumvent the law. Also, changing the content of the challenged modification may appear to be a viable option – for instance, when it is possible to adjust the modification so that it properly correspond to the clear, precise and unequivocal review clauses provided for in the initial procurement documents.

Application of the remedy of damages in cases of unlawful modifications might present much more difficulties. According to the EU law, the three main preconditions recognized in the case-law for claiming damages include the presence of a violation, the presence of harm and a direct causal link (conditio sine qua non) between the violation and harm. However, the regulation of specific rules on damages claims is left largely within the powers of the Member States, subject to the general principles of effectiveness and procedural equality, as the Remedies’ Directives do not establish a uniform, exhaustive set of rules. Therefore in reality, the primary source of law on damages for breach of procurement rules is often national case law and the possibility to obtain damages as a consequence of

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57 That was the result of the above referred Estonian Supreme Court case No 3-3-1-31-11 concerning modification of a concession contract.

58 See, e.g. Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others v Provincie Drenthe, C-568/08, ECLI:EU:C:2010:751, paragraph 92.

breach of public procurement law has been found to differ within the Member States’ jurisdictions.\textsuperscript{60}

With regard to unlawful contract amendments, the only case scenario that could provide realistic grounds for damages, would be a case where the claimant can show that had the modification been properly awarded, it would have won the award and earned certain profits. Even though cases of successful claims for lost profit have been noted in Member States and supported in literature,\textsuperscript{61} the possibility of receiving compensation for lost profits remains uncertain.\textsuperscript{62} Courts usually have a wide discretion in establishing the presence of the chance to earn the profits and may take into account different criteria.\textsuperscript{63} Thus, the option to claim damages for breach of modification rules may often remain a theoretical possibility with little or no actual perspective for use.

2.2 Accessibility of review procedures

The actual possibility of enforcing any of the three traditional procurement law remedies is difficult due to procedural and accessibility issues. Firstly, as was referred with regard to ineffectiveness above, the lack of publicly disclosed or obtainable knowledge about contract modifications may serve as a hindrance to a successfully practicing peer review in unlawful contract modification cases.

Even when a third party has information about a modification, the national rules concerning procedural standing can prevent the claim from being accepted for review. Review procedures are available to persons who can show an interest in obtaining a particular contract. This requirement can be satisfied in case of unlawful modification when a new award procedure is the intended result of the case. However, with claims aimed at set-aside or interim measures, the interest of a third party is often highly theoretical at best and simply absent in other cases.

In addition, the Member States may oblige the person submitting a claim to demonstrate the presence of an actual or potential harm caused by the alleged infringement.\textsuperscript{64} Again, there may be no direct harm to a third party in case of an unlawful modification of a contract. Thus, obtaining the chance at actual enforcement of any other remedies besides ineffectiveness is subject to remarkable difficulties in cases of unlawful contract amendments.

Besides the duty to establish ineffectiveness of an unlawful modification, the

\textsuperscript{60} C Bovis. Access to Justice and Remedies in Public Procurement, EPPPL 2012, 3, p. 201.
\textsuperscript{61} See more on this in Caranta, in D Fairgrieve & F Lichere. 2011, p. 177; Treumer, in D Fairgrieve & F Lichere. 2011, pp 150–151.
\textsuperscript{63} R Caranta, in D Fairgrieve & F Lichere, 2011, pp 176–177.
\textsuperscript{64} Werner Hackermüller v Bundesimmobiliengesellschaft mbH (BIG) and Wiener Entwicklungsge-
sellschaft mgH für den Donauraum AG (WED), C-249/01, ECLI:EU:C:2003:359, paragraph 19.
consequences of a breach of public procurement law are left for the national legal system to decide, subject to the principles of effectiveness and equality. In order for the supplier review to work as an efficient review system, a relatively wide circle of interested parties must have reasonable access to and be encouraged to make active use of the remedies available under the national review systems. In case of unlawful contract modification, this would have to mean enforcement of uniform and flexible rules on *locus standi* that allow a wider circle of competitors to challenge modifications made to public contracts. As a prerequisite of such right, a general (default) right of access to information on the performance stage of public contracts would facilitate actual information about public contract modifications.

Alternatively, institution of a system of outside review in the way of disciplinary, administrative or criminal sanctions could be considered and may appear to be a more effective way of enforcing the rules on public contract modification. Breaches of contract modification rules fall into the category of cases that do not benefit from the advantages normally applicable to the supplier review system: the competitors are not able to monitor the making of the modifications and to detect breaches in a timely manner; as a rule, the process of contract performance is not closely related to the competitors’ direct interests and the suppliers thus do not have the strongest incentive to monitor and claim review of possible breaches. In addition, the burden of proof in such cases may be unreasonably heavy for competitors. Instead, subjecting the cases of unlawful contract modifications to detection and enforcement through an external national system of review could be worth considering, especially if the external review body will be able to practices pro-active approach to detecting and timely sanctioning breaches.

Such alternative or additional outside review options could have the specific benefit of discovering and sanctioning breaches of public contract modification rules that under the current peer review system could go undetected or unchallenged. As such, the outside review can better serve the need of effective enforcement of the new rules of contract modification. While the re-active review procedures currently practiced according to the Remedies directives remain available to persons with a direct interest and incentive to bring review proceedings, persons with no standing for the purpose of review proceedings could be able to refer breaches to a competent authority. The alternative means of involvement

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65 Wall, paragraphs 43, 63–65, 71.
Old remedies for new violations?

would guarantee ‘sound procurement procedures’ as indicated in the recitals to the new directives.\textsuperscript{71}

3. In conclusion

As defined under the rules on contract modifications now established by the new directives, any substantial modification to a public contract is regarded as an illegal direct contract award and as such, may cause ineffectiveness of the contract and the obligation to conduct a new award as the primary results of the breach. The use of other remedies could benefit the purpose of upholding the new rules of modification as well. Such alternative or additional review options could include both remedies provided under the existing supplier remedies system – the set-aside and interim measures, and those enforceable through outer (administrative) review.

The current remedies system was however designed, keeping in mind the ‘traditional’ breaches of procurement law that occur before entering into a public contract. Therefore, the possibility to use such remedies in cases of breach of contract modification rules may be either complicated or unproductive or impossible, and may vary, depending on the national legislators’ choices. For instance, a genuine opportunity to effectively challenge unlawful contract modifications by any means of review presumes that third parties have a general (default) right of access to information about the modifications, either in a way of publicly disclosed or obtainable knowledge. The current rules do not guaranteed such access.

The lack of unequivocal understanding about the consequences of violating the rules on contract amendment provides grounds for different enforcement practices in Member States. In order to level the consequences of violations and provide uniform protection for rights of interested third parties, the current remedies directives might benefit from a review.

\textsuperscript{71} Recital 122 of the Public Procurement Directive, recital 128 of the Utilities Directive.