

3. Non-Compliance with contract terms: a comparative view on (non)regulation and remedies

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1. Introduction

Modification of public contracts is largely unresearched and underappreciated. It is one of the major grey areas in EU and national public procurement law. Reason is that it forms part of post-award transparency—an area that has flown under the radar for many years. Regulatory and political efforts have focused on the pre-award stage, demanding transparency of the procurement process, competitive bidding, and fair treatment of bidders,¹ while for the most part ignoring what happens after a contract is awarded.

When it comes to non-compliance with contract terms—by either the procurement agency or the contractor—and its legal consequences, the matter becomes even more obscure. This is due to a seemingly artificial break between public contract formation and contract execution in many EU Member States. The issue of non-compliance raises a row of complex questions such as: How is illegal modification different from non-compliance? Which remedies—public or private—exist for contract changes? Which law applies to contract changes? Which courts have jurisdiction over modifications of public contracts?

While more recent EU procurement regulations—including the 2014/24/EU (hereinafter the Procurement Directive 2014),² the 86/665/EC (hereinafter the Remedies Directive),³ and the case law of the European Court of Justice (hereinafter ECJ or Court)—have addressed some aspects of contract changes, such as the question as to what constitutes a “significant modification” and suggested some remedies to address illegal modifications, many aspects remain unaddressed—both at the EU and national level. Even when national procurement regulators and courts have taken on the task to fill the gap that the EU procurement system left, the national approaches are far from uniform and that is a well-known problem in EU community law.

This Chapter aims to shed some light into the darkness of illegal modifications and non-compliance in government procurement. It will give an overview of the different national remedies to address contract modifications, the communalities, and regulatory gaps. It will offer some critical thoughts on the regulatory bifurcation between contract formation and

¹ See the distinction between pre- and post-award transparency Désirée U. Klingler, “Measuring What Matters in Public Procurement Law: Efficiency, Quality and More,” (2020) “Journal of Management Policy and Practice 21, no. 3 (2020).

² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] L 94/65.

³ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, [1989] L 395, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] L 235.

execution and share observations as to the distinction between illegal modifications and non-compliance in different Member States, the applicable law and the courts' jurisdiction. With this overview, the Chapter aims to build the first step towards building an "acquis communautaire" for contract changes in EU procurement law.

2. Regulatory vacuum in the EU: free game for countries to address non-compliance

This book focuses on the existing (and non-existing) regulation of contract changes and their legal consequences—hence its name: the dark side of the EU public procurement law. Among illegal modifications and the lack of transparency in government contracting, the book also addresses the obscure area of non-compliance with contract terms. Before dwelling into the remedies discussion, this Section will first give an overview on how non-compliance is regulated in the different Member States, and how non-compliance differs from illegal modifications.

2.1. The easy, the hard and the intermediate way: three national approaches

As a preliminary note, neither the Procurement Directive 2014 nor the Remedies Directive address or regulate the issue of non-compliance with contract terms. Articles 72 and 73 of EU Procurement Directive focus on the authority's right to terminate a contract due to illegal modifications. The Remedies Directive suggests ineffectiveness of the public contract due to tender rule violations. This leaves the regulation of non-compliance with contract terms to the discretion of national regulators—which is in most countries addressed through private contract law. As it is well known, there is no real harmonization of private contract law throughout the EU, with all attempts to do so having failed thus far.⁴

Many of the Member States have not regulated the issue of non-compliance in their national procurement laws. With this choice, many countries have left non-compliance—at least implicitly—to private contract law and the civil courts. This "**easy way out**" of ignoring the issue of non-compliance in public procurement law was chosen in Finland, the UK, and Romania. Finland and Romania took the most radical stance and overlooked non-compliance entirely.⁵ This approach is prevalent especially in countries where post-award transparency is low. If countries have explicitly regulated illegal modifications, they often also address non-compliance one way or another.

The **intermediate approach** to deal with non-compliance, chosen for example in Denmark and Spain, is that contracting authorities *can*, but have no obligation to, act upon and enforce non-compliance with contract terms.⁶ Even though non-compliance is explicitly regulated in the Spanish Procurement Code, the Spanish contracting authorities have decided to remain

⁴ On this see, Qi Zhou 'Harmonisation of European Contract Law: Default and Mandatory Rules', in Larry A. DiMatteo, Qi Zhou, Severine Saintier and Keith Rowley (eds) *Commercial Contract Law Transatlantic Perspectives* (Cambridge University Press 2013) and Lucinda Miller, 'European Contract law after Lisbon', in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), 'The European Union after the Treaty of Lisbon' (Cambridge University Press 2012)

⁵ See contributions in this book by Carina Risvig Hamer, Modification of Contracts in Denmark; Merja Korteso and Pilvi Takala, Contract Chances in Finland; Pedro Telles, Public Contract Modifications in England, Wales, and Northern Ireland; Dana Cimpean, Dacian Dragos, Bogdana Neamtu, Contract Changes in Romanian Law.

⁶ See contributions by Carina Risvig Hamer, Modification of Contracts in Denmark, and Patricia Valcárcel Fernández, Contract Chances in the Spanish System on Public Procurement.

passive and not enforce non-compliance.⁷ This voluntary approach could endanger one of the core principles of public procurement law: equal treatment of suppliers. That is, however, only if the principle of equal treatment extends to the enforcement of public contracts—another question that has not yet been answered or addressed by lawmakers or academics. Without providing any conclusive evidence, the authors of this Chapter believe that under the current EU law, the principle of equal treatment does not extend to contract enforcement—an area that is governed by private contract law and the freedom of contract in most Member States.

It appears that the most conforming way to address non-compliance with contract terms is to regulate it in the national public procurement code. This “**hard way**” was chosen in Italy and Poland. In Italy, the need to regulate non-compliance was fueled by negative past experiences with corruption or favoritism. Italy had to deal with mafia-related issues,⁸ and has chosen “openness” to combat corruption in public procurement. The prescribed remedy for non-compliance is termination of the public contract. Poland is the opposite example: even though non-compliance is not regulated in the Polish Public Procurement Law, courts have required contracting authorities to retender the contract in case of non-compliance.⁹

Which approach is best? Having a procurement rule that is not enforced does not serve the purpose but is ‘dead letter law’. Ignoring the issue entirely cannot be the solution either. The authors of this Chapter see two ways to best approach the issue of non-compliance: a) regulating non-compliance directly in the public procurement law and *sanction* the authorities’ failure to enforce or b) including an explicit reference to private contract law in the public procurement laws to bridge the gap between both and avoiding uncertainty about how to approach the bifurcation of contract formation and contract execution (see next paragraph).

2.2. The problem: bifurcation of contract formation and contract performance

When comparing the regulations in the different Member States, a schism between *contract formation* and *contract performance* can be observed. In many countries this separation of the two stages is marked by the *signing* of the public contract. While public procurement laws prescribe strict rules on tendering and the award of public contracts up until the conclusion of the contract, most procurement laws are silent on issues related to the public contract after its conclusion, including contract modifications. In some countries the distinction between contract formation and execution is marked by the different forms of documents that are being modified: contract changes either relate to tender documents or the contract itself.

Even though there is no black letter law on how Member States should address modifications related to contract formation and execution, the jurisdictions covered in this book have chosen a similar approach. In Finland, Germany, Austria, France, and Italy modifications of tender documents are allowed restrictively—only the correction of formal errors is allowed, while modifications to the contract itself are allowed more generously.¹⁰ The fact that most changes to the procurement documents are considered unacceptable and require retendering is for the

⁷ See contribution in this book by Patricia Valcárcel Fernández, *Contract Chances in the Spanish System on Public Procurement*.

⁸ See contribution in this book by Paolo Patrito and Benedetta Biancardi, *Contract Changes in Italy*.

⁹ See contribution in this book by Piotr Bogdanowicz, *Contract Modifications in Poland: Much Ado About Nothing?*

¹⁰ See contribution in this book by Merja Kortesoja and Pilvi Takala, *Contract Chances in Finland*; Christoph Krönke and Valentina Neubauer, *Contract Changes in Germany, and Austria*; François Lichère and Valentin Lamy, *Contract Changes in France*; and Paolo Patrito and Benedetta Biancardi, *Contract Changes in Italy*.

protection of the core procurement principles of equal treatment, fair competition, and transparency. Changing documents during the procurement process would endanger these core principles.

The authors of this Chapter emphasize that this “bifurcation” of contract formation and contract performance obscures the area of contract changes even further. Private contract law would be ineffective if contractual rights could not be enforced through contractual remedies. This **mismatch between rights and remedies** is especially problematic in a field like public procurement, where public interest and public resources are at stake. Hence, defining what non-compliance is and what it is not, and how it relates to its twin brother illegal modifications helps to enlighten the dark side of contract changes in public procurement law.

2.3. Illegal modifications and non-compliance: a complicated relationship

What is non-compliance and when does it constitute an illegal modification? The issue becomes even more obscure when we add non-compliance into the mix. While the EU procurement law regulates some aspects of contract modifications, it does not address how it relates to non-compliance. Neither do most national procurement laws from the jurisdictions analyzed in this book.

The closest to providing answers to the complex relationship between non-compliance and illegal modifications in government procurement were the Den Haag District Court and Austrian scholarship. In two cases, the District Court in Den Haag decided that non-compliance amounts to a material modification a) when the contracting authority failed to enforce against a non-complying contractor, and b) when the contractor delivered non-conforming goods.¹¹ In another case, however, the Den Haag District Court rejected non-compliance to be a material modification when the contractor delivered the goods too late.¹² In Austria, a well-known procurement law commentary holds that the restitution of payment by the contractor following non-compliance would not be considered an illegal modification.¹³ In Denmark, it is generally accepted that certain non-compliance events can be considered substantial modifications, but so far no court decisions exist.¹⁴

While above-mentioned jurisdictions assume that non-compliance does not necessarily amount to a substantial modification and that only *certain* non-compliance events qualify as substantial modification, the Finnish approach seems to be more radical. The authors of the Finnish Chapter point out that there is no case law in Finland holding that non-compliance amounts to an acceptable contract change.¹⁵ Hence, all non-compliance events would qualify as illegal modifications. Illustrated in a VEN diagram, the two approaches look as follows:

¹¹ See contribution in this book by Erik Plas and Willem A. Janssen, Contract Modifications in the Netherlands: Understanding the Law, Jurisprudence, and Practice.

¹² See contribution in this book by Erik Plas and Willem A. Janssen, Contract Modifications in the Netherlands: Understanding the Law, Jurisprudence, and Practice.

¹³ See contribution in this book by Christoph Krönke and Valentina Neubauer, Contract Changes in Germany and Austria.

¹⁴ See contributions in this book by Carina Risvig Hamer, Modification of Contracts in Denmark.

¹⁵ See contribution in this book by Merja Kortesoja and Pilvi Takala, Contract Changes in Finland.

Figure 1: Netherlands, Austria, Denmark

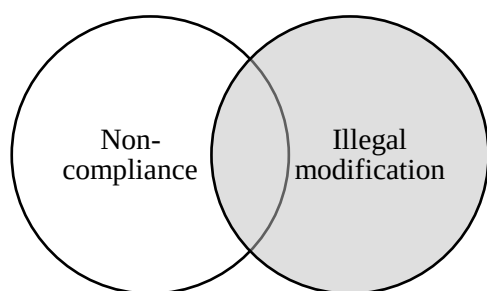
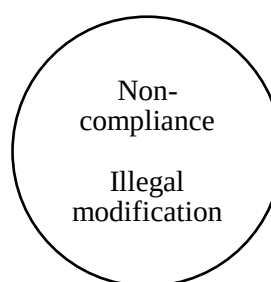


Figure 2: Finland



3. Case law: filling the regulatory gap at the EU and national levels

Considering the case law relevant for non-compliance, one needs to first look into *Finn Frogne*¹⁶ and how this ruling has shaped national case law. In *Finn Frogne*, the ECJ ruled that a settlement agreement that significantly reduced the scope and value of a contract constituted a substantial modification and was therefore subject to the principles *Pressetext*.¹⁷ In the latter case, the Court held that material amendments to contracts must respect the principle of equal treatment, and therefore require a retendering of the contract. The intention of the contracting authority or the success of the renegotiation of the contract were considered irrelevant. The Court also held that material changes can be legal if the tender documents foresaw such possibility. For the exercise of this prerogative the rules must be disclosed in detail in the tender documents.

Comparing how *Finn Frogne* was considered in the 11 jurisdictions covered in this book, it was only referred to in Germany and Austria, Italy, Finland, and Romania. In England and Wales, where a practice to use voluntary ex-ante (VEAT) notices as a pre-emptive defensive measure had developed, their use is likely to have been negatively affected by the judgment even though it is not presented directly as such.¹⁸ Hence, across the jurisdictions covered in this book, the reliance on *Finn Frogne* has been extremely limited since it was issued.

The question is why did the *Finn Frogne* ruling have such limited effect? We believe it was the timing. Since the Court's decision six years ago, only five of the 11 countries analysed in this book issued judgements reflecting on the case's application. Bearing in mind how long it can take for cases to be considered by higher courts or the limited reporting of cases in some countries, one should not be surprised that only a handful of cases were issued. The second timing issue pertains to the moment *Finn Frogne* came out. While it referred to contract modifications under the old Directive 2004/18/EC (hereinafter Procurement Directive 2004),¹⁹ by the time it was published the new Procurement Directive 2014 was already in force with article 72. The main objective of *Finn Frogne* to avoid substantive modifications to contracts is now regulated in article 72 of the Procurement Directive 2014. Even the parties' difficulties to perform the contract in *Finn Frogne*, which led to the contract changes, and not their mere

¹⁶ Case C-549/14, *Finn Frogne* [2016] ECLI:EU:C:2016:634. On this case see, Adrian Brown, 'Whether a new tendering procedure is required when a public contract is amended under a settlement agreement: the EU Court of Justice ruling in case C-549/14 *Finn Frogne* A/S', Public Procurement Law Review, 2017, 1, NA5-NA10.

¹⁷ C-454/06 *presstext Nachrichtenagentur* [2008] ECLI:EU:C:2008:351.

¹⁸ See contribution in this book by Pedro Telles, Public contract changes in England, Wales, and Northern Ireland.

¹⁹ Directive 2004/18/EC of the European Parliament and of the council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

desire to change the contract, do not go beyond the regulatory scope of article 72.²⁰ Also, the requirements for contract modification were explicitly foreseen in the tender documents,²¹ an issue that arose in *Presstext*,²² and is now explicitly regulated in article 72(1)(a). Hence, *Finn Frogne*'s relevance today is limited to the regulatory scope not explicitly covered by article 72 of the Procurement Directive 2014, which is anything else than significant modifications and amendments foreseen in the tender documents.

When taking a closer look at the jurisdictions that referred to *Finn Frogne*, it is hard to find a common thread among them, other than that the mentioning of the judgment was the gateway to investigate the principle of equal treatment and transparency. Furthermore, as argued in the chapters on Finland and Romania, it appears that *Finn Frogne* has been seen (or used) to restrict modifications beyond the existence of a revision clause. As argued above, this might have made sense for contracts tendered under the Procurement Directive 2004, but not for contracts regulated by the Procurement Directive 2014 and subject to its article 72.

Examining the doctrinal criticism of *Finn Frogne* and its pertained influence over national courts in some jurisdictions provides some interesting points for reflection. The Dutch chapter's conclusion that *Finn Frogne*'s importance has been overstated²³ seems well posed because contract modifications have now been clarified by the law, even in the absence of a review clause. The German and Austrian contributions have raised the question of culpable versus objectively unforeseeable contract changes.²⁴ The criticism of *Finn Frogne* is not new, other academics have expressed their bewilderment with the judgment's impact of a contract reduction being deemed an illegal modification²⁵ or the rigidity it entails,²⁶ reinforcing the Court's recent direction.²⁷ In short, academics have raised a degree of disconnect between CJEU's case law and commercial reality. Beyond that, *Finn Frogne* has also been considered to suffer from internal contradictions. The case refers to para 40 of *Belgacom*²⁸ where the Court held that the principle of legal certainty cannot be preferred over the principles of equal treatment and non-discrimination. Trying to uphold the effect of the VEAT notice, even in situations of material amendments, is an attempt to prioritise legal certainty in some circumstances.²⁹

²⁰ Case C-549/14, *Finn Frogne* at 31 and 32.

²¹ Case C-549/14, *Finn Frogne* at 30.

²² C-454/06 *presstext Nachrichtenagentur* at 37, 40, 60, 68 and 69.

²³ See contribution to this book by Erik Plas and Willem Janssen, Contract modifications in the Netherlands: understanding the law, practice, and jurisprudence.

²⁴ See contribution to this book by Cristophe Krönke and Valentina Neubauer, Contract changes in Germany and Austria.

²⁵ Albert Sanchez-Graells, 'Could the *Finn Frogne* case law get any weirder? The strange case of the partial termination of a parking concession (Conseil d'État, N°S 409728, 409799), available at: <https://www.howtocrackanut.com/blog/2017/11/29/could-the-finn-frogne-case-law-get-any-weirder-the-strange-case-of-the-partial-termination-of-a-parking-concession-in-aix-en-provence-conseil-dtat-ns-409728-409799>.

²⁶ Miguel Assis Raimundo, 'Good contracting authorities can predict the future: a note on *Finn Frogne*', (2017) European Papers Vol 2 no 1, 411-423.

²⁷ Vincent P Wangelow, 'EU public procurement law: amendments of public works contracts after the award due to additional works and unforeseeable circumstances', (2020) European Procurement and Public Private Partnership, 107-123.

²⁸ C-221/12 *Belgacom* [2013] ECLI:EU:C:2013:736.

²⁹ Erik Plas, 'Amendments to public contracts: in search of a sufficient degree of transparency', (2021) Public Procurement Law Review 1, 1-28.

4. Consequences of illegal modifications and non-compliance: a remedies discussion

Because the issues of illegal modifications and non-compliance are so closely related, we discuss the legal consequences and remedies of those two infringements together. This Section will first summarize and explain the law on illegal modifications at the EU level and how it was implemented in the different Members States (Section 4.1, 4.2, 4.3) and then compare the different national remedies against non-compliance (4.4).

4.1. Grounds for termination and ineffectiveness under EU law

As discussed, the EU procurement law only offers remedies against illegal modifications, but not against non-compliance—an area that is left to the regulatory discretion of the Member States. The Procurement Directive 2014 provides three main remedies against illegal modifications: retendering, modification notice (both in article 72), and termination (article 73). In most jurisdictions covered in this book, contract termination is used as the remedy of last resort or *ultima ratio* if no other measures seem appropriate. The Remedies Directive offers two more remedies against illegal modifications, which have been transposed into national law in most Member States: ineffectiveness (in many countries called annulment) of the contract (article 2d), and alternative penalties, including fines and shortening of the contract duration (article 2e).

The **grounds for termination** under Procurement Directive 2014 (article 73) are threefold: 1) if the contract was substantially modified, 2) if an exclusion ground, such as convictions or labor law violations, applies, or 3) if there was a serious infringement of public procurement rules. All Member States have transposed these grounds into national law, but some have gone beyond and added more grounds for contract termination (gold plating), including Finland and Spain. The Helsinki District Court decided in a case that the contracting authority was allowed to terminate the contract due to the contractor's delayed delivery.³⁰ The Spanish procurement law goes even further and includes bankruptcy or insolvency as termination grounds, and two events that are known from private contract law: impossibility and breach of an essential obligation.³¹

The **grounds for ineffectiveness** under the Remedies Directive (article 2d) are twofold: if the contract authority a) has awarded the contract directly without prior publication, or b) has deviated from the standstill period to sign the contract. In line with its “copy out” approach, the UK has followed this structure almost verbatim, while the Dutch legislator suggested to include another ground: gross breach of public procurement law (decision pending).³² The Romanian lawmaker went one step further and has enacted an exhaustive list of seven grounds that leads to the nullity of the contract.³³

Based on this overview of remedies, we can distinguish between two types of remedies: **monetary and non-monetary remedies**. This distinction is often used for remedies against

³⁰ See contribution in this book by Merja Kortesoja and Pilvi Takala, Contract Changes in Finland, fn 19.

³¹ See contribution in this book by Patricia Valcárcel Fernández, Contract Changes in the Spanish System on Public Procurement.

³² See contributions in this book by Pedro Telles, Public Contract Modifications in England, Wales, and Northern Ireland; and Erik Plas and Willem A. Janssen, Contract Modifications in the Netherlands: Understanding the Law, Jurisprudence, and Practice.

³³ See contribution in this book by Dana Cimpean, Dacian Dragos, Bogdana Neamtu, Contract Changes in Romanian Law.

non-compliance in private contract law. Most of the public procurement law remedies are non-monetary, including retendering, termination, and modification notice. The only monetary remedy mentioned in the Remedies Directive are fines (article 2e).³⁴ This limited selection of monetary remedies explains why many countries have chosen to extend the remedies menu with compensatory damages, and liquidated damages (see Section 4.4).

4.2. EU remedies against illegal modifications, their scope and effect

The bifurcation between contract formation and contract execution is reflected in different courts—administrative or civil—having jurisdictions over illegal modifications and non-compliance. In most of the Member States discussed in this book, public or administrative courts have **jurisdiction** to hear cases on illegal modifications of public contracts. These countries include Finland, France, Germany, Austria, Romania, Spain, and Italy. In Denmark, Poland, the Netherlands, and the UK, civil courts have jurisdiction over illegal contract modifications, even if they are regulated in public procurement laws.

The following table (Table 1) summarizes the scope and effects of the two main EU procurement remedies of termination and ineffectiveness in the here discussed jurisdictions. This section focuses on highlighting major differences and communalities among Member States, while leaving the detailed discussion to the individual chapters.

Table 1: National implementation of the EU remedies of termination and ineffectiveness

Country	Jurisdiction	Termination (article 73 Procurement Directive 2014)			Ineffectiveness (article 2d Remedies Directive)	
		<i>Scope (entire contract or amendment)</i>	<i>Effect (immediate or deferred)</i>	<i>Right of termination (statutory or contractual)</i>	<i>Scope (entire contract or amendment)</i>	<i>Effect (ex tunc or ex nunc)</i>
Denmark	Civil courts or arbitration	Affects entire contract if change is closely intertwined with original contract				ex nunc
Finland	1) Market Court (public) decides on contract changes 2) District Courts decide on other contractual issues like compensation		With or without immediate effect	Statutory power and contractual right to terminate, but needs to pay supplier for delivered products	Affects entire contract	ex nunc
France	Conseil d'État (public)	Affects amendment only	With deferred effect/ termination period	Statutory power (not obligation) to terminate	Affects amendment only	ex tunc

³⁴ Remedies Directive.

Germany	Award Chambers (public)	Can affect entire contract or amendment only	Ex nunc with immediate effect	Statutory power and contractual right to terminate (if agreed)	Affects entire contract	ex nunc
Austria	Federal Administrative Court	Can affect entire contract or amendment only	1) Ex nunc with immediate effect 2) In insolvency, 6-month termination period	Statutory power and contractual right to terminate (if agreed)	Can affect outstanding part or entire contract	ex nunc
Poland	Civil courts	Affects amendment only	Ex nunc with immediate effect	Statutory power to terminate	Affects amendment only	
Romania	Administrative courts	Affects entire contract if partial termination is not possible	With immediate effect, but judge can grant termination period	Statutory power to terminate	Affects entire contract only if partial annulment is not possible	ex tunc
Spain	Administrative courts	Usually affects entire contract		1) For exclusion grounds or severe infringement, authority must initiate <i>ex officio</i> review and terminate contract 2) Substantial modifications need to be appealed and the authority has the statutory power (not obligation) to terminate	Affects amendment only or entire contract (if execution of entire contract is affected)	
Netherlands	District courts	Likely to affect amendment only	Likely with a proportionate termination period	Statutory power to terminate work and service contracts, but not sales contracts	Likely to affect amendment only	ineffective after 6 months
Great Britain	General civil courts			Contractual right to terminate	Affects amendment only	ex nunc
Italy	1) In general, administrative courts 2) For non-performance, civil courts			Statutory power (not obligation) to terminate		
Summary	Public: 7 Private: 4	Contract: 3 Amendm.: 4	Immediate: 4 Deferred: 2	Statutory: 9 Contractual: 4	Contract: 3 Amendm.: 6	Ex tunc: 2 Ex nunc: 5

One question addressed in the national chapters is whether the remedies of termination and ineffectiveness **affect the amendment only**, or whether the illegal modification leads to the termination of the entire contract. Most countries—more overwhelmingly for ineffectiveness, allow the contracting authority to terminate the amendment only, rather than the entire contract. This choice reflects the ubiquitous principle of proportionality, which the national legislators probably had in mind when designing these rules. Giving the contracting authority the right to terminate the entire contract would disrupt the procurement process more than necessary. However, some countries allow the contracting authority to terminate the entire contract, especially when the modification is closely intertwined with the original contract (Denmark) or affects a core part of the contract (Spain).³⁵ This regulatory choice can be observed in a similar form in private contract law. The remedy of terminating the entire contract is usually reserved for a material breach where the essential obligation of the contract can no longer be fulfilled.

The termination of the public contract usually occurs **immediately**, without giving the breaching party any termination period. On the one hand, this choice could be related to the fact that the contracting authority wants to limit the damages and exit the contract where the economic equilibrium of a contract has been disturbed significantly or the procurement rules were severely violated. On the other hand, some jurisdictions recognize situations where a termination period may protect one or both parties better. While in the Netherlands and France a reasonable termination period is the default rule, Romania leaves the decision to deviate from termination with immediate effect to the courts, and in Austria, a six-month termination period applies after the contractor has declared insolvency.³⁶

All countries discussed in this book give the contracting authority **statutory power** to terminate the contract. The authors of the French, Spanish and Italian chapters have pointed out that the statutory power gives the authority the right, *but not the obligation* to terminate a contract.³⁷ Relying on the text of article 73, which states that the contracting authorities shall have the *possibility* to terminate a contract in case of substantial modifications, this interpretation appears correct. However, this power should not be abused to offer preferential treatment to some contractors.

Some jurisdictions complement the authority's statutory power with a **contractual right** to terminate the public contract. These countries include Finland, Germany, and Austria. But what is the benefit of having a contractual right to terminate in addition to a statutory power? Often the contractual right mirrors the statutory right to terminate and expands the menu of remedies to include contractual remedies. The only country that chose a contractual right instead of a statutory right to terminate the contract is the UK. This decision is deeply rooted in the English common law tradition that upholds the freedom of contract, which includes the parties' freedom to modify the contract and to terminate the contract.³⁸

³⁵ See contributions in this book by Carina Risvig Hamer, *Modification of Contracts in Denmark*; and Patricia Valcárcel Fernández, *Contract Chances in the Spanish System on Public Procurement*.

³⁶ See contribution in this book by Erik Plas and Willem A. Janssen, *Contract Modifications in the Netherlands: Understanding the Law, Jurisprudence, and Practice*; François Lichère and Valentin Lamy, *Contract Changes in France*, and Christoph Krönke and Valentina Neubauer, *Contract Changes in Germany and Austria*.

³⁷ See contribution in this book by See contribution in this book by François Lichère and Valentin Lamy, *Contract Changes in France*; Patricia Valcárcel Fernández, *Contract Chances in the Spanish System on Public Procurement*; and Paolo Patrito and Benedetta Biancardi, *Contract Changes in Italy*.

³⁸ See contribution in this book by Pedro Telles, *Public Contract Modifications in England, Wales, and Northern Ireland*.

Because the remedy of **ineffectiveness** is even more drastic than termination—it assumes that the contract has never even existed—most jurisdictions apply ineffectiveness to the illegal amendment only, and not the entire contract, thus amounting to a reduction of the contract. The ineffectiveness of the entire contract is often considered a secondary means if partial ineffectiveness is not possible (Romania, Austria) or if the contracting authority’s infringement is so severe that it taints the entire contract (Spain).³⁹ Two countries, Denmark, and the UK, have adopted a measure that can avoid ineffectiveness of the contract: the voluntary *ex ante* notice. The authors of this Chapter caution that the VEAT should not be extensively applied to avoid ineffectiveness due to potential abuses by the contracting authorities.

4.3. National remedies against illegal modifications: document correction, contractor substitution and review clauses

In addition to the remedies provided by the EU directives, some jurisdictions have introduced other—public and private law—remedies to address illegal modifications. This Section discusses the three most common remedies used in the different jurisdictions covered in this book.

Some Member States (Germany, Austria, and Finland) allow contracting authorities to **correct the tender documents**, without the need to retender the contract. These rules provide a “safe harbor” from the strict illegal modifications rules, but are limited to the correction of formal mistakes, rather than substantial errors. To ensure the competitiveness and fairness of the procurement process, German and Austrian regulation allow the bidders to adapt the offer, and the Finnish rules extend the deadline for bids.⁴⁰

Some Member States have adopted a public law remedy unknown in EU law: they give the contracting authority the possibility to temporarily step into the contractual obligations until the contract is retendered to a new contractor, which can be described as “**contractor substitution**.” Finland allows contractor substitution only if it was specified in the tender documents⁴¹—to uphold transparency and legal certainty. The Spanish procurement law foresees that the contracting authority can, for an interim period, continue the modified contract until a new contract has been awarded to avoid further damages.⁴² The French Conseil d’État decided in 2016 that the contracting authority can take over (temporary contractor substitution) a contract in case of non-performance by the contractor at the expense and risk of the defaulting contractor until it is retendered.⁴³ The main purpose of said remedy is for the contracting authorities to avoid the interruption of public services and to minimize the damages caused by waiting and retendering the contract.

As one of the most common contract law instruments, many jurisdictions allow for so called **review clauses** that are often incorporated in the General Terms and Conditions (GTC) of the public contract. Review clauses allow the parties of a contract to alter a contract if certain pre-defined circumstances are met. Review clauses are most used for a change of partner due to

³⁹ See contribution in this book by Dana Cimpean, Dacian Dragos, Bogdana Neamtu, Contract Changes in Romanian Law; Christoph Krönke and Valentina Neubauer, Contract Changes in Germany, and Austria; and Patricia Valcárcel Fernández, Contract Chances in the Spanish System on Public Procurement.

⁴⁰ See contribution in this book by See contribution in this book by Christoph Krönke and Valentina Neubauer, Contract Changes in Germany, and Austria; and Merja Kortesoja and Pilvi Takala, Contract Chances in Finland.

⁴¹ See contribution in this book by Merja Kortesoja and Pilvi Takala, Contract Chances in Finland.

⁴² See contribution in this book by Patricia Valcárcel Fernández, Contract Chances in the Spanish System on Public Procurement.

⁴³ See contribution in this book by François Lichère and Valentin Lamy, Contract Changes in France.

insolvency or bankruptcy, change of control of the partner or for unforeseen circumstances (so called *force majeure* clauses). These are of particular importance in the context of the restrictions imposed by *Finn Frogne* for contract modifications and article 72. Review clauses are allowed and applied in Denmark, Finland, Germany, Austria, and Poland, but are prohibited in Romania and the Netherlands—to avoid the circumvention of mandatory public rules on contract modifications. The Dutch procurement practice knows a special type of review clause: the “**waiting room clause**.” Based on this clause, a contracting authority can either choose or be ordered by a court to terminate the old contract and enter a new contract with the second-placed bidder in case of non-compliance or bankruptcy.⁴⁴ The second-placed bidder is in a “waiting room” and is called into duty if the first-placed bidder fails to perform. While this clause eases the process in case of contract modification, it also entails the risk of collusion among the first and second bidder—an issue that the authors of this Chapter caution about.

4.4. National public and private law remedies against non-compliance

Along the split between contract formation and contract performance, most Member States covered in this book address non-compliance by means of (private) contract law. Only three countries have chosen to explicitly regulate non-compliance in public procurement law: Italy, Spain, and Denmark. Because non-compliance is often governed by private contract law, in most Member States civil courts have **jurisdiction** over non-compliance issues. This includes Denmark, Germany, Austria, Poland, Romania, the Netherlands, the UK, and Italy. The situation in Finland is less clear. The Finnish Market Court (administrative law court) has issued conflicting decisions on whether it has jurisdiction to decide on non-compliance. In most cases, the Market Court has denied its jurisdictions on contractual matters, including contract interpretation, and contractual termination rights.⁴⁵ In the most recent decision of 2021, the Market Court acknowledged jurisdiction over non-compliance where the contract period or content was extended beyond what was originally stated in the tender documents.⁴⁶

The only two countries discussed in this book where administrative courts have jurisdiction do address both illegal modifications and non-compliance in government procurement are France and Spain⁴⁷, following their longstanding traditions of separating matters arising from administrative law and civil law. One benefit of having the same courts address both matters is the judges’ experience and expertise in public procurement law matters. Although, depending on the experience and formation of specific judges, it might be challenging for an administrative court to decide on non-compliance applying private contract law (as it is the case in France).

Taking a comparative view across the ten jurisdictions discussed in this book, the countries often distinguish between four **types of non-compliance** (see Table 2 below): 1) non-performance, where the contractor fails to perform an essential contractual obligation, 2) poor performance, where the contractor does not perform to a satisfactory degree, 3) delay, where the contractor is not keeping to the contracted timescales, and 4) impossibility, where the performance of the contract is no longer possible, often due to external events.

⁴⁴ See contribution in this book by Erik Plas and Willem A. Janssen, Contract Modifications in the Netherlands: Understanding the Law, Jurisprudence, and Practice.

⁴⁵ See contribution in this book by Merja Korteso and Pilvi Takala, Contract Chances in Finland.

⁴⁶ See contribution in this book by Merja Korteso and Pilvi Takala, Contract Chances in Finland.

⁴⁷ Switzerland and Portugal, which are not covered by this book, follow the same separation between administrative and civil law.

Table 2: Summary of national public and private law remedies against non-compliance

Non-compliance event	Contract law definition	Public law remedy (in addition to EU law)	Private law remedy	Considered illegal modification
Non-performance	Material breach, e.g., breach of essential contractual obligation	Contractor substitution, Exclusion ground	Termination, Compensatory damages	Rather yes
Bad performance	Partial breach, e.g., delivery of defective products	Extension of execution period	Restitution, Repair, Price reduction, Rescission, Compensatory and liquidated damages	Rather yes
Delay	Material or partial breach, e.g., late delivery	none	Termination, Compensatory and liquidated damages	Rather no
Impossibility	Material breach, e.g., destroyed good	none	Ineffectiveness, Rescission	Rather yes

As summarized in Table 2 above, we can find similar **contract law remedies** for each of those non-compliance events. While non-performance is often addressed by terminating the contract in conjunction with damages, delay is often addressed by means of liquidated damages (financial penalty) before the contract is terminated. Impossibility often leads to the annulment or ineffectiveness of the contract and the return of the services rendered. Finally, for poor performance a variety of remedies exist. The more lenient remedies are restitution and repair of the defective good and in more severe cases, the innocent party can rescind from the contract and claim damages. Some countries, including Austria, Finland and Poland also allow for a price reduction in case of poor performance.⁴⁸ Even though this remedy is quite common in private contract law, in the context of public procurement this remedy is slightly more problematic: a price reduction can alter the economic equilibrium and the competitive setting significantly and as was held in *Finn Frogne*, can be considered an illegal modification to the contract.

Before resorting to public and private law remedies, parties can design contractual clauses that help to manage and preempt potential non-compliance events. One of the most common contractual clauses to deal with non-compliance are **contractual penalties** or liquidated damages clauses. They are often used to penalize contractors for late performance and aim to incentivize contractors to keep their promise and deliver the goods in time. These have been frequently observed in Poland, Finland, the Netherlands, Austria, and Denmark in public contracts.

5. Conclusion

This Chapter scrutinizes the issue of non-compliance with contract terms and how it is treated in the different jurisdictions covered in the book, concluding that there is no uniform approach. In fact, there is a vacuum rather than a harmonized regime, with a clear dividing line upon the award of a contract: while the national approaches before the contract award are largely harmonized by EU law, after the contract award we are left with limited EU rules and differing national solutions. This can be explained by the historical lack of focus on legal harmonization for contract performance in comparison with pre-award procurement rules.

⁴⁸ Swiss contract law similarly offers price reduction as contract law remedy for sales contracts.

We summarize the different approaches as ‘one regime, four systems’. Within the public procurement regime dealing with contract modifications, we encounter both EU and national rules, and public and private law regimes—that bifurcate at the time point between contract formation and contract enforcement. While EU law regulated illegal modifications and their remedies, EU law does not offer guidance on non-compliance with contract terms. This area is left to the national law, most often private contract law, while public procurement law governs the pre-award stage. An additional complication to the traditional dichotomy between public and private law is the spotty regulation, which is left to the courts to fill.

Even where a degree of harmonization exists at the EU level, i.e., the remedies of termination and ineffectiveness, our analysis shows that national implementation of these vary significantly between different countries. Hence, the same legal question may lead to different answers depending on the law applicable to the case at hand. This plurality of solutions is the consequence of the lack of harmonization at EU public procurement law.

Our comparative analysis shows that we are far from harmonized post-award rules on non-compliance within the EU and that we have only scratched the surface with articles 72 and 73 of the new EU Procurement Directive 2014. Having unearthed so many different approaches, it would be a worthwhile learn from those different experiences and move towards a convergent and harmonized approach to deal with non-compliance and contract modification.