Contract Adjustments and Public Procurement

an analysis of the law and its application

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Thesis submitted to the University of Nottingham for the degree of Doctor of Philosophy

2016

Abstract

The focus of this study is on the public procurement law applicable where UK contracting authorities seek to adjust the provisions of existing contracts. This study aims firstly to identify the law applicable to contract adjustments and secondly to establish how that law is applied in practice.

In order to achieve the first objective, chapter 2 of this study set out the substantive law applicable to contract adjustments (including that arising from the Treaty on the Functioning of the European Union , the Public Contracts Regulations 2006 and 2015, and case law) and chapters 3, 4, and 5 consider respectively the content of that law specifically in the cases of review clauses, adjustments upon operation of law, and other adjustments.

The second objective is met through considering the findings of relevant case law and also through undertaking empirical research. Chapter 6 set out the empirical research method, which focuses on adjustments to public private partnership contracts in the health, secure accommodation and education sectors. Data was collected through semi-structured questionnaires from private practice lawyers who advise contracting authorities on adjustments to those contracts within the scope of this research and contracting authorities themselves. Chapter 7 then sets out the findings of that empirical research.

In the concluding chapter 8 the findings of the research are set out including an explanation of the ambiguities identified in the existing legal framework, and an articulation of the overall approach taken by contracting authorities when adjusting contracts, which suggests that a pragmatic approach (including assessment of likelihood of successful procurement law challenge) is taken to best enable the attainment of the contracting authorities' procurement objectives. The study closes by setting out ways in which the law on contract adjustments could be clarified or improved.

Acknowledgement

I would like to thank my supervisor, Professor Sue Arrowsmith, for her support and guidance throughout my research. I am privileged to have benefited from her comprehensive and authoritative command of procurement law, and from her detailed comments on drafts of my work.

I am also grateful to Professor David Fraser, in particular for his invaluable contribution to my empirical research.

I would also like to extend my thanks to those individuals who cannot be named for reasons of confidentiality who gave up their time to participate in my empirical research.

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Chapter 1: Introduction

1.1 Context of the study

This study focuses on public procurement law applicable to situations in which contracting authorities within England and Wales seek to adjust the provisions of their existing contracts.

The concept of adjustment is defined at section 1.2 below and, as explained in section 1.4, contract adjustments may be needed in practice for a variety of reasons, some of which are important to ensure the continued provision of a public service.

Where a clear legal framework exists contracting authorities and those advising them may be better placed to understand and apply the law. Where there is ambiguity contracting authorities may be uncertain as to how to proceed so as to ensure their objectives are met within the parameters of the law, and this may result in practical difficulties. For example, a contracting authority may decide not to make an adjustment which, had it been made, may have resulted in a better outcome for the contracting authority, or may be successfully challenged after making an adjustment which was not in fact legally permissible.

In this study, "public procurement" refers to the acquisition by contracting authorities of the goods, works, and services that they need to perform their functions. "Contracting authorities" are as defined in the Public Contracts Regulations 2015 (as amended) (the "2015 Regulations") which are, as explained in chapter 2, the main legal rules currently governing public procurement in England and Wales.[1] As also explained in chapter 2, the Public Contracts Regulations 2006 (as amended) (the "2006 Regulations") were in force between 31 January 2006 and 25 February 2015 and were therefore applicable during some of the period during which this study was

[1] The Public Contracts Regulations 2015 SI 2015/102 as amended by the Public Procurement (Amendments, Repeals and Revocations) Regulations 2016 SI 2016/275;

undertaken.[2] The definition of contracting authorities can be found at Regulation 3 of the 2006 Regulations.[3]

In this study references to "non-domestic" contractors means those established in a European Union (EU) member state other than that in which the contracting authority procuring the applicable public contract is established. "Domestic" contractors are those established in the same member state as the procuring contracting authority.

1.2 Contract adjustments: a definition

For the purpose of this study an adjustment is:

an event which causes the performance of or a provision of an existing contract to be different to the performance or provision before the occurrence of the event. Such event can be the operation of a provision of the contract, an external event, or the performance or acceptance by a party of an obligation in a manner which differs from that provided for in the contract as awarded.

The term "adjustment" was selected as it is conceptually more neutral than other terms available in the context of public procurement or UK contract law more generally. As such it gives a better platform from which to analyse various scenarios which may arise during the term of a contract. It is also desirable to use the same term for consistency.

Regulation 72 of the 2015 Regulations uses the term “modification” when setting out the permitted circumstances in which a contract may be modified

[2] The Public Contracts Regulations 2006 SI 2006/5 as amended by SI 2007/2157, SI 2007/3542, SI 2008/2256, SI 2008/2683, SI 2008/2848, SI 2009/1307, SI 2009/2992, SI 2010/133, SI 2010/976, SI 2011/1043, SI 2011/1441, SI 2011/1631, SI 2011/1848, SI 2011/2053, SI 2011/3058, SI 2012/725, SI 2013/252, SI 2013/1431 (the “2006 Regulations”); this study was commenced in October 2012 and the law herein is correct as to 23 June 2016; the “Procurement Regulations” means together the 2006 Regulations and the 2015 Regulations;

[3] For the purposes of this study there is no substantive difference between the definition of contracting authorities in the 2006 Regulations and 2015 Regulations;

during its term. Other terms available and referred to in case law and literature include "amendment" and more particularly "material amendment", "variations", "adjustments" and "changes". It appears that the courts and academics generally do not make a distinction in definition between these different terms.[4] This is perhaps because in common usage these terms are synonymous to a greater or lesser extent. However it is unhelpful to substitute these terms without distinction here as this does not lead to clarity in a study of this nature.

The concept of material amendment is used in the important case of *Pressetext*, which ruled:[5]

"...amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract." [6]

[4] For example, Case C-454/06, *Pressetext Nachrichtenagentur GmbH v Republic Osterreich (Bund) and Others ("Pressetext")* see further chapter 2 section 2.6.2; Auricchio, A., "The problem of anti-discrimination and anti-competitive behaviour in the execution phase of public contracts", *Public Procurement Law Review*, 1998, 5, pp. 113-115, using the terms "changes" and "variations" in the opening paragraphs and "modifications" is subsequently used as a subject heading under which examples are set out; Treumer, S., "Regulation of contract changes leading to a duty to retender the contract: the European Commission's proposals of December 2011", *Public Procurement Law Review*, 2012, 5, pp. 153-166 and Treumer, S., "Contract changes and the duty to retender under the new EU public procurement Directive", *Public Procurement Law Review*, 2014, 3, pp. 148-155, uses "changes" throughout; Poulsen, S. T., "The possibilities of amending a public contract without a new competitive tendering procedure under EU law", *Public Procurement Law Review*, 2012, 5, pp. 167-187, use of "amendment"; Hartlev, K., and Liljenbol, M. W., "Changes to existing contracts under the EU procurement rules and the drafting of review clauses to avoid the need for a new tender", *Public Procurement Law Review*, 2013, 2, pp. 51-52, use of "change", "modify", "adaptation" and "amendment" used in "introduction and purpose"; Miller, J. and Cohen, L., "One change too many! Is there any position for the American concepts of "cardinal changes" and the "cumulative impact doctrine in English law?", *Construction Law Journal*, 2002, 18(5), pp. 382-383, on variations using "variation", "alteration" "changes" and "modification"; "substantial modification" in Brodec, J. and Janacek, V., "How does the substantial modification of a contract affects its legal regime?", *Public Procurement Law Review*, 2015, 3, pp. 90-105;

[5] *Pressetext*, fn 4; see further chapter 2 section 2.6.2;

[6] *Ibid.*, para 34;

This strongly suggests that an amendment is something which makes the contract once amended "different" from that which existed prior to the amendment. The test is then whether the amendment is sufficiently material as to constitute a new contract award. This term is used as distinct from an "adjustment" which *Pressetext* uses to describe changes which do not constitute a "material contractual amendment".[7] *Pressetext* does not, however, consistently apply terminology - for example "change" and "modify" appear in connection with the change of contractual partner.[8]

The term "variation" is also used to describe adjustments to existing contracts.[9] This term may imply that a new contract has been formed following the variation as a principle exists in English contract law that consideration is required for the variation.[10] This may suggest that variations create a new contract, which would perhaps preclude the use of this term to describe the implementation of a term of an existing contract.

This study explores the legality of a range of scenarios which may occur or may be required during the term of a contract. The term "adjustment" has been selected by the author to encapsulate these various scenarios and does not imply anything about the acceptability of the adjustment either in terms of compliance with procurement law or in terms of the achievement of possible procurement objectives. It is intended to be value neutral and is

[7] *Pressetext*, fn 4, para 57;
[8] *Ibid.*, para 39, 43, 45, 47;
[9] See Dorter, J., "Variation", *Construction Law Journal*, 1991, 7(4), p. 281 explaining in the context of a construction contract a "variation" may firstly mean an "alteration" of the physical work required and secondly may denote a "change" to the contractual terms on which the work is performed;
[10] Chitty on Contract Law, 32nd edition, accessed through Westlaw, para 4-080; however see Kahn who suggests that "commercial common sense and realism" has led to a weakening of the doctrine of consideration in the context of a variation, Kahn, S. G., "Unilateral modification clauses in long term contracts", *International Business Law Journal*, 1986, 2, p. 145; and Coote reporting a New Zealand case that found that "consideration is a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself", Coote B., "Case Comment: Consideration and variations: a different solution", *Law Quarterly Review*, 2004, 120 (Jan), p. 21 reporting *Antons Trawling Co Limited v Smith*, [2003] 2 NZLR 23 (CA) (NZ) pp. 45-46;

used in this study to indicate that an existing contract has been adjusted in some respect.

It is hoped that the use of consistent nomenclature will give clarity as, in the absence of consistency, it may not be clear whether some types of adjustment are inadvertently excluded from the description, or whether their omission is intentional and in fact signifies a different approach is being taken to different types of "adjustments". Given the focus of this study on the public procurement law applicable to scenarios where contracting authorities seek to adjust the terms of existing contracts it is appropriate to define what is in the scope of this study, whereas this semantic point has perhaps not been relevant in other cases and commentary.

1.3 Objectives of procurement law and policy: the perspective of the contracting authority

1.3.1 Background

Public procurement is regulated in order to support the achievement of certain objectives. This section of the study considers a number of objectives and explains the relevance of these to contract adjustments. A number of different objectives overlap or are mutually reinforcing and this is explored in this section.

The relevance of each objective will vary depending on whether the issue is considered from the perspective of the EU or from that of the contracting authority. This section focuses on procurement objectives from the perspective of the contracting authority. This is appropriate as an aim of this study is to understand how contracting authorities apply the law in practice. It is relevant therefore to examine the objectives they are seeking to achieve through and in their procurements to understand their approach to applying existing law to contract adjustments. The content of and objectives of EU law are described in chapter 2 of this study, so are not mentioned further in this chapter.

The procurement objectives of contracting authorities should be understood in the context of the rules, both statutory and under common law, applicable to them.[11] Contracting authorities are under a duty to achieve value for money. This is explained in section 1.3.2 below. As explained below, this duty arises from fiduciary and, in the case of local authorities, statutory obligations.

In some instances procurement policies are set by government departments. HM Treasury has set out policies applicable to central government on obtaining value for money through "sound" procurement, which includes "fair and open competition".[12] The Efficiency and Reform Group of the Cabinet Office is responsible for some procurement strategy, working with HM Treasury to deliver efficiencies in public procurement. The policies issued by these bodies is relevant to the entities (primarily central government contracting authorities) to which it is addressed, but other contracting authorities may be explicitly advised to have regard to it or may choose to do so in an effort to pursue best practice. Therefore the existence and content of policy may influence and in some cases may prescribe the objectives set by contracting authorities.

The objectives of a contracting authority may vary within the framework of the applicable rules depending on the procurement in question. This section will consider procurement objectives in an abstract case, rather than looking at a contracting authority's objectives in a specific scenario. No attempt will be made to balance or assess the relative merits of competing objectives. The way in which contracting authorities manage their procurement objectives in practice is considered in chapter 8 in which conclusions are drawn as to how contracting authorities apply the law on contract

[11] See for further information chapter 2 of Arrowsmith, S., *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, Volume 1, 3rd edition, 2014, Sweet & Maxwell, pp. 11-147;

[12] HM Treasury, "Managing Public Money", July 2013, with annexes revised as at August 2015, Annex 4.6, at https://www.gov.uk/government/publications/managing-public-money, accessed 13 June 2016;

adjustments, following from the findings from the empirical research set out in chapter 7.

Throughout this study, and in particular in this section 1.3, references to the objectives of the contracting authority encompass those objectives of the relevant government departments to the extent these may have influenced or prescribed the objectives of an individual contracting authority.

1.3.2 Competition and value for money

The apparent synergy between competition and value for money, as explained in this section, means that it is helpful to consider these concepts together.

A key objective of domestic procurement systems is the achievement of value for money, which can be defined as ensuring that the contracting authority's requirements are let on the most advantageous terms.[13] This definition encompasses both price and also other elements that may be of relevance to a contracting authority, such as the suitability of the goods or service to meet the requirement, the quality provided, and other factors which may include the timing of delivery or maintenance costs.[14]

[13] Arrowsmith, S., "The past and future evolution of EC procurement law: From framework to common code", *Public Contract Law Journal*, 2005-2006, 35, p. 351; see also Neumayr who identifies three main aspects of value for money: (i) that which is to be procured must meet the needs of the contracting authority and must do so in an optimal way; (ii) that the contract which is the basis for the procurement should be on the most favourable terms possible; and (iii) that the contractor performs the contract in accordance with the contract awarded, Neumayr, F., "Value for money v equal treatment: the relationship between the seemingly overriding national rationale for regulating public procurement and the fundamental EC principle of equal treatment", *Public Procurement Law Review*, 2002, 4, p. 216;

[14] It should be noted that the precise construction of "value for money" is dependent on the perspective of the entity that is assessing it. See, Trepte, P., *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, 2004, Oxford University Press, Oxford, p. 390, where the point is made that "value for money" is contingent on individual preferences, the availability of differentiated products and services, and on the political and social judgements of the contracting authority;

In order to ensure value for money, contractors must deliver contracts on the basis of their successful bid.[15] Where contractors fail to perform contracts this may cause the contracting authorities to incur costs as they may need to re-procure the services, or pay the contractor extra fees to enable it to continue to deliver the contract. Contracting authorities will need to carefully consider the way in which value for money is best achieved where contractors fail to perform contracts on the agreed terms, including where a contract adjustment is considered to address the issue.

Contracting authorities will typically want to secure value for money as they want to, and want to be seen to, spend public funds in a manner which delivers the greatest benefit. Where contracting authorities fail to achieve value for money in their use of public money, this can lead to increased taxes or may reduce the funds available to spend elsewhere.[16]

Service users and those tax payers who have funded the procurement have an interest in whether or not a contracting authority obtains value for money, and contracting authorities who fail to do so may be subject to criticism.[17] Contracting authorities understandably want to escape criticism and be perceived to be doing a good job, and accordingly securing value for money will be an objective for contracting authorities for this reputational reason.

Contracting authorities are required to achieve value for money to comply with their fiduciary and in some instances statutory duties, and as such this should be reflected in their public procurement objectives. The achievement of value for money is imposed on contracting authorities based on the

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[15] Arrowsmith, S., Linarelli, J., and Wallace, D., *Regulating Public Procurement: National and International Perspectives*, 2000, Kluwer Law, p. 30;
[16] *Ibid*., p. 8;
[17] For example, there was negative publicity of (i) an "abandoned" procurement of an NHS IT system which reportedly cost "tax payers" £10 billion, http://www.theguardian.com/society/2013/sep/18/nhs-records-system-10bn, accessed 13 June 2016; and (ii) of "soaring costs" of private finance initiatives, http://www.theguardian.com/politics/2012/jul/05/pfi-cost-300bn, accessed 13 June 2016;

fiduciary duty imposed by UK administrative law. The concept underpinning this is that contracting authorities are funded by public money which is held in trust by the contracting authorities to be spend in a proper manner, including delivering value for money.[18]

In addition local authorities have statutory obligations to obtain value for money.[19] The Local Government Act 1999 introduced the concept of "best value", defined as being the obligation on local authorities owed to "local people to provide quality services at an acceptable price".[20] This reflects the necessity of obtaining a balance between quality and price. Local authorities are also required to have standing orders which must regulate the manner in which tenders are invited.[21] The thresholds applicable to tenders can be determined by the local authorities, subject to compliance with applicable EU law. In practice local authorities will provide for competitive tendering of contracts of a lesser value than the applicable EU thresholds and this may be because of a belief that this supports the achievement of value for money.

Effective competition is recognised as delivering value for money because bidders in competition with each other are likely to put forward their best offer.[22] Where there is competition for public contracts it is expected that competitive pressure will make contractors become more efficient in order to offer competitive prices and deliver contracts on attractive terms.[23] Competition can thus be understood as comprising two elements: the concept of competing individual procurements to secure value for money on that procurement, and competition in the wider market, which is arguably

[18] Arrowsmith, (2014), fn 11, p. 21 ;
[19] Local Government Act 1972, section 151; Part 1 of the Local Government Act 1999 (as amended by the Local Government and Public Involvement in Health Act 2007);
[20] Part 1 of the Local Government Act 1999 (as amended by the Local Government and Public Involvement in Health Act 2007);
[21] Local Government Act 1972, fn 19, section 135;
[22] See, Bovis, C., *EU Public Procurement Law*, Edward Elgar, Cheltenham, 2007, pp. 7-8; Fernandez Martin, J. M., *EC public procurement rules: a critical analysis*, 1996, Clarendon Press, Oxford, pp. 41-45; Neumayr, (2002), fn 13, pp. 216-217;
[23] Hjelmborg, S. E., Jakobsen, P. S. and Poulsen, S. T., *Public Procurement Law: the EU Directive on Public Contracts*, 2006, Djof Publishing, Copenhagen, p. 23;

required to ensure that there is effective competition for individual procurements.

Where there is no effective competition for individual procurements, which may be a consequence of a lack of competitiveness in the wider market, bidders may not face the same commercial incentive to offer the best solution at the cheapest price. In a situation where there is no or little competition, contractors may feel confident in their ability to propose higher prices and/or a poorer quality product, and still secure the public contract. This is detrimental to the achievement of value for money.

Competition has been described as a "discovery procedure" allowing contractors to disclose the prices and terms upon which products are available.[24] In order to incentivise contractors to offer prices that reflect the costs of production, the contracting authority must ensure that the contractors compete with each other as contractors will only offer prices that represent value for money where they believe that doing so is needed to win the bid.[25] On this analysis, competition is critical to ensuring value for money and as such contracting authorities seeking to achieve value for money may also seek to promote competition.

Adjustments made to contracts after award are, by their nature, not made in a competitive environment. Only one contractor is involved in the contract adjustment and there is therefore no "discovery" as described above. This will not matter where the adjustment is cost neutral and does not impact on the benefit received by the contracting authority, for example an adjustment made for administrative purposes. However, for other types of adjustments, the contracting authority will not enjoy the benefits of competition in terms of incentivising the contractor to offer the best deal that it can to the contracting authority.

[24] Trepte, (2004), fn 14, p. 394;
[25] *Ibid*., pp. 394-395;

The situation may be worsened where the contractor knows that the contracting authority faces difficulties if the contract is not adjusted, and therefore asserts a more robust commercial position in agreeing the terms of the adjustment then it would have had in a competitive environment. Furthermore other contractors may be able to offer a solution that better meets the contracting authority's revised requirements and, absent competition, they have not been able to demonstrate this. The contracting authority's ability to secure value for money in such situations will be impaired.

Adjustments to contracts may frustrate the purpose of the competition in a more fundamental way. Adjustments made during contract performance potentially undermine the principle of competition upon which the contract was awarded.[26] Adjustments to terms such as subject-matter, price and duration may make the competitive process illusory.[27] The adjusted contract differs from that originally procured which may undermine confidence in the procurement process.

The effect of this is exacerbated where the adjustment makes the contractor's offer less economically advantageous than that of another bidder.[28] This may cause disillusionment amongst potential bidders who may therefore be disinclined to compete for public contracts. Given that effective competition is perceived to be instrumental in achieving value for money, a reduction of interest in bidding for public contracts may not be desirable from the perspective of contracting authorities.

[26] Auricchio, (1998), fn 4, p. 113;
[27] Poulsen, (2012), fn 4, p. 170;
[28] This risk is identified by Albano and Zampino who comment that any substantial modification of the contractual terms during the execution phase of the contract is as if the contractor's quality-price tender has become less advantageous then the one submitted at award stage and does not therefore guarantee from an ex post perspective the best value for money for the contracting authority, Albano, G. L. and Zampino, R., "Strengthening the level of integrity of public procurement at the execution phase: evidence from the Italian National Frame Contracts", in Piga, G. and Treumer, S. (eds), *The Applied Law and Economics of Public Procurement: the economics of legal relationships*, Routledge, 2013, p. 18;

As described above, there is a link between competition and value for money on individual procurements. However, there may be genuine reasons for requiring a specific contract adjustment, including the attainment of value for money, in particular in ensuring the procurement continues to deliver the contracting authority's objectives for the benefit of the various stakeholders. There is an obvious tension between making an adjustment outside competition and the assumption that value for money will be best delivered through effective competition for individual contracts.

However, whilst adjusting a contract may achieve value for money in a specific case, this may have a negative impact on longer term value for money. As described above, contractors may be disillusioned from bidding where contract adjustments are made once contracts are awarded and this may reduce competition for public contracts with an adverse effect on longer term value for money. The existence of this distinction is relevant to understanding the competition and value for money objective of the contracting authority.

1.3.3 Procurement efficiency

A further objective of contracting authorities in the context of public procurement is efficiency - ensuring procurements are delivered in a timely and cost effective manner.[29]

Contracting authorities devote resource to public procurement. Staff are required to identify the contracting authority's requirements, prepare tender documents and evaluate bids. Specialist support may be required in the form of legal, financial and technical experts. Obviously this takes time, and contractors need time to prepare their bids, which delays the commencement date of the relevant contract. Therefore public procurements require both time and resource, which of course comes at a

[29] Arrowsmith, Linarelli, and Wallace, (2000), fn 15, p. 31, explains the requirement to balance the costs of procurement procedures against the value for money benefits achieveable;

financial cost to the contracting authority quite separate from the cost of paying for the goods or services provided under the public contract.[30]

Procurement efficiency is the aim of best using time and resource to identify and contract with the contractor best able to meet the contracting authority's requirements. An objective of contracting authorities therefore includes ensuring an efficient procurement process in terms of administrative costs and time.[31] As mentioned in section 1.3.1, efficiency in public procurement is a specific goal of the Efficiency and Reform Group of the Cabinet Office.

Procurement efficiency will be compromised where, for example, there are excessive administrative costs which may arise for instance where an excessive number of bids have been received requiring resource to evaluate them.[32] The costs of running a competition - both from the perspective of the contracting authority and the contractors - may outweigh the potential savings achieved by the competition.[33] This exposes a tension between the objective of competition and that of procurement efficiency.

As explained in section 1.4 contract adjustments are often required for legitimate reasons. If it were not possible to adjust a contract then the alternative would be to terminate it and commence a new procurement. Clearly the efficiency of this is questionable, as resource will be required to re-procure something that has already been procured and to deal with the consequences of the termination of the existing contract. If an adjustment is permissible then this may be more efficient as the need to re-procure falls away. However, where the contracting authority does not know whether or not an adjustment is allowed resource may be required to analyse this and

[30] See for an explanation of "transaction costs", Trepte, (2004), fn 14, pp. 122-127;
[31] Arrowsmith, (2005-2006), fn 13, pp. 351-352;
[32] Bovis, (2007), fn 22, p. 67;
[33] Hordijk, E. P., and Meulenbelt, M., "A bridge too far: why the European Commission's attempts to construct an obligation to tender outside the scope of the Public Procurement Directives should be dismissed", *Public Procurement Law Review*, 2005, 3, p. 129;

this may compromise efficiency, and diverting resources that may be better used elsewhere.

1.3.4 Equal treatment

Equal treatment has been described as including both formal and substantive elements.[34] The formal concept of equality requires equality before the law.[35] This is evidenced in the UK by bidders' ability to access review procedures and remedies on the same terms as each other. Equal treatment also requires that comparable situations be treated the same, unless a difference in treatment is objectively justified.[36] This has been identified as equal treatment in the substantive sense.[37] Contracting authorities may pursue equal treatment in both the formal and the substantive sense as procurement objectives.

Equal treatment in the context of public procurement has two functions. Equal treatment may be regarded by a contracting authority as an objective in its own right.[38] This is based on the theory that contractors have an equal right to bid for public contracts, and thereby to share in the potential benefits of public contracts.[39] Alternatively, it may be an objective of a contracting authority as a means to achieve other objectives within the procurement context.

For example, equal treatment may support value for money as bidders may be better incentivised to compete for public contracts where they all have an

[34] Trepte, (2004), fn 14, p. 391;
[35] *Ibid*.;
[36] Joined Cases C-21/03 and C-43/03, *Fabricom SA v Etat Belge ("Fabricom")*, para 27;
[37] Trepte, (2004), fn 14, p. 391;
[38] See for example Dekel who argues that equal opportunity constitutes an intrinsic part of public procurement rather than just an instrumental value whose sole purpose is to serve other objectives, which he identifies as being the achievement of efficiency and ensuring integrity, Dekel, O., "The Legal Theory of Competitive Bidding for Government Contracts", *Public Contract Law Journal*, 2008, 37, p. 246;
[39] Arrowsmith, Linarelli, and Wallace, (2000), fn 15, p. 54 which states that contracting authorities as "gatekeepers" "could be seen as being entrusted with the task of providing fair and equal access to work paid by the tax payer";

equal opportunity to compete for that contract. Treating contractors equally allows for an objective assessment of bids, which supports the discovery of the most economically efficient bid.[40] Corrupt activity in procurement (such as the payment of bribes or the inappropriate preferment of one contractor over another) requires contractors to be treated other than equally, so equal treatment could be a means of supporting an anti-corruption objective.

Contracting authorities may not articulate whether equal treatment is an objective in its own right, or whether it is a means to achieve other objectives. This distinction may be, however, of practical importance as it may affect the way in which contracting authorities balance competing objectives.

In the context of public procurement, equality has been defined more specifically as the aim of providing fair access to bidders competing for public contracts.[41] This is an example of equal treatment being an objective in its own right. Furthermore equal opportunity may be an independent objective where the contracting authority aims to ensure that all members of the public should be given an equal opportunity to enjoy the benefit of a contractual relationship with the contracting authority.[42]

Contracting authorities may want to and appear to promote equal treatment, as this is consistent with the expectations of stakeholders and other interested observers (such as the media). Where equal treatment is not achieved, the contracting authority may face criticism, as it may be argued the contract was awarded improperly - for example, to a contractor who had improper influence over the contracting authority or who had not demonstrated it was qualified to perform the relevant contract. This is an

[40] Trepte, (2004), fn 14, p. 391;
[41] Kelman, S., *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance*, The AEI Press, London, 1990, p. 11;
[42] *Ibid*., p. 240; Dekel, (2008), fn 38, p. 246, who submits that the provision of an equal opportunity to all members of society to compete for the economic advantage inherent in contracting with the government is one of the three objectives of public procurement;

example of equal treatment supporting appearance of (or achievement of) value for money and the prevention of corruption.

The possibility of violating equal treatment is arguably higher during contract performance.[43] Where adjustments occur outside of a competitive process, the provisions of the Procurement Regulations governing contract award which arguably support equal treatment, such as running an advertised competition with a contract being awarded on the basis of pre-disclosed evaluation criteria are avoided.[44]

The adjustment may be contrary to equal treatment as only the incumbent contractor is offered the opportunity to deliver the adjusted contract.[45] The extent to which this is an issue depends on the adjustment in question, and this is explored in subsequent chapters of this study.

The approach taken by the contracting authority on adjusting a contract may depend on whether they perceive equal treatment to be an objective in its own right, or whether they understand it to support the achievement of the objective of value for money. Where equal treatment is an objective it is apparent that it may be compromised where a contract is adjusted. This may dissuade contracting authorities from making the adjustment. However, if equal treatment is understood to support the objective of value for money and the adjustment is perceived to deliver value for money then contracting authorities may adopt a more permissive approach to contract adjustments.

1.3.5 Preventing corruption

Contracting authorities may want to ensure integrity in public procurement and to carry out their functions without any influence of corruption.

[43] Auricchio, (1998), fn 4, p. 124; see section 2.5.2 for discussion of the principle of equal treatment;
[44] For example Regulations 25-39, 48-55 and 56 of the 2015 Regulations;
[45] The exception to this is where adjustments are provided for in review clauses, see chapter 3;

Corruption can be defined as "the abuse of entrusted power for private gain".[46]

Where a procurement process has been subverted by corruption, the contract may not be awarded to the contractor who offers the most economically advantageous bid, or it may be awarded to a contractor who is not able to perform the contract. This has a potentially serious impact on the delivery of public contracts.

Corruption therefore has the potential to seriously undermine value for money as the proper allocation of public funds cannot be assured where funds are misused. Bidders may add a premium to the contract price to where they need to give consideration (for example) to an official of the contracting authority. This prejudices achievement of value for money

Furthermore bidders may be deterred from competing where there is an actuality or a perception of corruption, as they may feel there is no point if they believe the contract will be awarded corruptly to another contractor. A reduction in competition may be assumed to have an adverse impact on value for money.[47]

Contract execution is arguably the phase of the procurement process which is the most vulnerable to lack of integrity.[48] Discretion in negotiating contract adjustments may allow for discriminatory or corrupt practices.[49] Contract adjustments are not visible in the same way as a contract awarded at the end

[46] Transparency International, FAQs on corruption, at http://www.transparency.org/whoweare/organisation/faqs_on_corruption, accessed on 13 June 2016;
[47] Arrowsmith, S., Preiss, H.-J., and Friton, P., "Self-cleaning as a defence to exclusions for misconduct: an emerging concept in EU public procurement law?", *Public Procurement Law Review*, 2009, 6, p. 278, states: "corruption generally distorts competition between bidders and thereby increases public procurement costs";
[48] Albano and Zampino, (2013), fn 28, p. 186;
[49] Trepte comments that the possibility for personal gain to be extracted from the procurement process arises from the position that the procurement officer has to exercise discretionary authority, Trepte, (2004), fn 14, p. 71;

of a competitive procedure,[50] so the "policing" effect of the market is also less likely to apply. Adjustments may conceal corrupt practices as the contractor could be given benefits not included in the original contract. Contracting authorities may adjust the contract, including the price giving the contractor a considerable gain.[51]

In addition to its impact on value for money, as discussed above, corruption in public procurement has been stated to undermine the legitimacy of the State and the efficiency of public actions.[52] Maintenance of legitimacy and integrity may therefore be viewed by contracting authorities as an objective in itself, and this may be particularly the case where the contracting authority is concerned about the adverse reputational impact of lacking or appearing to lack integrity in its procurements.

The promotion of integrity in public contracting may set an example for standards of behaviour in the private sector.[53] Public corruption can have an adverse impact on the ethical tone of society and decrease the inclination of citizens to behave with probity in their everyday life.[54] Contracting authorities may see benefit in ensuring a high level of integrity in society as a whole, so may wish their behaviour to set a benchmark for conduct in commercial dealings.

Corruption may be linked to organised crime (although the incidence of this will vary dependent on a range of cultural, political and other factors). Reducing corruption may therefore reduce the resources available to support

[50] The 2015 Regulations provide that unsuccessful bidders have to be notified accordingly (Regulation 55) and a contract award notice is required in the Official Journal of the European Union (Regulation 50) in the cases of public contracts subject to these regulations. Note that Regulation 72(3) of the 2015 Regulations introduces a requirement for adjustments made in accordance with Regulations 72(1)(b) and 72(1)(c) to be published, thereby providing limited transparency;
[51] Auricchio, (1998), fn 4, p. 114;
[52] Hors, I., "Shedding light on corrupt practices in public procurement", *Public Procurement Law Review*, 2003, 5, NA101;
[53] Arrowsmith, Linarelli, and Wallace, (2000), fn 15, p. 37;
[54] Kelman, (1990), fn 41, p. 96;

criminal activities.[55] Contracting authorities may either individually or in line with applicable government policies apply this approach as a procurement objective.

States placing a high value on integrity may accept higher process costs to achieve this objective.[56] Higher process costs may arise from obligations connected to transparency or ensuring equal treatment as a means to prevent corruption. Whilst this may compromise procurement efficiency, contracting authorities may perceive this to be outweighed by the benefits they perceive to be gained in reducing corruption. As described above, such benefits may be in terms of achievement of value for money or the improved ethical tone of society. The approach adopted will be influenced by the priority they place on the relevant procurement objectives.

1.3.6 Transparency

Transparency has been described as comprising four aspects: (a) publicity of public contract opportunities; (b) publicity of the rules governing contract award; (c) rule-based decision making, limiting the contracting authority's discretion; and (d) the ability to verify compliance with and enforcement of the rules.[57]

It is arguable that transparency is a requirement of public procurement which supports the achievement of other objectives, rather than being an objective itself. This position has been articulated in academic commentary.[58]

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[55] Arrowsmith, Linarelli,and Wallace, (2000), fn 15, p. 38;

[56] Ibid., which comments that non-financial concerns linked to corruption may be perceived by some contracting authorities as justifying expenditure on anti-corruption measures that exceed financial savings; Arrowsmith, (2005-2006), fn 13, p. 352;

[57] Arrowsmith, Linarelli,and Wallace, (2000), fn 15, pp. 72-73.

[58] *Ibid.*, p. 73 states that transparency is a means of fulfilling core objectives, including value for money and probity; Trepte, P., "Transparency Requirements", in Nielsen, R. and Treumer, S., (eds), The New EU Public Procurement Directives, DJOF Publishing, Denmark, 2005, stating that the twin objectives of the transparency requirements in the Directive are (i) to ensure and (ii) supervise (control) intra-EU competition in procurement, p. 59; Trepte, (2004), fn 14, transparency is a term used to describe various mechanisms used as tools to

Transparency can arguably support value for money, as bidders may be more likely to participate in a procurement which is transparent,[59] thus providing competitive pressure on prices.

Transparency of opportunities and of the award procedure may increase bidders' appetites to bid for public contracts and as a consequence promote competition for public contracts.[60] Transparency may reduce corruption and support equal treatment of bidders where the rules of the competition are published and enforced by bidders if contravened, thus incentivising contracting authorities to act within permitted parameters.[61]

Transparency, as defined above, limits contracting authorities' discretion as where a prescribed transparent process is followed discretion will be limited. This limitation of discretion may support the integrity of the procurement process, as it arguably reduces the opportunity for corruption.

However, discretion may support value for money as empowering properly qualified procurement officers to make decisions on a case by case basis may enable them to better ensure that the contracting authority's objectives are

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achieve a number of specific goals; Krugner, M., "The principle of equal treatment and transparency and the Commission Interpretative Communication on Concessions", *Public Procurement Law Review*, 2003, 5, p. 193; Arrowsmith, S., "The purposes of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies", *Cambridge Yearbook of European Legal Studies*, 2012, 14, pp. 1-47;

[59] Allen, R. L., "Integrity: maintaining a level playing field", *Public Procurement Law Review*, 2002, 2, p. 112, commenting in an article on US procurement that more companies will be willing to compete where they are fully aware of the rules under which the competition is being conducted;

[60] Hjelmborg, Jakobsen, and Poulsen, (2006), fn 23, p. 47;

[61] Conversely, the contract execution phase of a procurement is vulnerable to lack of integrity as the contracting authority and the contractor are interacting outside the reach of "possible watchdogs" such as the losing bidders, Albano and Zampino, (2013), fn 28, p. 186, conversely it has been argued that transparency may promote corrupt activities, see Trepte, P., "Public Procurement and the Community Competition Rules", *Public Procurement Law Review*, 1993, 2, p. 114; however it will be assumed that contracting authorities do not promote transparency as an objective to increase corruption;

met.[62] It has been argued that giving procurement officers freedom to use their judgement would improve procurement outcomes.[63]

However, it could be countered that limits on discretion ensure procurement officers do not make improper decisions. The risk of this could be mitigated through, for example, training and ensuring procurement officers are held properly accountable. Furthermore, empowering procurement officers to use a degree of discretion does not necessarily entail them being given unfettered discretion.

Adjustments may be viewed as being inherently non-transparent as the adjustment is made outside a competitive procedure subject to the Procurement Regulations.[64] This is arguably a further disadvantage of allowing contracting authorities to adjust contracts where transparency is identified as being an objective by a contracting authority.

1.4 The necessity of contract adjustments

1.4.1 Introduction

Contract performance is a critical part of the procurement system as it is in this phase in which the goods, works or services are delivered to enable the contracting authority to fulfil its functions. The following section of this study explains why adjustments may be required during contract performance.

Contract adjustments may be required for legitimate purposes and may be critical to the continued performance of the contract. Given that, from the perspective of contracting authorities, service users and tax payers, the prime purpose of public procurement is to enable contracting authorities to perform their functions, it is important to recognise this when considering

[62] Neumayr, (2002), fn 13, p. 218, commenting that discretion allows contracting authorities at least in theory to adjust procurement practices to their individual needs;
[63] Kelman, (1990), fn 41, p. 90-91;
[64] The exception to this is where adjustments are provided for in review clauses, see chapter 3;

contract adjustments, and to note that there may be some circumstances in which failing to adjust the contract may have negative consequences.

1.4.2 Flexibility to deal with unforeseen circumstances

Contracts adjustments may be required during the term of the contract. In practice various scenarios can arise during the term which the contracting authority could not foresee when preparing the procurement documents and where the contracting authority's assumptions are not realised.[65] Examples may include genuinely unforeseen ground conditions requiring additional construction works or where a change in legislation requires services to be delivered in a different way.

Adjustments may also be needed where flexibility is required to deal with changed requirements. This could include a change in service users' consumption patterns or a shift in government policy or funding.[66] Requirements may also change where the contract deals with complex or evolving technology where flexibility may be required to deliver the relevant project.[67]

1.4.3 A consequence of poor procurement

An adjustment may be required as a consequence of poor procurement where a contracting authority has failed to correctly identify its requirements and consequently the procurement delivers an unsatisfactory solution. This risk is mitigated where the contracting authority has sufficient time, expertise and funds to be able to properly scope its requirements and deliver the procurement.

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[65] Poulsen, (2012), fn 4, p. 167; Hartlev and Liljenbol, (2013), fn 4, p. 151;

[66] For example, HM Treasury Guidance encourages contracting authorities to review their PFI portfolios with a view to making operational savings such as through optimising use of assets and adjusting the specifications for soft services, HM Treasury, "Making savings in operational PFI contracts", July 2011, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211210/iuk_making_savings.pdf, accessed 23.04.14,

[67] Taylor, J. and Davies, C., "Change management in technology outsourcing contracts", *Communications Law*, 2011, 16(4), p. 148;

Where, however, resources are not properly used at the planning phase, for example where tenders are issued without a detailed plan, the resulting project may be indicative and recourse to variation mechanisms may be required.[68] The importance of effective procurement planning is highlighted in the Cabinet Office guidance on major projects which includes an approval process to promote the "fitness and quality" of major projects throughout their term.[69]

However, despite the steps that are taken to ensure procurements are delivered to meet the needs of the contracting authority there may be some projects which have fallen short of the ideal position. Adjustments may be required to allow these contracts to deliver the actual requirements.

1.4.4 Avoiding the need to terminate and re-tender a contract

The alternative to adjusting a contract may be to terminate the contract and to re-tender it as adjusted. Indeed this may be the consequence of the legal position which provides that where a material amendment is made to an existing contract this constitutes a new contract award.[70] However, it will usually be inconvenient and potentially contentious for a contracting authority to retender a contract before its expiry date.[71]

Public contracts may include termination provisions allowing the contracting authority to terminate the contract on notice in the absence of breach, providing for a compensation payment to the contractor.[72] Such payments may expose the contracting authorities to criticism for spending public money where arguably no corresponding service benefit is received. In the absence of such a termination provision the contracting authority may have

[68] Auricchio, (1998), fn 4, p. 128;
[69] HM Treasury, "Major project approval and assurance guidance", April 2011;
[70] *Pressetext*, fn 4, para. 34; 2015 Regulations, Regulation 73(1)(a), see chapter 2 section 2.4.1;
[71] Treumer, (2012), fn 4, p. 153;
[72] For example HM Treasury, Standardisation of PFI Contracts, Version 4, March 2007 ("*SOPC4*");

to rely on negotiation with the contractor to allow for exit. The ability to adjust contracts may therefore be desirable so as to avoid the need for a contracting authority to terminate the existing contract and to perhaps make a termination payment.

Apart from the above problems, a competition resulting in a change of contractor could, particularly in the case of longer term contracts, technically complex projects or large construction works, involve delays and costs.[73] Delays could arise as a result of the contracting authority having to re-scope its requirements, obtain funding and internal approvals to proceed, and the time taken to run the competition once the new requirement had been advertised.

Costs would be incurred by the contracting authority in resourcing the competition and where the competition results in a price that is higher than that originally obtained. Bidders will incur costs participating in the competition.

There may also be reputational damage to the contracting authority as (depending on the facts) some will view a re-procurement as being evidence of ineptitude on the part of the contracting authority and there may be a perception that public money has not been well spent. Contracting authorities are likely to be anxious to avoid this.

1.5 Aims of this study

The first aim of this study is to identify the law applicable to contract adjustments. Contract adjustments have recently been dealt with in part in Regulation 72 of the 2015 Regulations, but prior to this were not dealt with in the 2006 Regulations. Case law interpreting the law applicable under the 2004 Directive and the 2006 Regulations developed principles for assessing whether an adjustment is permitted, or whether the adjustment constitutes

[73] Poulsen, (2012), fn 4, pp. 171-2;

a new contract award which had been entered into in contravention of the law. These principles have been incorporated in Regulation 72 of the 2015 Regulations.[74]

Arguably as a consequence of its development through case law, the law applicable to contract adjustments developed in an ad hoc way with Courts ruling on specific facts of the case before them. This study will establish what the content of the applicable law is. This aim is arguably important in itself as whilst some analysis has been undertaken of the law applicable to contract adjustments this study seeks to bring together the existing scholarship in a more comprehensive manner than has previously been undertaken.

The second aim of this study is to analyse how the law is applied in practice including where, in light of any ambiguities in the legal framework identified in chapters 3-5, the law is applied in practice to resolve or address such ambiguities. Identifying this is important as its practical application may contribute to the development of future law and policy as solutions adopted in practice to resolve difficulties the content of such solutions may inform policy makers and legislators.

The results of this study may be used by official bodies or by contracting authorities in assisting the development of guidance or more simply in the context of informing them how the law may be applied. The conclusions of this study are also potentially of use in informing the EU's regulatory policy in the context of contract adjustments more generally, as evidence of non-compliance or uncertainty as to how to achieve compliance may suggest that the policy framework would benefit from review. An empirical study of this scope has not to date been undertaken in the UK. This study aims therefore

[74] Note that Recital 107 of 2014 Directive states that it is necessary to clarify the circumstances under which modifications to a contract during its performance require a new procurement procedure, taking into account the relevant case law of the CJEU. As explained in section 2.4.4, the 2015 Regulations implement the 2014 Directive;

to contribute to the ongoing debate surrounding the circumstances in which contracts can lawfully be adjusted.

The third aim of this study is to suggest ways in which the law applicable to contract adjustments could be clarified or otherwise improved to better meet the needs of those seeking to apply it. Clarification is important to give greater certainty to contracting authorities as public procurement objectives may be frustrated where contracting authorities fail to make desirable adjustments due to an overly cautious interpretation of the law or are subject to challenge where they have made an impermissible adjustment.

An attempt is made to suggest ways in which the law could be developed and arguably improved in order to support effective procurement. This study therefore seeks to contribute to the continued development of law in this field.

1.6 Methodology and method: a summary

In order to deliver the first aim set out in section 1.5, this study adopts a primarily doctrinal approach as it attempts to establish the law "on paper". Whilst an effort is made to contextualise the law in light of potential difficulties that may be faced in its application, the methodological position here may best be described as positivist.

A qualitative empirical research is used to deliver the second research aim set out in section 1.5 and to inform the conclusions set out in chapter 8, which aim to deliver the third research objective. The author obtained written responses and conducted semi-structured interviews with both private practice lawyers who advise contracting authorities and contracting authorities. The method for this empirical research is described in chapter 6.

Through the empirical research contracting authority and private practice respondents were invited to explain how they applied the law in practice,

including in particular in instances where there were ambiguities in the existing legal framework. Respondents were also questioned in respect of the circumstances in which adjustments are required in practice and whether or not the adjustment was implemented, so as to explore whether the existing legal framework provides contracting authorities with a suitable means of meeting their procurement objectives.

Contracting authority and private practice lawyer respondents were also asked whether they could identify any ways in which the law on contract adjustments could be clarified or otherwise improved, a line of questioning which is relevant to this study's third research objective.

1.7 Outline of the study

The second chapter of this study sets out in detail the law applicable to contract adjustments. The TFEU provisions and principles are considered in depth and the Procurement Regulations are discussed. Given the importance of case law to the legal framework applicable to contract adjustments, a study is made of the relevant case law prior to the leading *Pressetext* judgment, and *Pressetext* is analysed in detail. The purpose of this chapter is to describe the general legal framework applicable to contract adjustments and to explain the policy objectives which have driven the formation of the law.

The next three chapters consider categories of adjustments, setting out the current legal position in respect of these and highlighting the ambiguities in the law. In the absence of authority an effort is made to explain what the legal position is likely to be with regard to certain contract adjustments. A critique will be offered of the existing legal position. These chapters differ from chapter 2 in their focus on specific categories of contract adjustments.

Chapter 3 considers adjustments which are made pursuant to review clauses. Review clauses are terms included in contracts which give scope to adjust the terms of that contract without a contravention of procurement law occurring. Chapter 4 looks at contract adjustments arising from an operation of law, such as an insolvency event. Chapter 5 considers adjustments that are made other than pursuant to review clauses or an operation of law. These include adjustments to the scope of services and price adjustments.

Each of chapters 3 to 5 define and explain the concepts used within them. The categorisation of these three types of adjustments has been selected as it enables convenient analysis as, as will be explained in these chapters, the legal position arguably differs between the three categories.

Chapter 6 sets out the methodology and method for the empirical study. This empirical study aims to identify what contracting authorities and those advising them do in practice in respect of contract adjustments. The study specifically considered public private partnership (PPP) contracts in the health, education and secure accommodation sectors.

As explained in detail in chapter 6, these contracts are relevant to the study as they are contracts to which the full requirements of the Procurement Regulations apply and as they are long term and complex contracts it is reasonable to assume that adjustments may be required to them during their term. As also explained in detail in chapter 6, there are numerous PPPs in the health, education and secure accommodation sectors, providing data for study, and also there are similarities between these types of PPPs making it logical for them to together be within the scope of this study. Other types of contracts have been excluded from this study, for example construction contracts and IT PPPs, in order to keep the scope of the study manageable. The rationale for this is also as set out in chapter 6.

The results of the empirical study are set out in chapter 7. This sets out the comments and criticisms made by respondents on the legal framework applicable to contract adjustments. The chapter then sets out contract adjustment issues identified by respondents as having arisen in practice and then goes on the explain the steps proposed by private practice lawyer respondents to mitigate the risk of successful challenge of an adjustment to a contract. The subsequent sections of chapter 7 consider respectively the consideration of the likelihood of challenge in the application of the law on contract adjustments and then the relevance to the advice provided by private practice lawyers of the procurement objectives of the contracting authority.

The first substantive part of the concluding chapter 8 sets out conclusions which can be drawn from chapters 3, 4 and 5 in respect of the content of the law applicable to contract adjustments, focusing in particular in commenting on those ambiguities which have been identified in the existing legal framework applicable. It is noted that a number of ambiguities exist and it is suggested that guidance (either from the UK government or the Commission) or amendments to the 2015 Regulations may assist in clarifying these ambiguities.

The second substantive part of chapter 8 attempts to articulate the overall approach taken in practice by contracting authorities, drawing on the empirical findings set out in chapter 7. It is suggested that contracting authorities are adopting a pragmatic approach to contract adjustments in practice, so as to enable them to best meet their procurement objectives including in circumstances where there are difficulties in applying the existing law.

The empirical research indicated that there were instances of contracting authorities identifying legal risk associated with a proposed adjustment and then making the required adjustment notwithstanding the existence of that

risk. As explained in chapter 8, this study has therefore demonstrated that legal risk is accepted by contracting authorities when adjusting existing contracts. It is concluded that the actual (rather than theoretical) risk of challenge may influence whether or not a contracting authority adjusts a contract and it is suggested that where the actual risk of challenge is low then contracting authorities may place less weight on this when deciding whether or not to adjust a contract and a correspondingly greater weight on their attainment of other procurement objectives.

The final substantive part of the concluding chapter sets out suggestions for the improvement or clarification of the existing law. It is suggested that notwithstanding the clarification through guidance or updated regulations, the legal position applicable to contract adjustments may benefit from careful analysis by policy makers of the various objectives relevant to contract adjustments (both from the perspective of a contracting authority and the EU).

It is also suggested that an enhanced transparency requirement may promote the attainment of both contracting authority and EU objectives on adjusting contracts. The reason for this is that it would incentivise contracting authorities to demonstrate that they are acting with probity and in a manner aimed at securing value for money, and it would enable the EU to understand the reasons why adjustments were being made and perhaps to legislate accordingly. This may have the eventual benefit of contributing to a legal framework which better meets the requirements of those contracting authorities seeking to apply it.

Chapter 2: The regulation of public procurement

2.1 Introduction

This chapter sets out the legal framework applicable to public procurement within the UK with the aim of explaining the law applicable to contract adjustments. This chapter explains that much of the law applicable to public procurement undertaken by contracting authorities within the UK during the period of this study derives from the TFEU, the 2004 Directive, the Remedies Directive, the 2014 Directive, and CJEU case law.[75]

The first objective of this chapter is to set out the wider objectives of the applicable EU procurement law. An understanding of this is needed to contextualise the legal framework applicable to contract adjustments. The objectives of contracting authorities outlined in section 1.3 may not be entirely aligned with those of the EU legislature and judiciary from which (as will be explained in this chapter) the legal framework applicable to contract adjustments arises. It is therefore necessary to explore the EU's objectives in the context of public procurement law as it is from EU law from which law applicable to contract adjustments in the UK derives.

The second objective of this chapter is to identify the legal principles applicable to contract adjustments. Understanding the framework of the law is necessary as subsequent chapters of this study elaborate on this framework. It is also necessary as this informs and provides the basis for the way in which this law is applied in practice, which is the focus of chapters 6 and 7 of this study, which in turn inform the conclusions in chapter 8.

[75] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), Official Journal of the European Union, C 83/47, 30.3.2010; Directive 2004/18 EC of the European Parliament and the Council of 31 March 2004 on the co-ordination of procedures for the award of public contracts (the "2004 Directive"); Directive 2007/66 EC of the European Parliament and 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 (the "Remedies Directive; Directive 2014/24 EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 EC (the "2014 Directive");

The first substantive section of this chapter, section 2.2, therefore deals with the objectives of EU procurement law. Various objectives of the EU are set out in section 2.2 but, as will be explained there is debate as to the existence and validity of these. The objectives considered are the establishment of the single market and removal of barriers to trade, competition, and transparency. An understanding of these objectives should provide an insight into the law applicable to contract adjustments.

Section 2.3 then outlines the provisions in the TFEU relevant to public procurement.[76] The TFEU was not perceived to be adequate alone to regulate public procurement.[77] As a result directives have been adopted in respect of public procurement, with the 2004 Directive, the 2014 Directive, and the Remedies Directive applying to contract adjustments during this period of study. The 2004 Directive and the 2014 Directive have been implemented in UK law by the 2006 Regulations and the 2015 Regulations respectively, and the Remedies Directive is implemented in each of the same.[78] This legislation is considered at section 2.4. As explored further in chapters 7 and 8, the availability of remedies influences how contracting authorities apply the law applicable to contract adjustments so the Remedies Directive is relevant this study.

The principles which support the TFEU, namely non-discrimination and equal treatment, proportionality, and transparency are then considered in section 2.5 of this chapter.

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[76] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), Official Journal of the European Union, C 83/47, 30.3.2010; the relevant provisions are concerned with the free movement of goods, the freedom of establishment, the free movement of services and the general principle of non-discrimination on grounds of nationality; TFEU, Articles 34, 56, 49 and 18;

[77] Bovis, C., *Public Procurement in the European Union*, Palgrave Macmillan, Basingstoke, 2005, p. 28;

[78] For the historical development of earlier directives see Allain, Y., "The New European Directives on Public Procurement: Change or Continuity?", *Public Contract Law Journal*, 2005-2006, 35, pp. 519-520; Arrowsmith, (2014), fn 11, pp. 149-179 and Arrowsmith, (2005-2006), fn 13, pp. 339-344; outside the scope of this study are the utilities directives 2004/17 EC and 92/13 EC (on remedies) which regulates entities engaged in activities in the water, transport, energy and postal services sectors (the "Utilities Directive") and Directive 2009/81 EC which covers procurements in the fields of defence and security;

Section 2.6 then turns to the principles on contract adjustments derived from case law, commencing with an explanation of the relevance of domestic and EU case law. The leading case on contract adjustments, *Pressetext* is then set out. Prior to the 2014 Directive, contract adjustments provisions were not included in the procurement directives so, as will be set out in section 2.6, principles derived from case law were important in understanding the law applicable to contract adjustments. As commented in section 2.3 and set out in section 2.6, the principles derived from Pressetext are reflected in 2014 Directive and therefore continue to be relevant.

The final section of this chapter contains a brief discussion of guidance published by UK policy makers such as the Cabinet Office and HM Treasury, and guidance published by the European Commission.

2.2 Objectives of EU procurement law

2.2.1 Introduction

Public procurement is regulated by EU procurement law in order to support a number of objectives. This section of the study considers several of those objectives, namely the establishment of a single market and the removal of barriers to trade, competition, and transparency. As will be explained in this study, these objectives are relevant to understanding the legal framework applicable to contract adjustments and may inform the practical application of this law by contracting authorities.

This section considers objectives from the perspective of the EU rather than from the perspective of the contracting authority. An explanation of procurement objectives from the perspective of the contracting authority is set out in section 1.3 of this study.

2.2.2 Establishment of a single market and removing barriers to trade

The Preamble of the TFEU contains a number of provisions which can be interpreted as evidencing the objective of removing barriers to intra-EU trade.[79] The Preamble also contains a resolution to ensure economic progress through elimination of the barriers that divide Europe, and a recognition that the removal of existing obstacles requires concerted action to guarantee expansion, balanced trade and fair competition.[80]

Non discrimination on grounds of nationality is a fundamental principle of EU law. The fundamental freedoms described in sections 2.3 of this chapter support the proposition that eliminating discrimination on grounds of nationality is a key objective of the TFEU. The purpose of a prohibition on discrimination on grounds of nationality is to remove an obstacle to intra-EU trade and thereby facilitate the establishment of an internal market within the EU.

The 2004 Directive and the 2014 Directive provide a mechanism for applying non-discrimination and the fundamental freedoms to achieve a common market within the EU.[81] This is evident from the fact that the proposals on which the early procurement directives were based were concerned with the abolition of restrictions on the freedom to provide services and of restrictions on freedom of establishment.[82] Consequentially it can be concluded that an objective of EU procurement law as articulated in these directives is to abolish barriers to trade.

Case law has stated that the aim of the procurement directives is to create a single market for public contracts with free movement of goods and

[79] See, the second recital which refers to economic progress by common action to eliminate the barriers that divide Europe, the fourth recital which calls for the removal of existing obstacles to guarantee stead expansion and fair trade, the sixth recital which refers to the progressive abolition of restrictions on international trade;
[80] TFEU, Preamble, paragraph 2 and 4;
[81] Trepte, (2004), fn 14, p. 382;
[82] See Fernandez Martin, (1996), fn 22, pp. 8-9 for discussion on the proposals prior to the adoption of Directive 71/304 EEC OJ 1971, L185/1 and Directive 71/305 EEC OJ ;

services.[83] The prohibition on discrimination is central to the EU's attempts to achieve an internal market in public contracts and this is reflected expressly in the 2004 Directive and the 2014 Directive as explained further below.

Furthermore, the internal market provisions of the TFEU are expressed to be the legal basis on which the Directive is founded.[84] The recitals to the 2004 Directive and the 2014 Directive state that the award of contracts by contracting authorities are subject to the principles of TFEU and in particular to the fundamental freedoms.[85] Importantly, there is an express provision in the requiring contracting authorities to treat contractors equally and non-discriminatorily.[86]

The promotion of the fundamental freedoms can be understood in light of the assumption that contracting authorities were preferring domestic contractors over non-domestic ones.[87] In this context, the 2004 Directive and 2014 Directive are arguably intended to counteract the tendency for contracting authorities to prefer domestic contractors. Whether or not contracting authorities prefer domestic contractors over non-domestic ones, removing barriers to intra-EU trade and prohibiting discrimination on grounds of nationality has the effect of minimising national preference.

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[83] Cases C-285/99 and C-286/99, *Impresa Lombardini SpA* para 34, note that this case concerned Directive 93/37/EEC;

[84] The opening text of the 2004 Directive states: "Having regard to the Treaty establishing the European Community, and in particular Article 47(2) and Article 55 and Article 95 thereof", note that the equivalent provisions in TFEU are Articles 53(2), 62 and 114 and the opening text of the 2014 Directive states: "Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Articles 62 and 114 thereof;

[85] 2004 Directive, Recital 2; 2014 Directive, Recital 1;

[86] 2004 Directive, Article 2; 2014 Directive, Article 18;

[87] For example, the European Commission, "Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985)", COM(85) 310 final, para 6 comments that during the economic recession barriers multiplied as member states sought to protect their perceived interests; the European Commission, Green Paper, "Public Procurement in the European Union: Exploring the Way Forward", Communication adopted by the Commission on 27 November 1996, para 1.4 refers to "habit, special links, and national preferences" in public procurement; Bovis, (2007), fn 22, p. 5; Arrowsmith, (2005-2006), fn 13, p. 339;

It has been argued that the 2004 Directive aims to promote the internal market, and that it does so through three means: prohibiting discrimination, implementing transparency and removing barriers to access.[88] This supports the assertion that an objective of the 2004 Directive is to create a single market, and suggests that prohibiting discrimination and removing barriers to access are means of achieving market integration.

In summary, the establishment of an internal market and the removal of barriers to trade underpin the TFEU and are key objectives therefore of the TFEU. It has also been shown that this objective is integral to the 2004 Directive and the 2014 Directive. Accordingly it is necessary to consider this objective when establishing and evaluating the law as applicable to contract adjustments.

2.2.3 Competition

As explained in section 1.3.2, competition may refer to competition for individual public contracts which may be an objective of a contracting authority and is linked to the achievement of value for money. However, there has been substantial academic debate as to the existence of and nature of the competition objective in EU procurement law.

Arrowsmith has considered whether the 2004 Directive seeks to replicate the process of competition which is assumed to exist in private markets, namely that private purchasers act "efficiently" in choosing the best suppliers and are not influenced by political pressure to favour domestic industry, which might influence public sector purchasers.[89] Arrowsmith concludes that the objective of competition in the 2004 Directive is limited to removing discrimination and barriers to market entry, and that competitive procedures are required for transparency reasons.[90] As such, therefore, the provisions

[88] Arrowsmith, (2012), fn 58, p. 2;
[89] *Ibid*., p.24;
[90] *Ibid*., p. 26;

of the 2004 Directives do not seek in general to award a contract to the "best" bidder or to replicate the private sector.[91] This interpretation directly counters that advanced by Sanchez Graells cited by Arrowsmith to the effect that the Procurement Directives are intended to replicate the private sector market.[92]

Sanchez Graells states, however, in response to Arrowsmith's challenge to his position that his approach should not be conceptualized as attempting to replicate market competition and should instead be viewed as an effort to properly integrate the Procurement Directives into an environment of market competition.[93] He argues that in order to attain value for money, public procurement needs to occur in competitive markets[94] and goes on to say that procurement rules should be seen as a "regulatory mechanism" that attempts to generate competition in order to ensure the best possible terms for the contracting authority.[95] This arguably clarified that Sanchez Graells does not think that the Procurement Directives have the objective of replicating market competition, bringing his views in respect of this in line with that of Arrowsmith.

However, the position asserted by Sanchez Graells that the Procurement Directives aim to generate competition to enable contracting authorities to attain value for money, as set out in the above paragraph, counters the view of Arrowsmith on this point. Arrowsmith comments that an interpretation of the references to value for money in the recitals to the 2004 Directive might be interpreted as the need to ensure procurement is undertaken through competition, with value for money being equated with the outcome of a

[91] Arrowsmith, (2012), fn 58, p. 26;
[92] *Ibid*., p. 25, citing Sanchez Graells, A., "More Competition Orientated Public Procurement to Foster Social Welfare", in Thai, K. V., (ed), *Towards New Horizons in Public Procurement*, (PRAcademics Press, Florida, 2010), 81, 105 and Sanchez Graells, A., *Public Procurement and the EU Competition Rules*, 1st edition, (Hart Publishing, Oxford, 2011);
[93] Sanchez Graells, A., *Public Procurement and the EU Competition Rules*, 2nd edition, Hart Publishing, Oxford, 2015, p. xiv;
[94] *Ibid*., p. 11;
[95] Sanchez Graells, (2015), fn 93, p. 63;

competitive market. [96] Arrowsmith concludes that this is not the case,[97] indicating a divergence between her view and that of Sanchez Graells.

Kunzlik offers a "third approach" to the existence and content of an EU procurement law competition objective.[98] He argues that the Procurement Directives have a competition objective but that this is concerned with protecting the structure of the market and equality of competitive opportunity for bidders, providing opportunity for EU-wide competition.[99] He comments that this is therefore a "structural" competition objective, rather than a competition objective which seeks to ensure the efficient allocation of resources.[100]

It would appear, therefore, that there is a consensus amongst these commentators that a competition objective exists, but that there is a divergence as to the content and purpose of this objective. Sanchez Graells appears to be of the view that the attainment of value for money by contracting authorities is a goal of the competition objective. Kunzlik and Sanchez Graells appear to share the position that the Procurement Directives are concerned with the promotion of competition through the structure of the market and allowing bidders to enjoy competitive opportunity.[101] All the commentators discussed above appear to be of the view that the replication of market conditions is not an objective of EU procurement law.

There are references to competition in the TFEU and the recitals of the 2004 Directive and the 2014 Directive and in Article 18(1) of the 2014 Directive.

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[96] Arrowsmith, (2012), fn 58, p. 32;
[97] *Ibid*.; however Arrowsmith notes that the rules on award procedures and award and selection are intended to be consistent with the function of identifying the best bidder, coinciding with the kind of rules adopted by contracting authorities to this end, Arrowsmith, (2012), fn 58, p. 27;
[98] Kunzlik, P., "Neoliberalism and the European Public Procurement Regime", *Cambridge Yearbook of European Studies,* 15, 2013, p. 327;
[99] *Ibid*., p. 335;
[100] *Ibid*.;
[101] *Ibid*., p. 335; Sanchez Graells (2015), fn 93, p. xvii, in which he states that there is no "third view" and that equality of competitive opportunity (as stated by Kunzlik to be comprised in the competition objective) amounts to facilitating economic efficient and that therefore the views of Sanchez Graells and Kunzlik are aligned in this respect;

This shows that competition is relevant to procurement law, notwithstanding the debate as to what precisely a competition objective is or seeks to do.

The fourth paragraph of the preamble to TFEU recognises that the removal of existing obstacles requires concerted action to guarantee *inter alia* fair competition.[102] This suggests that competition is relevant to the aims of TFEU, although there is no further detail as to how this applies in a public procurement context or to what competition specifically means in this context. It is possible that the reference to competition in the preamble is in relation to those Articles of the TFEU that are expressed to be concerned with competition[103] and that therefore it is not correct to extrapolate that this is a reference to competition in public procurement.

Recital 2 to the 2004 Directive and recital 1 the 2014 Directive state that for public contracts above a certain value it is advisable to have procedures to ensure the effects of the fundamental freedoms and TFEU principles and to guarantee the opening-up of public procurement to competition. It appears here that this reference to competition should be interpreted as referring to the removal of barriers to allow competition in the context of the establishment of a single market.

Competition is also referred to in recital 8 to the 2004 Directive which provides that where technical dialogue is undertaken before commencing a procurement, it should not have the effect of precluding competition.[104] The preservation of competition is also referred to in recital 59 to the 2014 Directive in the context of the need to avoid excessive concentrating of purchasing power. Recital 74 to the 2014 Directive states that technical specifications must allow public procurement to be open to competition, and to avoid artificially narrowing competition.

[102] TFEU, Preamble, paragraph 2 and 4;
[103] Namely, TFEU, Articles 101, 102;
[104] 2004 Directive, Recital 8;

"Effective competition" is referred to in recital 36[105] and in recital 46 of the preamble to the 2004 Directive. [106] "Effective and fair competition" is referred to in recital 92 to the 2014 Directive in the context of the selection of award criteria which allow for this. "Genuine competition" is referred to in recital 41 to the 2004 Directive, which states that contracting authorities should, where reducing the number of participants in a procurement, ensure there is genuine competition.[107]

Recital 13 to the 2004 Directive states that electronic purchasing systems allow contracting authorities to use this method of procurement to "ensure the optimum use of public funds through broad competition".[108] The same point is made in recital 63 to the 2014 Directive in the context of dynamic purchasing agreements and recital 69 to the 2014 Directive goes on to comment that the use of centralised framework agreements may increase competition.

Arrowsmith comments, in the case of the 2004 Directive, that these references to competition do not necessarily amount to the objective of replicating a competitive market and that competition in this context can be understood as referring to the fact that achieving competition is a goal to which the 2004 Directive contributes, and that the 2004 Directive promotes aspects of competition, namely market access and elimination of distortions due to discrimination.[109] Given the similarities in wording as outlined above between the 2004 Directive and the 2014 Directive in this regard it is reasonable to assume this comment also applies to the equivalent wording in the 2014 Directive.

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[105] 2004 Directive, Recital 36, which states: "to ensure development of effective competition in the field of public contracts" contract notices should be advertised throughout the EU;
[106] 2004 Directive, Recitals 46 and 2014 Directive, Preamble, paragraph 90, which provides that contracts should be awarded on the basis of objective criteria which guarantee that tenders are assessed in conditions of effective competition, to note that Arrowsmith comments that this appears to include the objective of replicating private sector competition in the public sector to ensure the best bidder is chosen, Arrowsmith (2015), fn 59, pp. 738-739;
[107] 2004 Directive, Recital 41;
[108] 2004 Directive, Recital 13;
[109] Arrowsmith, (2012), fn 58, pp. 32-33;

Recital 78 to the 2014 Directive promotes the division of large contracts into lots so as to facilitate small and medium enterprise participation in public procurement, and it is commented that this will "enhance" competition. Again, it is submitted that this does not evidence competition as an objective of the 2014 Directive and, instead, indicates that competition may be a consequence of a contracting authority so dividing their contracts and, as such, appears to be descriptive in nature.[110]

Recital 4 to the 2004 Directive states that member states should ensure that the participation of a public body as a tenderer for a public contract does not cause any distortion of competition in relation to private tenderers. Recital 31 to the 2014 Directive refers to the need to avoid distortion of competition in the case of public-public co-operation and recital 61 provides that frameworks should not be used so as to distort competition.

Distortion of competition is also referred to in recital 31 to the 2004 Directive where contracting authorities are permitted to use a more flexible procurement procedure provided that this procedure is not used in such a way as to restrict or distort competition.[111] Recital 49 to the 2014 Directive states that innovation partnerships should not be used in a way that restricts or distorts competition and the following recital 50 observes that the use of the negotiated procedure has a detrimental effect on competition. Recital 96 to the 2014 Directive refers to the need to avoid distortion of competition in the formulation of costing methodologies.

Arrowsmith has commented that references to the distortion of competition in the recitals to the 2004 Directive are confined to specific instances where there are risks of anti-competitive behavior, for example collusive arrangements or framework agreements which may close the market, rather

[110] Note that Recital 78 to the 2014 Directive goes on to state that avoiding the restriction of competition is a reason for contracting authorities to not divide the contract into lots and recital 79 states that contracting authorities may limit the number of lots they award to a contractor to preserve competition;
[111] 2004 Directive, Recital 31;

than evidencing a broad concept of competition.[112] Given the similarity of wording between the 2004 Directive and the 2014 Directive, as explained above, this interpretation would also appear to apply to the 2014 Directive. This author submits, therefore, that these references to the distortion of competition require contracting authorities to consider the impact their procurements may have on competition in these circumstances, rather than evidencing a broad competition objective.

More importantly, competition is referred to in Article 18(1) of the 2014 Directive, which provides that procurements shall not be designed with the intention of artificially narrowing competition and goes on to state that competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators. It is submitted that whilst this evidences an acknowledgment of the relevance of competition to the 2014 Directive and public procurement, the inclusion of competition alongside wording which relates to non-discrimination and equal treatment suggest that competition is not a separate objective of the 2014 Directive.

If it were the case that the 2014 Directive intended competition to be a separate objective, it would have been preferable for this to be articulated definitively, rather than conflated with non-discrimination and equal treatment. The present formulation raises interpretative issues as there may be a presumption that where there is no discrimination or unequal treatment then distortion of competition is irrelevant.[113] Arguably if competition was intended as a separate objective it would be articulated separately, to allow it to be promoted irrespective of the existence or otherwise of non-discrimination.

[112] Arrowsmith, (2012), fn 58, pp. 31-32;
[113] Sanchez Graells, (2015), fn 93, p. 209;

It would also appear that distortion of competition is permitted where this is unintentional. It may be technically difficult for contracting authorities to make a comprehensive assessment of whether competition will be distorted, meaning an objective standard may present them with issues in terms of complying with such a standard. However, it seems odd that if competition was intended to be a standalone objective, that it is not subject to a higher standard of application so as, for example, to require contracting authorities to take positive steps to ensure competition was not distorted.

In conclusion, notwithstanding the current uncertainty as to the status of the objective or competition, where competition is understood to be an objective of EU procurement law, this may influence the interpretation of and application of this law and is therefore relevant to this study.

Competition law, in the sense of the legal framework which regulates the behaviour of participants in the market more widely from a supply perspective, is beyond the scope of this study so is not considered in this section.[114] It is arguably necessary for competition law and procurement law each to function correctly in order to secure an optimum procurement outcome,[115] as in circumstances where there are, for example, market distortions it may be the case that competition for individual contracts is adversely affected. However, it is not clear that competition in the sense of how this concept is understood in the context of competition law is an aim of

[114] Note however there has been a call for competition law and public procurement law to be approached in a more integrated manner, see Sanchez Graells, (2015), fn 93; Skovgarrd Olykke, G., "How does the Court of Justice of the European Union pursue competition concerns in a public procurement context?", *Public Procurement Law Review*, 2011, 6, pp. 180-181;

[115] For example, Sanchez Graells, A., "Interaction between EU Competition and Procurement Rules" presentation delivered 27.02.2013 Public Procurement Seminar Series 2012-2013, University of Nottingham, argued that there was a natural link between competition and procurement and that competitive markets require competitive procurement;

procurement law. This is demonstrated by the fact that separate legal frameworks apply to each of competition law and procurement law.[116]

2.2.4 Transparency

There is nothing specific in the preamble to the TFEU relating to an objective of transparency. However, and explained in section 2.5.3, the principle of transparency is derived from TFEU and transparency has been considered in cases concerning the fundamental freedoms and principles.[117] It may therefore be the case that transparency exists is an objective of EU law and therefore it is relevant to consider it here.

The principle of transparency is referred to in the recitals to the 2004 Directive and 2014 Directive, in which it is stated that the award of contracts by contracting authorities is subject to that principle.[118] Transparency as a principle is also referred to in recitals 12 and 14 of the 2004 Directive and recital 68 of the 2014 Directive in the context of electronic purchasing techniques. The "spirit of transparency" is referred to in recital 39 of the 2004 Directive in assessing the suitability of bidders.

Contracts should be awarded on the basis of objective criteria which ensure compliance with the principle of transparency.[119] Recitals 45 and 80 of the 2014 Directive comment that the competitive procedure with negotiation should have safeguards to observe the principle of transparency.

Recital 52 of the 2014 Directive observes that electronic communication can increase the transparency of a procurement. Communications should be

[116] For further information on the legal framework applicable to competition law, see Jones, A., and Sufrin, B., *EU Competition Law*, 5th edition, Oxford University Press, Oxford, 2014;
[117] For example, Case C-324/98, *Teleaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG*, para 60-61 where the CJEU found that an obligation of transparency existed to enable it to be possible to ensure that the fundamental rules of TFEU and in particular the principle of non-discrimination had been complied with;
[118] 2004 Directive, Recital 2; 2014 Directive, Recital 1;
[119] 2004 Directive, Recital 46; 2014 Directive, Recital 61 in the context of criteria governing the choice of method of performing a framework agreement; 2014 Directive, Recital 90;

documented in writing to ensure transparency[120] and aggregation of purchases should be carefully monitored to preserve transparency.[121] Recital 82 of the 2014 Directive states that to ensure transparency, bidders should be able to request information on the procedure.[122] Transparency is also cited as a reason why a failing contractor should not be replaced with another without reopening competition, except in the case of certain corporate restructurings.[123] Transparency should be observed in the case of contracts that are not of cross-border interest.[124]

However, it is not clear that transparency is an objective of either the 2004 or the 2014 Directive or of TFEU. It has been submitted that transparency is not an objective in itself, but instead is a mechanism to achieve other objectives.[125]

It has been argued that one such objective is to ensure a level of transparency so that member states cannot easily conceal discriminatory awards.[126] The use of transparency has been stated to support non-discrimination by ensuring that compliance with that obligation can be monitored.[127]

Furthermore the fact that transparency limits contracting authorities' discretion and therefore the risk that domestic contractors will be preferred, may increase competition for public contracts.[128] This suggests that

[120] 2014 Directive, Recital 58;
[121] 2014 Directive, Recital 59;
[122] Transparency of decision making is referred to in Recital 126 of the 2014 Directive;
[123] 2014 Directive, Recital 110;
[124] 2014 Directive, Recital 114;
[125] Trepte, (2005), fn 58, p. 50, in this case Trepte submits that the twin objectives of the transparency requirements in the procurement directives are (i) to ensure and (ii) supervise (control) intra-EU competition in procurement, p. 59; see also de Mars, S. "The limits of general principles: a procurement case study" *European Law Review*, 2013, 38(3), p. 319, stating that the principle of transparency is often used to "support" the principle of equal treatment;
[126] Arrowsmith, (2005-2006), fn 13, p. 340;
[127] Arrowsmith, (2014), fn 11, p. 164; Arrowsmith, (2013), fn 59, p.8; Trepte, (2004), fn 14, p. 252;
[128] *Ibid*., pp. 21-22;

transparency can be a means of furthering the objective of competition, where this objective is understood to exist.

Transparency should therefore be understood as supporting the achievement of other objectives, rather than being an objective of EU procurement law.[129] However, in practice it may be the case that this distinction is not made, which may affect interpretation and application of the law applicable to contract adjustments.

2.3 TFEU

2.3.1 Introduction

The UK has been a member of the EU since 1973 and is accordingly subject to the TFEU.[130] The TFEU does not contain specific provisions dealing with public procurement although it does contain provisions prohibiting member states from discriminating against the industry of other member states.

Sections 2.3.2-2.3.4 consider Article 34 TFEU, on the free movement of goods, Article 49 TFEU on the freedom of establishment and Article 56 TFEU concerning the freedom to provide services. These provisions are collectively known as the "fundamental freedoms" and, as explained below, are relevant to public procurements undertaken by contracting authorities.[131] Section 2.3.5 sets out the circumstances in which the fundamental freedoms may be derogated from.

The fundamental freedoms do not apply to situations where the relevant activity is confined in a single member state and the parties to the

[129] Transparency was considered as a contracting authority objective in section 1.3.6;
[130] European Communities Act 1972, s2(1);
[131] TFEU Article 34; TFEU Article 49; TFEU Article 56; also TFEU Article 18 sets out a general prohibition on discrimination on grounds of nationality. TFEU Articles 34, 49 and 56 will apply in their respective areas of operation so reliance on Article 18 TFEU will be unnecessary, see para 28, Case 305/87 *Commission v Hellenic Republic*, also at para 12 which cites Case 2/74, *Reyners v Belgium*, Case 13/76, *Dona v Matero*, and Case 90/76, *van Ameyde v UCI*;

proceedings are also of that member state.[132] In the context of public procurement this has been considered but uncertainty exists as to how it applies.

In the case of *RI.SAN* the CJEU found that the free movement provisions did not apply as the situation did not have any "connecting link" to the free movement provisions.[133] However in the case of *Parking Brixen* the CJEU found that it was sufficient that the circumstances potentially discriminated against firms from other member states, as the failure to advertise might prevent contractors from other member states from exercising their rights under TFEU.[134] *Parking Brixen* suggests that the CJEU has extended the application of the fundamental freedoms to apply to situations where there is potential discrimination, therefore departing from the position in *RI.SAN*.

It has been argued that the approach in *Parking Brixen* is correct, and that the internal situations rule does not preclude domestic contractors from challenging pursuant to the fundamental freedoms in scenarios where the measure in question could deter contractors from other member states from bidding.[135] It is submitted that this is correct, as in the alternative it is not clear what the redress would be where a contracting authority had failed to advertise a procurement and for this reason had no interest from contractors from other member states.

In addition, a requirement for "cross border interest" exists as a limit on the application of the fundamental freedoms. The case of *An Post* found that Ireland was not in breach of Articles 56 and 49 TFEU in its failure to advertise a contract for postal services as the aggrieved contractor had not

[132] Cases 314-316/81 and 83/82, *Waterkeyn*; Case 286/81, *Oostheok's Uitgeuversmaatschappil*;
[133] Case C-108/98, *RI.SAN v Comune d'Ischia and others*;
[134] Case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerk Brixen AG*;
[135] Arrowsmith, (2014), fn 11, p. 244;

demonstrated that cross-border interest exists.[136] It has been suggested that this also applies to Article 34.[137] The test for establishing cross-border interest has been considered by the CJEU and it appears that the position is unclear.[138] The position as to what type of connection is relevant for the cross-border interest test is also unsettled.[139]

Whilst overlap exists between the concept that the fundamental freedoms do not apply to internal situations and the cross border interest test, these are in fact separate rules which may have a different content.[140] However, given the present uncertainty as to the scope and application of the two rules it is difficult to articulate either the precise content of the requirement or the degree of overlap.

2.3.2 The free movement of goods

Article 34 TFEU relates to the free movement of goods within the EU and states:

"*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member states*".[141]

Dassonville established that "equivalent effect" covers: "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".[142] Therefore a

[136] Case C-507/03, *Commission v Ireland ("An Post")*; see also Joined Cases C-147/06 and C-148/06, *SECAP and Santorso v Comune di Torino ("SECAP")*;
[137] Arrowsmith, (2014), fn 11, pp, 244-245;
[138] *An Post* referred to "certain cross border interest" suggesting a high threshold applied, in Case C-91/06, *Wall AG v Stadt Frankfurt am Main and Frankfurter Entsorgungs-und Service GmbH* did not refer to "certain" and said it was sufficient that the contract "may be of interest" to contractors from other member states - this test also features in Case C-226/09, *Commission v Ireland*, however in Case C-95/10, *Strong Seguranca SA v Municipio de Sintra* referred to the test in *An Post*;
[139] *An Post* required the interested firms to be "located" within other member states, whereas a wider concept of cross-border interest was applied in *Federal Security Services Ltd v Chief Constable for the Police Service of Northern Ireland* [2009] NICh 3;
[140] Arrowsmith, (2014), fn 11, p. 249;
[141] TFEU Article 34;
[142] Case 8/74, *Procurer du roi v Dassonville*, para 5;

potentially wide range of measures and restrictions fall within this prohibition.[143]

Article 34 TFEU applies to the supply of goods to a contracting authority. [144] It also applies where goods are to be supplied as part of the performance of the contract.[145]

Article 34 TFEU applies to measures which discriminate directly between domestic and non-domestic goods. For example, a requirement that only goods from a certain member state will be used will contravene the prohibition.[146] Furthermore, measures which apply equally to domestic and non-domestic contractors which have the effect of favouring domestic contractors are prohibited.[147] The CJEU has also found that measures which affect domestic and non-domestic contractors equally may contravene Article 34 TFEU.[148]

The CJEU has found that the Article applies to individual procurements in a number of specific instances.[149] Furthermore the CJEU has not recognised a *de minimis* principle with the effect of excluding Article 34 where the potential effect is negligible.[150] Accordingly it appears that individual procurement decisions potentially fall within Article 34 TFEU.

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[143] See Craig, P., and De Burca, G., *EU Law: Text, Cases, and Materials, 5th edition*, Oxford University Press, Oxford, 2011, pp. 638-640;
[144] For example Case C-3/88, *Commission v Italy (Re Data Processing)*, Case C-243/89, *Commission v Denmark (Storebaelt)*;
[145] Case C-45/87, *Commission v Ireland (Dundalk)*;
[146] *Storebaelt*, fn 144;
[147] *Dundalk*, fn 145;
[148] Case C-359/93, *Commission of the European Communities v Netherlands (Unix)*, where the specification of a type of computer system was unlawful because it excluded other types of computer system but in this case the specification did not appear to favour domestic suppliers; see: Fernandez Martin, J. M., "Case Comment: Note on Case C-359/93 Commission v The Netherlands (the "Unix" case)", *Public Procurement Law Review*, 1995, pp. CS75-CS76;
[149] *Storebaelt*, fn 144, *Re Data Processing*, fn 144, *Unix*, fn 148, *Teleaustria*, fn 117;
[150] Arrowsmith, (2014), fn 11, p. 240;

2.3.3 Freedom of establishment

Article 49 TFEU specifies:

"*...restrictions on the freedom of establishment of nationals of a member state in the territory of another member state shall be prohibited. Such prohibitions shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any member state established in the territory of any member state. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings...*".[151]

Article 49 TFEU therefore seeks to prohibit measures which hinder individuals and companies from establishing themselves in other member states and also extends to prohibit restrictions on them once established.[152] Article 49 TFEU may apply in the context of a public procurement where, for example, the contracting authority requires that the contractor be established in the same member state as that contracting authority.[153]

2.3.4 Freedom to provide services

Article 56 TFEU states:

"*restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of member states other than that of the person for whom the services are intended*".[154]

[151] TFEU Article 49;
[152] See further Craig and De Burca, fn 143, pp. 770-788;
[153] See Joined Cases C-357/10, C-358/10 & C-359/10, *Duomo Gpa Srl v Comume di Baranzate, Gestione Servizi Pubblici Srl v Comune di Baranzate, Irtel Srl v Comune di Venegono Inferiore*, concerning a services concession where the CJEU considered whether Italian Legislative Decree 446 was compatible with TFEU Articles 49 and 56; Case C-203//08, *Sporting Exchange Ltd v Minister van Justitie (stichting de Nationale Sporttotalisatior, intervening)*, in which TFEU Article 49 was considered;
[154] TFEU Article 56;

Services are defined in Article 57 TFEU as including activities of an industrial character or activities of craftsmen or the professions.[155]

Article 56 TFEU will be infringed by conduct restricting access to government contracts where this discriminates directly on grounds of nationality, and also covers measures that discriminate against contractors not established in the member state of the relevant contracting authority.[156] In addition, measures which have the effect of discriminating against non-domestic contractors are prohibited.[157] This can extend to measures which make it more difficult for a non-domestic contractor to use its own staff.[158]

The CJEU has also found that measures which apply equally to foreign and domestic contractors may contravene Article 56 TFEU.[159] In the case of *Contse* the CJEU appeared to assume that any measure that restricted access to public contracts would be prohibited by Article 56 TFEU.[160] This position was confirmed in *Serrantoni*.[161]

2.3.5 Derogations and exceptions

Conduct which would otherwise be prohibited pursuant to Articles 34, 49, or 56 TFEU may be permitted where there is an explicit derogation or where the general interest requirement applies.

Article 36 TFEU sets out derogations from Article 34 TFEU on grounds of public morality, public policy or public security, the protection of health and

[155] TFEU Article 57;
[156] Arrowsmith, (2014), fn 11, p. 291;
[157] *Re Data Processing*, fn 144, in this case Article 56 TFEU was contravened by a requirement that contractors must be wholly or mainly in Italian public ownership. Whilst in theory any contractor could be owned in this way, in practice all the data processing firms in public ownership were Italian; Case 380-89, *Commission v Italy*, where the requirement that contractors had to sub-contract certain works to entities that had offices in specific regions of Italy contravened Article 56 TFEU;
[158] *Storebaelt*, fn 144, where a requirement to use Danish labour contravened Article 56 TFEU;
[159] See in particular, Case C-384/93, *Alpine Investments BV v Minister of Finance*;
[160] Case C-234/02, *Contse v Insuldad*, to note however in this case the measures were indirectly discriminatory as they had a greater impact on foreign contractors;
[161] Case C-376/08, *Serrantoni Srl v Consorzio stabile edili Scrl v Comune di Milano*;

life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial or commercial policy.[162] To rely on these derogations there must be no arbitrary discrimination or a disguised restriction on trade between member states.[163]

Article 62 TFEU provides for express derogations from Article 56 TFEU on grounds of public policy, public health, or public morality.[164] Article 52 TFEU provides the same derogations in respect of Article 49 TFEU.[165]

A further derogation exists which provides that Articles 49 and 56 TFEU shall not apply to activities that are "connected, even occasionally, with the exercise of official authority".[166] This derogation has been narrowly construed by the CJEU and appears to cover the actual exercise of legislative and judicial powers and the formulation of high level policy.[167] Contracts which support the day to day running of official activities will not be covered as these are of an administrative nature rather than being connected with the actual exercise of official authority.[168]

Article 34 TFEU may also be derogated from where the measure can be justified by one of the public interest grounds recognised by the CJEU, including the protection of consumers,[169] environmental protection,[170] and

[162] TFEU Article 36;
[163] TFEU Article 36;
[164] TFEU Article 62;
[165] TFEU Article 52;
[166] TFEU Article 52; TFEU Article 62;
[167] Arrowsmith, (2014), fn 11, p. 296;
[168] *Re Data Processing*, fn 144;
[169] Case C-205/84, *Commission v Germany*, paras 30-33; Case C-233/94, *Germany v European Parliament and EU Council*, para 16; Case C-168/98, *Re Directive on Lawyers' Establishment: Luxembourg v European Parliament and EU Council*, para 32; Case C-42/07, *Liga Portuguesa de Futebol Profissional and another v Departmento de Jogos da Santa Casa da Misericordia de Lisboa*, para AG10 (Opinion of Advocate General Bot delivered on October 14, 2008); Case C-243/01, *Gambelli and others*;
[170] C-384/08, *Attanasio Group Srl v Comune di Carbognano*, para 50; Case C-400/08, *Re Shopping Centres Licensing: European Commission v Spain, supported by Denmark*, para 74;

the effectiveness of fiscal supervision.[171] The CJEU may add to this list where it finds it appropriate to do so to protect a particular interest. Articles 49 and 56 TFEU are also not applicable where the relevant measures fall within the general interest requirements. Measures aiming to protect grounds of an economic nature, such as ensuring returns on investment[172] or to allocate public contracts to an economically deprived region of a member state[173] are not capable of justifying a restriction on a fundamental freedom.

When applying derogations or one of the public interest grounds, the measure which would otherwise contravene a fundamental freedom must be appropriate for securing the objective pursued and should not go beyond what is necessary to obtain it.[174] A measure is appropriate where it genuinely reflects a concern to secure the objective in a "consistent and systematic manner".[175]

In addition to the above, Article 346 TFEU provides a derogation where member states take measures which are necessary for their essential security needs.[176] This provides that member states shall not be required to supply information where this is contrary to the essential interests of its security.[177] Furthermore member states may take such measures as necessary for the protection of its essential interests of security connected with the production of or trade of war materials or similar.[178]

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[171]Case C-233/09, *Dijkman v Belgium*; Case C-387/11, *Commission v Kingdom of Belgium (Taxation of non-resident companies) the United Kingdom intervening)*;
[172] Case C-260/04, *Commission v Italian Republic*, para 35;
[173] Case C-21/88, *Du Pont de Nemours Italiana v USL di Carrara*, para 18
[174] Case C-385/10, *Elenca Srl v Ministero dell'Interno*, para 26, considering TFEU Article 34; *Fabricom* , fn 36, para AG 38, para 32-36; Case C-213/07, *Michaniki AE v Ethniko Simvoulio Radiotileorasis Ipourgos Epikratis("Michaniki")*, para H13-H14;
[175] Case C-169/08, *Presidente del Consiglio dei Ministri v Regione Sardegna*, para H9 considering national legislation in the context of TFEU Article 49;
[176] TFEU Article 346;
[177] TFEU Article 346(1)(a);
[178] TFEU Article 346(1)(b); for further information on the applicability of Article 346 TFEU to public procurement see Pourbaix, N., "The future scope of Article 346 TFEU", *Public Procurement Law Review*, 2011, 1, pp. 1-8; to note, however, that this provision does not exempt all measures relating to the procurement of war materials or similar but applies to specific measures, Case C-414/97, *Commission v Spain*;

2.4 Directives and Regulations

2.4.1 Directive 2014/24 EU

The 2014 Directive is currently applicable to the procurement of works, supply and services contracts by contracting authorities. The 2014 Directive explains which contracts it applies to and sets out procedures for the award of public contracts above a certain threshold.[179] These are based on the fundamental freedoms and principles including non-discrimination, equal treatment, proportionality, and transparency.[180]

Article 18(1) of the 2014 Directive states: "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way." In addition, the 2014 Directive contains numerous specific provisions which support transparency, including the requirement to publish contract opportunities in the Official Journal of the European Union, and the requirement to publish details of the award of contracts.[181]

Article 18(1) of the 2014 Directive goes on to state that the design of the procurement should not be made with the intention of artificially narrowing competition.

The 2014 Directive sets out the competitive procedures that contracting authorities are required to follow when awarding public contracts for goods, works or services. The competitive procedures available are the open procedure and the restricted procedure, which are formal tendering procedures involving a single tendering phase, and the competitive procedure with negotiation, competitive dialogue, and innovation

[179] Articles 74-77 of the 2014 Directive contain limited requirements for the procurement of social and other specific services;
[180] 2014 Directive, Recital 1;
[181] 2014 Directive, Section 2, Publication and Transparency;

partnership, which are more flexible procedures that may include iterative tendering and/or dialogue phase with participants.[182]

The negotiated procedure without prior advertisement is also available in certain limited circumstances.[183] This procedure may be relied upon to extend the scope of the performance of existing contracts through awarding further work to the existing contractor where grounds for use of the procedure exist. It should be noted that this operates as an award of a new contract without competition and therefore is conceptually distinct from an adjustment to an existing contract.

The negotiated procedure without prior advertisement is available to extend the scope of a contract which was originally awarded using that procedure, such as where the works, supplies or services which are the subject of the contract can only be supplied by a particular contractor in the circumstances set out in the 2014 Directive Article 32 (2)(b).[184]

The negotiated procedure without notice can also be used in so far as strictly necessary where for reasons of extreme urgency brought about by events unforeseeable by and not attributable to the contracting authority, it is not possible to comply with the time limits for a competitive procedure.[185]

In the case of supply contracts, the negotiated procedure without notice can be used in the case of products manufactured purely for research[186] or for additional deliveries by the contractor intended as partial replacement or extension of existing supplies where a change of contractor would lead to the supply of goods with different characteristics or to disproportionate technical

[182] 2014 Directive, Articles 26-31; for detail about the procedures under the 2014 Directive see Arrowsmith, (2014), fn 11, pp. 605-1100;
[183] 2014 Directive, Article 32;
[184] 2014 Directive, Article 32(2)(b);
[185] 2014 Directive, Article 32(2)(c);
[186] 2014 Directive, Article 32(3)(a);

difficulties, provided the duration of such contracts shall not, as a general rule, exceed three years.[187]

The negotiated procedure without prior publication may also be used for works or service contracts which are repetition of similar works or services awarded to that contractor where these works or services are in conformity with the project for which the original contract was awarded, and where the basic project indicated the extent of the possible additional works or services and the conditions under which they would be awarded.[188] When the original project is procured, the future use of the negotiated procedure without publication for the future works or services should be disclosed and taken into account when estimating the contract value.[189] This can only be relied upon during the three years following conclusion of the original contract.[190]

Article 72 of the 2014 Directive sets out the circumstances in which contracts that are subject to Directive 2014 may be modified during their term without a new procurement procedure. It should be noted that procurement directives prior to the 2014 Directive contained no such provisions on the modification of contracts during their term.

Article 72(1)(a) explains the modifications made in accordance with "clear, precise and unequivocal" review clause, which state the scope and nature of the modification and the circumstance in which it can be used. Modifications may be made regardless of monetary value but must not alter the overall nature of the contract.

The following provision, Article 72(1)(b) states that modifications can be made to allow for additional works, services or supplies by the contractor where this has become necessary and in circumstances where a change of

[187] 2014 Directive, Article 32(3)(b);
[188] 2014 Directive, Article 32(4);
[189] *Ibid*.;
[190] *Ibid*.;

contractor cannot be made for economic or technical reasons and would cause significant inconvenience or duplication of costs for the contracting authority. Modifications are not permitted pursuant to this provision where any increase in price exceeds 50% of the value of the original contract. Where successive modifications are made this limit applies to the value of each modification. Consecutive modifications must not be aimed at circumventing the 2014 Directive.

Modifications are permitted in accordance with Article 72(1)(c) where all of the following are met: (i) the need to modify the contract has arisen from circumstances that could not have been foreseen by a diligent contracting authority; (ii) the modification does not alter the overall nature of the contract; and (iii) any increase in price must not be greater than 50% of the value of the original contract, and where successive modifications are made that limit applies to the value of each modification. Consecutive modifications must not be aimed at circumventing the 2014 Directive.

Contracting authorities making modifications in reliance on Article 72(1)(b) or (c) are required to publish a notice to that effect in the Official Journal of the European Union.[191]

The 2014 Directive also sets out circumstances in which the contractor originally awarded the contract can be replaced by another contractor. These are (i) where this is provided for in a review clause which conforms with Article 72(1)(a)[192]; (ii) as a consequence of a corporate restructuring where the replacement contractor meets the selection criteria applicable to the original procurement and the modification is not aimed at circumventing the provisions of the 2014 Directive;[193] and (iii) where in accordance with

[191] 2014 Directive, Article 72(1);
[192] 2014 Directive, Article 72(1)(d)(i);
[193] 2014 Directive, Article 72(1)(d)(ii);

national law, the contracting authority assumes the contractor's obligations to sub-contractors.[194]

Article 72(1)(e) states that insubstantial modifications are permitted.[195] Article 72(4) defines "substantial" to mean (i) where the modification introduces conditions which, had they been part of the original procurement, would have allowed for the admission of or selection of a contractor other than those originally admitted or selected, or would have attracted additional contractors to the procurement;[196] or (ii) the modification changes the economic balance of the contract in a manner not provided for in the original contract;[197] or (iii) the modification considerably extends the scope of the contract;[198] or (iv) where a new contractor replaces the original contractor other than as provided for in Article 72(1)(d).[199]

Article 72(2) provides that *de minimis* adjustments are permitted. Specifically those where the value of the modification is both below the thresholds set out in Article 4 of the 2014 Directive and less than 10% of the initial contract value in the case of services and supply contracts and less than 15% of the initial contract value in the case of works contracts. Modifications made pursuant to Article 72(2) must not alter the overall nature of the contract and the value of successive modifications should be assessed on a cumulative basis.

Article 73 of the 2014 Directive states that member states must ensure that contracting authorities have the possibility under conditions determined by national law to terminate a public contract. Of relevance to this study is Article 73(1), which provides a ground for such termination is where a

[194] 2014 Directive, Article 72(1)(d)(iii);
[195] Note that Recital 107 of the 2014 Directive indicates that Article 72 was drafted to take into account the relevant case law of the CJEU and Article 72(4) closely follows *Pressetext* as set out in section 2.6.2 below;
[196] 2014 Directive, Article 72(4)(a);
[197] 2014 Directive, Article 72(4)(b);
[198] 2014 Directive, Article 72(4)(c);
[199] 2014 Directive, Article 72(4)(d);

contract has been substantially modified where this required a new procurement procedure pursuant to Article 72.

2.4.2 Directive 2004/18 EC

The 2004 Directive was applicable to the procurement of works, supply and services contracts by contracting authorities prior to the 2014 Directive. In common with the 2014 Directive, the 2004 Directive set out procedures for the award of public contracts by contracting authorities above a certain threshold based on the fundamental freedoms and principles including non-discrimination, equal treatment, proportionality, and transparency.[200] Below threshold contracts and services concessions were not subject to the 2004 Directive and a limited regime applied to Part B services contracts within the meaning of the 2004 Directive.[201]

Article 2 of the 2004 Directive states: "Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way."[202] In addition, and in common with the 2014 Directive, the 2004 Directive contains provisions supporting transparency, including the requirement to publish contract opportunities in the Official Journal of the European Union, and to publish details of the award of contracts.[203]

The competitive procedures available under the 2004 Directive were the open procedure and the restricted procedure, the negotiated procedure and competitive dialogue.[204] The 2004 Directive applied to the period of time from when the contracting authority decides to commence a procedure to the point of contract award and it did not contain provisions akin to Article 72 of the 2014 Directive outlined above to deal with modifications made to contracts during their term.

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[200] 2004 Directive, Recital 2;
[201] 2004 Directive, Chapter 2 and Article 21;
[202] 2004 Directive, Article 2;
[203] 2004 Directive, Chapter 4;
[204] 2004 Directive, Articles 28-31 ; for detail about the procedures under the Directive see Hjelmborg, Jakobsen and Poulsen, (2006), fn 23, pp. 331-371;

In common with the 2014 Directive, of relevance to contract adjustments, however, was the negotiated procedure without advertisement, which was available to contracting authorities in limited circumstances.[205] This procedure could be used to extend the scope of the performance of existing contracts through awarding further work to the existing contractor. It should be noted that this operated as an award of a new contract without competition and therefore is conceptually distinct from an adjustment to an existing contract.

The negotiated procedure could be used to extend the scope of a contract which had been originally procured using the negotiated procedure without advertisement, for example where for artistic or technical reasons or for reasons connected with the protection of exclusive rights, a contract could only be awarded to a particular contractor.[206]

The negotiated procedure without advertisement was available to permit additional deliveries where they were intended to replace or extend normal supplies where a change to the supplier would mean the materials acquired had different technical characteristics which would result in incompatibility or disproportionate technical difficulty.[207]

It could also be used for public works and public services contracts for additional works or services not included in the project which became necessary through unforeseen circumstances, where such additional works or services cannot be separated from the original works or services without major inconvenience, or where the additional works of services, though separable, are strictly necessary for its completion.[208] Where this ground is

[205] 2004 Directive, Article 31;
[206] 2004 Directive, Article 31(1)(b);
[207] 2004 Directive, Article 31(2)(b);
[208] 2004 Directive, Article 31(4)(a);

relied upon the value of the additional works or services may not exceed 50% of the amount of the original contract.[209]

A further available ground for the use of the negotiated procedure was for new works or services which are a repetition of similar works or services provided that they were in conformity with the project for which the original contract was awarded.[210] The possible use of this procedure must have been disclosed when the original contract was advertised and taken into account in the total estimated value of the contract and can only be used during the first three years following the conclusion of the original contract.[211]

2.4.3 The Remedies Directive 89/665

Directive 89/665 applies to contracts falling within the scope of the 2004 Directive and the 2014 Directive.[212] It was amended by Directive 2007/66 EC, which was intended to improve the effectiveness of review procedures. [213]

The Remedies Directive sets out firstly the scope and availability of the review procedures. Member states are required to ensure that decisions taken by contracting authorities can be reviewed effectively and as rapidly as possible where it is alleged that such decisions have infringed public procurement law.[214] The remedies for infringement are set out and include

[209] 2004 Directive, Article 31(4)(a);
[210] 2004 Directive, Article 31(4)(b);
[211] 2004 Directive, Article 31(4)(b);
[212] Council Directive 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 (89/665/EEC) (OJ L 395, 30.12.1989, p. 33);
[213] Directive 2007/18/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, 20.12.2007, Official Journal of the European Union, L 335/31, note that Directive 89/665/EEC as amended by Directive 2007/66/EC are the "Remedies Directive" for the purposes of this study;
[214] Directive 2007/66/EC, Article 1, para 1;

ineffectiveness, fines, and the shortening in duration of the applicable contract.[215]

The Remedies Directive is relevant to contract adjustments as, where a contract is "materially amended" within the Substantial Modification Test (see section 2.6.2), this may constitute a new contract award.[216] The award of a new contract without regard to the provisions of the 2014 Directive (or previously the 2004 Directive) may trigger the application of the Remedies Directive including the remedy ineffectiveness.[217]

In the UK a contractor who successfully challenges a breach of the 2006 Regulations or 2015 Regulations may be entitled to an award of damages which will be payable by the breaching contacting authority. Damages are calculated based on the loss of profits to the contractor discounted to reflect the chance of the contractor winning the contract had the breach not occurred.[218]

An automatic suspension applies once proceedings have been issued in the High Court, meaning that a contracting authority is unable to award the relevant contract until either the High Court ends it using an interim order[219] or the proceedings are determined, discontinued or are otherwise disposed of.[220]

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[215] Directive 2007/66/EC, Articles 2d and 2e;
[216] *Pressetext*, fn 4;
[217] Directive 2007/66/EC, Article 2d, para 1; For further information on remedies and enforcement of EU public procurement law, including ineffectiveness, see: Caranta, R. and Treumer, S., (eds) *Enforcement of the EU Public Procurement Rules*, DJOF Publishing, Copenhagen, 2011; Henty, P., "Remedies Directive implemented into UK law", *Public Procurement Law Review*, 2010, 3, NA115-124; Clifton, M-J., "Ineffectiveness - the new deterrent: will the new Remedies Directive ensure greater compliance with the substantive procurement rules in the classical sectors?" *Public Procurement Law Review*, 2009, 4, pp. 165-183;
[218] *Lancashire County Council v Environmental Waste Controls Limited* [2010] EWCA Civ 1381;
[219] 2006 Regulations, Regulation 47(H); 2015 Regulations, Regulation 96(1);
[220] 2006 Regulations, Regulation 47G; 2015 Regulations, Regulation 95;

2.4.4 The 2006 Regulations and 2015 Regulations

The 2006 Regulations came into force in the UK on 31 January 2006 and transpose the 2004 Directive and the Remedies Directive into UK law. The 2015 Regulations replaced the 2006 Regulations as of 28 February 2015. Neither the 2006 Regulations nor 2015 Regulations extend to Scotland, which has implemented its own regulations to bring these directives into force in that territory.[221] The 2006 Regulations and 2015 Regulations were enacted pursuant to section 2(2) of the European Communities Act 1972.[222]

The provisions of the 2006 Regulations and 2015 Regulations essentially mirror those in the 2004 Directive and 2014 Directive respectively, and therefore the 2006 Regulations and 2015 Regulations contain provisions requiring equal treatment and non-discrimination[223] and transparency, and similarly contain provisions implementing the negotiated procedure and the other competitive procedures.[224] The 2015 Regulations and 2006 Regulations also give effect to the provisions summarised at section 2.4.1 and 2.4.2 above respectively. The 2006 Regulations and 2015 Regulations implement the Remedies Directive, described in section 2.4.3 above.

The approach of essentially copying out the provisions of the 2004 Directive and 2014 Directive into the 2006 Regulations and 2015 Regulations respectively reduces the occurrence of errors in the transposition and prevents inconsistencies between the relevant directive and regulations. Such errors have been described as being particularly likely in the context of public procurement as a consequence of the complicated and ambiguous provisions of these directives and the unpredictable nature of CJEU decisions,

[221] The Public Contracts (Scotland) Regulations 2006 (as amended); and the Public Contract (Scotland) Regulations 2015;
[222] European Communities Act 1972, Section 2(2);
[223] 2006 Regulations, Regulation 4(3)(a) implementing Article 2 of the 2004 Directive on equal treatment and non-discrimination; 2006 Regulations, Regulation 4(3)(b) implementing Article 2 of the 2004 Directive on transparency; 2015 Regulations, Regulation 18 implementing Article 18 of the 2014 Directive;
[224] 2006 Regulations, Regulation 14 implements Article 31 of the 2004 Directive on the negotiated procedure without publication of a contract notice;

arising in particular from the CJEU's discretion in applying the principles of equal treatment and transparency.[225]

2.5 The principles

2.5.1 Introduction

The principles set out in this section 2.5 are of relevance to public contracts and are the basis of the case law which has developed the rules governing contract adjustments both as set out in Regulation 72 of the 2015 Regulations and in applicable UK and CJEU case law. These principles are (as described further in this section) relevant to contracts that are not subject to or are only partially subject to the procurement directives and have also been used to develop rules on adjustments for those contracts, as well as for contracts subject to the 2004 Directive and the 2014 Directive (and thus the Procurement Regulations).

The principles discussed in this section 2.5 are equal treatment and transparency, as these principles have been found to be relevant to contract adjustments.[226] Proportionality is also considered, as it may be relevant to the way in which the law on contract adjustments is applied in practice.

The focus of the empirical section of this study will be on contracts that have been awarded in accordance with the full provisions of the Procurement Regulations. The principles of equal treatment, transparency and proportionality are relevant to these contracts, and equal treatment and transparency find specific expression in the Procurement Regulations, as explained in section 2.4 above.

The applicability of these principles to contract adjustments is dealt with in this section to the extent required to explain why they are relevant to

[225] Arrowsmith, S., "Implementation of the new EC procurement directives and the Alcatel ruling in England and Wales and Northern Ireland: a review of the new legislation and guidance", *Public Procurement Law Review*, 2006, 3, p. 90;
[226] For example, *Pressetext*, fn 4, para 34; *Wall*, fn 138, para 37;

contract adjustments. Detailed consideration of the application of the principles to specific contract adjustments is considered in chapters 3, 4 and 5.

2.5.2 Equal treatment

The existence of the principle of equal treatment

Article 2 of the 2004 Directive and Article 18 of the 2014 Directive provide that contracting authorities must in their award of contracts, treat contractors equally and in a non-discriminatory way. Equal treatment is therefore applicable to contracts awarded by contracting authorities that are subject to these directives.

Non-discrimination on the grounds of nationality is enshrined, as described in section 2.3 above, in the TFEU fundamental freedoms and Article 18 TFEU.[227] The Commission has indicated that these articles include a more general obligation of equal treatment.[228] The existence of a duty of equal treatment as distinct from a requirement not to discriminate on grounds of nationality finds support in case law, thereby extending the equal treatment requirement to procurements that are not subject to the 2004 Directive or the 2014 Directive.[229]

The position that equal treatment is a separate TFEU principle has been criticised. It has been commented that the CJEU has confused the principle of equal treatment with the prohibition on discrimination on grounds of nationality, and that only non-discrimination is enshrined in the fundamental

[227] TFEU Articles, 18,34, 49 and 56;
[228] For example, "Commission interpretative communication of the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directive", Official Journal C 179, 01/08/2006 P. 0002-0007;
[229] See, *Parking Brixen GmbH*, fn 134, which confirmed the existence of the principle of equal treatment for services concessions; C- 196/08, *ACOSET SPA v Conferneza Sindaci e Presidenza Prov Reg Ato Idrico Ragusa*; also Case C-410/04, *ANAV v Comune di Bari*;Case C-95/10; *Strong Seguranca SA* , fn 141, concerning Part B services; *An Post*, fn 136, concerning Part B services; *SECAP*, fn 136, concerning a below threshold contract;

freedoms.[230] Furthermore, it has been argued that general TFEU principle of equal treatment introduces uncertainty.[231]

The focus of this study is on contracts which are subject to the 2004 Directive or the 2014 Directive. Accordingly the obligation to treat contractors equally arises from these directives. The following therefore considers the content of the duty of equal treatment for those contracts subject to these directives.[232]

Content of the principle of equal treatment

There is considerable material on the application of the principle of equal treatment by contracting authorities prior to contract award, including case law and in the 2004 Directive and 2014 Directive, as explained further in this section. This is also relevant to understanding the content of the principle of equal treatment as applicable to adjustments made during the contract term, so is considered in this section. The specific application of the principle of equal treatment to contract adjustments is considered in the final paragraphs of section 2.5.2.

The concept of equal treatment is articulated in *Storebaelt*, which concerned the construction of a bridge in Denmark procured under the then works directive.[233] The CJEU observed that although that directive made no express

[230] Hordijk and Meulenbelt, (2005), fn 33, p. 126;
[231] On this point see, Hordijk and Meulenbelt, (2005), fn 33, p. 127, where the point is made in a discussion of the obligation to conduct a tender that legal certainty will suffer where general principles are used to regulate complex areas of law; Neumayer, F., "Value for money v equal treatment: the relationship between the seemingly overriding national rationale for regulating public procurement and the fundamental EC principle of equal treatment", *Public Procurement Law Review*, 2002, 4, p.220;
[232] For further information on the obligation of equal treatment for contracts that are not or not fully subject to the procurement directive, see "Commission Interpretative Communication on Concessions under Community Law", (2000/C 121/02); "Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives", Brussels, 23.6.2006, COM; de Mars, (2013), fn 125, pp. 316-344;
[233] *Storebaelt*, fn 144; Directive 71/305 EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, *Official Journal L 185 , 16/08/1971 P. 0005 - 0014*;

mention of the principle of equal treatment of bidders, this principle "lies at the very heart" of the directive."[234]

Equal treatment was considered in subsequent cases,[235] and was defined in *Fabricom* as requiring that: "comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified".[236]

The CJEU has found that in order to pursue the objectives of the free movement of services and the opening up of competition, EU law applies *inter alia*, the principle of equal treatment and the corollary objective of transparency.[237] The application of the principle of equal treatment to public procurement should be viewed in light of its intended aims, and does not constitute an end in itself.[238] This suggests that a purposive interpretation of the principle of equal treatment is required.

It is necessary to establish the comparable situation is to determine whether equal treatment has been complied with.[239] The UK High Court has

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[234] *Storebaelt*, fn 144, para 33;
[235] For example, Case C-87/94, *Commission v Belgium*, concerning a procurement of buses subject to Directive 90/531 EEC (the then applicable utilities directive) pursuant to which contracting authorities were required to comply with the principle of equal treatment; Case T-19/95, *Adia Interim v Commission of the European Communities*, in which the Court of the First Instance found that the Commission was not obliged to correct an error in a tender so as to ensure equal treatment; Case C-19/00, *SIAC Construction Limited v County Council of Mayo*, concerning a public works contract procured under Directive 71/305 finding that the contracting authority could award the contract to the tender which in the opinion of an expert provided the lowest overall cost, provided that the principle of equal treatment was assured; Case C-513/99, *Concordia Bus Finland Oy Ab v Helsingin Kaupunki and Hkl-Brussiliikenne*;
[236] *Fabricom*, fn 36, para 27; see further Roe, S., and Lessenich, C., "Case Comment: Submission of a bid by a person who has carried out preparatory work for a procurement", *Public Procurement Law Review*, 2005, 4, NA93-97;
[237] Case C-599/10, *SAG ELV Slovensko a.s. and Others v Úrad pre verejné obstarávanie ("SAG")*, para 25; Case C-336/12, *Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S ("Manova"),* para 28; for a case summary, see Brown, A., "The Court of Justice rules that a contracting authority may accept the late submission of a bidder's balance sheet, subject to certain conditions: Case C-336/12, Danish Ministry of Science, Innoviation and Higher Education v Manova SA, *Public Procurement Law Review*, 2014, 1, NA1-NA3;
[238] *Manova* , fn 237, para 29;
[239] R (on the application of All About Rights Law Practice) v The Lord Chancellor (as successor to the Legal Services Commission) [2013] EWHC 3461 (Admin), paras 40-42, 53-55, 65-73;

established a two stage test for determining this, namely to identify (i) who is in a comparable position and who is not; and (ii) if two bidders are in a comparable position, whether there are objective grounds for different treatment.[240] This demonstrates that equal treatment is relative – there has to be a disparity in treatment between two entities. Where there is no such disparity then it will arguably not be possible to demonstrate unequal treatment. This case also provides a justification for unequal treatment where there are objective grounds for this.

Equal treatment may be more easily demonstrated where there is evidence extrinsic to the bid that there has been no unequal treatment. In the CJEU case of *Manova* the CJEU considered whether the principle of equal treatment precluded a contracting authority asking for a balance sheet which the bidder had not included in its bid.[241] It was found that such a request could be made on a limited and specific basis provided that the information can be objectively shown to pre-date the tender deadline.[242] This decision can be queried as it seems that the nature of the evidence is being assessed, rather than the conduct of the contracting authority.

This case also supports the proposition that equal treatment is more likely to be infringed where the course of conduct directly contradicts a statement in the procurement documents. The CJEU indicated it would not be permissible for the contracting authority to request the relevant information where the contracting authority had indicated that failure to include would result in exclusion.[243] This emphasises the importance of compliance by contracting authorities with the procurement documents, and arguably underlines the wider relevance of the procurement documents in supporting the principle of equal treatment.

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[240] R (on the application of All About Rights Law Practice) v The Lord Chancellor (as successor to the Legal Services Commission) [2013] EWHC 3461 (Admin), paras 40-42, 53-55, 65-73;
[241] *Manova*, fn 237, para 24;
[242] *Ibid*., para 39;
[243] *Ibid*., para 40;

Case law has confirmed that equal treatment in contracts subject to the 2004 Directive and the 2014 Directive requires the subject matter of a contract and the criteria governing its award to be defined at the beginning of the procurement.[244] In order to guarantee equal treatment, the recitals of the 2004 Directive and 2014 Directive state that the criteria for the award of the contract should enable bids to be compared and assessed objectively.[245]

It has also been held that equal treatment requires that bidders be on an equal footing and have an equal opportunity in preparing their tenders.[246] In the ruling of the CJEU in *Michaniki*, which concerned a public works contract, it was stated that bidders must be in a position of equality when they formulate their tenders and when those tenders are being assessed by the contracting authority.[247]

Negotiations may prejudice the achievement of equal treatment.[248] The extent to which this is an issue before award of contract depends on the procurement procedure used. In the case of the negotiated and competitive dialogue procedures as set out in the 2004 Directive, and the competitive procedure with negotiation, competitive dialogue, innovation partnership and the negotiated procedure without prior publication as provided for in the 2014 Directive, negotiation is permitted within the limits of these directives before contract award.

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[244] See, Case C-87/94, *Commission v Belgium* Case C-368/10, para H1; Case C-470/99, *Universale-Bau and Others*, (*Univeral Bau)* para 98; Case C-340/02, *Commission v France*, para 34; Case C-368/10, *European Commission v Kingdom of the Netherlands (Re tender of dispensing machines of eco and fair trade labelling hot drinks)*, paras 55-56;
[245] 2004 Directive, Recital 46; 2014 Directive, Recital 90;
[246] *Universal BAU*, fn 244; Case C-199/07, *Re Contract Notice on Consultancy Railway Project: Commission of the European Communities v Greece*, para 38: stating that potential bidders must be in a position of equality as regards the scope of the information in the contract notice (concerning a procurement under the Utilities Directive 93/38);
[247] *Michaniki*, fn 174, para 45, see also SIAC, fn 235, paras 40-44;
[248] For further discussion on negotiations and the impact on transparency, see Hjelmborg, Jakobsen and Poulsen, (2006), fn 23, pp. 37-28;

In the case of the open and restricted procedures there are restrictions on post tender negotiations.[249] The CJEU has found that negotiations between a bidder and the contracting authority may contravene the principle of equal treatment.[250] This may be justified because there are no provision in these procedures for negotiations. Also there may be justification for the restriction where contracting authorities use negotiation to treat bidders unequally.

There is still, however, an opportunity for equal treatment to be compromised even where negotiation is permitted by the procurement procedure. In the case of *Nordecon*, procured using the negotiated procedure, it was found that allowing a bid that does not comply with mandatory requirements to be admissible with a view to negotiating to fixing the mandatory conditions would not allow the contracting authority to negotiate on a basis of conditions common to all of the bidders, and this would not allow the contracting authority to treat them equally.[251] There is also uncertainty as to whether a contracting authority may request amendments that improve bids.[252]

The raising of clarification questions during a procurement should have regard to the principle of equal treatment. Requests for clarification should be sent to all contractors who are in an equivalent position, unless there is an objectively verifiable ground justifying the difference in treatment.[253]

As identified in the above paragraphs, the principle of equal treatment applies to scenarios that are not provided for specifically in the 2004

[249] Office of Government Commerce, "EU procurement guidance: Introduction to the EU procurement rules", 2008, p. 7 at http://webarchive.nationalarchives.gov.uk/20110601212617/http:/www.ogc.gov.uk/documents/Introduction_to_the_EU_rules.pdf, accessed 18 April 2014;
[250] *SAG*, fn 237;
[251] Case C-561/12, *Nordecon AS and another v Rahandusministeerium*, para 38;
[252] Arrowsmith, S., and Treumer, S., "Competitive Dialogue in EU law: a critical review", in Arrowsmith S., and Treumer S. (eds), *Competitive Dialogue in EU Procurement*, Cambridge University Press, Cambridge, 2012, p. 109;
[253] *SAG*, fn 237;

Directive or the 2014 Directive, such as the raising of clarification questions. Equal treatment also has the effect of adding to or clarifying the obligations of contracting authorities in circumstances that are referenced in these directives, such as the approach to negotiations. This indicates that this principle is of importance in interpreting both the 2004 Directive and the 2014 Directive and in providing guidance in cases which are not expressly addressed therein.

Application of the principle of equal treatment to contract adjustments

Pressetext found that in order to ensure equal treatment of bidders, amendments to the provisions of a contract during its term constitute a new contract award where they are materially different in character from the original terms.[254] As explained further below, *Pressetext* is the leading case in respect of contract adjustments. This establishes that equal treatment underpins the law applicable to contract adjustments in respect of contracts that are subject to the 2004 Directive and the 2014 Directive and, as explained below *Pressetext* is reflected in Article 72 of the 2014 Directive, as implemented in the 2015 Regulations.

Equal treatment and the Substantial Modification Test (defined in section 2.6.2 below) were referred to in *Wall* as the legal basis for regulating contract adjustments. The CJEU stated that: "In order to ensure transparency of procedures and equal treatment of tenderers, substantial amendments to essential provisions of a services concession contract could in certain cases require the award of a new concession contract, if they are materially different in character from the original contract...".[255]

By its nature, an adjustment that is made during the term of a contract applies to the single incumbent contractor. This is arguably unequal as that

[254] *Pressetext*, fn 4, para 34;
[255] *Wall*, fn 138, para 37; this citation also supports the position that equal treatment is distinct from non-discrimination and that it derives from the TFEU;

contractor has been treated differently to other contractors. Given the centrality of the equal treatment principle in the Substantial Modification Test as applied in *Wall* consideration of equal treatment is relevant when considering contract adjustments.

However, if a comparable position needs to exist for equal treatment to apply it is questionable who is in a comparable position to the contractor (as the unsuccessful contractors have not been awarded and are therefore not performing the contract). If equal treatment is identified then in accordance with the test established by the UK High Court set out above, objectively justified reasons may allow the unequal treatment.

2.5.3 Transparency

The existence of a principle of transparency

Article 2 of the 2004 Directive and Article 18 of the 2014 Directive provides that contracting authorities must act in a transparent way. Chapter 4 of the 2004 Directive and Section 2 of the 2014 Directive set out specific requirements in respect of advertising and transparency with which contracting authorities must comply when awarding contracts. Transparency is therefore relevant to contracts that are subject to these directives.

The principle of transparency finds expression in case law from the CJEU, which has had the consequence of confirming that the requirement of transparency applies to contracts that are not subject to the 2004 Directive or the 2014 Directive. The decision in *Teleaustria* concerned a services concession contract, which did not need to be procured in accordance with the applicable procurement directive.[256] Here the Advocate General

[256] *Teleaustria*, fn 117; see Dischendorfer, M., "Case Comment: Service concessions under the EC Procurement Directives: a note on the Teleaustria case", *Public Procurement Law Review*, 2001, 2, NA57-63 for a summary;

commented that compliance with the principle of non-discrimination on grounds of nationality, which derives from the TFEU, requires that concessions be awarded with a minimum degree of publicity and transparency.[257]

The existence of a transparency requirement was confirmed in the subsequent cases of *Coname*, a services concession, and in *An Post*, a Part B service contract.[258]

Content of the principle of transparency

As explained above, the 2004 Directive and the 2014 Directive set out a general requirement that contracting authorities must act transparently and then set out specific requirements that contracting authorities must comply with in respect of transparency. However, in respect of procurements that are not or not fully subject to these directives, the position is less clear and it has been commented that there is little in existing case law to establish what the transparency obligation entails in practice.[259]

As explained above, the focus of this study is on contracts fully subject to the 2004 Directive or the 2014 Directive (as the case may be). However, it is worth considering the wider principle of transparency as it may be the case that in practice this is drawn on to interpret the legal position in circumstances where these directives do not or do not deal in detail with a particular circumstance.

Teleaustria found that the TFEU prohibition on discrimination on grounds of nationality implies an obligation of transparency which "consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to

[257] Opinion of Advocate General Fennelly delivered on 18 May 2000, *Teleaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG*, Case C-324/98, para 43;
[258] Case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de'Botti*; *An Post*, fn 136;
[259] McGowan, D., "Clarity at last? Low value contracts and transparency obligations", *Public Procurement Law Review*, 2007, 4, pp. 276-277;

enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed."[260] However, the CJEU did not set out further what a contracting authority must do in practice to meet the "rather vague Treaty requirement" for transparency and the degree of advertising mentioned.[261]

The Advocate General states in *Teleaustria* that the grant of a concession should not be "shrouded in secrecy or opacity" but that a requirement to publicise the opportunity did not necessarily equate to publication.[262] The Advocate General in *Commission v Finland* appears to endorse this approach, indicating that publicity is required rather than advertisement.[263] However it is not clear what this means in practice and it has been commented that the "precise distinction" between advertising and publicity is not discussed.[264]

In addition to the issue of whether advertisement is required, there is arguably ambiguity as to how advertising should be undertaken. In *Teleaustria* the Advocate General stated that the requirement of transparency would be met where the contracting authority had addressed itself directly to a number of potential tenderers.[265]

The Commission, however, in respect of contracts that are not or are not fully subject to the procurement directives, states that the only way to comply is for the publication of a "sufficiently accessible advertisement".[266] It has, however, been submitted that contrary to the Commission's view it should be sufficient for contracting authorities to contact a known group of suppliers

[260] *Teleaustria*, fn 117, para 62; see Dischendorfer, (2001), fn 256 for a case summary;
[261] Brown, A., "Seeing through transparency: the requirement to advertise public contracts and concessions under the EC treaty", *Public Procurement Law Review*, 2007, 1, p. 4;
[262] AG Opinion, *Teleaustria*, fn 257, para 43;
[263] Opinion of Advocate General Sharpston delivered on 18 January 2007, *Commission v Finland*; Case C-195/04, paras 82-83;
[264] McGowan, (2007), fn 259, pp. 278;
[265] AG Opinion, *Teleaustria*, fn 257, para 43;
[266] "Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives", (2006/C 179/02), para 2.1.1;

in certain circumstances.[267] The *Teleaustria* judgment is therefore not entirely clear as to what degree of advertising needs to be undertaken to fulfil the transparency requirement.[268]

In the subsequent case of *Coname* it was found that the principle of transparency required contracting authorities to ensure contractors in other member states had sufficient information such that the contractor could have, should it have so wished, expressed its interest in the procurement.[269] The Advocate General in this case considered that it was uncertain whether the fundamental freedoms establish a uniform set out rules.[270] It is clear therefore that there is no prescribed method of ensuring compliance with the principle of transparency by contracting authorities who instead are required to make a case by case assessment of the steps required. It is for the national courts to establish whether the principle of transparency has been complied with and to assess the evidence to that effect.[271]

A non-prescriptive approach may have the advantage of allowing contracting authorities to gauge what advertisement and degree of transparency is appropriate in a specific procurement. However, the difficulty is that in the absence of precision as to the content of the transparency requirements, the contracting authority may be uncertain as to whether it is in compliance.

Furthermore, transparency can also involve a requirement that the procedural process should be conducted according to clear rules, which by implication limits the discretion available to contracting authorities.[272] This interpretation finds support in *Teleaustria* where it is stated that the

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[267] Brown, A., "EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives", *Public Procurement Law Review*, 2010, 5, p. 173, see pp. 173-176 for a discussion as to other possible means of advertisement;
[268] Dischendorfer, (2001), fn 256, NA59;
[269] *Coname*, fn 258, para 21;
[270] Opinion of Advocate General Stix-Hackl, delivered on 12 April 2005, Case C-231/03, *Consorzio Aziende Matano (Coname) v Comune di Cinglia de'Botti*, para 70;
[271] *Teleaustria*, fn 117, para 63;
[272] Neumayr, (2002), fn 13, p. 217;

obligation of transparency is implied so as to enable a contracting authority to satisfy itself that the fundamental rules of TFEU and the principle of non-discrimination on the grounds of nationality in particular, are complied with.[273] However, contracting authorities do not necessarily have to follow the procedures in the procurement directives to comply with this requirement.[274]

The Commission has further stated in respect of contracts that are not or are not fully subject to the procurement directives that contracting authorities are required to set rules applicable to the selection of the contractor, adequately advertise the contract and the rules so as to be able to monitor impartiality, introduce competition between the interested contractors, comply with the principle of equal treatment, and select on the basis of objective non-discriminatory criteria.[275]

It has been suggested that legal ambiguity, combined with the risk aversion of contracting authorities, has led to contracts being advertised which are of no interest to contractors in other member states - a practice that appears inefficient.[276] If this suggestion is correct, it may also be assumed that contracting authorities are interpreting the transparency requirement in a broad manner to ensure they are staying on the correct side of the law.

The question of whether or not transparency is an objective of EU procurement law is considered at section 2.5.3.

[273] *Teleaustria*, fn 117, paras 60-61; see Hordijk and Meulenbelt, (2005), fn 33, p. 125;
[274] AG Opinion, *Teleaustria*, fn 257, para 43;
[275] Commission of the European Communities, "Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions", Brussels, 30.4.2004 COM (2004) 327 final, para 30;
[276] McGowan, (2007), fn 259, p. 283;

Application of the principle of transparency to contract adjustments

Transparency was considered in *Pressetext*, where it was stated that in order to ensure transparency of procedures, amendments to contracts constitute a new award where they are materially different in character from the original contract.[277] The point was reiterated in *Wall*.[278] In these cases there is emphasis on restoring the transparency of procedures. However, also of importance is the fact that in Wall the CJEU found that in these cases that in order to restore the transparency of the procedure it may be necessary to have a new award procedure.[279]

Transparency is relevant to contract adjustments precisely because contract adjustments may take place other than in a transparent manner - for example through negotiations between the contracting authority and the existing contractor where such negotiations are not made known to other contractors. In these circumstances there is no advertisement of the contract opportunity, and there are no transparent procedural rules. It is unsurprising, therefore that the cases of *Wall* and *Pressetext* reference transparency.

The relevance of transparency to contract adjustments is also evidenced in Article 72 of the 2014 Directive which provides that where Article 72(1)(b) or 72(1)(c) of the 2014 Directive are relied upon by a contracting authority these contract modifications must be publicised in the Official Journal of the European Union.[280] Adjustments made pursuant to these provisions have not been subject to prior disclosure and the grounds for their use are arguably not capable of being objectively verified. There is perhaps potential for a contracting authority to improperly rely on these grounds to adjust the contract, and the inclusion of enhanced transparency in these circumstances may be understood as a counter to this possibility.

[277] *Pressetext*, fn 4, para 34;
[278] *Wall*, fn 138, para 37, 43;
[279] *Ibid.*, para 43;
[280] See section 2.4.4 above for the content of these provisions;

2.5.4 Proportionality

The principle of proportionality

Proportionality is the principle that measures must be appropriate, necessary and proportional for achieving the objective they are intended to achieve.[281] It is submitted that the way in which the derogations from the fundamental freedoms are applied, as explained in section 2.3.5 above, indicates that proportionality operates to place parameters on the conduct of contracting authorities in terms of their ability to derogate from the fundamental freedoms.

The principle of proportionality is referred to in the Recitals to the 2004 Directive and 2014 Directive, which provides that the award of contracts by contracting authorities are subject to the principles of TFEU and in particular the fundamental freedoms and the principles deriving therefrom, such as proportionality.[282] This indicates that the principle of proportionality is relevant to procurements subject to these directives, and those that are subject to the TFEU provisions and principles.

It is established in case law that the principle of proportionality applies to procurement decisions made by contracting authorities. *Tideland*, a first instance ruling concerning a procurement by the Commission of navigation equipment, held that the principle of proportionality requires that measures that are adopted by Community institutions should not exceed the limits of what was appropriate and necessary to obtain the objectives pursued.[283] Where there was a choice between several appropriate measures recourse should be had to the least onerous measure.[284]

[281] Hjelmborg, Jakobsen, and Poulsen, (2006), fn 23, p.62;
[282] 2004 Directive, Recital 2; 2014 Directive, Recital 1;
[283] Case T-211/02, *Tideland Signal Limited v EC Commission* ("*Tideland*"), para 39;
[284] *Ibid.*;

Proportionality has been referred to in subsequent case law, as described further in the following section, which describes the content of the principle of transparency with reference to various decided cases.[285]

Content of the principle of proportionality

It has been argued that the principle of proportionality can require a contracting authority to waive or not enforce a specific term of a procurement, such as a deadline.[286] In such a case proportionality requires a contracting authority to consider the damage that may be sustained by the contractor when the contracting authority is considering whether or not to pursue a course of action.[287] Proportionality, therefore, may operate so as to require contracting authorities to follow a specific course of action.[288]

The principle of proportionality has been applied in UK case law. In the case of *Leadbitter* an interim injunction was granted in a case which concerned a contractor's bid being rejected as being incomplete on the basis that the claimant had an arguable case on the issue of proportionality.[289] The UK High Court found that a principle of proportionality applied to the formulation and implementation of the terms of a procurement process, considering that the

[285] See Verschuur, S., "Competitive dialogue and the scope for discussion after tenders and before selecting the preferred bidder - what is fine tuning etc?", *Public Procurement Law Review*, 2006, 6, p. 329, examples from the Dutch national courts are cited which support the existence of a principle of proportionality - *DNB/Compaq*, President of the District Court of Amsterdam March 23, 2000, BR 2003/914, in which the Court held that the contractor should have been allowed to correct an omission made by a notary whereby the notary had only indicated the contractor had not been convicted of an offence concerning professional misconduct and had omitted to refer to grave professional misconduct or serious misrepresentations, and *TPA/Gelderland*, President of the District Court of Arnhem December 23, 2005, BR 2006/484, in which it was confirmed that the contractor was allowed to confirm it did not intend to offer a discount on maintenance services as on the facts of the matter it was common ground that no discounts were offered for these services;
[286] For example, *JB Leadbitter & Co Ltd v Devon CC*, [2009] EWHC 930 (Ch); *Azam & Co Solicitors v Legal Services Commission* [2010] WHC 960 (Ch);
[287] Henty, P., "Extensions to the tender deadline: the case of Azam & Co v Legal Services Commission", *Public Procurement Case Review*, 2010, 5, NA207;
[288] Also *Tideland*, fn 283;
[289] Barroche, C., "Case Comment: JB Leadbitter & Co Ltd v Devon County Council", *Public Procurement Law Review*, 2009, 5, NA192;

principle of proportionality was an enforceable Community obligation in respect of a public contract.[290]

The concept of proportionality may also provide justification for contracting authorities taking a specific course of action, in the sense that they may be able to argue that a certain measure is not proportionate for them to take. In *SECAP* the CJEU found that it might be acceptable to automatically exclude abnormally low tenders where there was an "unduly large number" of tenders.[291] The CJEU went on to say that a large number of tenders might exceed the administrative capacity of the contracting authority and create delay which would jeopardise the implementation of the project.[292] This suggests that contracting authorities may be permitted to balance the benefits against the risks of behaving in a particular way and direct their conduct accordingly and that operational factors may be taken into account in such analysis.

However, in the Scottish Outer House, Court of Session ruling in *Lightways*, Lord Tyre found that the principle of proportionality was not applicable to allow the contracting authority to substitute one contractor for another where that contractor was not on the relevant framework.[293] He stated that the principle of proportionality could not be relied upon by a contracting authority which had failed to comply with procurement legislation.[294] This suggests that there may be limits on the principle set out in *SECAP*, perhaps that contracting authorities can use proportionality to determine a course of action provided this does not constitute a breach of applicable procurement law. However, the limits on the use of proportionality in this respect appear uncertain.

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[290] *Leadbitter*, fn 286, para 51;
[291] *SECAP*, fn 136, para 32; for information see Kotsonis, T., "Italian law on the automatic exclusion of abnormally low tenders: SECAP SpA v Commune di Torino (C147/06)," *Public Procurement Law Review*, 2008, 6, NA268-273;
[292] *SECAP*, fn 136, para 32;
[293] *Opinion of Lord Tyre in the cause of Lightways (Contractors) Limited v Inverclyde Council*, [2015] CSOH 169, para 9;
[294] *Ibid*.;

Proportionality has also been used where a certain objective could be achieved through a less restrictive method. In the case of *Fabricom* national rules precluding a contractor who had contributed to the development of the project being procured from the procurement was not permissible, as it went beyond what was required to attain the principle of equal treatment.[295] The case of *Michaniki* further illustrates this point, as here it was found that a national measure was disproportionate as it went beyond what was required to secure equal treatment.[296] These cases are also of interest as the CJEU considered the balance between competing principles and it may therefore be that proportionality can be used to determine such balance.

Application of the principle of proportionality to contract adjustments

As explained in section 2.6.2 below, the leading case of *Pressetext* found that a material amendment will constitute a new award.[297] This indicates that not all "amendments" will be material. The point is made by the Advocate General in *Pressetext* that not every contract amendment requires a new award procedure and that only material amendments justify conducting a new procurement.[298]

It is submitted therefore that the concept of proportionality is implied into the legal framework applicable to contract adjustments as materiality should be considered when assessing whether an "amendment" constitutes a new award. The implication is that in some cases, where the relevant materiality threshold is not reached, it would not be proportionate to require a new procurement.

[295] *Fabricom*, fn 36, para 12 and 34;
[296] *Michaniki AE*, fn 174, paras 48 and 61;
[297] *Pressetext*, fn 4;
[298] Opinion of Advocate General Kokott delivered on 13 March 2008, Case C-454/06, *Pressetext Nachrichtenagentur GmbH*, para 48;

The Advocate General further recognises that it may become necessary during the term to adjust the contractual provisions - giving the example of a change in the external circumstances necessitating an adjustment to the contract.[299] The point is made that there is potentially a conflict between the requirement to ensure the efficient conduct of the contract, and the need for equality to be maintained as between the contractors.[300] This suggest that proportionality is relevant to the Substantial Modification Test, the implication being that in some circumstances the need to efficiently conduct the contract will outweigh the need for equality to maintained.[301]

It may therefore be the case that proportionality provides objective justification for departing from the principle of equal treatment. If this approach is correct, then there may be a "tipping point" at which the risk of contravening the principle of equal treatment is counterbalanced by the principle of proportionality.

2.6 Case law

2.6.1 Introduction

The CJEU and UK courts have considered contract adjustments in a number of cases. Prior to the implementation of the 2014 Directive by the 2015 Regulations, there were no provisions in the TFEU, the 2004 Directive or the 2006 Regulations specifically guiding contracting authorities where contract adjustments were required, and case law was developed to articulate certain principles as set out below. This case law has been reflected in the 2014 Directive and 2015 Regulations, the content of which is set out sections 2.4.1 and 2.4.5 above.

Judgments of the CJEU on the interpretation of provisions of the 2004 Directive and 2014 Directive are binding on and applicable to contracting

[299] AG Opinion, Pressetext, fn 293, para 43;
[300] *Ibid*, para 44;
[301] See section 2.6.2 below for detail on the Substantial Modification Test;

authorities within the EU. It should be noted that in the UK a system of judicial precedent applies.[302] Supreme Court rulings bind all lower courts, but the Supreme Court can depart from its earlier decisions in certain circumstances. The Court of Appeal is bound by its own decisions in civil matters subject to limited exceptions.[303] However, UK courts are not bound to follow the rulings of higher UK courts in the event of conflict with a decision of the CJEU. It is therefore relevant to consider both EU and UK cases in establishing the legal framework applicable to contract adjustments.

2.6.2 Pressetext

Pressetext is the leading case on contract adjustments. This case concerned a contract for press agency services that existed between the Austrian Republic and APA that was subject to various adjustments during its term.[304] In 2004 a company called Pressetext Nachrichtenagentur GmbH offered news agency services to the Austrian Republic but this did not lead to the conclusion of an agreement.[305] Pressetext Nachrichtenagentur GmbH subsequently challenged the adjustments that had been made to the existing contract between the APA and the Austrian Republic, contending that the adjustments were unlawful.[306]

The CJEU considered the various adjustments and stated:

"*In order to ensure the transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitutes a new award of contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as*

[302] For background on the English civil and commercial justice system, see Partington, M., *Introduction to the English Legal System*, *7th edition*, Oxford University Press, Oxford, 2012, pp 202-230 and generally.
[303] *Young v Bristol Aeroplane Co Ltd* [1944] KB 718;
[304] *Pressetext*, fn 4, para 8-27;
[305] *Ibid.*, para 24;
[306] *Ibid*, para 25;

to demonstrate the intention of the parties to renegotiate the essential terms of that contract."[307]

This ruling has found expression in Article 72(1)(e) of the 2014 Directive, which permits modifications which are not substantial within the meaning of Article 72(4), which in turn states that a modification is substantial where it makes the contract "materially different in character" from the one originally entered into.[308]

For ease of reference, this study will refer the above as the "Substantial Modification Test".

The CJEU then set out three examples of "amendments" that may be regarded as material, which have been articulated as set out below in Article 72(4) of the 2014 Directive:

"*... when it 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*".[309]

As articulated in Article 72(4)(a) of the 2014 Directive, with the addition that the attraction of additional participants in the procurement procedure also constitutes a substantial modification.

"*when it extends the scope of the contract considerably to encompass services not initially covered*".[310]

As articulated in Article 72(4)(c) of the 2014 Directive, however the drafting in this provision omits the reference to services, thereby arguably widening

[307] *Pressetext*, fn 4, para 34;
[308] These provisions are transposed into Regulation 72(1)(e) and 72(4) of the 2015 Regulations;
[309] *Pressetext*, fn 4, para 35;
[310] *Ibid.*, para 36;

the application of this principle. *Pressetext* could be interpreted as meaning that only services would fall within its scope, which is understandable as *Pressetext* concerned a services contract. However, there is no reason why the principle should not apply to other types of contracting, namely works and supplies, so Article 72(4)(c) could be viewed as clarificatory from this perspective.

Furthermore, the drafting appears to widen the application of the principle beyond modifications to simply the supplies, works or services provided under the contract to include modifications to other contractual terms without the additional requirement expressed in the opening limb and Article 72(4)(a) that the modification must have an impact on the original competition. It is, however, submitted that the inclusion of "widening of scope" limits the practical application of Article 72(4)(c) to extensions in the delivery of the supplies, works or services under the contract as it is difficult to identify other contractual terms which, if adjusted equate to an extension of scope. However, for certainty it may have been helpful for this to have been addressed in the drafting of Article 72(4)(c).

"*...when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract*".[311]

This is articulated in Article 72(4)(b) of the 2014 Directive.

This study will refer to the above as the "Introduction of Conditions Limb", the "Extension of Scope Limb", and the "Economic Balance Limb" respectively.

The Substantial Modification Test lays down rules that must be applied by contracting authorities when ascertaining what adjustments are permissible

[311] *Pressetext*, fn 4, para 37;

and which require a new procurement process. As will be discussed in subsequent chapters of this study, in practice it may be difficult to apply the Substantial Modification Test.

2.7 UK Policy Guidance and Commission Interpretative Communications

UK Policy Guidance

Public procurement guidance is on occasion published by UK policy makers such as the Cabinet Office and HM Treasury. Guidance to assist contracting authorities in applying the law has been described as being an important feature of UK public procurement law.[312] The coalition government elected in 2010 and the conservative government elected in 2015 have arguably placed less emphasis on procurement guidance, compared to the labour administration in situ until 2010,[313] but guidance is available for example the Procurement Policy Notes issued by the Cabinet Office[314] and guidance issued by the Office of Government Commerce are available on archived sites.[315]

The UK Court of Appeal has found that courts may use guidance to determine the meaning of legislative provisions, but that guidance which is contrary to the interpretation preferred by the court can be ignored.[316] Guidance issued by the executive should have the same authority as a statement by any other informed commentator (such as an academic author)

[312] Boch, C., "The implementation of the Public Procurement Directives in the UK: devolution and divergence", *Public Procurement Law Review*, 2007, 6, p. 410;
[313] For further background on the role of the OGC and the role of guidance following the election of the Coalition Government in the UK in May 2010, see Arrowsmith, S., and Craven, R., "Competitive dialogue in the United Kingdom", in Arrowsmith and Treumer, (2012), fn 253, pp. 187-188;
[314] See see https://www.gov.uk/government/collections/procurement-policy-notes (accessed 23 November 2016), guidance documents published by the now defunct Office of Government Commerce are available at http://webarchive.nationalarchives.gov.uk/20110822131357/http:/www.ogc.gov.uk/ (accessed 13 April 2014);
[315] http://webarchive.nationalarchives.gov.uk/20110822131357/http:/www.ogc.gov.uk/, note that the OGC guidance no longer necessarily represents current procurement policy;
[316] *Risk Management Partners v London Borough of Brent* [2009] EWCA Civ 490, para 116;

and there is no presumption that the guidance is correct.[317] It is clear therefore that guidance does not have binding legal force.

However, contracting authorities and those advising them may in practice be familiar with the content of guidance. It may also be assumed from the above that whilst courts are not bound to follow guidance, they consider it when making judgments. Contracting authorities and those advising them may therefore be of the view that for this reason it is better to be aware of and perhaps to adhere to the guidance. It is worthwhile to consider such guidance in the context of a study such as this, which explores how the law is applied in practice.

Commission Interpretative Communications

The European Commission has published guidance on public procurement.[318] This guidance is typically published as an Interpretative Communication. Interpretative Communications are expressed to be non-binding and typically purport to give guidance on the content of EU law.[319] These communications represent the official view of the European Commission.

[317] *Risk Management Partners*, fn 316, para 227 citing *London Borough of Ealing v Race Relations Board* [1972] AC 342;

[318] For example, Commission of the European Communities, "Commission Interpretative Communication on the Community law on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives", Brussels, 23.6.2006, COM; Commission of the European Communities, "Commission Interpretative Communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPP)", (2008/C 91/02), C94/4 EN; European Commission: Public Procurement Policy, Explanatory Note - Competitive Dialogue, http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-dialogue_en.pdf; European Commission: Public Procurement Policy, Explanatory Note - Framework Agreements - Classic Directive, http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-framework_en.pdf;

[319] For example, "Commission Interpretative Communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPP) (2008/C 91/02)", C94/4 EN, Official Journal of the European Union, 12.4.2008, para 1 states: "This Communication does not create any new legislative rules. It reflects the Commission's understanding of the EC Treaty, the Public Procurement Directives and the relevant case law of the European Court of Justice (ECJ). It should be noted that, in any event, the binding interpretation of Community law is ultimately the role of the ECJ";

In *Commission v Germany*, a case concerning the Commission's Interpretative Communication on the law applicable to contract awards not or not fully subject to the 2004 Directive, the issue of the binding nature or otherwise of Interpretative Communications was considered.[320] Although the Interpretative Communication stated that it did not purport to be binding, the court considered that this statement was not enough to support the conclusion that the measure did not produce binding legal effects.[321] In order to determine whether the Interpretative Communication produced legal effects it is necessary to consider its content.[322]

Accordingly it is possible that depending on the content of an Interpretative Communication, it may purport to have legal effect. However, the Commission is responsible for proposing legislation and is not empowered to enact it.[323] As Interpretative Communications set out the Commission's view of the legal position, they should be interpreted as clarifying and explaining the existing legal position, rather than being the source of new law. Contracting authorities may have regard to the content of Interpretative Communications for this reason, and it is therefore relevant to consider these in this study.

[320] Case T-258/06, *Commission v Germany*; *Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives*, (2006/C 179/02), C179/2 EN, Official Journal of the European Union, 1.8.2006;
[321] Case T-258/06, *Commission v Germany*, para 28;
[322] *Ibid.*, para 27;
[323] For information on the role of the Commission, see Craig, and De Burca, fn 143, pp. 32-40, and on the legislative process see pp. 121-156;

Chapter 3: Review Clauses

3.1 Introduction

This chapter investigates the relevance of review clauses in the context of contract adjustments. Review clauses are terms included in contracts that provide for adjustments to be made during the contract term. As explained in this chapter, there is a distinction between adjustments that are made pursuant to review clauses and those that are made otherwise.

The first section of this chapter explains the purpose of review clauses and the protection afforded by them and the limits of this protection. Conclusions are then drawn as to the criteria that a review clause should meet to provide protection from challenge. The subsequent sections consider certain types of review clauses which may be found in public procurement contracts, as explained further in the paragraph below. The chapter ends with a conclusion, summarising the pertinent points raised in this chapter.

The review clauses included in this chapter are change control clauses, which can be defined as clauses which set out a mechanism by which a specific change can be implemented. Clauses which provide for sub-contracting are then discussed. Sub-contracting is where the contractor delegates some or all of the performance of the contract to a third party. The study then considers step-in, the process by which a third party (typically a funder) "steps in" to perform some or all of the relevant contract. Review clauses which adjust the length of the contract, either by extending it or for allowing for early termination, are then considered. Finally, price adjustments made pursuant to review clauses are discussed, including indexation, benchmarking and market testing.

This purpose of this chapter is to set out the legal position applicable to the contract adjustments described herein, and to set out the criteria to be met in order for an adjustment made pursuant to a review clause to be protected

from challenge. In addition this chapter identifies ambiguities present in the law applicable to contract adjustments made pursuant to review clauses. Chapter 7 section 7.3.2 explores the difficulties that arise in practice in applying the law applicable to review clauses.

3.2 The purpose of review clauses

3.2.1 Introduction

As explained in section 1.4, contract adjustments may be required during the term of a contract for numerous reasons, some of which are important to ensure continued provision of a public service. Review clauses are drafted with the objective of allowing adjustments to the contract and may to a certain degree, provide contractual flexibility.[324]

As explained in section 3.2.2, review clauses may provide protection from a challenge that the contract has been subject to a material amendment, and section 3.2.3 sets out the limitations of this protection. The final part of this section, section 3.2.4, sets out the author's view on the criteria which must be met in order for a review clause to provide the protection outlined in section 3.2.2.

3.2.2 The protection afforded by review clauses

Where at the tender stage, and in the subsequent draft contract, review clauses are included which take into account the possibility of adjustments then the implementation of these adjustments "will not be changes of the contract but changes pursuant to the contract".[325] Review clauses are important from a procurement law perspective therefore as it appears that adjustments made pursuant to review clauses may sometimes not be amendments to the contract.

[324] Hartlev and Liljenbol, (2013), fn 4, p. 58;
[325] *Ibid*., p. 67;

It is arguable therefore that the Substantial Modification Test would not apply to an adjustment made pursuant to a review clause as the adjustment is not a change to the contract. This position is strongly inferred in *Pressetext* as explained further below.

This position that adjustments made pursuant to review clauses are permissible finds support in Article 72(1)(a) of the 2014 Directive (and therefore in Regulation 72(1)(a) of the 2015 Regulations) which, as set out in chapter 2 section 2.4.1 and explained further in this chapter, provides that contracts may be modified without a new procurement procedure where the modifications have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses.

There is, however, arguably a conceptual difference between Regulation 72(1)(a) of the 2015 Regulations and the position articulated by Hartlev and Liljenbol that an adjustment pursuant to a review clause is not a change of the contract but instead is a change pursuant to the contract. The use of the term "modification" in Regulation 72(1)(a) implies a change of the contract, rather than a change pursuant to the contract, a position that is supported by the use of the word "modification" throughout the rest of Regulation 72 in cases where it is evident that there would be a change of the contract (for example additional services that were not included in the initial procurement (Regulation 72(1)(b)) or the replacement of a contractor other than pursuant to a review clause (Regulation 72(1)(d)(ii))).

However, from a practical perspective it is arguably immaterial whether an adjustment pursuant to a review clause is described as a "modification" or as a "change pursuant to a contract" provided that there is certainty as to when the adjustment is permitted and in what circumstances it constitutes a new contract award.

The drafting in Regulation 72(1)(a) of the 2015 Regulations states contracts may be modified where provided for in a review clause which meets the requirements of that provision. Now that this principle is confirmed, the distinction between changes pursuant to the contract and changes of the contract has become redundant as Regulation 72(1)(a) purports to set out the circumstances in which adjustments can be made pursuant to review clause, without the requirement to use the distinction to justify why adjustments pursuant to review clauses are acceptable.

As explained in section 2.6.2, in *Pressetext* the CJEU considered a number of adjustments that had been made to the terms of a contract. The first question decided was whether the change of a contractual partner in the circumstances of the case constituted a new contract award.[326] The CJEU found that this constituted a change to the essential terms of the contract, "unless that substitution was provided for in the terms of the initial contract".[327] This helps substantiate the position that where a contract includes a review clause providing for adjustments, making an adjustment in accordance with this will not require a new procurement.

A further example in *Pressetext* which supports the argument that adjustments made pursuant to review clauses included in a contract may not constitute a material amendment is found in the case of the application of a pricing index.[328] Here the CJEU appeared to assume that the inclusion of an indexation mechanism in the earlier version of the contract meant that the application of these provisions in the first supplemental agreement did not constitute an amendment to the essential terms of the contract and therefore did not amount to the award of a new contract.[329]

[326] *Pressetext*, fn 4, para 39;
[327] *Ibid.*, para 40;
[328] *Ibid*., paras 64-70;
[329] *Ibid.*;

The implication of this appears to be that adjustments made pursuant to indexation clauses in agreements do not constitute a new contract award. This position finds support in the drafting of Regulation 72(1)(a) which specifically references price revision clauses as an example of a review clause pursuant to which an adjustment can be made without a new procurement procedure.

Changes, however, to indexation clauses may constitute a material amendment where this, for example, alters the originally agreed payments and goes beyond being a "purely technical amendment in its effects".[330] It can be concluded that an adjustment made pursuant to an existing indexation clause is permissible but that adjusting the indexation clause itself may constitute a new contract award in certain circumstances.

Earlier cases also support the proposition that the inclusion and operation of a review clause to make adjustments affords protection from challenge. In *Rennes*, price adjustments were held to be acceptable as there was evidence that these adjustments were a consequence of applying a formula which had been included in the contract.[331] Here the CJEU found that the increase in price "was a result of the exact application of the formula for the revision of prices contained in the draft contract approved by the parties in 1993".[332]

This case concerned the procurement of a light railway project through the negotiation with Matra Transport where negotiations commenced before the adoption of the relevant utilities directive, Directive 93/38.[333] *Rennes* found that the application of a formula for the revision of prices that was set out in the draft contract was an "indication of the continuity of the procedure

[330] AG Opinion, *Pressetext*, fn 298, para 101;
[331] Case C-337/98, *Commission v France ("Rennes")*, para 53;
[332] *Rennes*, fn 331, para 53;
[333] *Ibid.*, para 1, and 25-26;

rather than evidence that an essential term of the contract had been renegotiated".[334]

The above paragraphs support the proposition that adjustments made pursuant to review clauses may be made without requiring a new procurement procedure. There are, however, as described in the following section 3.2.3, limitations on the protection provided by review clauses.

3.2.3 The limits of review clauses

Introduction

The inclusion of a review clause does not provide a *carte blanche* for contracting authorities to adjust their contracts. Whether a review clause is included in the contract is relevant to whether or not there is an amendment to the contract, but is not necessarily conclusive.[335]

This section commences with a discussion of the importance of including the review clause in the procurement documents and then sets out considerations that are relevant when assessing the scope of a review clause.

Inclusion in procurement documents

As explained in chapter 2 section 2.4, contracting authorities are required to follow certain procedures when awarding public contracts, including advertising the contract, in the case of a procurement fully subject to the Procurement Regulations using a contract notice in the Official Journal of the European Union, and providing procurement documents to the bidders.

Adjustments are less likely to be considered to be part of the original contract if they are not considered as part of the original competition.[336] This suggests that review clauses should be set out as precisely as possible in the

[334] *Rennes.*,fn 331, para 53;
[335] Arrowsmith and Treumer, (2012), fn 253, p. 125;
[336] Arrowsmith, (2014), fn 11, p. 588;

procurement documents, a position supported by Regulation 72(1)(a) of the New Regulations which requires *inter alia* review clauses to be provided for in the procurement documents.

Where and to the extent that the existence and content of a review clause would affect the contractor's decision to participate in a procurement sufficient information on this should be included in the procurement documents to allow contractors to decide whether or not to proceed.

Arguably this is important to support the principle of transparency. As explained in chapter 2 section 2.5.3, transparency requires a degree of advertising sufficient to allow the opening up of competition.[337] If contractors have not been given sufficient information about the inclusion of review clauses to enable them to assess whether or not to participate in the procurement, it would appear that this transparency requirement is not met.

Regulation 53 of the 2015 Regulations requires contracting authorities to offer unrestricted and full access to the procurement documents from the date of publication of the contract notice in the Official Journal of the European Union or the date on which an invitation to confirm interest is sent. The procurement documents include any document which describes elements of the procurement, including the conditions of contract.[338]

Arguably, therefore, the requirement of transparency is met through having the draft contract available for inspection by interested contractors at the point of advertisement in the Official Journal. It could be countered, however, that having to review contracts imposes an onerous obligation on contractors who may be looking at a number of opportunities in the Official Journal. It may be, therefore, that the degree of advertising required to support transparency requires review clauses (or perhaps review clauses which are material to the contractor's decision whether or not to bid) to be

[337] *Teleaustria*, fn 117, para 62;
[338] 2015 Regulations, Regulation 2, definition of "Procurement Documents";

made obvious to contractors, perhaps by including reference to them in the contract notice.

If the latter position was correct then contracting authorities would have to make an assessment of what clauses are material to the contractor's decision to bid. This would put contracting authorities in a difficult position as they would be required to gauge the relative commercial importance of a number of terms to a range of different bidders. Whilst they may be able to make some general assumptions (for example that review clauses which adjust the duration of the contract are likely to be of material interest to bidders) there may be review clauses for which the analysis is less certain. This would create uncertainty in the application of the law on contract adjustments.

It is submitted, however, that it is sufficient to comply with the principle of transparency for a contracting authority to make available procurement documents which contain review clauses, rather than being obliged to identify them in the contract notice. Contracting authorities may, however, choose to refer to particularly significant review clauses in the contract notice should they wish to bring these to the attention of the market.

Under the 2006 Regulations there was no requirement to make the procurement documents available at the start of the procurement. Contracting authorities were able to draft documents closer to the point in time that they needed to be published. However, to the extent that the relevant procurement document is not made available at the outset of the procurement, the duration of the contract, including any options or extensions, should be set out in the contract notice which is published in the Official Journal for the relevant contract.[339]

[339] This position finds support in *Indigo Services* where it was found that a contract extension constituted a contract for new services and was not permitted, in circumstances where the option to extend was not set out in the contract notice, Indigo *Services (UK) Limited v The Colchester Institute Corporation* [2010] EWHC 3237 (QB) para 41;

It is arguable that the duration of the term is a critical element of a public contract. The period of time for which the services are required is likely to be of importance to the contractor. As such the requirement for the term to be set out in the procurement documents along with periods of extensions is likely to be relevant to the decision of a contractor whether or not to participate in the procurement.

However, in practice it may not be as clear cut as this, as *de minimis* adjustments to the term (for example a four months extension over a thirty year term) are unlikely to determine a contractor's interest in the procurement. It is arguable therefore that the Substantial Modification Test should be applied to any discrepancy between the advertised and actual term of an agreement, rather than the discrepancy automatically constituting a material amendment. The requirement, therefore, to publicise the duration of a contract should not be interpreted as meaning that adjustments outside the advertised term are not permitted.

The requirement to disclose review clauses in tender documents also finds support in case law. In *Commission v France* the contracting authority awarded further work to the contractor who had been successful in an earlier phase of the project.[340] The Commission alleged that the contracting authority had awarded the contract for the further work without conducting a tender.[341] The argument of the French government was that there was an option to award the second phase to the contractor and that this therefore released the contracting authority from the obligation to publish a further contract notice.[342]

The CJEU rejected the position of the French government, stating that the principles of equal treatment and transparency required the subject matter

[340] *Commission v France*, fn 244;
[341] *Ibid*., para 31;
[342] *Ibid*., para 33;

of each contract and the criteria governing its award to be clearly defined.[343] It found that the second phase of the work was not the subject of a contract notice published in accordance with the relevant directive.[344]

This supports the proposition that a requirement for additional services should be included in the contract notice in the Official Journal. This is unsurprising given that the subject matter of the contract and the relevant award criteria are likely to be of interest to a contractor when deciding whether or not to participate in the procurement.

The Commission's decision in the London Underground state aid matter also supports the assertion that specifying adjustments in the procurement documents affords protection from challenge. The Commission considered it relevant that in this matter the possibility of post-selection changes being made was notified to bidders in advance, and that the relevant adjustments did not change the scope of the project beyond what was envisaged in the procurement documents. The Commission has been commended for its dismissal of the idea that post-selection modifications automatically cause discrimination and for its application of common sense factors to address the matter.[345]

It should be noted, however, that this was a particularly complex procurement which was procured using the negotiated procedure available under the Utilities Directive 93/38. It should not therefore be assumed that the same pragmatic approach will be taken in the case of less complex contracts or those procured under a more restrictive procedure.

In the UK Supreme Court decision in *Edenred,* Lord Hodge placed importance on the fact that the procurement documents envisaged the expansion of the

[343] *Commission v France*, fn 244, para 34;
[344] *Ibid*., para 44;
[345] Brown, A. and Golfinopolous, C., "Case Comment: The permissibility of post selection modifications in a tendering procedure: decision by the European Commission that the London Underground Public Partnership does not involve state aid", *Public Procurement Law Review*, 2003, 3, NA 54;

B2B services, which were the subject of the dispute.[346] He commented that the contract notice in the Official Journal envisaged this expansion and that bidders can have been in no doubt as to the extent of services they might have to provide under the contract.[347] This evidences the importance of the disclosure of review clauses in the procurement documents.

There is arguably no contravention of the principles of equal treatment and transparency where the terms of a review clause have been subject to prior disclosure, and bidders have had an equal opportunity to compete for the contract. This can be contrasted with where an adjustment is made during the contract term where a review clause has not been disclosure in the procurement documents. Here the principles of equal treatment and transparency may be prejudiced as the adjustment has not been disclosed and subject to competition.

The point that inclusion of review clauses in procurement documents is necessary to protect from challenge where an adjustment is made finds support in *Succhi di Frutta*. Here it was found that where a contract was amended without any express authority to permit this, the terms governing the award of the contract would be distorted.[348] However, if the tender documents had made provision for the adjustment of the contract for (in that case) the payment in one type of fruit to be replaced by another fruit, and setting out the precise arrangements for that substitution, then the principles of equal treatment and transparency would have been observed.[349]

In *Commission v Spain*, the award of a works concession contract for the upgrading and maintenance of a motorway which included the carrying out of addition works not included in the contract notice was held by the CJEU to

[346] *Edenred (UK Group) Limited and another (Appellants) v HMT and others (Respondents)*, [2015] UKSC 45, para 36;
[347] *Ibid*., para 34;
[348] Case C-496/99, *Commission v CAS Succhi di Frutta SpA*, para 120;
[349] *Ibid*., para 126;

breach Directive 93/37.[350] The additional works which were the subject of the challenge were not set out in the object of the concession, as defined in the contract notice and tender specifications.[351] This therefore supports the proposition that the scope of works or services should be set out in the procurement documents.

Also, of relevance, in the case of *Commission v France*, which is referred to above, the CJEU stated that the subject matter of the contract must be clearly defined.[352] This is stated to be required so as to satisfy the principle of equal treatment of contractors.[353]

Requirement for review clauses to be clear, precise and unequivocal

Where review clauses are included in the procurement documents, in order to meet transparency requirements, they need to be drafted so that they are clear, precise and unequivocal.[354] The *Law Society* case supports this point,[355] as in this instance the review clause was too broadly drafted to provide protection from procurement law challenge in the circumstances. Furthermore, ensuring a review clause is precise and unequivocal is more likely to ensure that contractors have a common understanding of the contract. This common understanding would appear to better support equal treatment and transparency.

The UK Court of Appeal decision in *Edenred* appears to suggest that there may be scope for the requirement for a review clause to be clear, precise and unequivocal to be interpreted differently depending on the contract in

[350] Case C-423/07, *Commission v Spain*; see for a case summary, Kotsonis, T., "The award of a works concession contract containing additional works which had not been defined adequately in the original advertisement: Commission v Spain (C-423/07)", *Public Procurement Law Review*, 2010, 5, N167-173;
[351] *Commission v Spain*, fn 350, para 62;
[352] *Commission v France*, fn 244, para 34;
[353] *Ibid*.;
[354] 2015 Regulations, Regulation 72(1)(a); Hartlev and Liljenbol, (2013), fn 4, p. 58;
[355] R (on the application of the Law Society) v Legal Services Commission, Dexter Montague & Partners (a firm) v Legal Services Commission [2007] All ER (D) 469 (Nov);

question. Specifically, Sir Terence Etherton commented that the relevant contract had to be interpreted against its factual background.[356] *Edenred* concerned a high value complex contract, so it might be inferred that there is more latitude in drafting of review clauses in such a contract as opposed to a simpler procurement, where perhaps the implication is that a higher degree of precision should be used in the drafting of review clauses. The legal position would be clearer where there was a single definitive position as to what was sufficient in terms of clear, precise and unequivocal.

Nonetheless, the Court of Appeal may be attempting to introduce a pragmatic approach to the issue which recognises the practical difficulty of drafting some review clauses in complex contracts with a high degree of precision. Arguably pragmatism is better than an overly rigid approach which cannot be adhered to in practice.

It has been argued that there is less likely to be a new contract where the adjustment is determined through a pre-specified mechanism, especially one that is binding on the parties as to the extent and terms of any adjustment.[357] It has been commented that there is less scope for abuse in such a case and the adjustment is more of a reflection of the originally competed contract.[358] The concept of "pre-specified" necessarily implies included in the contract documents.

This approach has much to commend it. Where there is a pre-specified mechanism and no scope for negotiation the principles of equal treatment and transparency are better met, as the implementation of the adjustment will be in accordance with the adjustment as set out in the procurement documents and would apply equally to whichever contractor was awarded the contract.

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[356] *Edenred (UK Group) Limited v HMT*, [2015] EWCA Civ 326;
[357] Arrowsmith, (2014), fn 11, p. 587;
[358] *Ibid.*;

However, it is submitted that there should be some latitude for negotiations to occur and that where the mechanism is not fully defined this will not *prima facie* mean that a contract adjustment is a material amendment within the meaning of the Substantial Modification Test. Where there are negotiations or where the mechanism is not fully defined, it is submitted that the Substantial Modification Test should be applied to ascertain whether the adjustment is permissible.

It appears therefore that drafting a clear, precise and unequivocal a review clause provides protection against the subsequent adjustment pursuant to the review clause being subject to successful challenge as a material amendment within the Substantial Modification Test.

However, the challenge for contracting authorities and those advising them therefore becomes that of drafting a review clause with sufficient precision to provide the certainty required to get the best protection from challenge, whilst allowing certain flexibility to allow for a response to various scenarios, some of which may be foreseen but others which will not have been or have not been fully in the contemplation of the parties when the contract was tendered and entered into.

Application of review clause in accordance with its terms

The need for the conditions applicable to the operation of a review clause to be set out and for the review clause to be applied in accordance with its terms finds support in Regulation 72(1)(a) of the 2015 Regulations, which states that the conditions for the operation of the review clause should be set out, and in case law.

In *Succhi di Frutta* the CJEU commented that the Commission should have set out the precise conditions for the substitution of fruit for that which had been prescribed as payment in order to comply with the principles of equal

treatment and transparency.[359] On appeal, the Commission alleged that the judgment attributed excessive scope to the principle of equal treatment as between bidders, and argued that different rules applied once the contract had been awarded.[360]

It was held, however, that there was a continuing duty to adhere to the conditions of the procurement documents, including at the contract performance stage.[361] The contracting authority is required to provide for the possibility of amendment in the procurement documents, as well as the relevant detailed rules.[362] In the absence of such provision, the contracting authority was not permitted to amend a significant condition of the procurement.[363]

Succhi di Frutta therefore demonstrates it is necessary to set out the conditions applicable to the adjustment, and that the operation of the adjustment should be in accordance with these. Furthermore, where the amendment is not expressly provided for, but where the contracting authority intends to derogate from an essential condition, it cannot do so.[364]

The *Law Society* case illustrates that contracting authorities cannot assume the inclusion of a review clause gives them the ability to make sweeping adjustments to contract terms.[365] Here, the Legal Services Commission included a contractual provision purporting to permit it to unilaterally amend the relevant contracts, including the standards to which the contract had to be performed and the circumstances that amounted to breach of contract.[366]

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[359] Joined Cases T-191/96 and T-106/97, *CAS Succhi di Frutta SpA v Commission of the European Communities*, para 81;
[360] *Succhi di Frutta*, fn 348, paras 15-16;
[361] *Ibid*., para 115;
[362] *Ibid*, para 116;
[363] *Ibid*., para 117;
[364] *Ibid*., para 119;
[365] R (on the application of the Law Society) v Legal Services Commission, Dexter Montague & Partners (a firm) v Legal Services Commission [2007] All ER (D) 441 (Jul); R (on the application of the Law Society) (Nov), fn 355;
[366] R (on the application of the Law Society) (Jul), fn 365, paras 52-53;

The application of these clauses had the potential to adjust the fundamental terms of the contract, given that they went to the scope of and standard of performance of the contract and the availability of termination for breach of contract. The inclusion of such a review clause was successfully challenged on appeal on the basis that it violated the principles of transparency,[367] equal treatment[368] and contravened Regulation 4(3) of the 2006 Regulations.[369]

It is submitted that this case is of limited assistance in understanding the extent to which review clauses provide protection against an adjustment constituting a material amendment within the Substantial Modification Test, as the review clause was so widely drafted. Indeed, it was found that the power of amendment was so wide as to be tantamount to an ability to rewrite the entire contract.[370] Furthermore, given that the case was extreme, the UK Court of Appeal found it unnecessary to consider the level of detail (procedural or substantive) required to comply with the principle of transparency, or when adjustments constitute a new contract award.[371] However, this does demonstrate that a review clause cannot provide absolute protection from a procurement law challenge.

3.2.4 Conclusions

The analysis in sections 3.2.2 and 3.2.3 can be drawn upon to extract the following principles. It is submitted that where an adjustment is made in accordance with these a new procurement procedure is not required and it is not necessary to apply the Substantial Modification Test. It is submitted that the principles of equal treatment and transparency are complied with by adherence to the first criteria, and where the second and third criteria have subsequently been complied with there is no prejudice to these principles.

[367] R (on the application of the Law Society) (Nov), fn 355, paras 61, 80;
[368] *Ibid*., para 81;
[369] *Ibid*., para 87;
[370] *Ibid*., para 76;
[371] *Ibid*., para 86;

The principles are:

(1) the terms of the review clause must be set out in the procurement documents;

The requirement for the review clause to be included in the procurement documents finds support in the case law and Regulation 72(1)(a), as set out in section 3.2.3. It should also be noted that inclusion in the procurement documents is required to satisfy the principles of equal treatment and transparency, as indicated in *Succhi di Frutta* and *Commission v Spain*.

(2) the terms of the review clause must be precisely defined such that (i) reasonably diligent bidders can interpret it in the same way; and (ii) negotiation is not required upon implementation of the adjustment;

The need for review clauses to be precisely defined finds support in the *Law Society Case* and in Regulation 72(1)(a) of the 2015 Regulations which requires review clauses to be "clear, precise and unequivocal".[372] The detail included should be such that the requirements are understood in the same manner by bidders, which is important to promote equal treatment. The standard suggested above is "reasonably diligent bidders" as it should not be assumed bidders exhaustively research all aspects of the tender (a point made in *Commission v Spain*) but as submitted above, this does not place an obligation on the contracting authority beyond including the review clauses in the procurement documents.

Finally the review clause should be drafted such that negotiation is not required at the point of implementation. If negotiation is required this suggests that the clause was not sufficiently precisely defined and could therefore be open to different interpretations by bidders. Furthermore, negotiations may have a range of outcomes, which does not preclude the

[372] R (on the application of the Law Society) (Jul), fn 365 and (Nov), fn 355;

possibility that a material amendment may be made, as the conclusion of such negotiations may depart from the original position.

(3) the implementation of the adjustment must be in accordance with the terms of the review clause.

This is essential as if the implementation of the review clause differs from the position set out in the procurement documents, the first two limbs of the above test will no longer have been met as they no longer define the relevant adjustment, and as such Regulation 72(1)(a) will not have been complied with.

3.3 Change control clauses

As explained in chapter 1 section 1.4, it may be necessary to adjust the scope of works or services provided under a contract during the term of the contract. Such adjustments may be provided for in review clauses which can be described as "change control" or "variation" mechanisms.

Change control mechanism review clauses vary in content, in some cases dealing with specific and well-defined adjustments and in other cases merely providing a framework in which the details of the change can be agreed. Section 3.2.4 concluded that an adjustment would not be an amendment to a contract where it was made pursuant to a review clause which met the criteria set out in that section. Therefore the content of a change control clause is relevant to whether an adjustment made pursuant to it is acceptable.

As established in *Pressetext*, in order to ensure transparency and equal treatment of bidders, amendments to a contract during its term constitute a new award where they are materially different in character from the original contract, thus demonstrating the intention of the parties to renegotiate

essential terms.[373] Where a change control clauses is drafted such as to potentially encompass any type of change to the service provision, rather than being a specific and defined adjustment, it may be the case that the parties are seeking to renegotiate an essential term of the contract and, where this is the case, the adjustment may be challengeable.[374]

Accordingly, change control clauses which merely set out a framework or process for agreeing an adjustment without specifically defining the adjustment are unlikely to meet the criteria set out in section 3.2.4. Adjustments made pursuant to such clauses should therefore be considered against the Substantial Modification Test. Conversely, where a change control clause meets those criteria set out in section 3.2.4, it is submitted that an adjustment made pursuant to this is permissible and the Substantial Modification Test does not need to be considered.

In practice, however, there is likely to be a spectrum of change control clauses, at one end of which there are clauses which precisely define the adjustment, and at the other end providing a framework for agreeing an undefined adjustment. It may also be the case that despite the inclusion of a well-considered review clause in the contract, the actual adjustment cannot be undertaken in accordance with it because of the circumstances at the time at which the adjustment takes place. In each scenario negotiation may be needed at the time of the adjustment.

Accordingly, in practice there are likely to be grey areas as the clause may not be sufficiently well defined or the adjustment may not fall precisely within the scope of the review clause. It may be the case that the practical necessity of making an adjustment will encourage contracting authorities to adjust their contracts despite the uncertainty. The approach to making adjustments pursuant to review clauses in practice is discussed at chapter 7 section 7.3.2.

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[373] *Pressetext*, fn 4;
[374] See for example R (on the application of the Law Society) (Jul), fn 365 and (Nov) fn 355;

3.4 Sub-contracting

3.4.1 Introduction

Sub-contracting is the process by which the contractor delegates some or all of its responsibilities to one or more third parties, who will deliver them pursuant to a sub-contract entered into between the contractor and the third party (the sub-contractor). Sub-contracting is not dealt with in Regulation 72 of the 2015 Regulations[375], although a sub-contracting approach is provided for in the Procurement Regulations.[376]

For the purposes of this study, sub-contracting can be sub-divided into the following categories. Firstly, it may be the case that the contracting authority has mandated the use of sub-contracting, perhaps specifying the identity of the relevant sub-contractor, and this may be reflected in the procurement documents. Secondly, the contractor may propose the use of sub-contractors in its bid response, including specifying the identity of the relevant sub-contractor, where this is provided for in the procurement documents. Next, there may be circumstances where the use of sub-contractors is not explicitly referred to in the procurement documents or bid but nonetheless takes place. Finally, there may be circumstances where the use of sub-contractors has been expressly prohibited by the contracting authority but takes place despite this.

As explained in this section, the implications of sub-contracting may vary depending on which of the above categories is applicable. Sub-contracting clauses are review clauses because they adjust the way in which a contract is performed through allowing performance of contractual obligations by a third party.

[375] Regulation 72(1)(d) of the 2015 Regulations is concerned with the replacement of a contractor. This differs from sub-contracting, which concerns the delegation by a contractor rather than its replacement;
[376] For example, Regulation 45 of the 2006 Regulations and Regulation 71 of the 2015 Regulations;

The final part of this section considers the substitution of a sub-contractor during the term of a contract.

3.4.2 Mandatory sub-contracting

Where a contracting authority mandates that a specified sub-contractor carries out certain of the services, and the contractor complies with this, it is submitted that this is not a contract adjustment as the contractor is performing the contract in accordance with its terms. Accordingly, it is not necessary to consider whether there is a review clause which meets the criteria in section 3.2.4 or to consider the Substantial Modification Test.

3.4.3 Sub-contracting provided for in the procurement documents

Pressetext refers to sub-contracting being provided for in the procurement documents, stating:

"*As a rule, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question, unless that substitution was provided for in the terms of the original contract, such as, by way of example, provision for sub-contracting*."[377]

This suggests that sub-contracting pursuant to a review clause is acceptable. What is not clear from the above, however, is the way in which the review clause needs to be drafted to be acceptable. The wording "provided for in the terms of the original contract" does not provide clear guidance on this point.

In *Pressetext* the Advocate General stated that a characteristic of sub-contracting is that the contractor retains full contractual liability for the

[377] *Pressetext*, fn 4, para 40;

performance of the contract.[378] This suggests that this is potentially a condition to be met in order for sub-contracting to be permitted, further implying that it may be necessary to include drafting to this effect in the review clause. This point was not specifically referred to in *Pressetext*, however, suggesting that the CJEU did not think it is determinative of whether or not an adjustment is permitted pursuant to a sub-contracting review clause.

3.4.4 Sub-contracting without explicit reference in procurement documents

Where sub-contracting is not explicitly referenced in the procurement documents section 3.4.3 is not applicable. According to *Pressetext* in the absence of a sub-contracting provision in the procurement documents, this constitutes a change to an essential term of the contract.[379]

It is submitted that the *Pressetext* position is ambiguous, as the first statement of the paragraph in section 3.4.3 refers to the substitution of a contractor. As described in section 3.4.1 sub-contracting involves the delegation by a contractor of some or all of the services to a sub-contractor. It is arguable that the delegation of all of the services amounts in practical terms to the substitution of a contractor and, as such, the *Pressetext* statement is relevant but it is unclear how the statement applies where some but not all of the services are sub-contracted.

Regulation 72(1)(d) refers to the "substitution" of a contractor, and does not clarify whether a substitution occurs only when a contractor sub-contracts the entire contract, and is not therefore of assistance on this point.

It is not necessarily the case that the sub-contracting of some of the services in the absence of an express provision in the procurement documents constitutes an adjustment requiring a new procurement. It is submitted that

[378] AG Opinion, *Pressetext*, fn 298, para 56;
[379] *Pressetext*, fn 4, para 40;

the position is more nuanced. For example, limited sub-contracting may not constitute a material amendment. Therefore the Substantial Modification Test should be applied to determine whether or not there is a material amendment.

3.4.5 Sub-contracting where there is an express prohibition

Succhi di Frutta found that where a contract was amended without any express authority to permit this, the terms governing the award of the contract would be distorted[380] but that the principles of equal treatment would be observed where the tender documents allowed for the relevant adjustment.[381] It would be consistent with this to argue that making an adjustment in circumstances where there was an express prohibition contravenes equal treatment and transparency, and is therefore not acceptable.

Where contractors have understood they are required to perform the contract themselves, this may impact on whether or not they bid. For instance, if a contract included roofing services and joinery and prohibited sub-contracting then contractors capable of doing only one of these would have assumed they were ineligible to bid. Accordingly, subsequently permitting sub-contracting would arguably bring the adjustment within the "Introduction of Conditions Limb" as contractors other than the successful contractor may have participated in the competition.

However, strict application of the *Succhi di Frutta* proposition leading to the conclusion that sub-contracting where an express prohibition exists is always prohibited may not be the correct approach. It is arguable that the Substantial Modification Test should be applied on the facts, in particular to see whether the "Introduction of Conditions Limb" is relevant.

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[380] *Succhi di Frutta*, fn 348, para 120;
[381] *Ibid.*, para 126;

Where the application of the Substantial Modification Test does not lead to the conclusion of a material amendment, it is arguable that sub-contracting is permitted. It is difficult to see that there has been any adverse impact on the principles of equal treatment or transparency in such circumstances. However, this position is not established in case law and contracting authorities may be uncertain as to what approach to take.

3.4.6 Substitution of sub-contractor

The substitution of a sub-contractor was considered in *Wall*.[382] In this case, a services concession contract for the operation and maintenance of some public toilets in Frankfurt, the CJEU was asked to consider whether an adjustment to substitute a sub-contractor whose identity had been emphasised in the tender required a new competition.[383] The relevant contract included a review clause stating that a change of sub-contractor was permitted with the consent of the contracting authority.[384]

The CJEU found that the substitution of a sub-contractor, even where provided for in the contract may in "exceptional cases" constitute an amendment to an essential term where the use of that sub-contractor was, in the context of the services concerned a "decisive factor" in the award of the contract.[385] In this case, the referring court considered it likely that the contract had been awarded to the contractor because of the identity of the selected sub-contractor.[386]

This indicates that the inclusion of a review clause permitting the substitution of a sub-contractor will not necessarily provide protection from challenge. The decision in *Wall* also indicates that the substitution of a sub-contractor

[382] *Wall*, fn 138;
[383] *Ibid.*, paras 2 and 28;
[384] *Ibid.*, fn 138, para 12;
[385] *Ibid*., para 39;
[386] *Ibid*., para 40;

may be a material amendment. However, it has been commented that *Wall* may be limited to the particular facts of the matter.[387]

The approach in *Wall* appears to support the principles of equal treatment and transparency, as arguably these would be prejudiced where the contractor was able to perform the contract in a manner other than in accordance with its tender. However, it introduces ambiguity as contracting authorities will be required to assess whether the substitution of a sub-contractor is material, and this assessment may not be clear cut.

The risk of challenge may be mitigated by including a review clause dealing with the substitution of a key sub-contractor. In order for this to provide protection, it is submitted that the criteria set out in section 3.2.4 be met. It is also relevant to consider whether the substitute sub-contractor needs equivalent qualifications to the entity that is being replaced. It is arguable that equivalent qualifications are required to preserve equal treatment.

However, in practice, it may not be possible for the contractor to provide sufficiently precise information to enable the criteria set out in section 3.2.4 to be met. In these circumstances it may be uncertain as to whether the adjustment is permitted, and this may create ambiguity in light of the *Wall* ruling.

3.5 Step-in

3.5.1 Introduction

Step-in is where either the contracting authority or the funders who have invested in a project can "step-in" to perform some or all of the services.

[387] Hartlev and Liljenbol, (2013), fn 4, p. 66, the special circumstances identified are that the contracting authority had placed a particular importance to Wall being a sub-contractor, as Wall had developed and owned intellectual property in a certain type of lavatory;

Step-in may apply where a default allowing the contracting authority to terminate the contract has occurred.[388]

Step-in is a contract adjustment as it provides for the delivery of the services by a party other than the contractor which was awarded the contract. *Pressetext* established that the substitution of a contractor may constitute a material amendment.[389] Regulation 72(1)(d) of the 2015 Regulations establishes that a contract may be modified without a new procurement procedure as a consequence of a review clause which meets the criteria set out in Regulation 72(1)(a), or where there is succession in the position of the original contractor in accordance with Regulation 72(1)(d)(ii).

Step-in may be provided for in review clauses, either in the contract between the contracting authority and the contractor, or in the applicable funding documents. The following sections will consider step-in pursuant to such review clauses by firstly the funders and secondly by the contracting authority. Section 3.5.4 considers the position where in addition to step-in, other adjustments to the contract are sought. In each case the relevance of Regulation 72(1)(d)(ii) of the 2015 Regulations is considered.

3.5.2 Step-in by funder

Funders may reserve step-in rights under contracts for which they have provided funding. Their objective would generally be to resolve the issues giving rise to the right of step-in, so as to enable the project to continue and thereby preserve their investment.[390]

Where step-in rights are exercised by the funders they may appoint a third party to act on their behalf to perform the project services. Where the project is rescued, the funders may step back out allowing the contractor to

[388] Arrowsmith, (2014), fn 11, p. 593;
[389] *Pressetext*, fn 4, para 40;
[390] Arrowsmith, S., "Public Private Partnerships and the European Procurement Rules: EU Policies in Conflict?", *Common Market Law Review*, 2000, 37, p. 731;

resume performance of the services on the terms of the contract which applied prior to step-in. However, where it is not possible for the project to be handed back to the contractor, the funders may appoint a new contractor to perform the project.[391]

Regulation 72(1)(d)(ii) arguably applies to some step-in scenarios but not to others. Where the funder has stepped in because the insolvency of the contractor has either of itself triggered the funder's ability to step-in or where the contractor fails to properly perform the contract as a result of insolvency (leading to defaults that trigger step-in) arguably this is a succession into the position of the initial contractor following insolvency.

However, this approach would appear to contradict the intent of the provision, which appears to be to provide a mechanism to transfer a contract from an insolvent contractor in circumstances where a new contractor would perform the contract, rather than dealing with the position on funder step-in. Therefore in circumstances other than insolvency (for example where the funder steps in due to the contractor's persistent poor performance) it seems unlikely that the provisions of Regulation 72(1)(d)(ii) are relevant.

There has been concern amongst practitioners that the application of step-in rights where a third party is required to perform the services may fall within the scope of the Procurement Regulations, as whilst the selection of a new contractor may be directed by the funders it is arguable that the funders are acting as agent of the contracting authority.[392] It has been submitted, however, that there is no requirement to run a new competition in accordance with the Procurement Regulations where the contracting authority is not involved in the selection of the new contractor, as here there is no discrimination by the contracting authority.[393]

[391] Arrowsmith, (2014), fn 11, p. 593;
[392] Arrowsmith, (2000), fn 390, p. 731;
[393] Arrowsmith, (2014), fn 11, pp. 593-594;

However, it is not clear whether the absence of a requirement to follow the Procurement Regulations is because the adjustment is pursuant to a review clause, or whether it is because there are separate considerations (essentially the role of the funders) that make the Procurement Regulations redundant. In practical terms it may be difficult to draft a review clause which meets the criteria set out in section 3.2.4 because of uncertainties inherent to step-in, as the scope of and nature of the step-in not be determined until the need for step-in arises. However, there is nothing in the 2015 Regulations or elsewhere supporting the second interpretation.

Where the contracting authority influences the funder's selection of a new contractor, the funder may be agent to the contracting authority and, as such, it is submitted that the 2015 Regulations should be adhered to in selecting the new contractor. This would create practical problems - for example, there may be disruption in service provision whilst the procurement process is undertaken and funders may be reluctant to invest in public contracts where they have less control over the way in which a failing project can be rescued. However, it is not clear that the Procurement Regulations provide an alternative to re-procuring in these circumstances.

3.5.3 Step-in by contracting authority

The contracting authority has an interest in ensuring the contract is performed so as to ensure service delivery and its attainment of objectives such as value for money and procurement efficiency. Contracting authorities may be able to step-in to contracts[394] and the aim of the contracting authority in such circumstances is likely to be to resolve the issue giving rise to the right of step-in.

[394] For example, SOPC4, fn 72, pp. 240-241 suggests that step-in be provided for where the contracting authority wishes to take action to prevent or mitigate a serious risk to health, safety (person or property) or the environment or to discharge a statutory duty and such a right may arise due to contractor breach or may alternatively arise out of matters not connected to the contract;

It is submitted that step-in by the contracting authority in circumstances where the contracting authority performs the services itself cannot constitute a material amendment as it is no longer outsourcing the service provision and accordingly there is no public contract to which to apply the Procurement Regulations.[395]

Where the contracting authority appoints a new contractor, it is submitted that the analysis above in respect of a scenario where a contracting authority is able to influence the selection of a contractor by the funders applies.

3.5.4 Position where other contract terms are adjusted

It may be the case that grounds for step-in have arisen as a consequence of something particular to that contractor. An example may be that the contractor is subject to a cash flow difficulty as it has over-committed across its portfolio of projects, and consequentially is unable to perform the contract.

However, grounds for step-in may arise because of a general change in conditions which impacts on project delivery or as a consequence of poor risk allocation or untenable commercial conditions in the relevant contract.[396]

A new contractor is unlikely to want to take over a failing project on the same terms as the original contract where the reason for failure is other than as a consequence of something specific to the original contractor. In such case the new contractor may seek to renegotiate contract terms.

[395] Regulation 2(1) of the 2006 Regulations defines a public contract as being a public services contract, public supply contract or public works contract, the definitions of each of which imply performance by a third party, and Regulation 2(1) of the 2015 Regulations defines a public contract as being one concluded by one or more economic operators and one or more contracting authorities, demonstrating that these regulations do not apply where the contracting authority is providing goods, works or services to itself;

[396] An alternative approach to step-in may be to vary those terms of the contract that are causing the contractor to fail in its delivery of the contract. Adjustments proposed to prevent or cease a breach of contract are considered in chapter 5 section 5.6;

It is also possible that the new contractor may require adjustments to the original contract to make the project deliverable from its perspective. For example, it may not be able to deliver the services in precisely the same way, or its directors may have a different risk appetite which may affect caps on liabilities, the scope of any guarantees, and the insurance position.

Where there are adjustments to contract terms, the Substantial Modification Test should be applied to these adjustments.

3.6 Contract term extensions

It is possible to include review clauses in contracts which allow for flexibility in the duration of that contract. This can be done by one of two methods. Firstly it is possible to provide that the term is a defined period (for example ten years) and that this can be extended (at the option of the contracting authority or by mutual consent) for a further period (for example, two years or a cumulative period such as three years plus two years). The other way to structure a similar effect is to provide for break clauses at specified periods (which can be exercisable at the option of the contracting authority, by mutual consent, and technically it is possible for a break clause to be exercised by the contractor).[397]

Whilst it is typical to refer to these methods using different terminology - extensions and break clauses respectively - in practice both operate as a form of adjustment to the duration of a contract and can be understood as different ways of achieving the same result.

Contracts can also be determined prematurely where a provision is included which allows either party (depending on the scope of the drafting) to bring the contract to an end voluntarily, as distinct from the termination rights that may apply where either party is in breach of the contract. This is a contract

[397] Hartlev and Liljenbol, (2013), fn 4, p. 64;

adjustment because its operation has the effect of adjusting the duration of the agreement.

Where the duration of a contract is extended other than pursuant to such a review clause, the services will be performed for a longer duration, amounting to a wider scope of services.[398] In the interim application in *Indigo* the UK High Court found that a contract extension not provided for in the terms of the original contract, constituted a contract for new services.[399] This case firstly supports the principle that an extension of the duration of a contract constitutes an extension of the scope of services and secondly that the inclusion of a review clause in respect of the adjustment to the duration provides protection against a challenge that the contract has been materially amended.

Where a contract with a defined duration is extended without this being provided for in a review clause this may be subject to challenge.[400] In the UK High Court case of *Banaco Builders* a procurement was commenced for a 12 month contract for improvements to dwellings, but during the procedure the duration of the contract was extended to 18 months and the start date was deferred by 6 months.[401] It was found that this was a new contract as there may be firms that would be interested in the revised arrangement.[402]

Therefore where adjustments to the duration of a contract are made other than in accordance with a review clauses meeting the criteria set out in section 3.2.4, the Substantial Modification Test should be applied to

[398] The link between extensions of the duration of a contract and the consequent change of scope of services of such contract is made in Poulsen, (2012), fn 4, p. 180;
[399] *Indigo*, fn 339, para 4;
[400] Hartlev and Liljenbol, (2013), fn 4, p. 63 which cites the decision of 16 October 2009 of the Complaints Board, Konkurrencestyrelsen v Region Sjaelland and Region Hovesdstaden and also the opinion of 13 November 2008 of the Danish Competition and Consumer Authority;
[401] *R v Portsmouth City Council ex parte Banaco Builders*, judgment of June 6 1995, cited in Arrowsmith, S., "Amendments to specifications under the European public procurement Directives", *Public Procurement Law Review*, 1997, 3, p. 130; note that the case was subject to an appeal but this point was not raised before the UK Court of Appeal, *R v Portsmouth City Council, ex parte Peter Coles and Colwick Builders* [1997] 1 CMLR 1135;
[402] *Ibid*.;

determine the materiality of the amendment, and this will determine whether or not the adjustment is permissible.

A distinction can be made between adjustments which extend a contract by mutual agreement and those that are mandated at the requirement of one of the parties only (a unilateral extension). Where the extension is unilateral, one of the parties is obliged to perform the contract for the extended duration, and so there is no need for mutual agreement.

It has been suggested that extensions that require mutual agreement constitute a new contract award because they are less objective then unilateral extensions.[403] It is arguably the case that extensions by mutual agreement do not meet the criteria set out in section 3.2.4 because of the uncertainty as to whether the extension will be exercised. In the absence of such certainty it could be argued that the performance of the services for the extended term falls within the Extension of Scope Limb.

However, it could also be argued that an extension by mutual agreement should not *prima facie* constitute a material amendment within the Substantial Modification Test. It could be argued that where the possibility of an extension by mutual agreement was included in the contract documents there is no infringement of the principles of equal treatment or transparency, as bidders had an equal opportunity to bid for the contract making their own assessment as to whether the extension would be exercised.

It seems that the second approach is preferable, as the first would appear to preclude the possibility of the parties agreeing to extend a contract, which may be problematic as it is not always practical to impose a unilateral extension on the contractor. However, it is not clear which position would prevail so this can be noted as an ambiguity in the existing legal framework.

[403] Arrowsmith, S., *The Law of Public and Utilities Procurement*, 2005, Sweet & Maxwell, London, p. 290 and 293;

Where an option to extend the duration of a contract is exercised, consideration should be made as to whether any other terms of the contract are adjusted. For example, the parties may seek to renegotiate prices or matters relating to contract performance such as the scope or level of performance of services.[404] It is submitted that the Substantial Modification Test should be applied to these adjustments.

As described at the start of this section, the alternative way to adjust the duration of the contract is to provide for a break clause or a clause which allows for voluntary termination. Break clauses can be exercisable on either the option of the contracting authority or on the option of the contractor and may require mutual agreement for the contract to end following service by a party of a notice to break.[405] Voluntary termination will typically only be exercisable by the contracting authority as generally, a contracting authority will not want the uncertainty of their contractors being able to end contracts without agreement with the contracting authority, as this may have an adverse impact on service provision.

Where the contract break is by mutual agreement or at the contracting authority's option then it is submitted that the analysis set out above in respect of contract extensions applies. Therefore, the review clause may not be sufficiently certain as to meet the criteria in section 3.2.4 but should not *prima facie* be construed as a material amendment, and the Substantial Modification Test should be applied to assess whether a material amendment has been made.

It is submitted that a break clause exercisable by a contractor is likely to be more problematic as in addition to the existence of the Extension of Scope Limb, there may also be a change to the economic balance as the contractor

[404] HM Treasury, Operational Taskforce Note 4, October 2009, Annex A, "Contract term extension";
[405] On the distinction between contracts subject to termination at the option of either party as opposed to contracts subject to a unilateral option to terminate, see Arrowsmith, (2005), fn 403, pp. 294-295;

may manipulate the operation of the contract to its advantage. For example, the contractor may front load payments to it in the payment profile and then break the contract when it is in an optimal financial position. This may bring the adjustment within the Economic Balance Limb described in chapter 2 section 2.6.2. This is however, unlikely to be an issue in practice given that a contracting authority is unlikely to allow a contractor to unilaterally break an agreement, as described above.

Where a voluntary termination provision is exercised at the contracting authority's discretion[406] it is arguable that the criteria set out in section 3.2.4 are not met. Accordingly, technically the Substantial Modification Test should be applied to this adjustment to ascertain whether there is a material amendment.

The application of the Substantial Modification Test to voluntary termination and to break clauses produces an incongruity as on the exercise of these the contract ceases to exist, and therefore a conclusion that there has been a material amendment is irrelevant. However, it could be argued that the contract in its adjusted form (being a shorter duration then that which was initially awarded) is materially different. This creates an ambiguity in the applicable law applicable, but one that is arguably of no practical significance.

3.7 Price adjustments

3.7.1 Introduction

Review clauses which adjust the consideration payable under a contract are considered in this section 3.7. Price is a fundamental term of a contract and price adjustments may be a material amendment.[407] Price is important from

[406] Voluntary termination at the option of the contracting authority is an accepted position in public contracts, see for example SOPC4, fn 72, which provides for voluntary termination at the sole discretion of the contracting authority, stating that there may be circumstances in which the contracting authority is no longer able to continue the contractual relationship, for example in the case of policy change which makes further provision of the service redundant, p. 171;

[407] *Pressetext*, fn 4; *Succhi di Frutta*, fn 348;

the perspective of the contracting authority as it is intrinsic to the concept of value for money, and in the case of the contractor it is the incentive and reward for service delivery. Regulation 72(1)(a) of the 2015 Regulations specifically refers to review clauses which provide for price revisions, indicating that this type of adjustment may be undertaken pursuant to a review clause without requiring a new procurement procedure.

The price adjustments that are included in this section are divided into two categories, firstly indexation and secondly other price adjustments, namely benchmarking and market testing.

This section does not consider price adjustments that are made in consideration of other adjustments to the contract (for example, adjustments to the scope of services). Where such adjustments are made pursuant to review clauses, the discussion in sections 3.2.4 and 3.3 apply. Where the adjustments are other than pursuant to a review clause, the analysis in chapter 5 applies.

3.7.2 Indexation

Indexation is the process of uplifting prices in a contract during its term. Indexes can be applied to all or part of the price and can be based on general indexes such as RPI or CPI[408] or sector specific indexes.

The objective of indexation is to allocate risk for rising costs over the term of a contract. Where a contractor is uncertain as to what the uplift in costs will be over the term, for example as a result of general inflation, it may increase its price to build in a contingency to cover its predicted cost increase. If this approach is taken it will increase the contract price, which will have an adverse impact on the achievement of value for money.[409] Inclusion of an

[408] Information on the Retail Price Index (RPI) and the Consumer Price Index (CPI) can be found at https://www.ons.gov.uk/economy/inflationandpriceindices (accessed 11 August 2016);
[409] This point is made in SOPC4, fn 72, pp. 108-109;

indexation clause should mean that the contractor does not need to price for this risk.

In *Rennes* the CJEU considered a price adjustment. In this case the procurement was prolonged and the 1991 prices initially submitted were updated to November 1996 prices.[410] The increase in price was a result of the application of a formula which had been included in the draft contract agreed between the parties in 1993.[411] The CJEU concluded that the Commission had not adduced evidence sufficient to indicate that the parties intended to renegotiate the essential terms of the contract.[412]

This case supports the proposition that price adjustments pursuant to a review clause provides protection from challenge, however it is not of assistance in establishing what criteria must be met for the review clause to provide such protection.

Indexation was accepted as an adjustment mechanism in *Pressetext* where the CJEU found that the reformulation of an index clause was permitted as the contract allowed for the calculation of indexation using a published consumer price index, or the index replacing it.[413] Accordingly, the replacement of the original index with a more up to date index "merely applied" the terms of the original contract and there was no amendment of the essential conditions so as to amount to a new contract award.[414]

It appears accepted therefore that the application of a pre-defined and objective (in the sense of being published by an external body, rather than being calculated by the contracting authority or negotiated between the contractor and the contracting authority) index to adjust the price is not a

[410] *Rennes*, fn 331, paras 10 and 14;
[411] *Ibid.*, para 53;
[412] *Ibid.*, para 56;
[413] *Pressetext*, fn 4, para 64;
[414] *Ibid.*, paras 68-69;

material amendment to the relevant contract. Such a clause appears to satisfy the criteria in section 3.2.4 in respect of review clauses.

However, the Advocate General in *Pressetext* introduced ambiguity. It was stated that where the index adjustment is used as a means to substantially alter the agreed payments it cannot be precluded that there is no material contractual amendment.[415] It is submitted that the Advocate General's comments refer solely to the replacement of one index with another, rather than the application of an index that was in the original contract.

This interpretation can be substantiated as the Advocate General firstly stated that a reference to an index other than that originally agreed may be a purely technical amendment.[416] The Advocate General then stated that where the adjustment substantively alters payment this goes beyond being a technical amendment.[417] It can therefore be concluded that the "technical adjustment" test applies where it is proposed to vary the indexation mechanism included in a review clause.

If indexation is not provided for in a review clause, but is nonetheless applied to pricing, this changes the risk profile of the contract, and has the effect of adjusting the prices payable under the contract. The Substantial Modification Test should be applied to assess whether a material amendment has occurred. The Advocate General's comments as described in the above paragraphs are relevant as it appears to be the case that "technical adjustments" is not a material amendment.

[415] AG Opinion, *Pressetext*, fn 298, para 101;
[416] *Ibid.*, para 100;
[417] *Ibid.*, para 101;

3.7.3 Other price adjustments

Benchmarking

Benchmarking is the process by which the contractor compares its costs of providing services against the market price for these services.[418] The findings may lead to price adjustments being made to make the price paid by the contracting authority consistent with the market position.[419]

It has been commented that conditions should be included in a benchmarking clause to prevent negotiations, including setting out the way in which the comparator prices are to be identified, identifying who is responsible for carrying out the exercise, describing the procedure that will be followed if comparable prices cannot be identified, and setting out the process for adjusting the payment.[420]

There is likely to be commercial justification for establishing a defined benchmarking mechanism in the procurement documents as contractors may be more likely to accept such provisions when they are in competition. Furthermore, a well defined benchmarking mechanism may satisfy the criteria set out in section 3.2.4 and therefore its implementation would not constitute a material amendment.

Where the benchmarking clause is well defined it is arguably analogous to an indexation clause as both adjust prices pursuant to a pre-defined mechanism. Objectivity is also relevant to both, as indexation is generally undertaken against a published index compiled by an external body and benchmarking is a process of comparison against external prices. Given this, the position in *Pressetext* regarding the acceptability of adjustments pursuant to indexation

[418] SOPC4, fn 72, p. 111;
[419] For example, HM Treasury, "Operational Taskforce: Note 1: Benchmarking and market testing guidance", October 2006, states: "value testing is designed to ensure that prices paid for soft services reflect a competitive rate for the services provided";
[420] Hartlev and Liljenbol, (2013), fn 4, pp. 62-62; see also, HM Treasury, fn 419, p. 3 states: "a clear methodology for assessing benchmarking data ... must be agreed at the outset";

clauses can be used to support the assertion that benchmarking is also an acceptable adjustment.

However, where there are negotiations as to the way in which benchmarking will be undertaken the analysis in the above paragraph does not apply. Where there are negotiations or in other circumstances where the benchmarking clause does not comply with the criteria set out in section 3.2.4, the Substantial Modification Test should be applied.

It should be noted that depending on the terms of the benchmarking clause, the price paid by the contracting authority could go up or down. Allowing the contractor to increase the price may offer value for money to the contracting authority, as in circumstances where there was no periodic benchmarking, the contractor may price in a risk reserve to protect it from future potential cost fluctuations.[421] A price decrease will also support value for money. Allowing for benchmarking may therefore improve value for money, as contractors may not feel it is necessary to price this risk into their bid.

Market testing

Market testing is where the contractor re-tenders the service (or part of a service) to ascertain the market price of that service, and the contract price may be adjusted to reflect the results of the exercise. This approach may be used in PPP projects and may result in the replacement of a sub-contractor.[422]

Any price reduction should in theory be considered against the Substantial Modification Test. However, given that price reduction does not fall within one of the Limbs set out in chapter 2 section 2.6.2, it is submitted that there is unlikely to be a material amendment in these circumstances.

[421] On this point, see SOPC4, fn 72, p. 110; also HM Treasury, fn 419, p. 6;
[422] SOPC4, fn 72, p. 109-110; see chapter 3 section 3.4.5 on the replacement of a sub-contractor;

3.8 Conclusion

In conclusion, whilst it is the case that review clauses provide a degree of protection from challenge on the basis that adjustments made pursuant to them will not require a new procurement process, it is submitted that whether or not such protection applies depends on whether the criteria set out in chapter 3 section 3.2.4 are met. Where these criteria are not met the Substantial Modification Test should be applied.

In practice, however, the application of the criteria in chapter 3 section 3.2.4 may not be clear cut. Therefore, whilst contracting authorities may include review clauses to provide contractual flexibility there may be a grey area in respect of which adjustments are permissible and which are not. Chapter 7 of this study considers the way in which review clauses are approached in practice, including the extent to which they are perceived to offer protection from challenge.

Chapter 4: Adjustments through operation of law

4.1 Introduction

This chapter considers adjustments which are made to contracts during their term as a consequence of an operation of law. For the purposes of this study "operation of law" means a supervening event which causes the contract between the parties or the substance of their contractual relationship to change as a consequence of that event rather than at the instigation of either party.

The operation of a review clause which is dependent on something external to the contract, such as an indexation clause linked to an index prepared by a third party,[423] does not for the purposes of this study constitute an operation of law. This is because the adjustment is governed by the review clause which the parties have agreed should be included in their contract. This can be distinguished from an operation of law which operates separately from the intention of the parties.[424] Adjustments made pursuant to review clauses were considered in chapter 3.

This chapter considers five adjustments categorised as operation of law, namely: (i) insolvency; (ii) change in control; (iii) assignment and novation; (iv)change in law; and (v) force majeure. A conclusion at the end of the chapter seeks to draw together the points raised in respect of each of these adjustments.

Each of these adjustments is considered in the context of both the EU's and the contracting authority's possible objectives in public procurement. In the case of the EU, the relevant objectives are the establishment of a single market and the removal of barriers to trade, competition, and

[423] See chapter 3 section 3.7.2 for a discussion of indexation;
[424] However, as explained in this chapter, clauses can be included in contracts which set out the process applicable in the event of an operation of law occurring, or providing the contracting authority with a termination right where the contractor is subject to a specified operation of law;

transparency.[425] The objectives of the contracting authority are competition and value for money, procurement efficiency, equal treatment, the prevention of corruption, and transparency.[426] These shall each be considered in this chapter.

The chapter explains the legal position in respect of adjustments to existing contracts as a consequence of an operation of law. This is considered in the context of the above objectives to attempt to understand the impact of the law on these objectives. The approach taken in practice upon occurrence of an operation of law is considered in chapter 7.

4.2 Insolvency

4.2.1 Introduction

An insolvency event arises where the continued financial or operational viability of the contractor is called into question, and an entity with an interest in the contractor (such as a creditor, shareholders or directors) takes steps in response to this. Different tests can be applied to determine insolvency, and the Insolvency Act[427] does not define "insolvency", instead using the concept of the company being "unable to pay its debts".[428] This definition may be used in public contracts to define an insolvency event.

Insolvency law attempts to create a "rescue culture" for insolvent companies, to preserve jobs and going concerns, and get maximum recovery for shareholders and creditors.[429] An efficient insolvency system where

[425] See chapter 2 section 2.2 for detail on EU procurement law objectives;
[426] See chapter 1 section 1.3 for detail on contracting authority procurement law objectives;
[427] Insolvency Act 1986;
[428] Section 123 Insolvency Act 1986, contains the definition of inability to pay debts, including circumstances where a company fails to pay a statutory demand for a debt of over £750, where the value of the company's assets is less than the sum of its liabilities, (taking into account contingent and prospective liabilities) and a failure to satisfy enforcement of a judgment debt ;
[429] Totty, Moss and Segal, *Insolvency: Volume 1*, Part A: Practitioners, Chapter A1: Background and Definitions of Insolvency, A1-01, accessed electronically via Westlaw on 20 June 2014;

corporate recovery is possible is important to promote economic stability.[430] Some voice doubts as to whether this can be achieved, stating that the reality is the search for the fairest method of allocating financial losses arising.[431]

Insolvency law is highly technical and it is not the intention of this section to fully explore it. Instead the focus will be on the impact of the insolvency event sustained by a contractor on the contract between it and the contracting authority and the consequence of this on the attainment of the EU and contracting authority's procurement objectives outlined above.

The financial standing of a contractor can be assessed by the contracting authority at the pre-qualification stage of a procurement. Regulation 58(1)(b) of the 2015 Regulations provides that economic and financial standing can be taken into account by contracting authorities, stating at Regulation 58(3) of the 2015 Regulations that contracting authorities may impose requirements to ensure that contractors have the necessary economic and financial standing to perform the contract.[432] Regulation 57(8)(b) of the 2015 Regulations allows contracting authorities to exclude insolvent contractors from procurements.[433]

EU objectives

Although the Procurement Regulations contain provisions relating to insolvency and financial standing, it is not clear that these directly pertain to any of the objectives of the EU in respect of public procurement law, as set out above.

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[430] Dennis, V and Fox, A., *The New Law of Insolvency: Insolvency Act 1986 to Enterprise Act 2002*, Law Society Publishing, London, 2003, p. 4;
[431] Totty, Moss and Segal, fn 429;
[432] Equivalent provisions at Regulation 24 of the 2006 Regulations;
[433] Specifically defined for these purposes as being where the contractor is bankrupt, or is the subject of insolvency or winding up proceedings, where its assets are being administered by a liquidator or by the court, where it is in arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national law and regulations; an equivalent provision was at Regulation 23(4) of the 2006 Regulations;

The recitals to the 2014 Directive refer to the need to ensure any requirements with regard to financial standing are not overly onerous,[434] but do not give any reasons from the EU's perspective as to why these provisions are included in the 2014 Directive.

Contracting authority's objectives

The contracting authority's objective of value for money and competition is undermined where the original competition cannot deliver the relevant contract where the contractor is insolvent and can no longer perform its obligations. Furthermore, it may be the case that the procurement process has delivered an "incorrect" result, and that an alternative contractor would have offered better value for money through being able to perform the contract without being subject to an insolvency event. Value for money will also be prejudiced where the contracting authority incurs costs as a result of the contractor's insolvency and subsequent failure to perform the contract.

The objective of procurement efficiency may be compromised where a contracting authority has to, for example, procure the delivery of the services through an alternate means where the contractor is unable to perform due to insolvency. There may be costs and delays arising from the inability of the contractor to perform the contract following an insolvency event, and this will have a negative impact on procurement efficiency.

It is not apparent that the occurrence of an insolvency event has a negative impact on the achievement of the contracting authority's objectives of equal treatment, the prevention of corruption, or of transparency. However, as explained in this chapter, these objectives may be undermined as a consequence of the steps taken in response to the insolvency event, in particular the disposal of the relevant contract to a third party.

[434] 2014 Directive, Recital 83;

4.2.2 Types of insolvency

Where a company is subject to an insolvency event, depending on the circumstances, a number of procedures can be followed.[435] The prevalence of one type of insolvency procedure over another depends on factors such as the economic climate, with the frequency of insolvency events increasing during periods of economic recession.[436]

Following the introduction of the Enterprise Act[437] the available corporate rescue measures are administration, administrative receivership,[438] company voluntary arrangement, and schemes of arrangement.

The alternative to these rescue measures is to liquidate the company through either compulsory liquidation (requiring the order of a court) or voluntary liquidation (by the company itself through either a members' voluntary liquidation or a creditors' voluntary liquidation).

4.2.3 Position of the insolvency practitioner

An insolvency practitioner is licensed to act on behalf of the insolvent entity and may advise in respect of formal insolvency procedures.[439] Administrators, liquidators, receivers and administrative receivers are

[435] For further information on insolvency law see Totty, Moss and Segal, fn 429;
[436] In the last quarter of 2008 in England and Wales there were 4607 compulsory and creditors' voluntary liquidations and 2428 other corporate insolvency procedures, 261 receiverships, 2018 administrations and 149 company voluntary arrangements, representing a 220.3% increase on the corresponding quarter for 2007, Loose, P. and Griffiths, M., *Loose on Liquidators: 6th edition*, Jordans, Bristol, 2010, para 1.3;
[437] Enterprise Act 2002;
[438] Note that administrative receivership allows a secured creditor to realise assets subject to the security, rather than being a corporate insolvency rescue mechanism in the strictest sense. The Enterprise Act 2002 abolished administrative receivership in all but very limited circumstances. However, administrative receivership continues to apply to a project company where the project is a public private partnership project and includes step-in rights (s. 72C, Insolvency Act 1986). It also continues to apply in the case of finance projects (with a debt of at least £50m is incurred for the purposes of the project) which includes step-in rights (s 73E, Insolvency Act 1986) - this is intended to cover project finance not otherwise covered by the PPP exemption;
[439] The Institute of Chartered Accountants in England and Wales, http://www.icaew.com/en/technical/insolvency/what-is-an-insolvency-practitioner, accessed 12 June 2014;

insolvency practitioners. The objectives of the insolvency practitioners are not identical to the procurement law objectives of the EU or contracting authority.

An administrator must perform its functions with the objective of (a) rescuing the company as a going concern; (b) achieving the best result for the company's creditors as a whole then would be likely if the company were wound up (without first being in administration), or (c) realising property in order to make a distribution to one or more secured or preferential creditor.[440] These purposes are hierarchical, and therefore the second objective should be pursued where it is not possible to achieve the first and so on, emphasising the importance of corporate rescue.[441]

An administrator is able to do anything "necessarily expedient" to manage the business of the relevant company.[442] It has been commented that this emphasises the wide powers of management granted to an administrator, including the power to sell the business of the company.[443]

A liquidator has been described as partly trustee, partly agent and partly officer of the company for the purpose of winding up the company's affairs and terminating its existence.[444] In summary, the liquidator is required to collect the company's assets, distribute them,[445] and dissolve the company. The liquidator is able to carry out the business of the company to the extent necessary for the winding-up but is not permitted to carry out business with

[440] Schedule B1 para 3(1), Insolvency Act 1986;
[441] Loose and Griffiths, (2010), fn 436, para 14.7;
[442] Schedule B1 para 5(1), Insolvency Act 1986;
[443] Dennis and Fox, fn 430, p. 170;
[444] Loose and Griffiths, (2010), fn 436, paras 1.4-1.17;
[445] The order of payment of debts is: (a) expenses properly incurred in the winding-up (section 115, Insolvency Act 1986); (b) preferential debts (section 175, Insolvency Act 1986); (c) floating charges (section 175(2)(b), Insolvency Act 1986); (d) ordinary creditors; and (e) deferred creditors (Sections 74 and 189, Insolvency Act 1986, and section 735, Companies Act 2006), with secured creditors either being paid from their security or ranking as ordinary creditors to the extent they cannot do so;

the aim of seeing whether a sale of the business will be possible in the future or to try and rescue the business as a going concern.[446]

Where a receiver or an administrative receiver has been appointed, they will be acting primarily for the creditor that appointed them.[447] Their objective will be to realise the assets that have been charged under the relevant debenture and return the proceeds to the appointing creditor. As such their aims differ to those of a liquidator or an administrator.

Technically, the company continues to exist until formally wound-up,[448] but the insolvency practitioner essentially has the ability to direct the company.[449]

In the case of administration, the insolvency practitioner will remain in situ for a period of one year,[450] unless extended by court order (for such period as the court thinks necessary) or by consent from the appropriate creditors (for a period of no more than six months).[451] An administrator's appointment will generally end on either the success or the failure of the administration.[452] Where the administration has failed, the administrator can petition for the compulsory winding-up of the company. However, there may be circumstances whereby the company has been rescued and the period of involvement of the insolvency practitioner is limited.

[446] Loose, and Griffiths, (2010), fn 436, para 7.8;
[447] Their appointment is essentially contractual set out in the relevant debenture and facility agreement, which states the creditor's rights in the event of default by the company, Loose and Griffiths, (2010), fn 436, para 14.2;
[448] Section 87(2) Insolvency Act 1986;
[449] The liquidator controls the actions of the company, Loose and Griffiths, (2010), fn 436, paras 1.7; an administrator will exercise those powers previously exercised by the directors and specific statutory procedures set out in Schedule 1 of the Insolvency Act 1986, Dennis and Fox, (2003), fn 430;
[450] Schedule B1 para 76, Insolvency Act 1986;
[451] Schedule B1, para 76(2), Insolvency Act 1986;
[452] Dennis and Fox, (2003), fn 430, p. 180;

4.2.4 Occurrence of insolvency

It is unclear whether the insolvency of a contractor creates a requirement to retender a contract.[453] In these circumstances there may be a breach of any term of the contract prohibiting insolvency which may give rise to a right of termination - but there is no adjustment of the contract at this point as there is no change to the performance or terms of the contract.

It has also been argued that the transfer of a contract to the insolvency practitioner in accordance with UK insolvency law is not a material amendment to the contract.[454] However, given the role of the insolvency practitioner described above, the way in which the company is directed has changed, reflecting the wider powers an administrator or liquidator has over the operation of the company.[455] It is arguable that given the power of direction has transferred to a third party (the insolvency practitioner) this is the substitution of a contractual partner.

Pressetext found that the substitution of a contractual partner may constitute a material amendment.[456] Upon the appointment of an administrator or liquidator (as the case may be) the contractor ceases trading on its own account and the administrator or liquidator exercises control over the contractor.

However, it is not clear that the administrator or the liquidator replaces the contractor, given that the corporate counterparty to the contract continues to be the contractor until such point as the company is dissolved.

[453] See, Treumer, (2012) , fn 4, p. 156; Treumer, S., "Transfer of contracts covered by the EU public procurement rules after insolvency", *Public Procurement Law Review*, 2014, 1, p. 22;
[454] Treumer, (2014), fn 453, 1, p. 21;
[455] An administrator acts as agent of the company (Schedule B1 para 70(3), Insolvency Act 1986);
[456] *Pressetext*, fn 4, para 40 discussed at section 4.4.1;

Pressetext provides relevant guidance, stating that a change in the composition of shareholders is not a material amendment.[457] In such a case the counterparty to the contract, the contractor, remains the same but the identity of the owners of the company have changed. It is arguable that the position on insolvency is analogous because the identity of the contractor remains the same and as such there is no adjustment at this stage, and therefore no material amendment.

However, where the insolvency practitioner seeks to transfer the relevant contract to a third party or where there is a proposed adjustment to the contract terms, the analysis below should apply.

4.2.5 Disposal of contract to a third party

Introduction

The insolvency practitioner may dispose of the contractor's business, including any public contracts, to a third party. This could be achieved by either disposing of contracts individually (for example, novating the contract to a third party) or by selling the shares in the insolvent company to a third party.

There is case law from member states suggesting that the transfer of a contract following an insolvency event is not permitted.[458] This position is clarified in Regulation 72(1)(d)(ii) of the 2015 Regulations which provides that where a new contractor replaces the original contractor as a consequence of insolvency, provided the new contractor meets the qualitative selection initially established and there are no other substantial modifications to the

[457] *Pressetext*, fn 4, para 52;
[458] See discussion in Treumer, (2014), fn 453, pp. 22-27;

contract and is not aimed at circumventing the 2015 Regulations, a new procurement procedure is not required.[459]

Impact on achievement of EU objectives

In *Pressetext* the Advocate General explained that substituting a contractor was potentially a material amendment as allowing substitution creates a risk that procurement law will be circumvented, and there will therefore be a risk that the new contractor will be given preference over other contractors.[460]

This suggests that the EU objective of the establishment of a single market and the removal of barriers to trade may be prejudiced upon the disposal of a contract to a third party. This may be the case where the contracting authority favours a domestic contractor. This prejudices the achievement of the single market and arguably constitutes a barrier to trade.

Furthermore, in *Pressetext* the Advocate General found that the substitution of a contractor creates a risk of distortion of competition.[461] The objective of competition may therefore be undermined in this circumstance).

However, it has been argued that where a compliant competition has been run (resulting in the award of the contract to the contractor) the procurement rules have fulfilled their function.[462] The subsequent transfer of the contract by an insolvency practitioner to a third party does not obviate the fact that a competition was run. There is therefore no prejudice to the objective of competition where an insolvency practitioner transfers a contract to a third party.

[459] For completeness, Regulation 72(1)(d)(i) of the 2015 Regulations provides that a new contractor can replace the original contractor where this is provided for in accordance with a review clause which conforms with Regulation 72(1)(a). It is submitted, however, that a disposal on insolvency will not conform with Regulation 72(1)(a) because of the impossibility of drafting for this unforeseen circumstance. Regulation 72(1)(d)(i) is therefore not considered further;
[460] AG Opinion, *Pressetext*, fn 298, para 54;
[461] *Ibid.*;
[462] Treumer, (2012), fn 4, p. 157; also Treumer, (2014), fn 453, p. 24;

This interpretation has much to commend it as if a compliant competition has been run then it is difficult to argue that there has been any frustration of the objective of competition. However, the competition assumed that the successful bidder would perform the contract on its terms for the contract's duration. The failure of the contractor undermines the legitimacy of this competition. The subsequent transfer to a third party appears to further undermine the original competition.

Accordingly, frustration of competition is relevant and prejudice to this objective appears to be a valid reason for prohibiting the transfer of a contract from the original insolvent contractor to a new contractor.

The final objective to be considered from the perspective of the EU is that of transparency. The obligation of transparency arising from the need to treat bidders equally was specifically referenced in *Pressetext*.[463] Transparency could be compromised upon the disposal of a contract in the absence of a transparent procedure being followed.

Impact on contracting authorities' objectives

Where a contractor becomes insolvent, the objectives of competition and value for money and procurement efficiency are likely to be compromised, as an insolvent contractor is unlikely to be able to continue to perform the contract, leading to service disruption. The contracting authority may have to make alternative arrangements to enable continued service provision, incurring costs and concentrating its resources on resolving the issues arising from the insolvency event.

The objectives of the contracting authority may be well served by the insolvency practitioner disposing of a contract to a new contractor. Ideally, from the contracting authority's perspective, the new contractor can assume the obligations of the insolvent contractor and continue to perform the

[463] *Pressetext*, fn 4, para 32;

contract ensuring continuity of service provision. This may reduce the costs and delays incurred by the contracting authority and may be more efficient then re-procuring the contract.

However, there may be prejudice to the objectives of value for money and competition upon the disposal of a contract to a third party. As explained in chapter 1 section 1.3.2 competition and value for money in the wider market place (rather than just in respect of an individual procurement) may be an objective of a contracting authority. This may be undermined where a contract is disposed of to a third party following an insolvency event as bidders may feel that the competition initially run was flawed or illusory and may be discouraged from bidding from public contracts in the future.

In addition, procurement efficiency and value for money and competition may be better served where the contract is reprocured. This is based on the assumption that the solutions available in the market would have improved during the period of time the contract was being performed.[464] However, this will depend on the market in question and when in the duration of the contract the insolvency event occurs.

Where the contracting authority does not influence the selection of the replacement contractor and this selection is made by the insolvency practitioner, it is not clear that there is prejudice to equal treatment. Furthermore, the objective of preventing corruption does not appear to be prejudiced where the contracting authority cannot influence the disposal. There is, however, the possibility of these objectives being compromised where the contracting authority influences the disposal.[465]

Impact on insolvency practitioners' objectives

[464] Treumer, (2014), fn 453, p. 23;
[465] Note that it has been commented that the contracting authority has in realist wide power to influence the insolvency practitioner, *Ibid*., p. 25;

As introduced in section 4.2.3, the insolvency practitioner has certain functions and objectives upon occurrence of an insolvency event. As explained in that section, there are various policy reasons underpinning these. Where the law prevents or makes uncertain the ability of an insolvency practitioner to transfer a contract from the insolvent contractor to a new contractor, a number of these objectives are frustrated.

If an insolvency practitioner is impeded in transferring a contract this will affect its ability to obtain value for the insolvent company's shareholders and creditors, [466] and may have adverse consequences, such as staff redundancies which may have been avoided had the contract been transferred.

Furthermore, uncertainty may lead to a more systemic issue as if it is unclear whether a public contract can be transferred to a new contractor, contractors (being corporate entities controlled by their directors who have certain statutory duties in terms of promoting the success of the company[467]) may be discouraged from bidding for public contracts, as they may be concerned about the implications of an insolvency event.

However, as described above, Regulation 72(1)(d) of the 2015 Regulations has clarified the circumstances in which a contract can be transferred to a new contractor on insolvency. This should resolve uncertainties and therefore avoid the issues set out in the preceding paragraphs.

4.2.6 Adjustment of contract terms

Introduction

Where an insolvency practitioner disposes of a contract to a new contractor, the insolvency practitioner or the new contractor may seek to amend the terms of that contract.

[466] Treumer, (2012), fn 4, pp. 157-158;
[467] Section 172 Companies Act 2006, provides that a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole;

The reasons for this are similar to those set out in chapter 3 section 3.5.4, which discusses contract adjustments following step-in. In summary, the new contractor is unlikely to want to take over a project on the same terms as the original contract where the insolvency event arose because of factors particular to that contract.[468] The new contractor may also require adjustments to the original contract to make the project deliverable from its perspective.

A condition for the application of Regulation 72(1)(d)(ii) of the 2015 Regulations is that there should not be other substantial modifications of the contract. Accordingly, in circumstances where substantial modifications are proposed, this provision cannot be relied upon. The definition of substantial modifications is set out at Regulation 72(8) of the 2015 Regulations (and Article 72(4) of the 2014 Directive as explained in chapter 2 section 2.4.1). It is submitted that therefore that the Substantial Modification Test should be applied to such adjustments.

4.3 Change in control

4.3.1 Introduction

Contracts are frequently awarded to contractors whose shares can be transferred without the contractor changing its identity.[469] This occurs as a result of a share transfer to a third party. In such circumstances the control of the company may pass to that third party from the original owners of that company.

Contractual terms concerning change in control may be included in contracts. These clauses often include a prohibition on the contractor undergoing a change in control without the contracting authority's prior permission, and

[468] Note that insolvency events may arise for reasons specific to a contractor - for example, that contractor has over committed itself on other contracts or has funding or credit withdrawn by banks or suppliers for reasons not wholly connected to the relevant public contract;
[469] Poulsen, (2012), fn 4, p. 185;

where an unauthorised change in control occurs, the contracting authority may terminate the contract.[470]

Change in control can be defined contractually with reference to the Corporation Tax Act, which states that control means the power of a person to secure (i) by means of holding shares or the possession of voting power; or (ii) as a result of any powers conferred by the articles of association or other document regulating that or any other body corporate, that the affairs of the company are conducted in accordance with that person's wishes.[471] The contracting authority can, however, include a different definition in its contracts to cover this point.[472]

Change of control is classified as an operation of law in the sense used in this study, as where shares in a company are transferred this will operate automatically and independently of the contractual relationship between the contracting authority and the contractor.

The change in control clause does not operate as a review clause which would provide protection against a procurement law challenge as it provides for notification of the change in control and gives a right of termination, rather than setting out the scope of and manner of implementing the adjustment. Accordingly Regulation 72(1)(d)(i) of the 2015 Regulations, which provides that the substitution of a contractor is permissible when done in accordance with Regulation 72(1)(a) is not relevant. Chapter 3 section 3.2.4 set out those criteria which it is submitted a review clause should meet

[470] For example, Partnerships for Schools, Building Schools for the Future, PFI Project Agreement, December 2007, pp. 228-229, clause 72; SOC4, fn 72, pp. 124-127;
[471] s 1124 Corporation Tax Act 2010 - note that this reference replaced the definition of change of control from s 840 Income Tax and Corporation Act 1988, and contracts may reference this earlier statutory reference;
[472] For example, SOPC4, fn 72 disposal of any legal, beneficial or equitable interest in any or all of the shares in the Contractor and/or Holdo (including control over the exercise of voting rights conferred on those shares, control the right to appoint or remove directors or the right to dividends) and/or (b) any other arrangements that have or may have or which result in the same effect as paragraph (a);

to provide protection. These criteria are not met in the case of a change of control clause of the nature described above.

4.3.2 Transfer of shares

Case law: Pressetext

Pressetext found that the nature of companies listed on the stock exchange meant that the shareholders in these companies may change at any time and accordingly this situation did not affect the validity of any contract awarded to such company.[473] Furthermore, *Pressetext* stated that similar considerations as apply to listed companies should apply to "limited liability registered cooperatives" and that the change in shareholders in such an entity will not "as a rule" be a material amendment.[474]

It appears logical to extend these statement to other share issuing corporate entities, such as private limited companies - a vehicle commonly used to deliver contracts in the UK. This is because the nature of this type of company means that shareholders are subject to change, so the above rationale from *Pressetext* applies.

However, *Pressetext* went on to comment that if the shares were transferred to a third party during the course of the contract this would no longer be an internal reorganisation of the initial contractor but would instead be a change of contractor.[475] This statement appears to contradict the later statements in the judgment to the effect that transfer of shares would not constitute a material amendment.

This is arguably unhelpful, particularly given that the Advocate General was unequivocal in stating that where the contractor has legal status, it will be that entity that is counterparty to the contract rather than the individual

[473] *Pressetext*, fn 4, para 51;
[474] *Ibid.*, para 52;
[475] *Ibid.*, para 47;

members of that entity, and as such changes to the membership of that entity will not be a material contractual amendment.[476]

Regulation 72(1)(d)(ii) of the 2015 Regulations arguably clarifies the legal position as it provides that a new procurement procedure is not required where there is a succession in the position of the original contractor following corporate restructuring, including takeover, merger, acquisition or insolvency, by a new contractor provided the criteria for the qualitative selection initially established are met, there is no substantial modification of the contract, and it is not aimed at circumventing the 2015 Regulations.

The wording in Regulation 72(1)(d)(ii) does not refer to a transfer of shares to a third party. However, because the transfer of shares is a mechanism through which takeovers, mergers and acquisitions are achieved, it seems logical that the intent of the provision is to cover share transfers where these consequences arise. This position is arguably supported by the fact that the transfer of shares is not expressly excluded from Regulation 72(1)(d)(ii) of the 2015 Regulations, as if it was the case that share transfers were to be excluded this should have been made clear given the importance of that mechanism in achieving takeovers, mergers and acquisitions.

Relevance of UK company law

Whilst Regulation 72(1)(d)(ii) of the 2015 Regulations provides clarification of the legal position, the wording “universal or partial succession” of the contractor arguably introduces ambiguity.

Where shares are transferred, the counterparty to the contract does not change (albeit that its shareholders have changed). As a matter of UK company law, the incorporated company stands as a legal entity and it is not appropriate to "look behind the corporate veil" to the identity of the

[476] AG Opinion, *Pressetext*, fn 298, paras 69-70;

shareholders.[477] It is not apparent, therefore, that there has been a "universal or partial succession into the position of the contractor" as the legal entity which is the contractor has not changed and it is not relevant from a UK company law perspective to look at the composition of the shareholders.

Given this, it is not apparent that a transfer of shares, irrespective of Regulation 72(1)(d)(ii) of the 2015 Regulations, is a material amendment which would necessitate a new procurement process because there is no change in the corporate identity of the contractor. Nonetheless, Regulation 72(1)(d)(ii) make clearer the circumstances in which a new procurement process is not required and appear helpful from this perspective.

Impact on EU's objectives

In terms of the objectives of EU law set out in chapter 2, the transfer of shares has no adverse impact on the establishment of a single market and removal of barriers to trade or the promotion of competition. Contractors are unlikely to be dissuaded from bidding from contracts in other member states, or domestically where shares in a contractor can be transferred to new shareholders.

The objectives of the establishment of the single market and removal of barriers to trade and the promotion of competition is arguably promoted by the clarification in Regulation 72(1)(d)(ii) of the 2015 Regulations setting out the circumstances whereby a change of control was acceptable from a public procurement law perspective. This is because contractors may be encouraged to bid for contracts both within their member state and in other member states where they have the certainty they can transfer those contracts to promote their corporate objectives.

[477] *Salomon v Salomon & Co* [1897] AC 22 HL;

As explained above, it is submitted that the contractor remains the same on a transfer of shares. If there is no change in contractor there is no prejudice to transparency as the results of the original procurement will remain unchanged.

Impact on contracting authority's objectives

The contracting authority's objective of value for money and competition is unlikely to be prejudiced on the disposal of shares to a third party as, as commented above, the contractor remains unchanged and therefore there is no change to the terms of the original procurement.

Furthermore, there does not appear to be a negative impact on procurement efficiency as the contractor has not changed. However, if it was the case that a transfer of shares to a third party was an adjustment to which *Pressetext* should be applied this may lead to a requirement to retender contracts and this would take time and resources which would prejudice the objective of procurement efficiency.

For the reasons described above in the case of the EU, the contracting authority's objective of transparency is unlikely to be prejudiced as the original procurement process is unchanged. There is also unlikely to be an issue with equal treatment as the contractor does not receive preferential treatment.

It is possible that transfer of share ownership may compromise preventing corruption shares are being transferred to a company which has issues in this regard. However, this issue arises out of the identity of the new owner, rather than being caused directly by the change in control. Therefore it is arguable that allowing transfer of shares to a third party does not of itself compromise the objective of prevention of corruption.

4.3.3 Adjustments consequent to a change of control

Where there has been a change of control, the new owners of the contractor may seek to "re-brand" the contractor, or to propose adjustments to the contract terms. This may be done where it is deemed desirable to integrate the acquired company and its associated contracts into the new owner's business. It may also be required where the new owner wants to change the service provision, or risk allocation in respect of matters such as insurance levels, indemnities or guarantees.

Regulation 72(1)(d)(ii) of the 2015 Regulations applies provided that the succession of the position of the contractor does not entail substantial modifications (as defined in Regulation 72(8) of the 2015 Regulations). It is submitted therefore that, unless it has been possible to draft a review clause setting out the details of the change in control and required adjustments such that the criteria set out in section 3.2.4 are met (in which case Regulation 72(1)(d)(i) would permit the adjustment), the Substantial Modification Test should be applied to assess whether the adjustment is permissible where an adjustment is required.

4.3.4 Change in group resources

Introduction

Following a change of control the position should be considered as to whether the new owner and the new corporate structure are equivalent to that of the original owner and structure. The reasons for this are discussed in this section.

Upon a change of control, contracting authorities may consider the status of the new owner, including assessing the ongoing financial viability of the new corporate structure and undertaking due diligence to check there are no issues (for example reputational) in respect of the new owner. The results of

such investigations may influence whether or not the contracting authority consents to the change in ownership.

Whether a contracting authority can withhold consent to a change in control may be set out in the relevant contract. The contracting authority may be in breach of contract where it withholds consent to the change of law or seeks to terminate the contact other than in accordance with the contract.

Issues arising: application of Pressetext

Where a contractor had previously relied on group resources to perform the contract[478] but as a result of the change of control these are no longer available this may present an issue from a procurement law perspective. The group expertise may have been relied on at pre-qualification stage to qualify the contractor, and then later in the procurement and during contract performance by the contractor.

Where group resources were relied upon by the contractor at pre-qualification stage, the pre-qualification criteria should be applied to the new structure to establish whether the contractor is still qualified. If the contractor is qualified it is submitted that this is sufficient, as there has been no change in the qualifications of the contractor and therefore there is no adjustment to assess. This position is reflected in Regulation 72(1)(d)(ii) of the 2015 Regulations which requires that the new contractor must meet the qualitative selection criteria already established.

However, it may be the case that the contractor was shortlisted because it got a higher pre-qualification score than other otherwise qualified bidders, and proceeded in the competition where those other bidders did not. The "Introduction of Conditions Limb" set out at section 2.6.2 states that an amendment may be regarded material where it introduces conditions which,

[478] Regulation 24(4) of the 2006 Regulations and Regulation 63 of the 2015 Regulations provide that a contractor can rely on group resources at pre-qualification stage;

had they been part of the original award procedure, would have allowed for the admission of bidders other than those initially accepted.[479] This scenario falls within this where re-shortlisting would lead to the admission of bidders other than the contractor. Therefore the adjustment may be problematic from a procurement law perspective.

However, Regulation 72(1)(d)(ii) of the 2015 Regulations does not appear to extend to require this. This requires the qualitative criteria to be met, suggesting that if the new contractor is able to meet any pre-qualification minimum requirements and is not subject to mandatory or discretionary exclusion, that Regulation 72(1)(d)(ii) can be relied upon. However, this is not made explicit, and it is arguable that the requirement implies that the new contractor must be as good as the original contractor. This indicates ambiguity in the content of the law in this regard.

Group resources may also be relied on in the contractor's pre-qualification questionnaire and bid response and subsequently during contact performance. Where these group resources are no longer available it appears that the "Introduction of Conditions Limb" should be applied to assess whether conditions are introduced which would have allowed for the success of another bidder. Where this is the case this may constitute a material amendment.

Where the contractor has not previously been relying on group resources to perform the contract it is submitted that there is no need for the contracting authority to consider further the resources of the new group structure. As the group resources are not relevant to the contract's performance, the above analysis does not apply.

[479] *Pressetext*, fn 4, para 35;

Impact on EU objectives

An adjustment which falls within the "Introduction of Conditions Limb" following a change of control may frustrate the EU's objective of the establishment of a single market and the removal of barriers to trade where the contracting authority has favoured a domestic contractor, for example by allowing them to continue to deliver the contract in circumstances where another contractor would now be better able to do so.

The EU objective of competition may also be frustrated where the contracting authority accepts diminished contract performance following a change of control. The results of the original competition are thereby arguably rendered irrelevant and bidders may be deterred from participating in future procurements as they may feel the process is unfair and not worth participating in.

Transparency may also be compromised as the contracting authority set out in the procurement documents the requirements that the contractor must meet, and where these requirements have no longer been met transparency has not been achieved.

Impact on contracting authority's objectives

There are potential impacts on the achievement of a contracting authority's public procurement objectives in circumstances where the "Introduction of New Conditions" Limb is triggered following a change of control. Competition and value for money may be adversely affected where the contractor is no longer the most suitable to perform the contract. There may be implications on the future achievement of value for money and competition as contractors may be deterred from bidding for contracts where they think that the contracting authority can unfairly adjust the contract during its term.

Procurement efficiency may be compromised where the adjustment results in the contractor not being properly resourced to perform the contract, causing the contracting authority delay and costs in attempting to resolve issues. However, procurement efficiency is also likely to be compromised where the law requires a contracting authority to run a new tender in circumstances where the change of control triggers a material amendment within the "Introduction of Conditions Limb" as this requires time and resources that may otherwise be allocated elsewhere.

The objective of equal treatment may be negatively affected as the contractor has been treated differently to the other bidders. Bidders may be dissuaded from competing in future competitions where they do not feel the contracting authority is treating bidders equally. There may also be (or be perceived to be) an opportunity for the contracting authority to act in a corrupt manner in view of the fact that the contractor has been treated in a manner different to that in which the other bidders have been treated, and this may call the integrity of the contracting authority into question. Transparency is arguably compromised on change of control where this adjustment is not provided for in the procurement documents or bid responses.

However, contracting authorities can point to Regulation 72(1)(d)(ii) of the 2015 Regulations to legitimise their acceptance of a change of control which may alleviate concerns that may otherwise exist where its acceptability was not understood to be part of existing law.

4.4 Assignment and novation

4.4.1 Introduction

Novation is the method by which both benefits and obligations under a contract are transferred from one party to a third party. Technically this operates as extinguishing the original contract and creating a new contract

from the point in time that the contract is novated.[480] A novation needs to be executed by the original contractor, the contracting authority, and the new contractor (i.e. all parties to both the original contract and the "new" contract).

Assignment[481] is the process by which a party to the contract, the assignor, transfers the benefit of that contract to a third party, the assignee. From that point, the assignee takes the benefit of that contract (for example contract payment) and the assignor is no longer entitled to the assigned benefits.

Novation and assignment be categorised as operations of law as whilst the parties to the assignment or novation, as the case may be, have discretion as to whether to execute the assignment or novation, once executed it comes into effect as an operation of law. As explained above, the contracting authority is not required to be party to an assignment so the contractor could assign the benefit of the contract without the knowledge or consent of the contracting authority.

Pressetext found that the substitution of a new contractual partner for the one which was originally awarded the contract constituted a material change, unless provided for in the terms of the initial contract.[482] In the case of novation and assignment as explained in sections 4.4.2 and 4.4.3 below respectively, there appears to be an entire or partial substitution of the contractor and therefore it is relevant to consider these adjustments from a procurement law perspective.

Section 4.4.4 considers the relevance of review clauses in the context of assignment or novation. Section 4.4.5 then examines the concept of "corporate restructuring" as provided for in Regulation 72(1)(d)(ii) of the

[480] Beale H. G. (General Editor), *Chitty on Contract Law: Volume 1 General Principles: Thirty First Edition*, Sweet & Maxwell, London, 2012, p. 1516; also Trietel, G. H., *The Law of Contract: 11th Edition*, Sweet & Maxwell, London, 2005, p. 673;
[481] For background information on assignment, see *Chitty* (2012), fn 480, pp. 1475-1518; also Trietel, (2005), fn 477, p. 672;
[482] *Pressetext*, fn 4;

2015 Regulations. The potential impact on the procurement objectives of each of the EU and the contracting authority of assignment and novation are considered in the final section.

4.4.2 Novation

Novation operates to transfer the relevant contract from the contractor to a third party. *Pressetext* found that the substitution of the contractor was a change to an essential term of the contract, unless provided for in the terms of the contract,[483] or where it constitutes an internal reorganisation which does not modify in any fundamental manner the initial contract.[484]

An adjustment is not a modification which requires a new procurement process when it is made pursuant to a review clause which meets the criteria set out in chapter 3 section 3.2.4 (which, it will be recalled, discusses the implications of Regulation 72(1)(a) of the 2015 Regulations). This point is affirmed in Regulation 72(1)(d)(i) of the 2015 Regulations which provides that the replacement of a contractor will not require a new procurement procedure when provided for in a review clause which complies with Regulation 72(1)(a). Regulation 72(1)(d)(ii) provides that the universal or partial succession in the position of a contractor following corporate restructuring does not constitute a modification for which a new procurement process is required, where the criteria set out in that provision (as set out in chapter 2 section 2.4.1) are met.

It will therefore be necessary to review the contract to confirm whether it contains a review clause dealing with novation which meets those criteria set out in section 3.2.4. In the alternative, analysis should be undertaken to establish whether the adjustment constitutes a corporate restructuring permissible by Regulation 72(1)(d)(ii) of the 2015 Regulations. Review

[483] *Pressetext*, fn 4, para 40;
[484] *Ibid.*, para 45;

clauses are considered at section 4.4.4 below and corporate restructuring is considered at section 4.4.5.

In the absence of a review clause, and where Regulation 72(1)(d)(ii) of the 2015 Regulations is not applicable, the substitution appears to be a substantial modification within in Regulation 72(8)(e) of the 2015 Regulations and therefore requires a new procurement process.

4.4.3 Assignment

It is submitted that the assignment of a contract is generally permissible as it is only the benefit of the contract which is assigned.

As described above, the main benefit under a contract is payment. If a contracting authority is paying a third party but the original contractor is otherwise performing the contract on its original terms, other than minor administrative adjustments (such as changing bank account details), there is no substantial modification to the original contract and therefore no requirement to run a new procurement process.

There may, however, be circumstances where the assignment is broader than an entitlement to payment. This might arise, for example, in the case of a concession contract where the benefit of the contract includes the right to exploit the services to derive third party income, and therefore this benefit is potentially assignable.

Where a material portion of the contract is assigned this may, depending on the facts of the matter, constitute a substitution of a contractual partner. Where services are performed by someone other than the original contractor it is arguable that the steps set out in section 4.4.2 above should be undertaken to ascertain whether there is a review clause which meets the criteria in chapter 3 section 3.2.4 or whether the adjustment is a corporate restructuring permitted by Regulation 72(1)(d)(ii) of the 2015 Regulations.

4.4.4 "Review" clauses

Contracts may contain provisions restricting the ability of either the contractor or the contracting authority to transfer the contract, either through assignment or novation.[485] In the case of clauses which restrict the contractor, these typically prohibit the assignment or novation of the contract other than with the prior consent of the contracting authority (and the consent of the funders will also be relevant in the case of a PFI project).[486]

The finding in *Pressetext* set out in section 4.4.1 above suggest that the substitution of the contractor will be acceptable where this is provided for in a contractual term permitting sub-contracting. Regulation 72(1)(a) of the 2015 Regulations applies in principle to the replacement of the contractor, as evidenced by Regulation 72(1)(d)(i). This implies assignment or novation in accordance with a review clause may not be a material amendment.

It is, however, arguable that *Pressetext* should be construed narrowly. It has already been seen that the substitution of a sub-contractor even where provided for in the contract can constitute a material amendment.[487] It is possible therefore that substitution of the contractor through novation or assignment is not necessarily permitted by virtue of the existence of the statement in *Pressetext*.

A narrow construction of *Pressetext* finds support in the Advocate General's opinion in that case.[488] This set out the general rule that a change in contractor indicates a material amendment, but that some changes "exceptionally" do not amount to a material amendment, commenting on

[485] For example, SOPC4, fn 72, pp. 121-123;
[486] *Ibid.*;
[487] See discussion of *Wall* in chapter 3 section 3.4.6;
[488] AG Opinion, *Pressetext*, fn 298;

the examples of sub contracting and organisational changes of a purely internal nature.[489]

The focus on these types of adjustment in *Pressetext* is because they are relevant to the facts of that matter. Whilst this may suggest that the categories of substitution are not closed, the use of "exceptionally" contradicts an overly wide interpretation of the permissibility of assignment or novation even where provided for in the terms of the contract.

It is arguable that the content of the contractual clause dealing with the assignment or novation is relevant to determining whether it constitutes a review clause which is capable of providing protection against a challenge that a material amendment has been made.

As submitted in chapter 3 section 3.2.4, a review clause should meet certain criteria in order to avoid the requirement to run a new procurement process.[490] Where a contractual clause simply prohibits assignment or novation without the contracting authority's consent, it is submitted that this does not meet the requirements set out in section 3.2.4. It will therefore be necessary to consider whether the adjustment is a corporate restructuring permissible by Regulation 72(1)(d)(ii) of the 2015 Regulations, and (if not) whether the modification constitutes a substantial modification as set out in Regulation 72(8).

Where the review clause sets out detail in respect of the proposed adjustment, including the identity of the relevant third party, the timing of the adjustment and any other relevant terms, it may be possible for the review clause to meet the criteria set out in section 3.2.4. However, given the above analysis in respect of *Pressetext*, and the lack of reference to Regulation 72(1)(a) of the 2015 Regulations in Regulation 72(8) there is

[489]AG Opinion, *Pressetext*, fn 298, paras 55-58;
[490] Regulation 72(1)(d)(i) of the 2015 Regulations provides that a replacement of contractor will not require a new procurement process where it is done pursuant to a review clause which conforms with Regulation 72(1)(a);

arguably ambiguity as to the extent to which a review clause is capable of providing protection where there is a transfer of a contract by a third party.

4.4.5 Corporate restructuring

Current legal position

Pressetext indicates that an "internal reorganisation of the contractual partner which does not modify in any fundamental manner the terms of the contract" will not constitute a material amendment.[491] However, the judgment provided a number of reasons as to why the facts of *Pressetext* did not constitute a material amendment.[492] This included the fact that the new contractor was a limited liability company, the sole shareholder in which was the original contractor, the original contractor controlled the new contractor and gave it instructions, and that the original contractor continued to be responsible for compliance with the contract.[493]

It is not clear whether some or all of these components need to be present for an adjustment comprising the assignment or a novation of a contract to a related company to amount to an internal reorganisation. Ambiguity has therefore been introduced in relation to what nature of relationship between the original and new contractor is permissible as constituting an "internal reorganisation".

Brown comments that the emphasis in *Pressetext* placed on the point that the new contractor was wholly owned and closely controlled by the original contractor appears to bring it in line with the first condition of the *Teckal* control test.[494] He submits that the *Teckal* test is not suitable for assessing

[491] *Pressetext*, fn 4, paras 39-54;
[492] *Ibid.*, para 54;
[493] *Ibid.*;
[494] Brown, A., "When do changes to an existing public contract amount to the award of a new contract for the purposes of the EU procurement rules? Guidance at last in case C-454/06", *Public Procurement Law Review*, 2008, 6, NA261; Case C-107/98, *Teckal Srl v Comune di Viano and Azienda Gas Acqua Consorziale (AGAC) di Reggio Emilia*, para 49-51, which provides that the procurement directives do not apply where a contracting authority concludes

whether a transfer is an internal one permitted by *Pressetext*, as the aims of the procurement rules were met by the contracting authority in the conducting of the originally compliant selection of the contractor.[495]

The "internal reorganisation" test has now been dealt with by Regulation 72(1)(d)(ii) of the 2015 Regulations which uses the term "corporate restructuring". Corporate restructuring is stated to include takeover, merger, acquisition or insolvency. There is no reference to this restructuring needing to be internal, and it should be assumed therefore that the internal reorganisation test is irrelevant to the application of Regulation 72(1)(d)(ii). It is submitted that Regulation 72(1)(d)(ii) of the 2015 Regulations reflects the current legal position and that the internal reorganization test therefore is no longer currently applicable law.

Objectives of the EU

If it were the case that a contracting authority could transfer a public contract without restriction it seems likely that a number of the EU's objectives in respect of public procurement would be frustrated.

The objective of the establishment of a single market and the removal of barriers to trade may be impeded as contracting authorities may, in the absence of rules to the contrary, treat domestic contractors differently to foreign contractors (for example providing greater flexibility where it is proposed that the contract is assigned or novated to a domestic contractor). There may also be a risk to competition if a contracting authority behaved in this manner.

The objective of transparency is arguably compromised where a public contract can be assigned or novated without restriction, in particular where

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a contract with an entity that is legally distinct from it but where the contracting authority exercises control over that entity similar to that exercised over its own departments and, at the same time, the entity carries out the essential part of its activities together with the controlling contracting authority;

[495] Brown, (2008), fn 494, NA261;

the new contractor requires adjustments to other terms of the contract or where the new contractor is not properly qualified or is in some other respect not able to perform the contract in the same manner as the original contractor. In these circumstances the transparency of the original procedure is not maintained.

It is difficult to see how the above procurement objectives of the EU will be compromised where there is a review clause which meets the requirements set out in section 3.2.4 allowing for assignment or novation. This is because the contractor would have been procured on the basis that the adjustment would take place in accordance with that review clause.

In the case of an adjustment permitted by Regulation 72(1)(d)(ii) it is again difficult to see how the EU's procurement objectives are compromised. This is because the substitution of the contractor takes place independently from the contracting authority, as a result of the corporate decision making of the contractor or others in the market. There is therefore no opportunity for the contracting authority to act in a non-transparent manner. The objectives of the establishment of the single market and removal of barriers to trade and of competition are arguably supported where the market has freedom to operate.

Objectives of the contracting authority

Competition and value for money may be negatively impacted where public contracts are assigned or novated without restriction, as contractors may be dissuaded from bidding where they feel the integrity of the original competition is not preserved post award. However, this objective may be frustrated if overly onerous restrictions are placed on the ability of the contractor to transfer contracts as this may deter them from bidding from public contracts. This is because the contractor may be concerned that the lack of flexibility may impede its future corporate objectives and may bid instead for contracts that are not subject to these restrictions.

Procurement efficiency may be compromised where the relevant contract is assigned or novated to a new contractor who is less able to perform the contract than the original contractor. If this happens, the contracting authority may have to spend time and resources managing issues which arise as a consequence of this. However, it may be the case that the contracting authority would prefer to manage these issues rather than re-procure the relevant contract, which would also require the contracting authority time and resources, compromising efficiency.

The objective of equal treatment may be undermined where a contract is assigned or novated as the original contractor has been treated in a manner that is different from the way in which other bidders were treated – as it has been permitted to transfer the contract rather than perform it itself. The new contractor has received the advantage of performing a public contract without having to compete for it, therefore being treated unequally to other contractors.

If transfers without restrictions were permitted then there may be opportunity for a contracting authority to act in a corrupt way - for example awarding the contract and then allowing it to be novated to a new contractor who had convictions for corruption or engaging in other corrupt practices. However, this is arguably an issue with the new contractor, rather than it being inherent in all assignments or novations.

Finally, the objective of transparency is frustrated as the contract is not being performed on the basis upon which it was procured.

However, for the reasons explained above in the context of the EU's objectives, it is arguable that the prejudice to these objectives is removed in circumstances where the adjustment is provided for in a review clause which complies with section 3.2.4, or where the adjustment is in accordance with Regulation 72(1)(d)(ii).

4.5 Change in law

4.5.1 Introduction

Typically public contracts contain terms requiring the contractor to perform the contract in accordance with the law.[496] In addition, contractors will generally have to comply with the law in the performance of the contract to ensure that they do not contravene the law and incur liability on their own account.[497] Where the applicable law changes over the duration of the contract, the contractor will have to modify its performance of the contract to comply with the new law.[498] This may cause the contractor to incur capital or ongoing expenses.

For the purposes of this study, change in law is a separate concept to force majeure which is considered at section 4.6 below. A force majeure event operates to frustrate or impede the parties' performance of the contract. An event will not be a force majeure event if and to the extent that the parties can take steps to mitigate or stop the occurrence of the event. Therefore implementing a change in law clause to adjust performance of the contract to comply with the law and apportion costs arising does not constitute a force majeure event.

4.5.2 Adjustments to the performance of the contract

Relevance of review clauses

As explained above, public contracts may include a term requiring the contractor to perform the contract in accordance with applicable law, including continuing to perform the services in accordance with any revised legal requirements.

[496] For example, Partnerships for Schools Building Schools for the Future, PFI Project Agreement, December 2007, p. 107, clause 22;
[497] For example, law relating to health and safety, and employment law;
[498] Poulsen, (2012), fn 4, p. 167, where it is pointed out that with longer term contracts there can be a need for amendments due to changes in the law;

However, where the content of the change of law and the steps required by the contractor to ensure compliance will not be known when the contract was entered into, it will not be possible to draft a review clause to meet the criteria set out in chapter 3 section 3.2.4.

Where a change in law is anticipated, it may be possible to draft a review clause that it meets the criteria set out in section 3.2.4. An adjustment made in accordance with such a clause will not require a new procurement process.

Application of Pressetext

Despite the difficulties of drafting a review clause in respect of an unforeseen change in accordance with chapter 3 section 3.2.4, it is submitted that generally a change in law should not require a new procurement procedure.

This is because compliance with applicable law in the provision of the services would apply to all contractors equally and as such a contract adjustment would be required to deal with the change in law regardless of the identity of the contractor.

The fact that the change affects all contractors equally is relevant to whether or not there has been a material amendment within the Substantial Modification Test. The "Introduction of Conditions Limb" set out in section 2.6.2 provides that an amendment to a contract during its term may be regarded as being material where it introduces conditions which, had they been part of the original award procedure, would have allowed for the admission or acceptance of tenders other than those initially included or accepted.

Where other contractors would have had to respond to the change in law in the same way as the contractor awarded the contract, the change of law adjustment would not change the outcome of the competition. It is arguable

that there would be no infringement of the principle of equal treatment and non-discrimination, as the adjustment would apply to all contractors equally and does not favour one over the other.

Relevance of unforeseen external circumstances

It has been argued that where the requirement for an adjustment arises as a consequence of external circumstances, this indicates the adjustment is not a material amendment.[499] The analysis in *Pressetext* as to whether the change in the currency of payment was a material amendment suggests that external circumstances are relevant to this assessment as here the adjustment was permissible and was to accommodate "changed external circumstances".[500]

However, the CJEU added the proviso that the amounts in question were calculated in accordance with the provisions in force.[501] In *Pressetext* therefore, the requirement for the adjustment was due to external circumstances and, in addition, the adjustment was made with reference to an external mechanism - in this case regulations relating to the introduction of the euro.[502]

Accordingly, it is submitted that where both the fact of and the content of the change of law and the contractual adjustment required can be verified with reference to an external event, this should be decisive in confirming that a new procurement process is not required. In these circumstances, as explained further below, it is difficult to see how the objectives of the EU in respect of procurement law would be prejudiced.

Where the event itself is external but there is no external mechanism to determine the adjustment negotiations will be necessary between the contractor and the contracting authority to confirm those details that cannot

[499] Hartlev and Liljenbol, (2013) fn 4, p. 57;
[500] *Pressetext*, fn 4, para 57;
[501] *Ibid.*;
[502] Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1);

be dealt with by reference to an external mechanism. Where negotiations are required the achievement of EU procurement law objectives, and indeed some of the contracting authority's objectives, may be frustrated as explained further below.

It has been commented that an adjustment required as a result of an external event, can be distinguished from a situation where the contracting authority has changed its mind about its requirements or has not drawn them up with sufficient foresight.[503]

The distinction can be made as where there is an external event the event the scope for the contracting authority to act in a manner which prejudices the achievement of the EU's procurement objectives may be limited. This is because the motivation for the adjustment is to react to the external event, rather than the adjustment arising from the relationship between the contractor and the contracting authority.

The relevance of an external event to the permissibility of an adjustment is dealt with in Regulation 72(1)(c) of the 2015 Regulations which provides that a modification without a new procurement procedure may be made where the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen where the modification does not alter the overall nature of the contract and any increase in price does not exceed 50% of the original contract value.

This provision clarifies that in certain circumstances adjustments pursuant to a change in law do not require a new procurement process. However, Regulation 72(1)(c) only appears to cover unforeseen changes in law, and therefore where a change in law is expected contracting authorities would instead be advised to rely on Regulation 72(1)(a) of the 2015 Regulations to include a review clause dealing with the required adjustment.

[503] Poulsen, (2012), fn 4, p. 173;

Furthermore, the requirement for the modification not to alter the overall nature of the contract may be unhelpful as it may be difficult in practice to define what constitutes a change to the overall nature of a contract. Similarly, the inclusion of the value threshold may be unhelpful where it is difficult to quantify the value of the adjustment.

Where an adjustment pursuant to a change in law requires a new procurement process then this may leave the contracting authority in a difficult position as it will be necessary to adjust the contract to comply with the law, but this may not be permissible without this contravening the applicable law on contract adjustments.

Impact on EU's objectives

It is not clear that there are any adverse impacts on the achievement of EU objectives in allowing an adjustment in response to a change in law in accordance with an external mechanism. In these circumstances the position of all the bidders would be the same and as such the contracting authority could not behave in a manner which would compromise the EU's procurement objectives.

In the absence of an external mechanism there may be prejudice to the EU's procurement objectives. The objective of the establishment of the single market and the removal of barriers to trade may be prejudiced where the contracting authority addresses the adjustment in a manner which favours a domestic contractor. This behaviour would also adversely affect the objective of competition. Transparency is at risk where the contracting authority does not make the adjustment with reference to an external mechanism as it may not be clear on what basis the adjustment was made.

Impact on contracting authority objectives

In circumstances where the change in law adjustment is determined in accordance with an external mechanism whereby all bidders would be in the same position, it is not apparent that there would be any adverse impact on the contracting authority's procurement objectives.

Where the adjustment cannot be determined in accordance with an external mechanism, in particular where the adjustment needs to take into account the disproportionate impact of the external event on that contractor, there may be detriment to the objective of equal treatment, as bidders will not be treated equally. The objective of preventing corruption may be prejudiced where there is an adjustment without reference to an external mechanism. This could be the case where the contracting authority takes the opportunity to engage in corrupt practices or where this is perceived by others to be the case.

Furthermore, the objective of value for money and competition may be affected where the adjustment requires the contracting authority to pay additional sums where other contractors may not have required this. Bidders may become disillusioned with public contracts where contracts are adjusted to favour the incumbent contractor and may not bid for them, thus adversely affecting competition and therefore value for money.

In the absence of an external mechanism governing the adjustment, the objective of transparency is at risk as it will be harder to demonstrate the process by which the adjustment was made.

The adjustment following a change in law will require resources within the contracting authority to amend the contract, which has an adverse impact on procurement efficiency. However, the contracting authority may believe adjusting the contract is more efficient then reprocuring it, indicating that

procurement efficiency may in these circumstances be supported by the making of the adjustment.

4.5.3 Allocation of financial risk

Contractual clauses can be included in contracts to apportion financial risk incurred in complying with a change in law.[504] The "Economic Balance Limb" described in chapter 2 section 2.6.2 provides that an adjustment may be regarded as material where it changes the economic balance in favour of the contractor in a way which was not provided for in the original contract.

It is submitted that the allocation of financial risk following an adjustment pursuant to a change in law should be dealt with in a review clause which sets out the parties' respective responsibilities for the cost of the change in law, where possible satisfying the criteria set out in chapter 3 section 3.2.4. This may not, however, be possible given that the particulars of complying with the change in law will not have been known at the outset.

However, where the costs are allocated in such a manner so as not to change the economic balance in favour of the contractor there does not appear to be a material amendment within the "Economic Balance Limb". Furthermore, where principles of cost allocation are set out in a review clause it appears unlikely that there would be a material amendment within the Substantial Modification Test.

4.6 Force majeure

4.6.1 Introduction

Unforeseen events which occur during the term of a contract may result in a contract being discharged through the operation of the doctrine of

[504] For example, SOPC4, fn 72, pp. 99-107; Partnerships for Schools Building Schools for the Future, PFI Project Agreement, December 2007, pp. 190-192, clause 59 and Schedule 3;

frustration.[505] Frustration is where something occurs after the formation of a contract, which makes it physically or commercially impossible to perform the contract or transforms the requirement to perform into something radically different from that entered into.[506] Where a contract is discharged in this manner it will terminate automatically.[507]

To avoid the uncertainty of a contract terminating as a result of frustration,[508] the parties may include a contractual force majeure clause.[509] These define the force majeure event and then set out the process to be followed by the contractor and the contracting authority in the event of occurrence.[510] Force majeure events are typically defined as being occurrences that are beyond the reasonable control of the parties.[511]

Therefore, whilst the doctrine of frustration is technically an operation of law, the concept of force majeure is wider than the doctrine of frustration. It is also the case that contracting authorities and contractors can draft the circumstances which constitute a force majeure clause and the parties' response to it. Therefore force majeure appears to constitute a risk allocation mechanism in a commercial contracts.

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[505] Under the doctrine of frustration a contract may be discharged if an event occurs making performance impossible or illegal, Trietel, (2005), fn 477, p. 866;
[506] *Chitty*, (2012), fn 480, p. 1635;
[507] *Hirji Mulji v Cheong Yu SS Co* [1936] AC 497; McKendrick, E., *Contract Law: Fifth Edition*, Macmillan, 2003, p. 312;
[508] The doctrine of frustration can cause uncertainty as it may be hard to tell whether the impact of the supervening event is sufficiently serious to discharge the contract, Trietel, (2005), fn 480, p. 900;
[509] It should be noted that in the absence of an express provision, the Court is not empowered to modify contracts in light of the supervening event, Trietel, (2005), fn 480, p. 869;
[510] For further information see Stannard, J., *Delay in the Performance of Contractual Obligations*, Oxford University Press, Oxford, 2007, pp. 130-133;
[511] For example, Partnerships for Schools Building Schools for the Future, PFI Project Agreement, December 2007, pg 7, clause 1.1 provides: "Force Majeure Event" the occurrence after the date of this Agreement of (a) war, civil war, armed conflict or terrorism; (b) nuclear, chemical, or biological contamination unless the source or cause of the contamination is as a result of any act by the Contractor or its sub contractors or any breach by the Contractor of the terms of this Agreement; or (c) pressure waves caused by devices travelling at supersonic speeds, which directly causes either Party (the "Affected Party") to be unable to comply with all or a material part of its obligations under the Agreement;

However, for the purposes of this study, a force majeure clause is considered as an operation of law. This is because the events comprising a force majeure will be beyond the control of the parties, and the response to it will be dictated by the event itself. Force majeure clauses are not able to precisely define the parties' response to the event as this will necessarily depend on what the event is, when it occurs, and the impact of this on the parties' delivery of the contract.

When a force majeure event occurs contract performance may need to be adjusted to accommodate the changed circumstances. A force majeure clause in a contract may set out a process by which the affected party notifies the other of the occurrence of the event, and the clause may then go on to relieve the affected party of its contractual obligations and to require the parties to agree appropriate terms to mitigate the effect of the force majeure event. If a force majeure event continues for a defined period of time, the parties may be able to terminate the contract.

It should, however, be clarified that the force majeure event in itself is not a contract adjustment. The occurrence of, for example, a terrorist attack or extreme weather is not of itself as a contract adjustment. The adjustment is the cessation or interruption of the performance of the contract or the modification of contractual terms which occurs as a response to the force majeure event.

4.6.2 Analysis

Relevance of review clauses

Whilst, as explained above, contractual clauses may be included in public contracts, these typically provide a definition of force majeure event and set out a process by which the parties agree the steps to be taken upon occurrence of a force majeure event. Because of the unforeseen nature of

the force majeure event it will not be possible to draft the review clause to meet the criteria set out in chapter 3 section 3.2.4.

Relevance of unforeseen external circumstances

The analysis set out in section 4.5.2 above on the relevance of unforeseen external circumstances in the context of change in law clauses applies equally to force majeure.

It has been argued that adjustments made as a consequence of a force majeure event should not constitute a material amendment in circumstances where there is no discrimination between bidders.[512] Furthermore, in a situation where the consequences of a force majeure event would have applied equally to all contractors it is not clear that there is any unequal treatment of bidders.

However, whilst the occurrence of the force majeure event is an external event, the adjustments made in response to it are not necessarily capable of being defined with reference to an external mechanism. The contracting authority may be able to take a range of steps to adjust the contract as a consequence of the force majeure event. Therefore the fact that the requirement for the adjustment has arisen from a force majeure event should not mean that procurement law should not apply, and therefore the Substantial Modification Test should arguably be applied to the relevant adjustments.

In some circumstances, it may be the case that the contract is adjusted for a temporary period, and that the original terms of the contract are resumed when the force majeure event ends. In these circumstances it is arguable there is a temporary re-negotiation of contract terms and that therefore the detriment to the objectives of the procurement system described below is more limited.

[512] Auricchio, (1998), fn 4, p. 115;

The temporary nature of a force majeure event is relevant to assessing whether there is a material amendment within the Substantial Modification Test, as the materiality may be reduced when the event is of a temporary nature. However, from a practical perspective it may be difficult to ascertain the time for which the force majeure event will subsist at the point in time it arises.

Impact on EU objectives

The procurement objectives of the EU may be frustrated where an adjustment is made to a public contract as a consequence of a force majeure event. Although the event is beyond the control of the parties and may have affected all bidders equally, the response to the force majeure event is likely to be negotiated between the parties as the unforeseen nature of the event means it is impossible to provide for it in advance.

The objective of the establishment of the single market and removal of barriers to trade may be undermined where a domestic contractor receives preferential treatment as a consequence of adjustments made following a force majeure event. Competition may be undermined in these circumstances as bidders may become disillusioned and may fail to bid for public contracts. Transparency will be undermined where the basis for the adjustment is not clear.

However, the objectives of the establishment of the single market and removal of barriers to trade and of competition may be prejudiced where procurement law prohibits an adjustment being made following an event of force majeure or is overly restrictive. This is because bidders may be uncomfortable with the uncertainty that they may perceive arising if a force majeure event occurs, and may feel that the chance of the contract being terminated in these circumstances puts them at great risk. They may therefore decide not to bid for these contracts.

Objectives of the contracting authority

The objectives of value for money and competition may be undermined where upon occurrence of a force majeure event, the contractor negotiates a position which is more favourable to it than that applicable before the force majeure event. Here procurement efficiency is also at risk as the contracting authority may not be using its resources in the best way.

However, value for money and procurement efficiency may be compromised where it is not possible to adjust a contract following a force majeure event. If the parties are unable to perform the contract on the terms upon which it was awarded, the alternative to adjusting the contract would be to terminate it and to re-procure the services if they were still required. Costs and delay are likely to be incurred as a result of this.

It is also not certain that re-procuring the contract would deliver better value for money, particularly where other contractors would respond to the force majeure event in the same way, so would require this position to be reflected in their contract. Furthermore, bidders may be discouraged from bidding for public contracts where adjustments cannot be made following an event of force majeure as a result of the commercial uncertainty this creates.

Equal treatment may be prejudiced where the contracting authority and the contractor negotiate an adjustment following a force majeure event. The contractor is not being treated in an equal manner to other contractors, who have not had an opportunity to offer a bid which reflects the revised position following the force majeure event. The objective of prevention of corruption may be prejudiced where there is an adjustment following a force majeure event as there may be scope for corrupt activities to take place where, for example, the contracting authority improperly favours the contractor when making the relevant adjustment.

Finally, transparency will be prejudiced in circumstances where the basis upon which the adjustment was made is not clear to contractors.

4.7 Conclusion

As has been explained in this chapter, there may be valid reasons for permitting an adjustment upon occurrence of an operation of law. In particular, in the case of an insolvency event there are policy reasons related to corporate rescue and financial stability that indicate adjustments in such circumstances should be permitted. This chapter has also argued that in a number of instances it is unclear that an adjustment upon occurrence of an operation of law frustrates the EU's objectives in public procurement. Similarly, in many cases the objectives of the contracting authority do not appear to be frustrated, and there are instances where permitting the adjustment facilitates the achievement of the contracting authority's objectives.

It is arguable that adjustments in circumstances where the adjustment arises following an operation of law should be permissible. This should be the case where other safeguards exist to prevent the contracting authority from acting in a manner which would contravene the principles of non-discrimination and equal treatment and transparency. Such safeguards can be summarised as follows.

Firstly, the adjustment must arise following an operation of law. The requirement for the adjustment should be directly and causally linked to the operation of law. Therefore it should not be possible to adjust terms of the contract that are unrelated to the operation of law or which are not affected by the operation of law. The adjustment should therefore go no further than what is required to deal with the operation of law.

Secondly, where possible, the adjustment should be calculated or otherwise defined with reference to an external mechanism. This was found to be

possible in *Pressetext* in the context of the change of currency in which the payment for the contract was made, but it is recognised that it in many circumstances concerning an operation of law such an external mechanism will not be available.

Thirdly, the adjustment should not be permitted where there is a risk of discrimination on grounds of nationality or material unequal treatment. It is submitted that there should be an element of materiality in the context of unequal treatment here, as if the test applied is to consider whether the contractor (or the new contractor in the case of an assignment, novation or transfer in the case of an insolvency) has been treated differently to other contractors the issue is then identifying the other contractors. If the contractors that were involved in the original procurement are considered there will inevitably be differences between the way in which these contractors and the contractor have been treated. This is because the contractor has been performing the contract for a period of time. As such a level of materiality should be introduced into this test as otherwise it will always be the case that there is unequal treatment.

However, the above approach presents difficulties. It may be difficult in practice for a contracting authority to apply the above test. It is recognised that some of the concepts above are open to interpretation, which introduces uncertainty. In particular it may be difficult for the contracting authority to ascertain whether there has been material unequal treatment of contractors, particularly in light of the fact that the contract will have been performed for some time so the contractors that were in the original procurement are no longer equal to the incumbent contractor.

The approach set out in Regulation 72(1)(d)(ii) of the 2015 Regulations in the case of insolvency, change of control, and assignment and novation provides some clarity. Similarly, Regulation 72(1)(c) may be of assistance in the case of adjustments pursuant to change in law and force majeure. As has been

explained throughout this chapter, however, there is uncertainty in some respects as to how these provisions will apply to the adjustments described in this chapter. The law may have been better clarified with the inclusion of the test set out in the above paragraph, as opposed to the approach set out in Regulation 72(1)(c) and (d)(ii) of the 2015 Regulations. The basis for this is that the proposed test focuses on procurement objectives and may therefore better promote these, whereas it is less certain how the content of Regulations 72(c) and d(ii) support the achievement of procurement objectives.

Chapter 5: Other adjustments

5.1 Introduction

This chapter is entitled "other adjustments". Chapter 3 of this study explained the position regarding adjustments made pursuant to review clauses and chapter 4 considered adjustments made as a consequence of an operation of law. This chapter is concerned with adjustments that are made otherwise than pursuant to a review clause or as a consequence of an operation of law. For brevity such adjustments will be referred to as "other adjustments".

This chapter considers specific examples of other adjustments. Adjustments to the scope of the goods, works or services delivered under the relevant contract are firstly discussed. This is followed by consideration of adjustments to payment provisions. The chapter then looks at adjustments to other contractual terms which affect the risk profile of the contract, followed by a consideration of adjustments to consortia during the term of the contract. The chapter then considers the situation where the terms of the relevant contract are not enforced by the contracting authority, and finally offers some conclusions.

The aim of this chapter is to identify and discuss other adjustments and to consider the legal position applicable to them. As explored in chapter 7, whether or not other adjustments can be made within the framework of the existing law has important practical implications for contracting authorities, and ambiguities in the law applicable to this category of adjustment are particularly unhelpful.

5.2 Adjustments to scope

5.2.1 Introduction

It may be difficult for contracting authorities to correctly define their requirements at the outset of a procurement and for these requirements to

become clear as the project progresses, making it necessary to adjust the contract to meet the now understood requirements.[513] Such adjustments may comprise adjustments to the scope of goods, works, or services performed under the relevant contract.

This section sets out the existing legal position in respect of other adjustments to the scope of a contract. The first category of adjustment is where there is an increase in a contract's scope. The position where there is a decrease in the scope is then considered followed by an analysis of *de minimis* scope adjustments. Adjustment to the scope to improve the goods, works or services from those originally contracted for is then considered.

Case law has established that a change in the duration of a contract in the absence of a review clause may change the scope of services.[514] Accordingly, this type of adjustment is considered as the final category of adjustments discussed in this section. Adjustments to the duration of a contract pursuant to a review clause are considered in chapter 3 section 3.6 of this study.

5.2.2 Increase in scope

A contracting authority may wish to change the specifications of a project during a contract, for example, requiring additional features to be added or increasing capacity.[515] This may require it to adjust the contract to increase the scope of goods, works or services provided pursuant to it.

Pressetext specifically found that an amendment to the original contract may be material where it extends the scope of the contract considerably to include services not initially included.[516] In such circumstances the "Extension of Scope Limb" defined in chapter 2 section 2.6.2 is relevant. Furthermore, it is possible that that an adjustment to increase the scope of

[513] Hartlev and Liljenbol, (2013), fn 4 , p. 51;
[514] *Indigo*, fn 339, para 4;
[515] Arrowsmith, (1997), fn 401, p. 128;
[516] *Pressetext*, fn 4, para 35;

services may lead to a situation where had the adjusted contract been advertised, different bidders may have bid or the results of the competition may have been different. This would trigger the "Introduction of Conditions Limb" set out in chapter 2 section 2.6.2.

The case of *Commission v Germany* considered the alleged practice of the procurement of ambulance and patient transport services without a competition.[517] One of the instances complained of was the extension of an existing contract to include additional services, namely the operation of an ambulance station at Bad Bevensen, without a contract notice being published.[518]

The Advocate General explained that the adjustment extended the area of operation by 25% and the total value of the contract increased by 15%, and the amendments were therefore material and constituted a new contract award.[519] The CJEU does not refer to these percentages in its decision and instead stated that the increase in value of the contract was considerably higher than the procurement thresholds and that therefore the extension of the contract was a material amendment.[520]

An increase in the scope of services was also considered in *Edenred* which concerned proposed adjustments to a services contract to include a childcare voucher scheme.[521] The case was ultimately dealt with by the Supreme Court, which stated that the "central question" in *Edenred's* case was whether the proposed amendments constituted a material variation.[522]

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[517] Case C-160/08, *Commission v Germany*; see for a case summary, Smith, S., "Application of EU procurement law to public ambulance services: Case C-160/08, Commission v Germany", *Public Procurement Law Review*, 2010, 5, NA180-185;
[518] *Commission v Germany*, fn 517, para 32;
[519] Opinion of Advocate General Trstenjak, delivered on 11 February 2010, Case C-160/08, *Commission v Germany*, para 135;
[520] *Commission v Germany*, fn 517, paras 100-101;
[521] *Edenred (UK Group) Limited and another (Appellants) v Her Majesty's Treasury and others (Respondents)* [2015] UKSC 45 on appeal from [2015] EWCA Civ 326 on appeal from [2015] EWHC 90 (QB);
[522] *Edenred*, UKSC, fn 346, para 29;

It should be noted that although *Edenred* made its claim under the 2006 Regulations, Lord Hodge, with whom the other judges and the parties to the action agreed, assessed the claim under the 2015 Regulations, using the 2014 Directive and case law to aid interpretation.[523] Edenred submitted that the relevant contract amendments considerably extended the contract scope. However, the Supreme Court did not accept that the prohibition on the modification of a contract to encompass services not initially included meant prohibiting modifications to extend contract services where the advertised contract and related procurement documents envisaged the expansion of services, and required the contractor to have the resources to and to deliver them.[524] Lord Hodge was satisfied that the amendments did not considerably extend the scope of the contract, and that it therefore was not a substantial modification.[525]

In conclusion, therefore, the Supreme Court appears to be saying that on the facts before them the amendments to the existing ATOS services contract to include the provision of the childcare voucher scheme was within the framework of the existing contract. To expand, the fact that the amendment was within the "reasonable compass"[526] of the objectives of the contracting authority as set out in the procurement documents meant that there was no material amendment to the existing contract. Therefore, the Supreme Court appears to be saying that despite there being a change to the scope of services provided under the contract with the inclusion of the new B2B services to administer childcare accounts, this was in fact within the scope of the contract.

This arguably introduces ambiguity into the legal position, as hitherto it was understood that unless an adjustment was dealt with in a review clause

[523] *Edenred*, UKSC, fn 346, para 30;
[524] *Ibid*.;
[525] *Ibid*., para 38; To note that Lord Hodges determined (at para 39) that his judgment at para 38 was sufficient to determine the appeal. However, he felt it appropriate to consider the submissions made by *Edenred* in respect of Article 72(1)(a) of the New Directive. Lord Hodges' analysis on this point is discussed at chapter 3 section 3.2.3;
[526] *Ibid*., para 36;

(which it is submitted should meet the requirements in chapter 3 section 3.2.4), the adjustment would be a change to the contract and the Substantial Modification Test should be applied to ascertain whether the adjustment required a new procurement process. The Supreme Court appear to have followed a different test, instead looking at the nature of the adjustment and concluding that it was not a change in the scope of the contract, irrespective of the fact that it introduced services which were not within the original scope.

This suggests a difference in the application of the concept of "scope". The Supreme Court has adopted a wide approach, which considered the content of the procurement documents and the overall context of the contract. However, previous to this, "scope" arguably meant the actual terms of the contract (including review clauses). Whilst the wider approach may provide greater flexibility to contracting authorities, for example, because referring to adjustments in procurement documents may protect from successful challenge even in the absence of a review clause which meets the criteria set out in chapter 3 section 3.2.4, ambiguity is arguably introduced. For example, it is uncertain what degree of precision is required in the references in the procurement documents, and the types of contract to which *Edenred* may be applied is also uncertain (as it may be the case that the *Edenred* approach is only permissible in complex contracts).

5.2.3 Reduction in scope

Pressetext does not refer to a reduction in the scope of services as being a category of adjustment constituting a material change. Regulation 72(8)(d) of the 2015 Regulations specifically refers to an extension in the scope of the contract, apparently precluding a reduction in services being a substantial amendment pursuant to that provision. Notwithstanding this, depending on the nature of the reduction in services, it may be the case that the

"Introduction of Conditions Limb" described in chapter 2 section 2.6.2 is relevant.

A reduction in services required may have the effect of appealing to a different group of contractors. In practice different contractors may have differing capacities for the contract at a given time, considering their resources and other contractual commitments and this will influence their decision whether or not to bid. This decision may have been different were a reduced scope of services tendered for at the outset, and a reduction of services is therefore arguably capable of constituting a material amendment.

Furthermore, where the scope of services is reduced but the payment for the services remains the same there is likely to be a change in the economic balance of the contract in favour of the contractor. This type of adjustment is specifically dealt with in the "Economic Balance Limb" described in section 2.6.2.

It has been commented, however, that a reduction in the performance of a contract by a contracting authority, such as the limitation of some construction works for budgetary reasons, will not give rise to a requirement to have a re-tender as it can be assumed that there will only be an impact on competition in exceptional circumstances.[527]

As explained above, however, the "Introduction of Conditions Limb" may be triggered by a reduction of services. As such there may be an impact on competition. It is submitted that the Substantial Modification Test should be applied on a case by case basis to assess whether or not there has been a material amendment, and that it may be inaccurate to assume that the requirement to re-tender arises only in exceptional circumstances.

[527] Poulsen, (2012), fn 4, p. 178;

5.2.4 Adjustments to scope to deliver improvements

The contracting authority may, during the term of a contract, identify adjustments with the objective of improving the performance of the contract. Adjustments may also be made where the contractor is able to suggest improvements to the contracting authority.[528] An example may be where a new version of a product is being marketed by a contractor and the contracting authority wishes to avail itself of its wider functionality.[529] Adjustments may also encompass new technology or methods of service delivery. Such adjustments may alter the scope of services being provided without actually adjusting by way of extension or reduction the scope of the goods, works or services provided.

An example of this can be found in *Rennes*, which considered a contract for the provision of light railway services which had been adjusted over the course of a six year procurement. One adjustment considered was the change from the VAL 206 system to the VAL 208 system[530] reflecting a change in the available technology.

In this case the CJEU found that the substitution of the systems did not constitute proof that an essential term of the contract was renegotiated.[531] The CJEU stated that in a negotiated procedure extending over a long period of time, the parties may take account of technical developments that occur whilst negotiations are ongoing without this being regarded each time as a renegotiation of the essential terms of the contract.[532]

It should be noted that *Rennes* used the negotiated procedure which, by its nature, permits discussion and refinement of solutions. It may be the case, therefore, that the contracting authority had wider discretion to accept

[528] Arrowsmith, (1997), fn 401, p. 128;
[529] Hartlev and Liljenbol, (2013), fn 4, p. 59;
[530] *Rennes*, fn 331;
[531] *Ibid.*, para 50;
[532] *Rennes*, fn 331, para 51;

alternative solutions than may be the case where a procurement procedure is used in which negotiation is not permitted. Furthermore, there was a 2 cm width difference between the systems,[533] suggesting that there was not a material amendment to the technical solution. Accordingly it may not be advisable to interpret this finding in *Rennes* too widely.

In many cases allowing contracts to be adjusted to encompass improved technologies may assist achievement of the contracting authorities' value for money objective. However, there is no exemption for an adjustment to be made in these circumstances and contracting authorities must therefore apply the Substantial Modification Test to establish whether an adjustment is material. However, if an improvement is proposed and there are no other adjustments, including to price or to the scope of services, it is difficult to see how the application of the Substantial Modification Test could conclude there had been a material amendment as the contracting authority has obtained a benefit in addition to the terms of the contract originally procured.

The exception to the requirement to apply the Substantial Modification Test is where the contracting authority can rely on Regulation 72(1)(c) of the 2015 Regulations, namely where the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen, and where the modification does not alter the overall nature of the contract, and where any increase in price does not exceed 50% of the original contract value. It is arguable that it will be difficult in practice to satisfy the first condition, as it may be the case that the possibility of a technological improvement is foreseeable (which raises the question of what level of knowledge is needed to meet this threshold, as a contracting authority may be aware that there will be improvements, but is unlikely to know the technical detail of these). Secondly, the inclusion of the word "need" in the

[533] *Rennes*, fn 331, para 51;

first condition may be too high a hurdle to permit something which is desirable but not necessary.

5.2.5 Adjustments to the duration of a contract

An adjustment to the duration of a contract in the absence of a review cause specifically permitting the adjustment may constitute a material amendment.[534]

The performance of services for a period of time not provided for in the original contract may fall within the "Extension of Scope Limb" defined in chapter 2 section 2.6.2 as illustrated in the interim application before the UK High Court in *Indigo*. [535] In this case, the incumbent contractor was unsuccessful in its re-tender for a cleaning contract and argued that it was possible for it to continue to perform the contract pending a final ruling. The Court found this submission to be counterintuitive as an extension would necessitate the contract being performed over a new period and therefore was a contract for new services.[536] The performance of services for a period of time not provided for in the original contract may thus constitute a material amendment.

It is also possible that the "Introduction of Conditions Limb" set out in chapter 2 section 2.6.2 could be triggered by an extension of the contract's duration. An example has been given in the context of a works contract, where if a contract stipulates completion within 5 years, an extension of 6 years should not be permitted, as this allows the contractor an unfair advantage over others who bid based on the shorter time period.[537] Furthermore, where a longer contract term is performed compared to that which was advertised it is possible that different bidders would have bid for

[534] Review clauses which adjust the term of the contract are discussed in chapter 3 section 6;
[535] *Indigo*, fn 339; for a summary of the case, see Henty, P., "Lifting an automatic suspension: Indigo Services (UK) Ltd v Colchester Institute Corp", *Public Procurement Law Review*, 2011, 3, NA87-90;
[536] *Indigo*, fn 339, para 41;
[537] Auricchio, (1998), fn 4, p. 127;

the contract.[538] This could arise because a contractor's capacity to perform the contract may depend on the duration for performance, for instance because of other contractual commitments or staff availability.

In the case of *Banaco Builders*[539] the UK High Court considered an adjustment to the duration of a contract during its procurement to increase it to 18 months from 12 months and to delay the start date by six months. The Court found that the contract was thus materially different from that which was advertised and that contractors who had not bid may have been interested in the contract as adjusted. It has been submitted that the adjustment would have also been a material change had it occurred following contract award.[540]

The adjustment may change the economic balance of the contract, falling within the "Economic Balance Limb" defined in chapter 2 section 2.6.2. This is because the contract duration may be relevant to other commercial factors, such as the depreciation periods applied to equipment, the speed at which construction works needs to progress, or delivery periods. Adjusting the contract duration may therefore affect the commercial assumptions on which the bid was made and cause a financial benefit to accrue to the contractor. It may also be that different bidders would have been interested in the contract had it been advertised on the basis that it is now being performed because of the adjustments to the underlying commercial assumptions, so the "Introduction of Conditions Limb" may be relevant.

However, the period of adjustment should be considered in the context of the duration of the original contract. The point is made, for example, that the significance of a one year extension will often differ between a contract for the supply of goods for two years and a service contract for 15 years.[541]

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[538] Simovart, M. A., "Amendments to public contracts: Estonian Law in the light of the *Pressetext* ruling", *Juridica International XVII/2010*, p. 156;
[539] *Banaco Builders*, fn 401;
[540] Arrowsmith, (2014), fn 11, p. 580;
[541] Poulsen, (2012), fn 4, p. 182;

Where the extension is proportionally small in the context of the original contract this is unlikely to constitute a material amendment.[542] It is submitted that this should be a relevant factor in applying the Substantial Modification Test to ascertain the materiality of the adjustment.

5.2.6 *De minimis* adjustments

Regulation 72(5)(a) of the 2015 Regulations clarifies that certain adjustments are permitted due to their immaterial nature. Specifically, an adjustment is permitted where its value is below the procurement threshold set out in Regulation 5 of the 2015 Regulations, and below 10% of the initial contract value in the case of supplies or services or below 15% in the case of works. In addition the adjustment must not change the overall nature of the contract.

The use of percentages of the value of the original contract to establish materiality appears consistent with *Pressetext*, in which the CJEU looked at the materiality of the adjustments in the context of the contract as a whole. This is because percentage values assess materiality in a quantitative manner, looking at the relative value of the adjustment in the overall context of the contract. The use of percentages was also considered in *Commission v Germany* discussed above.[543]

However, this provision arguably gives rise to uncertainties in the legal position as its application presupposes that the value of the adjustment can be quantified in financial terms.[544] This may create difficulties where the calculation of the value of the adjustment cannot be readily calculated, for example where it is an adjustment to a contract term apportioning responsibility for a risk that may or may not arise during the term, suggesting Regulation 72(5) of the 2015 Regulations cannot apply to this type of adjustment. It may also be the case that the commercial position reached in

[542] Likewise, the greater the scope of the change, considered in the context of the overall contract, the greater the risk to the contracting authority, Arrowsmith, (2014), fn 11, p. 583;
[543] See section 5.2.2, *Commission v Germany*, fn 517;
[544] This point is made in Treumer, (2014), fn 4, p. 152;

respect of an adjustment may be the result of minor adjustments to a number of existing terms in addition perhaps to the inclusion of further services, and it may be difficult to allocate value to the adjustments.[545]

The relevance of the requirement for the adjustment not to alter the "overall nature of the contract" is uncertain. An example is given of a change to the "subject matter", where the construction of a school is being procured and this requirement is adjusted so as to require the construction of a swimming pool.[546] Such an adjustment evidently constitutes a change to the overall nature of the contact. Theoretically the exchange of a school for the building of a swimming pool may fall within the *de minimis* thresholds.

However, such circumstances seem unlikely in practice as the contractor selected to build a school may not be willing or able to build a swimming pool on the same terms that led it to be selected to build the school. Accordingly, in practice it seems unlikely that either the contractor or the contracting authority would propose such an adjustment.

Other than the substitution of one requirement for another requirement of a similar contract value, it is difficult to see in what circumstances an adjustment could be made that could alter the nature of the contract and still constitute a *de minimis* adjustment. If the legislature intended that this was the only instance to be captured, then this could have been made explicit in the 2014 Directive.

However, it has been commented that this condition is relevant because a small-scale adjustment which is not material in financial terms could still have an impact on the range of competition as contractors other than those who

[545] See further section 5.4.1 below;
[546] Poulsen, (2012) fn 4, p. 179;

participated in the procurement may be interested in the contract as adjusted.[547]

The inclusion of the percentages may provide a welcome degree of comfort to contracting authorities when making small adjustments which fall within the provisions of Regulation 72(5) of the 2015 Regulations. This may reduce uncertainty and the need to obtain specialist legal advice in understanding whether an adjustment is permitted or not. However, it could also be argued that the application of the Substantial Modification Test to these types of adjustment would result in a conclusion that there was no material amendment, so arguably the inclusion of the *de minimis* provisions in Regulation 72(5) do not provide material assistance.

5.2.7 Regulation 72(1)(b) of the 2015 Regulations

Regulation 72(1)(b) of the 2015 Regulations allows for modification of a contract without a new procurement process where additional works, services or supplies by the original contractor have become necessary and were not included in the original procurement where a change of contractor cannot be made for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs for the contracting authority, provided that any increase in price shall not exceed 50% of the value of the original contract.[548]

It is submitted that, in common with the negotiated procedure discussed below, a strict test will apply on the use of this provision and as such this provision will not be extensively relied on by contracting authorities.

[547] Treumer, (2014), fn 4, p. 152;
[548] The Public Procurement (Amendment, Repeals and Revocations) Regulations 2016, Schedule 2, Part 1, para 16, which amended "or" to "and", clarifying that both limbs must be satisfied to rely on this ground;

5.2.8 Relevance of the negotiated procedure

It will be recalled that the negotiated procedure without prior publication of a contract notice is available in certain limited circumstances to enable further works, supplies or services to be provided pursuant to the original contract.[549] This provision operates as the award of a new contract which is exempt from the requirements for advertised competition, and is not an adjustment to an existing contract. Given that the negotiated procedure without notice effectively adjusts the scope of services it is relevant to consider it here for completeness.

Where a contracting authority can rely on the negotiated procedure there is no requirement to consider whether the adjustment in question is material. However, it has been commented that it is very difficult in practice to fulfill the conditions to use these provisions.[550] The negotiated procedure without notice therefore offers a tightly defined mechanism allowing for the extension of the scope of a contract and therefore is of limited practical use to contracting authorities seeking to adjust existing contracts.

5.3 Adjustments to payment provisions

5.3.1 Introduction

This section of the study considers price adjustments made other than pursuant to a review clause. Price adjustments pursuant to review clauses are considered in section 3.2.4. This section of the study has been split into three parts: (i) material price adjustments; (ii) non-material price adjustments; and (iii) adjustments to the currency in which payment is made.

[549] See chapter 2 sections 2.4.1 and 2.4.2;
[550] Hartlev, and Liljenbol, (2013), fn 4, p. 67;

5.3.2 Material price adjustments

Pressetext confirmed that price is an important element of a public contract[551] and that amending the price in the absence of a review clause may infringe the principles of equal treatment and transparency.[552] This reconfirms the position in *Succhi di Frutta*.[553]

If a contractor is paid more than was originally contracted for, with no corresponding increase in its obligations, this improves the contractor's financial position and worsens that of the contracting authority. Such an adjustment is capable of falling within the "Economic Balance Limb" set out in section 2.6.2.

It is arguable that the "Economic Balance Limb" is not triggered where the contractor's contractual obligations increase in line with an upwards price adjustment. In these circumstances it is not clear that the economic balance has been altered. It may be possible therefore to adjust the price payable under a contract without the "Economic Balance Limb" being triggered. It has been commented that the economic balance will not change where the profit margins of the contractor are the same before and after the adjustment.[554] This seems logical as the profit derived by a contractor from its performance of a contract is a measure of the benefit it derives from this performance.

However, in practice it may be difficult to ascertain the relevant profit margins. For example, the contractor may not have done a detailed analysis to establish its precise profit margin over the course of the term and discussion may be required to determine, for example, whether a further adjustment should be made in the event that anticipated profits are not realised or are exceeded. It may also be difficult to unequivocally value

[551] *Pressetext*, fn 4, para 59;
[552] *Ibid.*, para 60;
[553] *Succhi di Frutta*, fn 348, paras 117 and 121;
[554] Hartlev, and Liljenbol, (2013), fn 4, p. 56-57;

certain obligations, for example the assumption of greater risk, which will hinder establishing whether the profit margin has remained the same, and thus whether the economic balance has been maintained.

Third parties are not prejudiced by a contracting authority paying a lower price than that determined in the tender process and as set out in the contract.[555] A reduction in price, absent a corresponding reduction in the scope of services or adjustment to other contractual terms, does not appear to fall within any of the Limbs set out in chapter 2 section 2.6.2. Therefore it appears unlikely that a reduction in price could be construed as a material amendment pursuant to the Substantial Modification Test.

However, the comments made by the Advocate General in *Pressetext* potentially confuse this position. It was commented that an agreement reducing the contract price may have a distorting effect on competition.[556] The Advocate General indicated that the price that the contracting authority could have achieved on the market at the time of the adjustment was determinative, as prices may have fallen generally since the contract award and therefore lower remuneration did not necessary equate to economic efficiency and achieve competition.[557]

It is submitted that the remarks of the Advocate General should not be construed in the context of a simple price reduction. If the contracting authority has contracted a fixed price over the contract duration any price reduction to should be construed in the context of that contract, and not with reference to the price that could be achieved if the contract was re-tendered at the point in time at which the adjustment was made. This is because the price payable for the contract as a whole was derived following a competitive process and, following evaluation, that bid represented the best offer available to the contracting authority. Where the price was reduced

[555] Brown, (2008), fn 494, NA262;
[556] AG opinion, *Pressetext*, fn 298, para 90;
[557] *Ibid.*, para 91;

below that contained in the successful bid this would not alter the outcome of the original competition.

However, in circumstances where a reduction in price is part of a suite of amendments, the comments of the Advocate General are of relevance in particular in ascertaining whether the economic balance of the contract has changed. It may be the case that, despite a reduction in price, the economic balance may have shifted in favour of the contractor because the contractor may benefit from an improved profit margin for those services that are now cheaper for it to perform (and which therefore other contractors could provide for less).

It is not clear how a contracting authority could confirm the prices available at the time the adjustment is made in the absence of a competition being run. This point has been made by Brown, who states that it is difficult for contracting authorities to assess price in the abstract.[558] Contracting authorities may have data from the original procurement procedure which they could use to inform an assessment, but this might be irrelevant given the Advocate General indicated that prices available at the time of the adjustment were relevant.[559] The comments of the Advocate General therefore create confusion in the application of the law.

5.3.3 Minor price adjustments

Pressetext established that it was possible to change the price payable under a public contract where the adjustment was minimal and objectively justified.[560] An example given was where this facilitates contract performance by simplifying billing procedures.[561]

[558] Brown, (2008), fn 494, NA262;
[559] AG opinion, *Pressetext*, fn 298, para 91;
[560] *Pressetext*, fn 4, para 61;
[561] *Ibid.*;

In *Pressetext* following a conversion in the currency in which payments under the contract were made[562] there were minor price adjustments. The annual fee for the use of articles was reduced by 0.3% and the prices for press releases were reduced by 2.94% and 1.47% for 2002 and 2003 respectively, so that there would be round figures to facilitate contract administration.[563]

The point has been made that it would be surprising if the CJEU in *Pressetext* found that a new contract arose from the rounding of the payments by fractional amounts, but that the "modest and benign" adjustments in this case are not as instructive as if the adjustments had been more material.[564] If the variance was greater it is not clear at what point the acceptability of adjusting for easier contract administration ceases. The ease of administration of a contract and the adjustments required to enable this are likely to be a subjective matter from the perspective of the contracting authority and the contractor, and may be interpreted differently by an aggrieved third party contractor.

The position has been clarified in Regulation 72(5) of the 2015 Regulations in which certain *de minimis* adjustments which can be financially quantified are permitted up to certain specified thresholds. In addition, the adjustment must not alter the overall nature of the contract. This is discussed at section 5.2.5 above.

5.3.4 Changes in currency

In *Pressetext* the CJEU considered the adjustment of the currency applicable to payment under the contract to euros. The adjustment was made with reference to regulations which applied on the introduction of the euro.[565]

[562] See chapter 5 section 5.3.4 on adjustments to a contract's currency;
[563] *Pressetext*, fn 4, para 62;
[564] Brown, (2008), fn 494, NA261-262;
[565] Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1); for comment on legal issues arising on the

The existence of an objectively verifiable external mechanism, namely the regulations applying in a change of currency, is relevant in ascertaining whether the adjustment is permissible or not. The mechanism is applied following the occurrence of an external event, namely the adoption of the euro by Austria. The application of such a mechanism is transparent and would apply like for like to any other contractor who had been selected to deliver that contract.[566] Transparency and equal treatment feature in the CJEU's analysis of price adjustments in *Presstext*[567]and are, it is submitted, important in evaluating whether an adjustment is permissible or not.

The CJEU was explicit in its finding that the change of currency in the circumstances of *Pressetext* was permissible. Therefore there appears to be no ambiguity in the law in this respect. However, the position may be less clear where the currency of payment is adjusted without the safeguards present in *Pressetext*. In *Succhi di Frutta*, for example, the change of the types of fruit in which payment was to be made was found to be a material amendment.[568]

The currency in which a contract is paid may link to other commercial elements of the contract, such as responsibility for foreign exchange risk, so adjusting the contract may have a wider commercial impact. The "Introduction of Conditions Limb" or "Change in the Economic Balance Limb" set out in section 2.6.2 may therefore be triggered, depending on the relevant facts.

It is submitted therefore that where the adjustment to the currency in which a contract is paid takes place other than in accordance with the conditions

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introduction of the Euro, see Hutchings, B. And Livingston, D., "Legal issues arising from the introduction of the Euro", *Journal of International Banking Law*, 1997, 12(2), pp. 63-66;
[566] Arrowsmith, (2014), fn 11, p. 581, commenting that a change in the currency of payment may often be neutral in its effect between contractors, but that in the case of future payments this will depend on the facts of the case;
[567] *Pressetext*, fn 4, para 60;
[568] *Succhi di Frutta*, fn 348;

applicable in *Pressetext* set out above, the Substantial Modification Test should be applied to the adjustment.

5.4 Adjustments to other contractual terms

5.4.1 Adjustments to the apportionment of risk

Risk apportionment refers to the allocation of the responsibility for the risks that the parties have identified may arise during the contract. Examples of risks that may be dealt with in contractual clauses in a PPP include change in law risk,[569] responsibility for dealing with as yet unknown ground conditions[570] or asbestos in existing buildings[571], or responsibility for weather conditions causing disruption to building works.

Risk transfer may be important from a financial perspective as the responsibility to deal with the consequences of the risk should it arise will have a monetary cost.[572] Quantifying the value of the risk transfer is difficult[573] and is based on the parties view of the likelihood of that risk arising and the financial consequences of this. The contractor will take into account the way in which a contract apportions risk when proposing a price for the performance of that contract.

The risk profile of the contract may also be considered by the contractor when deciding whether or not to bid. It may be the case that it (or its funders) are unable to accept certain types of risk, and this may influence whether or not a bidder participates in a procurement. The inclusion of

[569] Discussed in chapter 4 section 4.5, this is where the contractor's obligation to comply with a change in law occurring during the term of a contract requires capital expenditure and/or an adjustment to service delivery to ensure compliance with that new law, see SOPC4, fn 72, chapter 14;
[570] SOPC4, fn 72, chapter 5, para 5.1.5;
[571] *Ibid*., chapter 6, para 6.3.2;
[572] Loncle, J. M., "Transfer of risk in PFI projects", *International Business Law Journal*, 2000, 2, p. 144;
[573] See Ball, R., Heafey, M., and King, D., "Risk Management and the Private Finance Initiative", in Ghobadian, A., Gallear, D., O'Regan, N. and Viney, H. (eds), *Public Private Partnerships: Policy and Experience*, Palgrave Macmillan, Great Britain, 2004, pp. 181-184;

onerous liability clauses may deter contractors from bidding and their subsequent deletion may be a material amendment.[574]

It is therefore possible that either the "Change in Economic Balance Limb" or the "Introduction of Conditions Limb" defined in section 2.6.2 could be triggered where a provision of a contract which apportions risk is adjusted. It would appear, therefore, that the Substantial Modification Test should be applied to the adjustment.

5.4.2 Waiver of right to terminate

One of the questions asked of the CJEU in *Pressetext* was whether the waiver of a right to terminate the contract by notice was a material amendment.[575] The CJEU ruled that this was not a material amendment as the right had existed in the contract between 2000 and 2005 and neither party had sought to terminate, and that there was no evidence of either party seeking to terminate in the period up to 2008.[576]

The Advocate General set out principles against which it could be assessed whether the waiver constituted a material amendment. She commented that in order to be categorised as a material amendment, the waiver must be liable to distort competition in the relevant market and to favour the contractor.[577]

The Advocate General commented that this will "exceptionally" be the case where there are "concrete reasons" for believing the contracting authority would exercise the waiver, as it is only then that other contractors would have the opportunity to replace the contractor.[578] The Advocate General concluded that there was no economic incentive for the contracting authority

[574] Arrowsmith, (2014), fn 11, p. 581;
[575] *Pressetext*, fn 4, para 72;
[576] *Ibid.*, paras 77-79;
[577] AG Opinion, *Pressetext*, fn 298, para 76;
[578] *Ibid.*, para 77;

to change to another contractor and that as far as could be determined there would be no equivalent offers for the service provision under better conditions that would justify making a change.[579]

The above reasoning creates issues as without actually running a competition it is likely to be difficult for a contracting authority to conclude that there are no other contractors able to offer better terms. Furthermore, whether or not alternative terms represent a better position for the contracting authority may be subject to multiple interpretations, leading to uncertainty.

In addition, the reasoning seems at odds with the "Introduction of Conditions Limb" set out at chapter 2 section 2.6.2 which invites contracting authorities to consider whether the outcome of the original competition would have been affected. This is a backwards looking test and logically considers the outcome of the concluded competition. The Advocate General, however, in the context of the waiver of the right to terminate appears to be looking at the present facts, rather than assessing the impact on the original competition.

It has been commented that the CJEU's ruling on this point is correct, as on the facts, the renewal of a waiver for a three year period was not significant and should not therefore constitute a material amendment.[580] However, the reasoning on this point appears inconsistent with the approach taken in the "Introduction of Conditions Limb" and thus creates ambiguity in the applicable law.

5.5 Changes to composition of consortia

This section considers the legal position arising from an adjustment to a consortium. PFI/PPP projects may be delivered by a consortia of entities, which may referred to as a special purpose vehicle ("SPV"). It has been

[579] AG Opinion, *Pressetext*, fn 298, para 79;
[580] Brown, (2008), fn 494, NA262-263;

commented that experience has shown that changes in consortia have occurred in a number of cases both before and after the public contract is entered into.[581] The reason for the adjustment could be because of financial issues, problems with the performance of the contract, or a lack of co-operation between the consortium members.[582]

An adjustment to consortia was considered by the Advocate General in *Pressetext* who stated that an adjustment would be significant from a procurement law perspective if it results in at least a partial change of service provider and thus constitutes a material amendment.[583] This places emphasis on the "service provider" which may be construed as the entity delivering the services. Therefore changes to the ownership of an SPV company, such as the mere increase or reduction of a participant's equity contribution absent would not appear to fall within the Advocate General's prohibition.

It has been argued that, whilst the procurement directives appear to apply to only the selection of a contractor, a purposive approach should be adopted to allow for their application to changes in equity ownership so as to prevent the evasion of the directives.[584] However, any grounds of veto should be limited to those grounds of exclusion accepted by the contractor under the directive.[585]

It is submitted that this approach is erroneous. In the case of a PPP where a SPV has been incorporated, it is submitted that, in accordance with the views of the Advocate General in *Pressetext* there is no material amendment where there is an adjustment within the consortium. The SPV is the counterparty to the contract with the contracting authority and is responsible for the delivery

[581] Treumer, (2012), fn 4, p. 159; also Brown, A., "Post tender changes in the membership of a bidding consortium: Case C-57/01 Makedoniko", *Public Procurement Law Review*, 2003, 3, NA58;
[582] Treumer, (2012), fn 4, p. 159;
[583] AG Opinion, *Pressetext*, fn 298, para 67;
[584] Arrowsmith, (2000), fn 390, p. 730;
[585] *Ibid.;*

of that contract. The equity owners do not perform these contractual obligations, so it is difficult to see that there would be an evasion of the directives if there was an adjustment.

The Advocate General further opines that where the consortium has a separate legal personality, it will be the counterparty to the contract with the contracting authority and an adjustment within this will not constitute a material amendment.[586] However, where the consortium does not have a separate legal personality its members will normally have rights and obligations to the contracting authority and an adjustment to this may constitute a material amendment.[587]

Arrowsmith has submitted that a change to consortium membership during the bid phase does not provide grounds for exclusion where that adjustment would not have affected the decision of the contracting authority whether or not to take that bidder forward, but where the adjustment would have affected the decision then there may be a breach of equal treatment and it may be necessary to remove that bidder.[588] Brown has commented that there may be a breach the principle of equal treatment where a change substantially alters the capability of the consortium in question.[589]

Therefore in circumstances where the change in consortium membership also affects the qualifications or capability of the contractor, it is submitted that the "Introduction of Conditions Limb" set out in section 2.6.2 may be triggered and the Substantial Modification Test should be applied to the adjustment.

Regulation 72(1)(d)(ii) of the 2015 Regulations should arguably be considered in the context of the change in the identity of a member of a consortium. This provides that a modification can be made where the new contractor

[586] AG Opinion, *Pressetext*, fn 298, para 69;
[587] *Ibid*., para 68;
[588] Arrowsmith, (2000), fn 390, p. 728;
[589] Brown, (2003), fn 581, NA58;

replaces the original contractor as a consequence of the universal or partial succession of the original contractor following corporate restructuring, including takeover, merger, acquisition or insolvency where the new contractor meets the initial qualification criteria, there are no other substantial modifications, and it is not aimed at circumventing the 2015 Regulations.

A change in consortium membership appears to be a partial succession in the position of the contractor. However, Regulation 72(1)(d) places limitations in the circumstances in which the provision can be used. A change in the membership of a consortium in the case of a PFI special purpose vehicle may be described as a corporate restructuring the membership of the consortium changes as there may be a change in the ownership and composition of that SPV.

However, circumstances such as the exit of one of the members of the consortium or the addition of a new member absent an insolvency event do not appear to be covered. It has been commented that presumably this situation is outside the scope of Regulation 72(1)(d) of the 2015 Regulations, which should be construed as covering mergers, acquisitions and where an internal reorganisation takes place within a company.[590] An alternative interpretation would, it is argued, allow for a company to become part of the consortium without having any prior involvement with that consortium and that would distort competition.[591]

Where a consortium is incorporated and is the counterparty to the contract with the contracting authority the corporate identity of that consortium does not change upon a change to the identity of the consortium members, and therefore there has not been a substitution of a contractor.[592] Accordingly, it

[590] Truemer, (2012), fn 4, p. 159;
[591] *Ibid*.;
[592] See further section 4.3.2 explaining the status of UK companies as a matter of company law;

appears that Regulation 72(1)(d) of the 2015 Regulations is not relevant in these circumstances and that furthermore there is no adjustment to which it is necessary to apply the Substantial Modification Test.

Finally, the case of *Makedoniko* concerned a consortium that changed its composition following its selection as provisional contractor and as a result was excluded from the competition by the contracting authority.[593] The CJEU found that there was no EU prohibition on member states having national rules to prevent changes to a consortium's composition following submission of bids.[594] However, the CJEU did not comment on whether changes were permitted in circumstances where there was no national law on that point or on whether the adjustment was a material amendment.

5.6 Failure to deliver contract in accordance with its terms

Research has demonstrated that contracting authorities may fail to enforce terms of their contracts.[595] There may also be examples of contracting authorities allowing renegotiation of contract terms where the contractor is unable to or is unwilling to perform the original contract. If the contractor fails to comply with the terms of the original contract, and the contracting authority accepts this, the contract should be considered adjusted.

The contracting authority's failure to enforce contractual terms is likely to confer a benefit on the contractor, who has not had to suffer the consequences of either being compelled to perform the contract on its terms or the consequences of a failure to perform, for example, financial penalties or the termination of the contract. The economic balance of the contract may therefore be adjusted in favour of the contractor and this may fall within the "Economic Balance Limb" example given in section 2.6.2.

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[593] Case C-57/01, *Makedoniko Metro and Mikhaniki AE v Elliniko Dimosio*;
[594] *Ibid*.;
[595] For example, out of 743 inspections, 481 breaches of contract were detected, but only in 2.49% of cases were penalty clauses enforced by the contracting authority in research conducted on Italian national frame contracts, see Albano and Zampino, (2013), fn 28, p. 186;

A practical example is where the contract prescribes completion dates with payments to be made to the contracting authority on delay. If the contractor misses a completion date but the contracting authority does not enforce its remedy, the contractor has had the benefit of a longer time period to meet its contractual obligations, but has not suffered the corresponding financial cost of being late.

The failure to perform a contract on its terms has also been argued to be a breach of the principle of equal treatment of bidders.[596] The example given was where a contract called for spare parts to be manufactured according to a specific system and the contract is awarded to a contractor on that basis and the contractor subsequently does not comply and submits different spare parts to the contracting authority, with the contracting authority accepting these parts.[597] In these circumstances the following paragraph may apply or the adjustment may trigger the "Economic Balance Limb" where, for example, the replacement parts cost the contractor less and it did not pass that saving to the contracting authority.

In circumstances where the adjustment introduces conditions which, had they been part of the original procurement would have allowed for the admission of or selection of contractors other than those admitted or selected, the "Introduction of Conditions Limb" set out in section 2.6.2 is triggered and, as such, the adjustment may be a material amendment.

It has been commented that adjustments needed to resolve possible breach or deficiencies in the contract performance are frequently substantial as other contractors would have been awarded the contract had the terms of the contract been as adjusted from the start.[598] It is possible that had other bidders known that the performance of the contract would not in practice be as onerous as the terms included in that contract, that they may have been

[596] Auricchio, (1998), fn 4, p. 127;
[597] *Ibid*.;
[598] Treumer, (2012), fn 4, pp. 160-161;

encouraged to bid or to offer prices lower than those which they actually bid. This may mean that the "Introduction of Conditions Limb" is triggered.

However, in practice, the contracting authority may be open to adjustments where it considers that there will be adequate contract performance particularly where the contract is complex and partially implemented and consequently a change in contactor would be difficult in practice, costly and time consuming.[599] Furthermore, where a contractor disputes a perceived deficiency in performance, this may lead to legal proceedings and the contracting authority may wish to avoid this.[600] Adjusting the contract may be a practical way to do so.

Furthermore, there may be difficulties identifying whether a breach constitutes a material amendment within the Substantial Modification Test. This may particularly be the case where there are a series of persistent minor breaches.

It has been commented that the 2014 Directive should have clarified that a contracting authority can make some adjustments where there have been deficiencies in performance and set out criteria by which adjustments are allowed.[601] This would arguably have presented a pragmatic approach to dealing with a situation which may arise in practice. However, an approach open to contracting authorities is to apply the Substantial Modification Test to the adjusted contractual performance, and thereby form a view as to the permissibility of the adjusted performance from the perspective of procurement law.

[599] Treumer, (2012), fn 4, p. 161;
[600] *Ibid*.;
[601] Treumer, (2014) fn 4, p. 149;

5.7 Conclusion

The adjustments considered in this category are diverse but as explained at the outset, they have in common the fact that they occur otherwise than in accordance with a contract review clause or as an operation of law.

As is shown in chapter 7, other adjustments arise frequently in practice. In some cases the adjustment may be necessary or desirable, for example to allow a contracting authority to benefit from new technology or to increase the scope of services to cater for increased user demand.

As explained in this chapter, however, the contracting authority is required to apply the Substantial Modification Test to these adjustments to ascertain whether they are permissible in circumstances where the adjustment in question is not provided for in another of the provisions in Regulation 72 as explained in this chapter.

However, it should be noted as explained at section 5.2.2 above, the Supreme Court in *Edenred* appeared to follow a different test, looking at the nature of the adjustment and concluding that it was not a change in the scope of the contract, irrespective of the fact that it introduced services which were not within the original scope. This arguably introduces ambiguity into the legal position and suggests perhaps a widening of the concept of "scope" in the context of adjustments to contracts.

"Other" adjustments have the potential to undermine the EU's procurement objectives and the legal framework does not differentiate between adjustments which are made, from the perspective of the contracting authority, for positive reasons. Whilst there is a benefit to legal certainty in ensuring the legal framework is applied consistently to "other" adjustments regardless of the subjective intent of the adjustment, a contracting authority may feel that the legal framework does not necessarily support its attainment of its procurement objectives.

Chapter 6: Methodology

6.1 Introduction

This chapter sets out the methodology for the empirical element of this study. Section 6.2 explains the focus of the empirical research, explaining in section 6.2.1 that certain contracts have been selected for this study, namely public private partnership (PPP) contracts for accommodation projects. Section 6.2.2 discusses the participants in the study, explaining the rationale for their selection.

The objectives of this empirical element are set out in section 6.3 below, and can be summarised as aiming to understand how the law applicable to contract adjustments is applied in practice. The final section of this chapter, section 6.4, explains the research method adopted, including the research activities undertaken. The rationale for using interviews for data collection is explained in this section followed by an explanation of the practical way in which the participants of the study were identified. The section then sets out the approach taken to data collection and concludes with a discussion on data analysis and categorisation.

The findings of the empirical enquiry are set out in chapter 7.

6.2 Focus of study

6.2.1 Types of contract

Introduction

The scope of this empirical research is restricted to those contracts subject to the full requirements of the Procurement Regulations. As explained in chapter 2, the public procurement regime applies in full to above threshold contracts entered into for the supply of goods, works or services. This study focuses in particular on contracts awarded by contracting authorities that relate to accommodation projects categorised as PPP contracts.

Focus on contracts subject to the full requirements of the Procurement Regulations

The scope of the empirical enquiry is limited to contracts that are fully subject to the Procurement Regulations, and contracts that are not or are not fully subject to the Procurement Regulations are out of scope. As explained in chapter 2 section 2.4 the Procurement Regulations prescribes the process by which contracts that are subject to them must be awarded, and requires that contracting authorities treat contractors transparently, equally and in a non-discriminatory way.[602]

Contracts that have historically not or not been fully subject to the 2006 Regulations (or earlier applicable procurement regulations) are subject to increased regulation following the implementation of the new procurement regulations. The 2015 Regulations removes the distinction between Part A and Part B services[603] and the Concession Contracts Regulations[604] now regulates services concessions, where previously they were unregulated.

Focussing on contracts fully subject to the Procurement Regulations should therefore be a more productive line of enquiry in terms of contributing to research in this field, as the issue of adjustments to contracts that are not fully or are partially subject to the Procurement Regulations arguably becomes progressively less relevant because of the existence of the new regulatory framework. This focus is sensible given that it is not feasible to study all types of procurements undertaken by contracting authorities in this study.

[602] 2006 Regulations, Regulation 4(3); 2015 Regulations, Regulation 18(1);
[603] As stated in chapter 2 section 2.4.2 Part B services were subject to a limited regime under the 2006 Regulations;
[604] The Concession Contracts Regulation 2016, SI 2016 No 273;

Public Private Partnerships

There is no agreed definition of PPPs. In its widest sense, the concept of PPP includes a range of co-operative behavior between the public and private sector.[605] However, PPPs in the context of UK public procurement[606] are generally understood as being long term contracts between the public and private sectors whereby the provision and operation of an asset is delivered by the private sector. This understanding of PPP will be used for the purpose of this study. Within the UK, private finance initiative (PFI) is a type of PPP.[607]

A key element of PPPs is for the private sector to manage the public service or facility, providing the necessary capital for the asset, and being responsible for the design, construction and management of the facility.[608] PPP contracts will, therefore, typically be "mixed" procurements, meaning that they include works and services in their delivery. PPP contracts can be used to deliver complex procurements over a long period of time (a PFI contract will typically have a service delivery period of not less than twenty five years)

[605] The Commission has defined PPP as being "forms of co-operation between public authorities and the world of business, which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service", "EC Commission Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions", COM (2004) 0372, 1; Arrowsmith, (2000), fn 390, p. 709; within the UK common forms of PPP arrangements have been identified as: contracting out; PFI (including concessions); institutionalised PPPs (IPPPs) and development agreements, see Craven, R., "Procurement procedures under the Private Finance Initiative: the operation of the new legal framework", Thesis submitted to the University of Nottingham for the degree of Doctor of Philosophy, November 2011, p. 20;

[606] For background on the use of PPPs in the UK see, Badcoe, P., "Public private partnerships in local government: the legal, financial and policy framework", *Public Procurement Law Review*, 1999, 6, pp. 279-301; and Ghobadian, A., Gallear, D., O'Regan N. and Viney, H., "PPP: The Instrument for Transforming the Public Services", in Ghobadian, A., Gallear, D., O'Regan N. and Viney, H., *Public Private Partnerships*, Palgrave Macmillan, Great Britain, 2004, pp. 1-12;

[607] Formally commenced in the UK in 1992, PFI plays an important role in the delivery of PPP projects within the UK. HM Treasury has stated that with a PFI project, the private sector is usually responsible for designing and building the relevant asset, raising necessary finance, and operating the service that uses the asset;

[608] Braun, P., "Selection of bidders and contract award criteria: the compatibility of practice in PFI procurement with European law", *Public Procurement Law Review*, 2011, 1, p. 4;

and the value of such contracts is above threshold and will be subject to the full public procurement regime.[609]

PPPs are therefore relevant to this study, which focuses on contracts subject to the full procurement regime. Services concessions, which can be characterised as a PPP, are excluded from the scope of this study, as they have not historically been subject to the full procurement rules. Although the Concessions Contracts Regulations 2016 regulates the procurement of concessions this came into force after the empirical research was undertaken.

It has been commented that the parties to a public contract may frequently wish to amend its terms, particularly where the contract is particularly complex.[610] The complex nature of PPP contracts makes it likely that adjustments will be required to it over its duration. Furthermore, it is likely to be difficult to draft a complex contract so as to ensure that it reflects the requirements of contracting authorities over its term.[611] Adjustments may therefore be required to ensure the contract continues to meet the contracting authority's requirements, and these may be undertaken pursuant to review clauses or otherwise.

During the course of a long term contract adjustments may be required for a variety of reasons including changes in law, developments in materials and technologies, or social or environmental conditions.[612] Furthermore, circumstances may arise that could not have been foreseen when the

[609] See HM Treasury, copy of current PFI contracts list, March 2012, which shows the service delivery period of a PFI contract is typically in excess of 25 years and that the value of these contracts is significantly in excess of the public procurement contract value thresholds;
[610] Brown, (2008), fn 494, NA258;
[611] Hartlev and Liljenbol, (2013), fn 4, p. 51, which states that where more complex contracts are involved it may be difficult for a contracting authority to fully identify and describe its requirements at the tender stage and it may be necessary to modify the contract where the solution does not match the contracting authority's subsequently realised requirements; also Poulsen, (2012), fn 4, p. 171, stating that the more complex a procurement, the harder it is for a contracting authority to foresee all elements of the procurement at the time of contract award;
[612] Poulsen, (2012), fn 4, p. 167;

contract was entered into. Adjustments may be required to encompass these changed circumstances. Finally, in the case of long term contractual arrangements, such as PPPs, the contracting authority's requirements may change over time.[613]

As explained in section 6.3 below, this study considers the relevance of review clauses to contract adjustments in practice. PPP contracts typically contain review clauses,[614] so focussing on these contracts allows investigation of this specific area.

These above reasons make PPP contracts suitable for consideration in a study concerned with adjustments. Furthermore consideration of PPP contracts should yield informative results on the ways in which contracting authorities and those advising them apply the law applicable to contract adjustments in practice.

Exclusion of other contracts

Other types of contract have been excluded from the scope of the study as they do not have the above characteristics of being long term and complex. Short term and simple contracts are less likely, following the logic set out above, to require adjustments than longer term complex contracts. Where a contract is of a short duration the contracting authority is more likely to be able to anticipate its requirements over the term of the contract when it is procured. It is, of course, conceivable that circumstances may arise during the term of a short term simple contract which necessitate or make adjustments desirable. However, the likelihood of adjustments being required arguably increases where the term of the contract is longer or is more complex.

[613] Hartlevand Liljenbol, (2013), fn 4, p. 51;
[614] For example, SOPC4 contains change control protocol, provisions relating to step-in, benchmarking, market testing, force majeure; also Loncle (2000), fn 572, pp. 147-148, stating: "Due to the long duration of PFI projects, index adjustments and price revision mechanisms will be stipulated";

Accordingly, short term services and supply contracts are excluded from the scope of this section of study as they are less likely to generate relevant results in this study on contract adjustments. These contracts would also be excluded from the scope of study where their contract value is below threshold, meaning that the Procurement Regulations do not apply to them. Contracts to which the Procurement Regulations do not apply are excluded from the scope of this study for the reasons explained at the start of this section.

Adjustments may be required to complex works contracts as it is difficult to ascertain the steps needed to correctly execute the works.[615] Changes to the project are therefore a common consequence of the complexity of the construction process.[616] Despite the importance of adjustments to works contracts these are excluded from the scope of the study for two reasons.

Firstly construction projects are often procured using industry standard contracts, such as JCT,[617] NEC,[618] or FIDIC.[619] Contracting authorities use these industry standard contracts.[620] These standard form contracts contain review clauses but the content and application of these may be governed by norms within the construction industry.

Whilst it would be interesting to consider these norms and the way in which they interact with the public procurement law applicable to contract

[615] Auricchio, (1998), fn 4, p. 114;
[616] Bowsher, M., "EC Procurement Law and Change During the Tender or Contract", *International Construction Law Review*, 2003, p. 154;
[617] Joint Contract Tribunal, see further http://www.jctcontracts.com/;
[618] See further, http://www.neccontract.com/ and note that the NEC contracts have received endorsement from the House of Commons Business and Enterprise Committee, see *Construction Matters: Ninth Report of Session 2007-8*, Volume 1, para 129, at http://www.publications.parliament.uk/pa/cm200708/cmselect/cmberr/127/127i.pdf, accessed 24.05.14;
[619] International Federation of Consulting Engineers, see http://fidic.org/;
[620] For example, the Local Government Association is a member of the JCT. The members represent the sectors of industry that are key participants (i.e. signatories) to contracts, see http://www.jctltd.co.uk/about-us.aspx, accessed 24.05.14; the NEC has been stated to be recommended by the OGC, see http://www.ice.org.uk/Publications/NEC, accessed 24.05.14; NEC contracts used for London Olympics see Department for Culture, Media and Sport, "London 2012 - a global showcase for UK plc: a report by Sir John Armitt", July 2012, p. 4;

adjustments, such enquiry is not feasible within the scope of this study. This is because, in order to be manageable, this study cannot deal with all areas in which contract adjustments are required. Adjustments to construction contracts have been excluded because the focus of this study is on accommodation sector PPPs, for the reasons explained above.

Secondly, external legal advisers may specialise in construction law. It may be the case that when a works contract is adjusted, the input of an external lawyer with that specialism is required by a contracting authority. Including works contracts therefore potentially extends the number of external lawyers who are inputting into a contracting authority's decision making process in respect of contract adjustments. Whilst it would be interesting to examine the input of these advisers, and the way in which external law firms co-ordinate procurement law and construction law advice, it is unrealistic to attempt to achieve this within this study.

Framework agreements[621] are also excluded from the scope of this study. These are agreements under which a contracting authority selects one or more contractors (depending on whether the arrangement is intended to be single sourced or multiple sourced) and places orders under that framework on a periodic basis when the need arises. Framework agreements have historically been established in a variety of ways.[622] They may be used by contracting authorities to introduce flexibility into purchasing arrangements

[621] Regulation 2(1) of the 2006 Regulations defines a framework agreement as: an agreement or other arrangement between one or more contracting authorities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the framework agreement applies; Regulation 33 of the 2015 Regulations defines a framework agreement as: "an agreement between one or more contracting authorities and one or more economic operators the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price, and, where appropriate, the quantity envisaged";
[622] See further Arrowsmith, (2014), fn 11, pp. 1113-1115;

where, for example, the contracting authority does not know what its future requirements are at the point in time the contract is entered into.[623]

The flexibility inherent in framework agreements makes them unsuitable for consideration in this study. This is because the lack of specificity in contract terms may reduce the need for both review clauses and adjustments, as the contracting authority may leave details that may be subject to change or are uncertain unconfirmed until an order is placed under that framework. Accordingly, framework agreements are fundamentally different to the PPP accommodation projects that are the subject of this study, and are unsuitable for consideration in the context of this study.

As explained in the following section, PPPs have been used to deliver projects across a range of sectors but, for the reasons explained below, the scope of this study has been limited to accommodation projects in specific sectors.

Accommodation projects: a definition

PPP contracts have been used to deliver projects across a range of sectors including infrastructure, health care and education.[624] The focus of this investigation is, for the reasons set out below, limited to accommodation based projects in the health, education, and secure accommodation sectors. A more detailed explanation of the projects encompassed in these sectors is set out below.

For the purposes of this study "accommodation projects" are those that include the design and construction of an asset (for example, a school, hospital, or a prison) and a degree of maintenance and/or operation of that asset for the term of the contract. As explained above, these contracts will

[623] For further information on framework agreements in the EU and UK see Arrowsmith, S., "Methods for Purchasing On-Going Requirements: The System of Framework Agreements and Dynamic Purchasing Systems Under the EC Directives and UK Procurement Law", in Arrowsmith, S., (ed), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulations for the 21st Century*, Thomson Reuters, 2009, pp. 131-192;
[624] Arrowsmith, (2000), fn 390, pp. 709-710;

be above threshold "mixed" procurements. Payment will typically be linked to key performance indicators, such as the availability of the building, or other measures linked to the way in which service users use the building (such as patient throughput).[625] In these respects these projects are similar, and this should facilitate data comparison.

Furthermore, these projects can be classified as "social infrastructure", being physical infrastructure that aids the provision of social services.[626] These projects can be differentiated from economic infrastructure projects (such as roads, bridges and water engineering projects)[627] or environmental infrastructure projects (such as waste facilities).[628] This is therefore a further similarity between the projects selected for this study and this again should facilitate data comparison.

The sections below give background information on each sector which is the subject of this study. There are accommodation based projects in each sector, and PPP has been used to deliver these projects for a number of years. This suggests that a requirement for adjustments may have arisen over this period, and also therefore that contracting authorities and those advising them have had an opportunity to consider the law applying when adjusting such contracts.

Exclusion of other sectors

The empirical section of this study considers accommodation projects in the education, health, and secure accommodation sectors. Accommodation projects may, however, exist in other sectors, such as leisure or in the

[625] This can be distinguished from other types of PPP where the contractor's income is primarily obtained directly from the service users themselves, such as economic projects such as roads or bridges where the contractor may charge a fee for the use of the asset directly to the service users (for example by means of a toll), or some leisure projects where the service users may be charged for their use of the facility (for example a per visit charge for swimming);
[626] Dewulf, G., Blanken, A., and Bult-Spiering, *Strategic Issues in Public Private Partnerships*, 2nd edition, Wiley Blackwell, 2012, p. 65;
[627] *Ibid*., pp. 49-64;
[628] *Ibid*., p. 65;

provision of other public facilities such as libraries or office accommodation. The exclusion of accommodation projects other than those in the education, health, and secure accommodation sector was to keep the scope of the study manageable.

The restriction of the scope of study to accommodation project PPPs means that certain other sectors in which PPPs have been used to deliver projects have been excluded. The rationale for this is set out below.

Adjustments may be required where there is a change in technology.[629] This may be particularly relevant in IT projects. IT projects have been delivered by PPP.[630] However, it is not proposed to include IT PPPs in the scope of this empirical study, as because of the complexity of the technology and its evolving nature a vast number of changes may occur over the term of the contract.[631] It has been commented that there is a divergence in practice between the "legal" contract and project practice, whereby the project team implementing the contract do so in a manner which may not be the same as the formal contract.[632]

Although adjustments are therefore relevant to IT projects, the specific challenges apparent in this sector mentioned above mean that the conclusions drawn about the approach to contract adjustments may be specific to IT contracts. Whilst it would be of interest to examine this further, it would increase the scope of the study which may be unmanageable, so the decision has therefore been made to exclude them.

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[629] Arrowsmith, (1997), fn 401, p. 128;
[630] Davies, C., "A brief history of UK government IT contracting", *Communications Law*, 2012, 17(2), p. 54;
[631] Taylor and Davies, (2011), fn 67, p. 148;
[632] Stephens, R., "Contract terms and project realities: the built-in collision course", *Computer and Telecommunications Law Review*, 1998, 4(8), p. 277; see also Davies, C., "ICT outsourcing contracts – life after signature", *Communications Law*, 2008, 13(5), p. 160, which comments that the project team (meaning both customer and supplier) are tempted to and may pursue courses of action that are pragmatic and address the issues that arise without reference to the contract;

Projects categorised as economic infrastructure projects have been excluded. These projects include road, rail, and other transport projects. Some of these projects are procured under the utilities regulations[633] and are therefore excluded from the scope of this project, which is concerned with contracts that are fully subject to the Procurement Regulations. In addition, these contracts may be concession contracts which, as explained above, have historically been excluded from the full scope of the procurement regime so are outside the scope of this study.

Projects which relate to the environment, such as waste and energy projects have been excluded.[634] These projects are often complex and of a long term. Waste and energy projects may include assets of significant value including plant, equipment, and land. However, assets of this nature are not accommodation and are therefore separate from the types of project that are the focus of this study, and have therefore been excluded.

Waste PPPs may require co-operation between central and local contracting authorities and sometimes between neighbouring contracting authorities.[635] This introduces complexity as it would be necessary to understand how the individual contracting authorities understand the law in respect of contract adjustments and then to consider how this combines in practice. It is not feasible to add this complexity to a study of this nature. Furthermore, waste PPPs have specific risks, such as the volumes of waste that require processing over the term, the availability of markets on which to dispose of products generated from waste,[636] and the availability of other third party income

[633] The Utilities Directive as implemented in the UK by the Utilities Contracts Regulations 2016, SI 2016 No. 274;
[634] Note that these can be classified as economic infrastructure projects or as environmental infrastructure projects;
[635] National Audit Office, Department for Environment, Food and Rural Affairs: Managing the waste PFI programme, report by the comptroller and auditor general, HC 66 Session 2008-2009, 14 January 2009, at http://www.nao.org.uk/wp-content/uploads/2009/01/080966.pdf, accessed 31 May 2014;
[636] Note that this may include "energy from waste" - for further information see, Department for Environment, Food and Rural Affairs, Energy from Waste: A guide to the debate, February 2014 (revised edition), at

streams, consideration of adjustments to which would significantly increase the scope of the study.

Energy PPPs may include energy from waste projects (to which the above paragraphs apply), wind farms or nuclear power facilities.[637] UK government policy has not focussed on contracting authorities procuring energy projects, and instead seeks to require energy providers to supply a certain proportion of their energy from sustainable sources.[638] The energy providers in the UK are not owned by UK contracting authorities[639] and as such it should not be assumed that their objectives are the same as those of contracting authorities, and therefore it is not appropriate to include them in this study.

Whilst given more time and more resources it may be interesting to include additional sectors, particularly to consider whether there was any difference in the approach taken to adjustments between the sectors, this is not practicable within the constraints of the current study. The research objectives will be better achieved therefore by focussing on the sectors identified above rather than extending the scope of enquiry.

The education sector

Projects included in this sector include schools and other educational establishments, such as colleges. Central government commitment to improve the quality of education and the environment in which it is delivered against a backdrop of historic under-investment has led to PFI being used in

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284612/pb14130-energy-waste-201402.pdf, accessed 31 May 2014;

[637] The UK government aims to have nuclear power stations generating electricity from around 2019, see https://www.gov.uk/government/policies/increasing-the-use-of-low-carbon-technologies, accessed 31 May 2014;

[638] For example, the Renewable Obligations policy introduced in 2002 to provide incentives for large scale renewable energy in the UK which requires UK electricity suppliers to source a specified proportion of electricity from renewable sources, see https://www.gov.uk/government/policies/increasing-the-use-of-low-carbon-technologies/supporting-pages/the-renewables-obligation-ro, accessed 31 May 20 14;

[639] The "big six" suppliers (namely British Gas, NPower, SSE, Scottish Power, EON and EDF) supply 95% of the gas and electricity to households in the UK. See http://www.bbc.co.uk/news/business-24670741, dated 27 March 2014, accessed 31 May 2014;

the education sector.[640] Schools projects may be "bundled" (such that the project as a whole comprises a number of schools).[641] Therefore an education project may comprise more than one asset.[642]

PPP (including PFI) has been used to deliver education projects since the 1990s.[643] It flourished under the Labour government's Building Schools for the Future programme, which aimed to rebuild, refurbish and provide information technology for all 3,500 secondary schools in England by 2020.[644] However, Building Schools for the Future was cancelled by the Coalition government in 2010. A new PFI school building programme was announced in July 2011,[645] of a more modest scale than the proposals under Building Schools for the Future.

Demand for schools will be influenced by population trends and by developments in teaching.[646] Contract adjustments may therefore be of relevance to education PPPs where contracting authorities seek to respond to such factors or where unforeseen circumstances necessitate a contract adjustment.

As of March 2012 there were[647] one hundred and sixty six PPP education projects signed in the UK comprised of Building Schools for the Future (BSF)

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[640] McCabe, B., McKendrick, J. and Keenan, J., "PFI in Schools - pass or fail?", *Journal of Finance and Management in Public Services*, 2001, 1, p. 66;
[641] Dewulf, Blanken, and Bult-Spiering, (2012), fn 626, p. 67; a low capital value may make the project commercially unattractive to contractors and their funders;
[642] For example the Barnsley Building Schools for the Future project was delivered in three phases, which replaced 13 secondary schools and the creating of 9 new advanced learning centres. The PPP delivered by a special purpose vehicle (Barnsley Local Education Partnership) include PFI, conventionally financed design and build with facilities maintenance, and the provision of ICT;
[643] For example, the Sir John Colfox School procured by the Dorset County Council with a financial close date of 18 November 1997 and an operational period of 30 years;
[644] https://www.nao.org.uk/press-releases/the-building-schools-for-the-future-programme-renewing-the-secondary-school-estate-2/, accessed 24 April 2014;
[645] http://www.theguardian.com/education/2011/jul/19/300-schools-built-private-finance-scheme, accessed 24 April 2014; for detail on the current status of PFI/PF2 education projects see https://www.gov.uk/government/publications/pfipf2-tracker-department-for-education, accessed 30 April 2014;
[646] Ball, Heafey and King, (2004), fn 573, p. 180;
[647] HM Treasury, Copy of PFI Current Projects List, March 2012;

schemes and non-BSF schemes.[648] The contracting authority for each of these projects is a local authority. These projects have an operational term of 22 to 32 years[649] and have financial close dates from between 1997[650] and 2012.[651] There are, therefore, numerous education PPPs in the UK and the fact that some of these have been established for a long time may be relevant as to whether or not adjustments have been required.

The health sector

PFI has been used in the health sector to deliver projects such as hospitals and social accommodation. In a typical NHS PFI project, the private sector builds a new hospital and leases it to the NHS trust, as well as providing ancillary services, leaving the NHS trust to provide core clinical services.[652] Ancillary services may include facilities management services, such as maintenance, cleaning, catering, and laundry.[653] However, there are instances of contractors being used to deliver clinical services[654] and where this is done within the scope of a PPP which falls within the definition set out in section 6.2.1 these contracts will not be excluded from the scope of study.

Health sector PPPs may face uncertainties during the term of the relevant contract. It has been suggested that the uncertainties can be sub-divided into three categories, namely variations in the population which the facility

[648] HM Treasury, Copy of PFI Current Projects List, March 2012;
[649] The exception to this is a project procured by the London Borough of Lambeth with a financial close date of 1 February 2005 which has an operational period of 8 years. This project is the Connected Learning Project (ICT in Schools) and being a project concerned with IT is in any event outside the scope of this project, HM Treasury;
[650] The Sir John Colfox School procured by the Dorset County Council with a financial close date of 18 November 1997 and an operational period of 30 years;
[651] Leicester City Council's BSF Wave 1 Phase 2 with a financial close date of 30 March 2012 and an operational period of 25 years;
[652] Elsenaar, M., "Law, accountability and the private finance initiative in the National Heath Sector", *Public Law*, 1999, Spr, p. 35; Skilbeck, J., "The private finance initiative and public procurement", *Public Procurement Law Review*, 1996, 4, p. 148;
[653] Tony Hagger, "An examination of the Private Finance Initiative - has the PFI Initiative assisted in the investment in our public services or has it been an expensive diversion?", in Abby Ghobadian, David Gallear, Nicholas O'Regan and Howard Viney (eds), *Public Private Partnerships: Policy and Experience*, Palgrave Macmillan, Great Britain, 2004, pp. 166;
[654] Lister, J., *The NHS after 60: for patients or profits*, Middlesex University Press, UK, 2008, pp. 223-265;

serves, changes in medical technology, and changes in health care policies.[655] In the event that circumstances change, an adjustment to the contract may be necessary or desirable. Adjustments may also be relevant where affordability issues impact on the project and efforts are made to reduce service levels and costs to meet the constraints.

As of March 2012 there were one hundred and eighteen PPP health projects signed in the UK comprised of social and acute care projects.[656] Examples include the redevelopment of the Mid Essex Hospital NHS Trust main site, which opened in November 2010 and had a capital value of £148m[657] and the Alder Hey Hospital children's health park which is expected to become operational in June 2015.[658]

The contracting authority for these projects is either a local authority, a NHS Trust, or a Primary Care Trust. These projects have an operational term of 23 to 38 years[659] and have financial close dates from between 1997[660] and 2011.[661] This shows that there are a large number of health sector PPPs in the UK. The contracts are of a long term and some have been operational for a number of years, which may be relevant as to whether adjustments have been required.

[655] Dewulf, Blanken, and Bult-Spiering, (2012), fn 626, pp. 85-87;
[656] HM Treasury, Copy of PFI Current Projects List, March 2012;
[657] http://www.nhs.uk/services/trusts/overview/defaultview.aspx?id=2226
[658] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/230868/Annex_A_-_pfi_current_projects_list_march_2013__additional_projects_.xls (accessed 23.04.14);
[659] The exception to this is a project procured by Oxleas NHS Foundation Trust with a financial close date of 11 December 1998 which has an operational period of 50 years, HM Treasury, copy of PFI current projects list, March 2012;
[660] Darent Valley PPP, an acute facility procured by the Dartford and Gravesham NHS Trust with a date of financial close of 30 July 1997 and an operational period of 32 years, HM Treasury, copy of PFI current projects list, March 2012;
[661] Holt Park and Wellbeing Centre, a social care project procured by Leeds City Council with a date of financial close of 14 December 2011 and an operational period of 25 years, HM Treasury, copy of PFI current projects list, March 2012;

Secure accommodation sector

Projects in this sector include prisons and other secure accommodation in which people are held on remand or sentenced to custody by the courts of England and Wales. The prison service entered into its first PFI contract in 1996.[662] Since that date PFI contracts have been entered into for a number of secure facilities, including at Dovegate (2001), Rye Hill (2001), Forest Bank (2000) and Ashfield (1999). As of March 2012 there were 14 private prisons managed by contractors such as Serco and G4S Justice Services.[663] The existence of established PPPs means that this is a suitable area of enquiry for this study.

Under the PFI approach, in the case of a prison, the contractor is responsible for the construction of the prison and its operation, including security, education of prisoners, catering and maintenance.[664] The private sector has also been viewed as a source of improvement and innovation in terms of maximising use of capacity.[665]

However, it has been commented that prisons constructed and operated under PFI contracts may not be sufficiently flexible to respond to changing policies, for example the balance between containment and rehabilitation of offenders, and it has been acknowledged that negotiating changes to a PFI

[662] National Audit Office, *The Operational Performance of PFI Prisons*, report by the Comptroller and Auditor General, HC 700 Session 2002-2003: 18 June 2003, nao.org.uk/wp-content/uploads/2003/06/0203700.pdf, p. 9;
[663] http://www.justice.gov.uk/about/hmps/contracted-out, accessed 25.4.14;
[664] Hartley, K., "Problems of Using Partnering and Similar Private Sector Practice in the Public Sector Environment: the Example of PPPs/PFIs", in Arrowsmith, S. and Trybus, M. (eds), *Public Procurement: the Continuing Revolution*, Kluwer Law International, printed in Great Britain, 2003, p. 191;
[665] Bastow, S., "Overcrowding as normal: Governance, adaptation and chronic capacity stress in the England and Wales prison system 1979-2009", A thesis submitted to the Department of Government of the London School of Economics for the degree of Doctor of Philosophy, London, January 2012, p. 226;

may be complex.[666] The changing priorities of the justice system suggest therefore that adjustments are relevant to PPP contracts in this sector.

As of March 2012 there were 22 secure accommodation projects signed in the UK comprised of prisons, courts and secure training centres.[667] The contracting authority for each of these projects is a Youth Justice Board, a local authority, the court service, or the National Offender Management Service. These projects have an operational term of either 15 or 25 years. The projects have financial close dates from between 1995[668] and 2010.[669] There are therefore fewer secure accommodation PPPs in the UK then there are education or health PPPs, but there are still a significant number. Again, the contracts are long term and some have been established for a lengthily period, which makes them suitable for consideration in a study dealing with contract adjustments.

6.2.2 Participants

Scope of enquiry

The following have been identified as being relevant to the empirical study, namely: (i) external legal advisers; and (ii) individuals within contracting authorities, being (a) legal advisers; (b) other advisers within contracting authorities; and (c) decision makers within contracting authorities. The distinction among these groups and their relevance to this study is set out in this section under the relevant sub headings further below.

This study is restricted to respondents from or advising contracting authorities. Other entities that are relevant to the procurement of contracts

[666] National Audit Office, *The Operational Performance of PFI Prisons*, report by the Comptroller and Auditor General, HC 700 Session 2002-2003: 18 June 2003, nao.org.uk/wp-content/uploads/2003/06/0203700.pdf, p. 6;
[667] HM Treasury, copy of PFI current projects list, March 2012;
[668] HMP Altcourse procured by the NOMS with a financial close date of 1 December 1995 and an operational period of 25 years, HM Treasury;
[669] HMP Thameside (Belmarsh West) procured by the NOMS with a financial close date of 30 June 2010 and an operational period of 25 years;

by contracting authorities are: (i) contractors; (ii) external funders; and (iii) government departments and other interested public bodies. As explained further below these entities have the potential to impact on the approach taken by contracting authorities to contract adjustments. However, it is not proposed to interview representatives from these entities as this study is concerned with the approach taken by contracting authorities to contract adjustments. The influence of these entities may, however, be reflected in the way in which the contracting authority deals with the adjustment. Any input from third parties therefore needs to be considered from the perspective of the contracting authority in terms of understanding the contracting authority's approach to adjustments.

Contractors are relevant to the issue of contract adjustments. The contractor will be counterparty to the public contract in question and thus directly affected by the contract adjustment, the decision not to adjust, or any challenge made to the adjustment.

Contractors are also the entities that bid for public contracts and as such their involvement is required to generate competition which, as explained in chapter 1 section 1.3.2, is linked to value for money. The contractors' willingness to bid for contracts is therefore relevant to the achievement by contracting authorities of their procurement objectives and, as discussed in section 1.3.2, contract adjustments may affect whether or not contractors bid for public contracts. Contractors' perception of adjustments is therefore of relevance to public procurement.

Finally an aggrieved contractor can bring a challenge for breach of procurement law.[670] Such a breach may include where it is alleged an adjustment has been made in breach of procurement law. Contractors may

[670]See chapter 2 section 2.4.3 for a discussion on remedies following successful procurement law challenge;

therefore question and challenge whether a proposed adjustment is legal and this may influence the approach taken by contracting authorities.

Where a contractor challenges a specific adjustment, the contracting authority may consider whether to not proceed with the adjustment. It may also be the case that where an individual contracting authority has been previously challenged in respect of an adjustment, that this may influence the approach taken by that contracting authority to adjustments.

PFI contracts are funded externally by third party funders. These funders will have an interest in the way in which a contract is managed during its term, including the implementation of contract adjustments, as funders will not want the contract's risk profile to vary as this may mean that they will not make the returns they anticipated from the project.[671] Accordingly the project documents will typically require funders be consulted before the implementation of some contract adjustments.

External funders or their advisers have not been consulted in this study, given the aim of this study is to understand how contracting authorities apply the law. However, if funders are not content with the proposed adjustment they may be able to veto it, so their perspective may influence how contracting authorities approach contract adjustments in practice. Therefore contracting authorities and those advising them were given the opportunity to identify whether input by funders impacts on the approach taken to contract adjustments by the contracting authorities in practice.

Government departments or other public bodies may be relevant to adjustments made to PPPs. They may set policy in respect of PPPs and their

[671] SOPC4, fn 72, para 13.3.8.1;

ongoing operation[672], perform a supervisory or oversight function,[673] or be involved in making funding decisions in connection with PPPs.

It should be noted that the involvement of government departments or other public bodies is likely to vary depending on the nature of the PPP and also from time to time as successive governments impose their own policy. However, it may be the case that input from these bodies or a policy approach promulgated by them influences the way in which contracting authorities apply the law in respect of contract adjustments. However, it is beyond the scope of this study to consider the role of these entities, other than to understand what, if any, influence they have on the way in which contracting authorities apply the law.

External legal advisers

External legal advisers are lawyers employed by professional services law firms. To qualify as a lawyer in the UK an individual must have an undergraduate degree in law and then must complete the Legal Practice Course, which is a post graduate diploma or Masters qualification, and then is required to undertake two years of training at a law firm before being admitted to the Roll of Solicitors.[674] Once qualified, practising lawyers build up experience and expertise typically acting for a number of clients at a given

[672] For example, HM Treasury, (July 2011), fn 67, aims to assist public sector PFI contract managers to identify and implement cost saving measures that would reduce costs while maintaining frontline services, p. 3; it has been suggested that HM Treasury has influenced the PFI procurement process by pressurising contracting authorities to comply with issued guidance, see Braun, P., "Strict Compliance versus Commercial Reality: The Practical Application of EC Procurement Law to the UK's Private Finance Initiative", *European Law Journal*, 2003, 9, 5, p. 582;

[673] For example, the National Audit Office scrutinises public spending on behalf of Parliament and audits the financial statements of central government departments, agencies and other public bodies, and also undertakes value for money reviews, see further http://www.nao.org.uk/about-us/what-we-do/ (accessed 23.04.14), in October 2013 the National Audit Office issued a briefing to the House of Commons Treasury Select Committee, "Review of the VFM assessment process for PFI";

[674] For further information see http://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/routes-to-qualifying/ (accessed 26 August 2016). Alternative routes to UK qualification are available to lawyers who have qualified in a different jurisdiction or following a period of recognised training. It is also possible to do an under graduate degree in a subject other than law and complete a post graduate diploma in law prior to undertaking the Legal Practice Course;

time, and may develop specialisms in certain practice areas during their careers.

Contracting authorities may consult external legal advisers on contract adjustments.[675] This is likely to be the case where the legal advisers within the contracting authority or the other staff at the contracting authority do not have the expertise or capacity to deal with the contract adjustment, including in situations where there is doubt as to whether the contract adjustment is permissible or not.

However, it should not be assumed that contracting authorities refer all contract adjustments to external legal advisers. There may be circumstances in which the contracting authority does not identify a legal risk. Furthermore, contracting authorities frequently have internal legal support[676] and contract managers may feel competent to handle some adjustments to contracts, even in circumstances where legal risk is identified, without reference to lawyers, either internal or external. The empirical research asked respondents from contracting authorities to explain which adjustments were referred to external advisers.

Instructing external advisers requires contracting authorities to incur costs in legal fees. Internal resource will also be required to instruct and liaise with lawyers, so it is not necessarily the case that the use of an external firm will remove work from the contracting authority. In addition it may be necessary

[675] See HM Treasury, Change Protocol Principles – August 2007, Foreword, www.hm-treasury.gov.uk/ppp_standardised_contracts.htm) in which contracting authorities are recommended to take appropriate legal, financial and technical advice;

[676] A search of "council" on the "find a solicitor" feature on the law society website (www.lawsociety.org.uk/find-a-solicitor) on 12 April 2013 shows 456 results of "councils" at which solicitors registered on the roll work. Such a search has obvious limitations – central government departments and other contracting authorities (of which there are many including police and fire authorities, schools and other educational establishments) are not included and the search does not indicate the presence of legal advisers able to assist with procurement law queries. It does, however, support the position that there are internal advisers at contracting authorities;

to run a competitive tender to procure the services of an external law firm.[677] These practical points may dissuade contracting authorities from referring contract adjustments to external advisers. Again, contracting authorities will be asked to explain why adjustments have not been referred to external legal advisers, giving them an opportunity to comment on these issues.

The aim of this study is to understand how the law in respect of contract adjustments is applied by contracting authorities. External legal advisers advise contracting authorities[678] and for the reasons below it is relevant to consider this when attempting to understand the way in which the relevant law is applied in practice.

External legal advisers may be instructed by contracting authorities specifically to advise on the legality of the proposed adjustment and potential legal risks.[679] In such circumstances their advice has therefore been actively sought by the contracting authority so therefore is likely to influence the contracting authority.

External legal advisers are likely to be understood by the contracting authority to be experts. This means their input is likely to be influential. The views of external legal advisers are therefore likely to be relevant to how the law is understood and interpreted by contracting authorities.

The external legal advisers will be acting solely for the contracting authority in respect of that contract adjustment and will have no agenda other than to provide correct advice. This may not be the case for other entities that may

[677] Legal services were Part B services under the 2006 Regulations. In the 2015 Regulations the concept of Part B services has been removed but legal services are subject to specific exemptions (set out at Regulation 10(1)(d)) and a "lighter touch" regime as set out in Regulations 74-77 applies;

[678] It has been commented that the "complexities and novelty" of PFI require contracting authorities to use external legal advisers, and that these external lawyers are in a position to advise contracting authorities on the options available and the associated risks, see Braun, (2003), fn 672, p. 578;

[679] They may also be instructed to draft amendments to the relevant agreements to reflect the relevant adjustment;

influence contracting authorities - for example, the incumbent contractor may want the adjustment where it has the potential to increase the fees available to it or where it relieves it from obligations.

An area of enquiry will look at whether and the extent to which contracting authorities follow this advice from private practice lawyers, and this should build up a picture of the factors taken into account by contracting authorities when adjusting public contracts.

It may also be the case that for complex PPP contracts, external advisers may be instructed to draft and negotiate the relevant contract.[680] Drafting input may have been reduced as a consequence of increased standardisation of terms and conditions applicable to complex projects[681] but project specific amendments may be required on a case by case basis.[682] In the context of this study it is of interest to consider the input of external advisers when considering adjustments and in particular review clauses.

Individuals from contracting authorities

Individuals within contracting authorities can be sub-divided as follows: (i) legal advisers, (ii) other advisers within contracting authorities; and (iii) decision makers within contracting authorities. The distinction between these three groups is set out below, but as explained it is preferable to treat these groups together for the purposes of this study.

[680] This is based on the author's experience of working at as a solicitor in a law firm, specialising in PPP/PFI;
[681] The importance of standardisation has been emphasised by HM Treasury, see "PFI: Meeting the Investment Challenge", July 2003, para 1.21, 1.34, and also the statement in this document that "the Government will rigorously enforce contract standardisation to reduce bid costs", p. 11; HM Treasury have issued standard form contracts - SOPC3, SOPC4, and PF2 (in draft) and there are sector specific standard form contracts – (for example, Building Schools for the Future standard form contracts););
[682] Foster, C., "Finding the right partner", in Ghobadian, A., Gallear, D., O'Regan N. and Viney, H., (eds), *Public Private Partnerships*, Palgrave Macmillan, Great Britain, 2004, p. 91;

Legal advisers within contracting authorities are lawyers employed by the contracting authorities. These individuals will have completed the same training as external legal advisers.[683]

Legal advisers within contracting authorities are frequently required to advise on a range of matters that arise within contracting authorities on a day to day basis. Consequently legal advisers within contracting authorities are unlikely to be specialists in all of the issues that they are required to advise on. This is not to call into question their professionalism - it is to note that it may be that not every legal adviser at a contracting authority is a public procurement law specialist. Also of distinction between legal advisers at a contracting authority and those at external law firms is that those at a contracting authority will advise just one client - the contracting authority by which they are employed.[684]

Advisers of contracting authorities other than legal advisers are individuals who are not practising as a solicitor. These individuals will be contract managers and other public procurement professionals. As a group, they are likely to have diverse qualifications which may include legal qualifications.[685] They may also have substantial practical experience dealing with public procurement and contract management.

Decision makers from contracting authorities are those individuals authorised to approve whether or not an adjustment proceeds or, in the case of an adjustment which takes place as an operation of law, are in the position to

[683] See fn 674;
[684] Of course, an individual is likely to have worked at other organisations during their career, including in cases at external law firms before becoming employed by the relevant contracting authority;
[685] For example the Chartered Institute of Purchasing and Supply offers specialist procurement qualifications (see http://www.cips.org/en/Qualifications/About-CIPS-Qualifications/cipsqualifications/ accessed 23 April 2014), there is also an executive course offered by the University of Nottingham (LLM Public Procurement Law and Policy) to procurement professionals who may or may not already have legal qualifications (see http://www.nottingham.ac.uk/law/prospective/executiveprogrammes/structureofthedegree/llm.aspx accessed 23 April 2014);

confirm whether or not the contract as adjusted should continue or be terminated.

Again, the qualifications of the decision maker will vary between contracting authorities, and it may be the case that in some instances decisions are referred to a group of individuals for consideration, in which case the qualifications of these individuals will necessarily vary.

It is unlikely that there would be a single decision maker at a contracting authority responsible for approving or dealing with all contract adjustments as in practice there may be different levels of authority to make decisions and these may vary depending on the contracting authority – for example small adjustments may be approved by contract managers, some adjustments may just "happen" without a decision, and some adjustments may be subject to more detailed scrutiny.

It is not proposed to investigate the decision making process at each contracting authority involved in the empirical research. However, when interviewing respondents it will be necessary to confirm whether or not that individual is the person who ultimately applies the law in respect of contract adjustments, or whether another individual (or group of individuals) is responsible for this. Where the respondent advises another individual in respect of the adjustment enquiry shall be made as whether or not that individual acted in accordance with the recommendation so as to understand how the law was applied by the contracting authority.

Analysis

It is submitted that it is valid to assume external legal advisers are distinct from individuals (either legal advisers, other advisers or decision makers) employed by contracting authorities given the characteristics of legal advisers set out above. Furthermore, for the reasons explained above it is appropriate to question external legal advisers.

However, given that legal advisers at contracting authorities may not be specialists in public procurement law and that other advisers or decision makers at contracting authorities may have some formal legal training including in procurement law, it is not clear that it is appropriate to delineate between these two groups for the purposes of this study.

Instead contract adjustments will be explored in the same way with all contracting authority respondents, and individuals will be asked to describe their qualifications and specialisms (if any). This will be considered when assessing the data generated by the questioning, as it may be relevant to the nature of the answers given by the respondent. It is submitted that this approach is preferable to assuming a single standard applies to each group as there may be variations in the data which may be attributable to the level of procurement law experience of the respondent, rather than providing informed insight into the approach to dealing with contract adjustments, and the proposed approach should identify this.

6.3 Objectives of empirical study

The aims of this study are set out in chapter 1 section 1.5 of this study. Chapters 2 to 5 dealt with the first research objective, to establish the content of the law applicable to contract adjustments and thereby to identify ambiguities in the existing legal framework.

As explained in chapter 1 section 1.5, the second aim of this study is to analyse how the law is applied in practice in particular to resolve or address ambiguities identified in the applicable law. Contracting authorities are required to apply the law in respect of contract adjustments when dealing with their contracts and, as such, this study seeks to understand how they apply the law in practice, with input from their external legal advisers.

Contracting authorities and their legal advisers were requested to explain the way in which they interpret and apply the existing law on contract

adjustments. In order to better understand the rationale for that approach it is necessary to enquire why that approach is taken, and this enquiry will need to take into account the influence of third parties and the risks that contracting authorities perceive in following specific courses of action in respect of contract adjustments.

The final aim of this study is to suggest ways in which the law applicable to contract adjustments could be clarified or otherwise improved to better meet the needs of those seeking to apply it. Contracting authorities and those advising them were therefore asked whether they can identify any ways in which the law could be changed to better support this.

6.4 Method

6.4.1 Introduction

The first substantive part of this section sets out the research method for this study. This is followed by a description of the activities that will be undertaken to generate data to address the research aims set out in section 6.3 above. The third substantive section explains why interviews are being used for data collection. The following part of this section explains how research participants were identified. The fifth substantive section sets out the approach taken to data collection, and this section concludes with an explanation of the approach taken to data analysis and categorisation.

It should be noted that the author is a practising solicitor who has advised on procurement law applicable to contracts within the scope of this study. It is relevant to consider therefore the concept of "insider research", which is where the researcher carries out research in a familiar setting.[686] Insider status can influence how the researcher is perceived and what information is

[686] Cownie, F., *Legal Academics: Culture and Identities*, Hart Publishing, Oxford, 2004, p.23;

collected.[687] It has been argued that familiarity with subject matter delivers benefits such as allowing the researcher and participants to share language and experience, thereby avoiding irrelevant enquiries.[688]

Conversely, however, it has been suggested that familiarity is a problem, as researchers may not take sufficient note of matters with which they are familiar. However, it is submitted that over familiarity will not impair this investigation. The study will consider the responses to semi-structured interviews, and as such respondents will have a degree of freedom in their responses which should enable them to make the points they feel are relevant, thus mitigating the risk that this author is imposing pre-conceived ideas on them.

However, it is likely to be the case that the author's personal experiences of the types of issues that arise in the context of contract adjustments have influenced the construction of the questionnaire. This is unavoidable as the topic of enquiry is influenced by the practical and academic issues understood by the author. This may be problematic where the author's experience is not reflective of the views of those that the questionnaire seeks to question where the respondents are not able to share their views. This problem is mitigated through the use of semi-structured interviews. As explained further below, respondents can respond in a conversational manner to questions posed and this should give them an opportunity to present their understanding of contract modifications.

It is not possible to remove entirely the influence of the author from the results of the empirical research as respondents will be led to an extent by the questions asked, which have been selected by the author. The author will bear this in mind when undertaking the research.

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[687] Schensul, J. J., "Methodology, Methods and Tools in Qualitative Research", in Laplan, S. D. Quartaroli, M. T. and Riemer, F. J., (eds), *Qualitative Research: An Introduction to Methods and Designs*, John Wiley & Sons, 2012, San Francisco, p. 72;
[688] Cownie, (2004), fn 686, p. 24;

6.4.2 Research methods

As explained in chapter 1 section 1.5, this study aims to analyse how the law on contract adjustments is applied in practice. Empirical research of the kind described in this chapter is suited to meeting this objective as it enables the author to collect data from respondents who are engaged in interpreting and applying the relevant law. This data, once analysed, allows the author to draw conclusions as to how the law on contract adjustments is applied in practice.

Qualitative techniques have been identified as being most suited to meeting the research aim. Specifically, semi-structured interviews are used to generate data for analysis. Qualitative techniques can be distinguished from quantitative techniques as explained in the following paragraph.

It has been commented that qualitative research generates descriptions whereas quantitative research applies numbers to derive meaning.[689] Furthermore, qualitative research is characterised by alternative data collection, analysis and sampling as distinct from quantitative research, which is a linear process of firstly data collection then analysis.[690] Qualitative studies usually consider fewer 'cases' than quantitative studies and do not typically begin with a hypothesis, as is expected in quantitative research.[691]

However, it has been commented that there is a danger that such distinction between qualitative and quantitative methodologies can become overly simplistic.[692] For example, quantitative researchers may use narrative to describe the results of statistical analysis and it may be the case that

[689] Laplan, S. D. Quartaroli, M. T. and Riemer, F. J., "Introduction to Qualitative Research", in Laplan, S. D. Quartaroli, M. T. and Riemer, F. J., (eds), *Qualitative Research: An Introduction to Methods and Designs*, John Wiley & Sons, 2012, San Francisco, p. 16;
[690] Boeije, H., "Doing Qualitative Analysis" in Gelissen, J., *Qualitative Research Methods*, 2nd edition, Sage, London, 2012, p. 89;
[691] Silverman, D., *Interpreting Qualitative Data, 4th edition*, Sage, London, 2011, pp. 4;
[692] *Ibid.*, pp. 3-5;

qualitative research commences with a hypothesis. Nonetheless, the above generalisation explains the differences between the methodologies.

In this study the use of semi-structured interviews of respondents with a data set comprising descriptive responses to the questions posed can be understood to be qualitative empirical research. Qualitative researchers argue that interviews allow participants to respond in a way that reveals the complexity of their perspectives.[693] Accordingly, qualitative research is best suited to meet the aim of this research as it enables respondents to respond to the questions in their own words, which should elicit information explaining how they apply the law in practice.

6.4.3 Research activities

The forms of questionnaire posed to respondents from the contracting authorities and external legal advisers is annexed to this study at Annex A.

The questionnaire defines key terms used in the empirical research, namely "adjustment" and "review clause". It also itemises potential "contract issues", which are areas where legal risk may arise upon contract modification which are therefore of relevance to this study. This is done to assist the respondents' understanding of key concepts in this study and also to attempt to ensure a degree of consistency of this understanding. Consistency should improve the research as it should help ensure that the author and the individual respondents have a common understanding of the questionnaire.

Contracting authorities will be asked to explain the adjustments that are required to contracts in the sectors described above.[694] The study then investigates the areas in which the contracting authorities identify legal risk where they adjust or propose to adjust a contract. This will firstly confirm

[693] Boeije, (2012) fn 690, p. 123;
[694] The approach for identifying respondents is set out in section 6.4 and the in-scope sectors are described in section 6. 2;

the contracts to which the respondents refer are within the scope of the study, and secondly establish the way in which contracting authorities understand the law in respect of contract adjustments.

The study then asks what questions are referred to external legal advisers and why this is the case. The study then considers the extent to which contracting authorities rely on the advice they receive from the external legal advisers. This is to establish the extent to which external legal advisers are approached for advice on contract adjustments, and provide data to understand whether this advice influences the decisions made by contracting authorities in respect of the adjustment.

Contracting authorities were asked to explain what factors impact on their decision whether or not to adjust a contract - such as the likelihood of successful challenge, or the potential consequences where an adjustment is or is not made. They were asked to describe what course of action they take in practice in respect of an adjustment, and why.

Contracting authorities and their external advisers were asked to identify any changes or clarifications that could be made to the existing law to better enable contracting authorities to meet their procurement objectives. This questioning establishes what (if anything) could be done to improve the position from the perspective of these respondents.

The relevance of review clauses is explored as part of the questionnaire, and contracting authorities were asked to explain their understanding of review clauses and what level of risk (if any) they perceive as being associated with making adjustments pursuant to review clauses.

Contracting authorities were also asked whether they are influenced by any of the third parties in connection with contract adjustments. Where third parties were identified by the contracting authority as being influential, the study investigates what the nature and content of the influence is, and also

looks at the response of the contracting authorities to such influence. The purpose of this is to understand whether anyone else influences the way in which contracting authorities interpret the law in respect of contract adjustments, and this questioning may also assist in understanding why contracting authorities may pursue a particular course of action in respect of the adjustment.

External legal advisers were asked what questions are referred to them by contracting authorities in respect of contract adjustments. They were asked to confirm the type of contract and sector in which the requirement for advice arose in respect of. Again, this is to confirm that the contracts to which the respondents refer are within the scope of the study.

The questioning explores what factors external legal advisers consider in their advice. This is to establish whether the legal advisers interpret and therefore advise contracting authorities on the "pure" law, or whether they consider any other factors in their advice. This understanding of the legal advice may assist in exploring why the contracting authorities interpret the law in the way that they do, and also to establish what factors are relevant to this interpretation.

External advisers were also asked to explain the relevance of review clauses in connection with contracting adjustments - both in terms of their objectives when drafting review clauses, and whether they perceive adjustments made pursuant to review clauses to provide protection against successful procurement law challenge.

External legal advisers were asked whether they interact with funders or with any other third parties in connection contract adjustments. They were asked to confirm whether or not they incorporate this input in the advice to contracting authorities. Again, this helps establish whether the views of third

parties influence the decisions made by contracting authorities in respect of contract adjustments.

6.4.4 Interviews

The method of data selection used should be that which is most suited to meeting the research aim. In this case semi-structured interviewing was chosen, and this technique yielded data capable of being analysed to meet the research aim. Interviewing consists of presenting a set of questions to respondents and capturing their answers for analysis.

Interviewing has been described as being less time and resource intensive than other methods of data collection.[695] However interviewing does require time and resource and in this study 45 responses were collected over a 7 month period. Whilst interviewing was not overly onerous in terms of actual time spent, the difficulties of diarising interviews with busy respondents reduced the efficiency of the process and meant in practice only a couple of interviews could be carried out each week. This imposes a practical constraint on the conduct of this type of study.

Interview methods can be classified into "structured", "semi-structured" and "unstructured".[696] The more structured the interviews are, the less opportunity there is for participants to express themselves as they would in a regular conversation.[697]

Unstructured interviews are the most flexible. The interviewer should be engaged in active listening and may aim to build a rapport with the respondent.[698] This type of interview is not suited to this research project as there are some topics that need to be covered where possible by each

[695] Silverman, (2011), fn 691, p. 166;
[696] Fontana, A. and Prokos, A. H., *The Interview: From Formal to Post Modern*, Left Coast Press, Walnut Creek, California, 2007, p. 9;
[697] Schensul, (2012), fn 687, p. 88;
[698] Silverman, (2011), fn 691, pp. 162-163;

respondent to generate suitable data. If an unstructured interviewing technique was used it would not be possible to script the questions to ensure the relevant points were covered. Furthermore, the closed questions that have been included in the interview (see Annex A) are not compatible with an unstructured interviewing approach.

In structured interviewing, pre-established questions are put to each respondent with a closed set of response categories, with the interviewer following a script.[699] There is therefore little flexibility in this technique. Closed interviewing is not suitable to meeting the research aim of understanding how the law is applied in practice. This is because the respondents need to be given the opportunity to respond to the research questions in their own words. It is assumed that the respondents know more about how they apply the law than the author does and if respondents were constrained in their ability to respond, which would be a consequence of using a structured technique, this is likely to have an adverse impact on the data collected.

A structured technique also precludes the inclusion of questions which give the respondents an opportunity to raise points which are not otherwise captured in the questionnaire. Given that the respondents are well placed to explain how the law on contract adjustments is applied in practice it should not be assumed that no new points will be raised during the interviews. An interview technique is required therefore which allows for such points to be raised by the respondents and a failure to allow for this may lead to incomplete data being collected.

Semi-structured interviews fall between structured interviews and unstructured interviews.

[699] Fontana and Prokos, (2007), fn 696, p. 19;

Semi-structured interviews have been described as being sufficiently structured to address the specific topics that are the subject of the research, whilst allowing the participants to contribute to the focus of the study.[700] Accordingly, semi-structured interviewing is suited to the research aim as it is possible to ensure the topics that are relevant to the study are covered, whilst giving respondents the flexibility required to generate appropriate data.

A consequence of using semi-structured interviews is that points of relevance may arise throughout the interview as participants do not usually give straightforward answers to the questions asked.[701] This may benefit the study as it will help ensure relevant data is included in the analysis. However, it may add complexity as it may be that data emerges which is not readily reconcilable with other respondents' responses. As already explained above, respondents may also raise new issues which the author has not identified when constructing the questionnaire. Issues arising are explored in chapter 7, which sets out the findings of the empirical enquiry.

6.4.5 Identification of participants

External legal advisers

External legal advisers have been identified using the Legal 500 which is a publication available online which identifies and ranks law firms in accordance with their practice areas.[702] The directory is compiled by asking participating law firms for references from and information about their clients and projects they have advised on. Firms are then ranked based on the information that is provided, with positive recommendations from clients and a wide range of projects resulting in a higher ranking. Individuals at firms

[700] Galletta, A., *Mastering the Semi-Structured Interview and Beyond*, New York University Press, New York, 2013, p. 24;
[701] Boeije, (2012), fn 690, p. 47;
[702] www.legal500.com;

were identified using the firm's website or through making basic enquiries as to who the most appropriate person was to respond.

Firms may specialise in advising contracting authorities, contractors, or funders, or may work with a variety of clients. Where firms indicated their practice area did not extend to advising contracting authorities on PFI/PPP these firms were not requested to complete the questionnaire.

Identified individuals were contacted by way of a brief email introducing this study and explaining the input that is being requested from them. Individuals who expressed an interest in assisting were sent a further email providing further information about the research, the Participants Information Sheet,[703] and attaching the questionnaire (see Annex A). Individuals could either complete the questionnaire in writing, or via a telephone interview.

Individuals within contracting authorities

Contracting authorities who have in-scope PPP projects were identified using the Partnerships UK website, which lists PFI/PPP projects that have been entered into in the UK and from which projects can be identified by sector.[704] Information on PFI projects that have been signed as of 31 March 2012 was also obtained from HM Treasury.[705]

Basic internet searches and telephone enquiries were then undertaken to identify the legal adviser and/or the contract manager within the contracting authority from whom procurement law queries and advice in respect of the identified projects is sought.

[703] See further section 6.4.6;
[704] www.partnershipuk.org.uk;
[705] www.hm-treasury.gov.uk/infrastructure_data_pfi.htm;

6.4.6 Approach to data collection

Potential respondents identified as described above were contacted with a short email to ask whether they wish to participate in the study. Those that were willing to participate were sent a copy of the relevant questionnaire (see Annex A) and Participants Information Sheet (see further below) and were asked to whether they would like to complete a written response or participate in a telephone interview. The questions in the telephone interview followed the form of the questionnaire.

Giving respondents the option to respond in writing is in recognition that busy professionals may not have the time to commit to a telephone interview and that it may be more convenient therefore to respond in writing. Whilst it would be ideal to conduct all of the interviews in the same way to better ensure consistency and quality of responses, the need to have meaningful number of responses should take precedence over the format of the response. In cases where written responses were not sufficient for the purposes of this study they were disregarded.

Interviews were carried out between February and August 2015 and data was analysed in parallel with data collection. The interviews were recorded and written up into long-hand for the author's ease of reference.

The empirical research was carried out in accordance with the University of Nottingham's policy on research ethics. Respondents were given information on the ethical framework in which the research was conducted and other practical matters though a Participants Information Sheet.

The Participants Information Sheet explained that data collected is anonymised for the purposes of presentation in the thesis and explained the security measures that protect the data. Respondents were informed as to the purpose for which the data was collected and were entitled to withdraw from the study.

Responses were anonymised such that individuals cannot be identified from the published results of the study. This is important as lawyers may feel that the duty of confidentiality which they owe to their clients is compromised if they are identifiable. Individuals at contracting authorities may also be concerned that if they are identifiable this will expose their organisation to risk in cases where their responses suggest their organisation is not complying with applicable law.

6.4.7 Data analysis and categorisation

Data analysis in this study consisted of organising the responses received, being written responses to the questionnaire and telephone interviews subsequently written up by the author.[706]

In this case the data was coded around central themes to allow for analysis of the data. These themes were (i) comments on the state and fitness for purpose of the legal framework applicable to contract adjustments; (ii) examples of contract adjustments that arose in practice and the way in which the law was applied to them; and (iii) the factors impacting on the way in which the law was applied in practice. Within these central themes, patterns within the data have emerged. The findings of the data is set out in chapter 7 of this study, and this is further explored, along with overall conclusions, in chapter 8.

[706] On data analysis see further, Boeije, (2012), fn 690, p. 46;

Chapter 7: Analysis of empirical study

7.1 Introduction

7.1.1 The objective of this chapter

As explained in chapter 1 section 1.5, the first aim of this study is to identify the law applicable to contract adjustments. This objective has been dealt with in chapters 2 to 5 which identified respectively the law applicable to the regulation of public procurement, adjustments pursuant to review clauses, adjustments as an operation of law, and other adjustments.

The second aim of this study is to analyse how the law on contract adjustments is applied in practice. This chapter 7 presents the findings of the qualitative research undertaken as described in chapter 6 and thereby examines how the law on contract adjustments is applied in practice.

7.1.2 The structure of this chapter

Section 7.2 below sets out the respondents' comments and criticisms on the legal framework applicable to contract adjustments. Section 7.3 then sets out contract adjustment issues identified as having arisen in practice. The content of these sections is relevant to how the law on contract adjustments is applied in practice as it demonstrates the respondents' understanding of what the law is and also explains how it is applied when specific contract adjustment issues arise.

Section 7.4 goes on to explain the steps proposed by private practice lawyers to mitigate the risk of successful challenge to a contract adjustment. Section 7.5 then considers the relevance of consequences of challenge and section 7.6 explains the consideration of the likelihood of challenge in applying the law on contract adjustments. The final section, 7.7, discusses the relevance

of the contracting authority's objectives to the advice provided by private practice lawyers.[707]

Sections 7.4 to 7.7 can be understood in the context of the body of research undertaken into the behaviour of contracting authorities in applying procurement law, most importantly the work of Braun who considered the practical application of procurement law to UK PFI concluding that the divergence between procurement law and commercial requirements had led to practices being adopted which provided procedural flexibility.[708] The findings set out in sections 7.4 to 7.7 can also be contextualised in the findings of research concerned with the practical application of contractor remedies for alleged breaches of procurement law.[709] The situation of this study in the existing body of work on applied public procurement law is considered further in chapter 8.

7.1.3 The approach to analysis

The approach to analysis is from the perspective of private practice lawyers who advise contracting authorities on the application of the law to contract adjustments. The data collected from contracting authorities is used to supplement the data collected from private practice lawyers.

This framework is used because private practice lawyers' responses generated a fuller data set then the contracting authority responses. Private practice lawyers addressed the questionnaire in a detailed and comprehensive manner, producing a relevant data set.

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[707] To preserve confidentiality responses received from private practice lawyers will be labelled PPL and numbered for the purposes of identification, e.g. PPL1, PPL2, etc. Responses received from contracting authorities will be labelled CA and numbered for the purposes of identification e.g. CA1, CA2, etc. Respondents are all described as "he";

[708] Braun, (2003), fn 672, pp. 575-598, especially conclusion at pp. 597-598; see also Craven, (2011), fn 605;

[709] See Arrowsmith, S., and Craven, R., "Supplier litigation behaviour in public procurement under the EU Remedies Directives: an empirical study of the UK market", forthcoming, 2016; Boch, (2007), fn 312, pp. 410-434; Pachnou, D., "Bidders' Use of Mechanisms to Enforce EC Procurement Law", *Public Procurement Law Review*, 2005, 14, pp. 256-263;

7.2 Commentary on legal framework

7.2.1 Introduction

As explained in section 2.4.4 the 2015 Regulations came into effect on 26 February 2015 and apply to procurements commenced after that date. The case of *Edenred*[710] and government guidance[711] confirm that Regulation 72 of the 2015 Regulations applies to contract adjustments occurring after 26 February 2015, irrespective of whether the public contract was awarded prior to the coming into effect of the 2015 Regulations.

This research was conducted between February 2015 (pre-dating the commencement of the 2015 Regulations) and August 2015. A significant majority of responses therefore were provided after the 2015 Regulations had come into effect. However, those respondents interviewed prior to 26 February were aware of the 2015 Regulations as the 2015 Regulations had been consulted on by the UK Cabinet Office[712] and Directive 2014/24 EU was adopted on 26 February 2014, and the respondents articulated which law they were commenting on in their responses. Futhermore, responses that post-dated 26 February 2015 gave examples of adjustments occurring prior to 26 February 2015 and were thus not subject to the 2015 Regulations. Clarification was sought where necessary as to which legal framework respondents were referring to.

This section deals firstly with the legal framework prior to the 2015 Regulations and then considers the 2015 Regulations before examining obstacles to further improvement in the applicable legal position.

[710] *Edenred*, fn 521;
[711] Crown Commercial Service, "The Public Contracts Regulations 2015: Guidance on Amendments to Contracts During Their Term", updated August 2016;
[712] Cabinet Office, "Consultation Document UK Transposition of new EU Procurement Directives: Public Contract Regulations 2015", undated, note that responses were sought by 17 October 2014;

7.2.2 The legal framework prior to the 2015 Regulations

Pressetext[713] was referred to by nearly a third of the 21 private practice lawyers and nearly a fifth of the 24 contracting authority respondents. [714] The principles derived from *Pressetext* were criticised as being general and difficult to apply in practice.[715] *Pressetext* was described as "going too far" by putting the threshold of what needs to be advertised at too low a level thus constraining contracting authorities.[716]

Notwithstanding this criticism, two private practice lawyer respondents felt that the legal framework applicable to contract adjustments was clear prior to the 2015 Regulations.[717] Five private practice lawyer respondents felt, however, that the law existing before the 2015 Regulations was unclear[718] and one did not express a definitive opinion.[719] Contracting authority respondents did not comment.

7.2.3 The 2015 Regulations

Regulation 72(1)(a) which concerns review clauses[720] was commented on by three private practice lawyers.[721] PPL16 indicated that Regulation 72(1)(a) could have provided greater guidance as to when adjustments pursuant to review clauses were permitted or not.[722] Regulation 72(1)(a) was also commented on by PPL8 said that there was "huge room for manoeuvre" in terms of what would be permitted pursuant to Regulation 72(1)(a).

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[713] *Pressetext* is, as explained in chapter 2 section 2.6, the leading CJEU authority on contract adjustments, of particular importance given that Regulation 72 of the 2015 Regulations sets out for the first time provisions on contract adjustments;
[714] PPL4, PPL6, PPL10, PPL16, PPL17, PPL18, CA4, CA9, CA14, CA23, CA24;
[715] PPL4;
[716] PPL4;
[717] PPL16, PPL17;
[718] PPL4, PPL8, PPL9, PPL18, PPL20;
[719] PPL5 answered "yes and no";
[720] See chapter 2 section 2.4.1 on the content of Article 72(1)(a) of the 2014 Directive which is implemented in Regulation 72(1)(a) of the 2015 Regulations;
[721] PPL6, PPL8, PPL16;
[722] PPL5 also commented that guidance on review clauses would be useful;

PPL14 spoke of the difficulties of drafting a review clause which was "precise and unequivocal" saying "a crystal ball" would be required to identify the adjustments.[723] This suggests that there may be a practical limitation on the application of the regulation and thus the potential protection it provides to procurement law challenge because of the difficulties of drafting to meet this requirement.[724]

The inclusion of "safe harbour" percentage thresholds in Regulation 72(5) was viewed by some as clarifying the legal position[725], in particular giving better certainty as to what "material" meant in terms of the value of a change.[726] However, it was also commented that it was largely irrelevant as an adjustment up to those thresholds would not have been understood as being material anyway.[727]

PPL11 commented that whilst the law was unclear, it was not so unclear as to prevent lawyers giving "workable, practical advice".[728] However, the lack of clarity in the law was stated to generate work for lawyers.[729] It was also commented that there was room for interpretation giving rise to the possibility of different interpretations.[730]

Half of the private practice lawyer respondents and nine of the 24 contracting authority respondents stated that the 2015 Regulations improved the legal position as compared to the legal position existing prior to their implementation.[731] The remaining respondents did not offer an opinion as to

[723] PPL14 also indicated a reluctance on the part of clients to duly consider this as there may be pressure to get the contract signed and drafting review clauses may be viewed as an "irritant";
[724] See section 7.3.2 on the practical difficulty of drafting review clauses;
[725] PPL8, PPL10;
[726] PPL10, PPL18;
[727] PPL8;
[728] PPL11 expanded on this point to say that where a procurement law issue was identified options would be discussed with the contracting authority to identify whether procurement law risk could be reduced;
[729] PPL21;
[730] PPL1;
[731] PPL1, PPL2, PPL4, PPL7, PPL8, PPL9, PPL10, PPL12, PPL16, PPL17, PPL19, PPL20, CA1, CA2, CA3, CA4, CA8, CA14, CA18, CA22, CA24;

whether the 2015 Regulations were an improvement on the previous law, showing that those who commented were unanimous in their view that the legal position had been improved. PPL17 commented that the 2015 Regulations were an improvement but "it still turns on the question of materiality which is inevitably a difficult concept at the margins". This suggests continuity between the legal position existing prior to the 2015 Regulations and that set out in the 2015 Regulations, given that the concept of materiality is relevant to both. [732]

Four of the 21 private practice lawyer respondents and four of the 24 contracting authority respondents stated that the law on contract adjustments following the 2015 Regulations was still unclear.[733] Five contracting authority respondents stated that the law on contract adjustments following the 2015 Regulations was clear.[734]

7.2.4 Obstacles to further improvement

It was commented that the application of the law on contract adjustments had to be done on a case by case basis[735] and that the application of the law would vary depending the relevant contract.[736] These comments suggest that the multiplicity of scenarios to which the law may be applied create complexity in deriving principles of general application. PPL1 commented that more case law would assist in the application of the law on contract adjustments as it would help in understanding where the "limits" were. PPL5, PPL13 and CA2 said that guidance would be helpful.

PPL14 said that issues applying the law on contract adjustments arose not because of the uncertainties in the legal framework but because of a lack of information about what happened during the tender process, what the

[732] See chapter 2 on the regulation of public procurement;
[733] PPL6, PPL8, PPL11, PPL13, PPL20, PPL21, CA1, CA5, CA9 saying there may be difficulties in applying the 2015 Regulations, CA20;
[734] CA4, CA6, CA9, CA17, CA19;
[735] PPL7, PPL9, PPL10;
[736] PPL10;

contract looked like before, and whether there are any other contractors in the market who are interested. This comment appears to combine the requirement to identify whether the adjustment is in accordance with procurement law and the actual risk of someone bringing a procurement law challenge. It may be the case that measures such as better record keeping by contracting authorities could address PPL14's concern, and that such a measure may assist in the application of the law.

The lack of a clear set of principles or guidelines that are capable of general application is evident in three private practice lawyer responses that indicated an intuitive approach was required to understand and apply the law to contract adjustments. It was commented that in order to interpret the law you need a "feel" for it, not just reliance on black letter law[737] and that you exercise a value judgment when applying the law.[738] PPL7 stated that "a lot of the time it is still a case of touch and feel as to whether or not something is a material change to a contract".[739]

7.3 Contract adjustment issues identified in practice

7.3.1 Introduction

Respondents were offered the opportunity to comment on contract adjustment issues that had arisen in practice and the findings of these enquiries are set out in this section 7.3. The adjustments were: (i) pursuant to review clauses; (ii) insolvency; (iii) change of control; (iv) assignment/novation; (v) force majeure; and (vi) change of law. The section concludes with a summary of the findings of these responses.

[737] PPL7, PPL21;
[738] PPL1;
[739] PPL7;

7.3.2 Whether an adjustment can be made or not pursuant to a review clause

Nine of the 21 private practice lawyer respondents and a quarter of the 24 contracting authority respondents spoke of advising in circumstances where there was uncertainty as to whether an adjustment could be made pursuant to a review clause. [740] Three private practice lawyers and five of the contracting authority respondents had not encountered difficulty in circumstances where they were advising whether or not an adjustment could be made pursuant to a review clause.[741] The remaining nine private practice lawyers and 13 contracting authority respondents did not identify a circumstance in which they had been asked to consider an adjustment pursuant to a review clause. Therefore a majority of those respondents providing a substantive answer had encountered uncertainty when adjusting a contract pursuant to a review clause.

Two private practice lawyers commented that no procurement law issues arose in the circumstance that they had been instructed on because the contract that was being adjusted had been competed and had included the relevant review clause.[742] The third private practice lawyer respondent who had not encountered difficulties stated that this was because the review clause was drafted so broadly,[743] the implication being that there would be a risk in making an adjustment pursuant to it and therefore there was no difficulty providing legal advice stating this risk existed.

Uncertainty as to whether an adjustment could be made pursuant to a review clause could arise because of ambiguity as to whether the adjustment fell within the scope of the review clause.[744] The scope of the review clause is concerned with whether or not the proposed adjustment is provided for

[740] PPL4, PPL5, PPL6, PPL8, PPL9, PPL10, PPL16, PPL17, PPL20, CA2, CA3, CA5, CA16, CA19, CA20;
[741] PPL3, PPL14, PPL21, CA4, CA6, CA9, CA18, CA24;
[742] PPL3, PPL21;
[743] PPL14;
[744] PPL20;

within that review clause, the implication being that adjustments within the scope of a review clause are more acceptable than those made outside the scope of a review clause.

The difficulty identified by PPL16 and PPL17 from a practical perspective is that although it may be possible to identify certain adjustments that may be required during the term of a contract and thus include review clauses to bring such adjustments within their scope it may not be possible to identify all adjustments. In the case of a foreseen event, it should be relatively easy to include contract review provisions that address the change in clear and unambiguous terms.[745] Examples given of where it was possible to achieve this are price review clauses or options to extend the contract.[746] Where bidders were made aware of these clauses during the procurement this was stated by PPL11 to remove the risk of challenge.

Contracting authorities must therefore identify all of the adjustments that may be relevant during the term of the contract.[747] They would then be in a position to include the adjustment within the scope of a review clause. Contracting authorities are encouraged by private practice lawyers to consider how the project may evolve over the term of the contract[748] and to think about all eventualities and to try to make provision for them even if it is not clear to what extent they will actually be required.[749] PPL5 commented that time spent considering the consequences associated with all possible adjustments is time well spent from both a commercial and a procurement perspective.

An issue identified by three private practice lawyers was that adjustments may be required for reasons unforeseen at the time that the contract was

[745] PPL17,
[746] PPL11,
[747] PPL1, PPL4,
[748] PPL4, also CA6 commented that it was important to identify adjustments that may be required during the term of a contract and provide for these in review clauses;
[749] PPL1, PPL14;

entered into.[750] There is recognition, therefore, that it is not possible to capture unforeseen adjustments in clear and unambiguous review clauses. This point was made by PPL14, commenting, "in a world of perfect information you would be able to draft a clause perfectly to cover it, but when you don't have all that information it is much harder to draft a clause which works".[751] The risk remains therefore that an unforeseen circumstance may arise that is not dealt with in a review clause.[752]

PPL16 spoke of the "nervousness" of a contracting authority where the adjustment proposed was not provided for in a review clause. This illustrates uncertainty occurring in practice in respect of adjustments that are not provided for in review clauses. It arguably also supports the proposition that review clauses may provide protection from procurement law challenge – as if this was not understood to be the case their inclusion would be irrelevant to the state of mind of the contracting authority.

Private practice lawyers were aware that review clauses which did not describe the relevant adjustment in clear and unambiguous terms were unlikely to protect from procurement law challenge. PPL11 stated that it was "risky" to rely on a clause that said "we can change anything we like".[753] Three of the 24 private practice lawyers gave examples of review clauses concerned with putting in place the process for making the adjustment rather than describing the actual adjustment.[754] Widely drafted review clauses were identified by PPL14 and PPL17 as creating uncertainty as to whether an adjustment could be made pursuant to it – a review clause "may

[750] PPL6, PPL16, PPL17;
[751] PPL14;
[752] Unforeseen events may comprise an operation of law, discussed at chapter 4;
[753] PPL11;
[754] PPL4, PPL8, PPL20;

not actually provide much comfort because the scope for change provided within the clause is too broad".[755]

The "level of risk of material change" created when making adjustments pursuant to a review clause was cited by PPL20 as a potential issue. PPL4 commented that where a review clauses takes you outside the "*Pressetext* guidelines" then there would potentially be an award of a new contract. This indicates potential uncertainty in the understanding of the legal position as these responses are arguably inconsistent with the view that adjustments made pursuant to clear and unambiguous review clauses are permissible.

7.3.3 Insolvency

Two thirds of the 24 private practice lawyers had advised on the insolvency of a contractor[756] or a sub-contractor under a PFI.[757] One third of the 21 contracting authority respondents had considered insolvency of a contractor.[758] This indicates that procurement law is considered in practice by contracting authorities and private practice lawyers upon occurrence of an insolvency event arising in practice.

PPL4 commented that prior to the 2015 Regulations where a new contractor takes over a contract upon insolvency of the original contractor then it is very likely that this will be a material change, and as such a problem for the contracting authority. However, the procurement law consequences of the insolvency of a contractor have been clarified in the 2015 Regulations.[759] As such the difficulty identified by PPL4 appears removed.

[755] PPL14, PPL17 and PPL19 saying that risk is reduced where drafting is set out in the contract;
[756] PPL1, PPL4, PPL5, PPL6, PPL8, PPL10, PPL14, PPL16, PPL17, PPL18, PPL19, PPL20, PPL21;
[757] PPL2, PPL3, PPL6 responded with examples of insolvent sub-contractors;
[758] CA1, CA2, CA5, CA6, CA9, CA16, CA19, CA20;
[759] Regulation 72(1)(d)(ii); see further chapter 4 section 4.2;

Procurement law risk was stated to not arise where a sub-contractor was insolvent and the contractor (being the counterparty to the contract with the contracting authority) replaced that sub-contractor.

7.3.4 Change of control

17 of the 21 private practice lawyers and 13 of the 24 contracting authority respondents had considered change of control.[760] This indicates that this has been an issue for a significant number of respondents.

Respondents indicated that the degree of procurement law risk identified varies depending on whether the change in control is an asset or a share sale. If it is a share sale procurement law risk was not identified, as there has not been a change in the contractor.[761] The position was described as being more problematic where the identity of the contractor changed[762]and risk of procurement law challenge was identified in the case of an asset sale[763] where the identity of the contractor changes.

Seven private practice lawyers spoke of contractual change of control provisions which either prohibited change of control or provided that change of control could occur with the consent of the contracting authority.[764] An unauthorised change of control may be an event providing a contractual right for the contracting authority to terminate the relevant contract.[765] Advice may be sought as to whether what is proposed falls within the remit of these clauses.[766] This indicates the acceptability of change of control is considered

[760]PPL1, PPL2, PPL3, PPL4, PPL5, PPL6, PPL8, PPL9, PPL10, PPL13, PPL15, PPL16, PPL17 (indicating he had advised on "corporate restructuring"), PPL18, PL19, PPL20, PPL21, CA1, CA2, CA3, CA4, CA5, CA6, CA9, CA13, CA16, CA17, CA19, CA20, CA21; see chapter 4 section 4.3 on change of control;
[761] PPL4, PPL6, PPL10, PPL15, PPL21;
[762] PPL9;
[763]PPL6, see further chapter 4 section 4.3;
[764] PPL2, PPL3, PPL4, PPL9, PPL12, PPL15, PPL20;
[765] PPL3, PPL4, PPL12, PPL15, CA1 stating that a contract had recently been terminated on change of control but without confirming whether this was pursuant to a contractual right;
[766] PPL2, PPL9;

in terms of the content of contractual provisions rather than it being solely an exercise in applying procurement law to this adjustment.

PPL20 said that it was rare for a contracting authority to be explicitly told that there was an assignment; they may only become aware when they are issued with an invoice requesting that they pay a different entity. This is troubling as it may be the case that the relevant contract adjustment takes place without the knowledge of the contracting authority and therefore the contracting authority is not able to consider its procurement law implications, and is thus exposed to risk of procurement law challenge without its knowledge.

Where an unauthorised change of control is a contractual termination event this may have the practical effect of encouraging contractors to notify contracting authorities that they are undergoing a change of control and obtain specific consent for this, rather than run the risk that the contracting authority becomes aware of the change of control after the event and then terminates the relevant contract. Including contractual provisions prohibiting unauthorised changes of control and enabling the contracting authority to terminate in these circumstances may be sensible and may give contracting authorities an opportunity to consider procurement law risk before the adjustment occurs.

Two of the 24 private practice lawyers said that they would advise on the new owner's covenant strength, and the pre-qualification questionnaire selection criteria from the original procurement would inform that analysis.[767] Covenant strength is understood by private practice lawyers[768] to be the ability of a contractor to comply with its contractual obligations, a

[767] PPL20, PPL4 made the point that if there was a parent company guarantee provided by the original owner or the financial standing of the original owner was of material importance to the selection and the new owner did not give a PCG or gave an inadequate one this could be an issue;

[768] Based on the author's experience of working as a PPL and also working for a contracting authority receiving advice from PPLs;

contractor with good covenant strength being perceived to be more able to comply with its contractual obligations than one with weak covenant strength.

This suggests that in practice procurement documents are being used to underpin a commercial analysis of the suitability of a change in control rather than change of control being something that is relevant solely from a procurement law perspective. In terms of procurement law analysis, it was commented that where the new owner could meet the pre-qualification questionnaire selection criteria "in theory" the adjustment would be acceptable.[769]

PPL9 noted that following a change in control the contractor's priority was to retain the contract, as this had a value to their business, so they usually accepted the contract without wanting to negotiate other adjustments. Where the contractor takes this position, the issue is simplified from the perspective of the contracting authority whose assessment of the materiality of the adjustment is thus confined to the change of control rather than also having to consider the acceptability of a number of other adjustments from a procurement law perspective.

7.3.5 Assignment/novation

Half of the 21 private practice lawyer respondents and a quarter of the 24 contracting authority respondents had considered the assignment or novation of a public contract.[770] This is less than the number of respondents who commented on change of control and insolvency, suggesting either that assignment/novation does not arise as frequently in practice or that it generates fewer (if any) procurement law issues.

[769] PPL20;
[770] PPL1, PPL5, PPL6, PPL8, PPL10, PPL14, PPL16, PPL17 (had advised on "corporate restructuring"), PPL18, PPL19, PPL20, CA2, CA3, CA5, CA16, CA19, CA20; see chapter 4 section 4.4 on assignment/novation;

PPL20 stated that assignment and novation had occurred in practice where a contractor underwent a reorganisation. Risk of procurement law challenge existed here as the contractor was different to that which the contracting authority awarded the contract, it being commented that, "it is hard if you are bringing in a new party not to infringe the procurement rules".[771] However, where the contract remained in the same group structure following the adjustment, no procurement law risk was identified.[772]

PPL12 said that assignment and novation would not create a procurement law risk where it was contemplated in the contract, the exception being where it was used as a device to deliberately avoid procurement law. The first part of this response is consistent with the position that adjustments pursuant to review clauses may be protected from procurement law challenge, but the second part suggests a caveat to that position.

PPL11 commented that where procurement law risk was identified in assigning a contract that instead the entire contract could be sub-contracted and that this would "normally" be acceptable.[773] This approach appears to recognise that an adjustment whereby the contractual counterparty remains the same creates less risk of procurement law challenge then an adjustment entailing the change of a counterparty.

7.3.6 Force majeure

Three out of the 21 private practice lawyers respondents and five of the 24 contracting authority respondents had advised on the occurrence of a force majeure event.[774] It is interesting to note that the number of responses for the private practice lawyers is significantly fewer than for the contract adjustment issues set out earlier in this section, whilst the number of contracting authority responses does not show such a significant reduction.

[771] PPL1;
[772] PPL5;
[773] PPL11;
[774] PPL5, PPL8, PPL10, PPL17, CA2, CA5, CA9, CA19, CA20;

This may reflect the fact that contracting authorities are less likely to seek legal advice in the case of force majeure, perhaps because they do not perceive procurement law risk arising.

An alternative explanation may be that in the case of force majeure contracting authorities do not feel specialist procurement law advice is necessary as they will need to take practical steps to deal with the force majeure event regardless of whether such steps introduce procurement law risk so they may attach less importance to understanding procurement law risk.

In circumstances where the force majeure event entitled a contracting authority to award a new contract without advertising,[775] two of the 21 private practice lawyers stated it was permissible to negotiate with the contractor to make the changes needed to deal with the force majeure event.[776]

One respondent opined that if a force majeure event arose the parties would take a collaborative approach to resolving the issue, so contractual provisions such as relief or compensation events may be used or a variation proposed through change control.[777] An alternative approach proposed was that the contracting authority could step-in to the contract for the duration of the force majeure event and at the end of it would see whether the contract would continue or not.[778]

PPL12 stated that adjustments following a force majeure event are unlikely to create a procurement law risk and that the fact that it is a "no fault"

[775] This is a reference to Regulation 14(1)(a)(iv) of the 2006 Regulations which implemented Article 31 of the 2004 Directive discussed at chapter 2 section 2.4.2. Regulation 72(1)(c) of the 2015 Regulations deals with this situation and implements Article 72(1)(c) of the 2014 Directive which, as discussed at chapter 2 section 2.4 provides that a modification will not require a new procurement process in this circumstance;
[776] PPL4, PPL8;
[777] PPL15;
[778] PPL11;

ground is relevant to the assessment rather than the materiality of the adjustment.

7.3.7 Change in law

Four of the 21 private practice lawyer respondents and seven of the 24 contracting authority respondents had advised on a change in law. [779] Of note is that the number of private practice lawyer respondents indicating that they have advised on change of law is significantly less than that had advised on the issue of insolvency, change of control, and assignment/novation but the number of contracting authority respondents who had considered change of law remains consistent with those responding to these earlier issues. This may suggest a tendency for contracting authorities to deal with change of law internally without recourse to external advice.

PPL11 said that change in law sat in a "grey area" as if the change in law meant that the whole contract is completely changed this may be material. PPL4 said that there could be a procurement law issue if the original contract was altered "fundamentally", for example if considerable new services had to be added. This indicates that respondents understood that a risk of material amendment may arise following a change in law.

7.3.8 Conclusion

This section 7.3 shows that contract adjustment procurement law issues arise in practice and that these are considered both by contracting authorities and the private practice lawyers that advise them. As has been demonstrated in this section, not all issues have been universally experienced and that the degree of procurement law risk identified (if any at all) varies on the issue and presumably (drawing on the comments set out in section 7.2.4) on a case by case basis depending on the scenario and the relevant contract.

[779] PPL5, PPL8, PPL10, PPL17, PPL18, PPL19, PPL20, CA2, CA3, CA5, CA9, CA16, CA19, CA20;

The findings set out in this section 7.3 are of interest in the context of this study which seeks to understand how the law is applied in practice as firstly it demonstrates that the law is indeed applied in practice in specific instances where contract adjustment issues arise. Secondly it forms the basis for an understanding of the types of issues that arise and the particular difficulties these create. This is developed in the subsequent sections of this chapter which set out the factors which influence the advice of private practice lawyers and therefore contracting authorities where procurement law issues on contract adjustments arise.

7.4 Legal risk "mitigants"

7.4.1 Introduction

When providing advice to contracting authorities on contract adjustments, private practice lawyers identified steps whereby the risk of successful legal challenge can be mitigated by contracting authorities. These steps were universally described by private practice lawyer respondents as "mitigants". Legal risk mitigants were understood both in terms of minimising the actual risk of there being a successful challenge and also in terms of mitigating the consequences of successful challenge.

This section describes the mitigants identified by respondents, including the effect understood to be achieved (or desired) in terms of reducing or removing the risk of successful challenge. Six mitigants were identified as follows: (i) voluntary transparency notices; (ii) contract award notices; (iii) severable variations; (iv) procurement indemnity deeds; and (v) interim contracts. An explanation of what is meant by each of these is set out in the relevant section below.

Half of the 21 private practice lawyer respondents described providing advice to contracting authorities on mitigants in connection with a contract adjustment. The respondents not cited in respect of any of the six mitigants identified either omitted to identify any mitigants or omitted to identify that

specific mitigant. Only one contracting authority respondent, CA2, referred to a mitigant.

It should be noted that respondents were not specifically asked to comment on mitigants. Respondents who identified mitigants did so in response to questioning on the factors that they took into account when providing procurement law advice to contracting authorities on contract adjustments. The fact that half of the 21 private practice lawyer respondents spontaneously identified mitigants arguably illustrates the importance of mitigants to the legal advice provided by them to contracting authorities.

7.4.2 Voluntary transparency notices

Publishing a voluntary transparency notice was cited by a quarter of the private practice lawyer respondents and CA2 as a possible legal risk mitigant in the case of contract adjustments.[780]

Where a contracting authority publishes a voluntary transparency notice in accordance with Regulation 99(2) of the 2015 Regulations[781] the remedy of ineffectiveness[782] is not available to the aggrieved contractor. Voluntary transparency notices were explicitly stated by PPL16 to have the potential to protect against an ineffectiveness claim.

The publication of a voluntary transparency notice was also identified as a mitigant where it had the potential to set the clock running in terms of the limitation period for bringing a damages claim[783] as this commences on the date that the aggrieved contractor knew or ought to have known[784] of the

[780] PPL1, PPL2, PPL4, PPL10, PPL16, PPL19, CA2;
[781] Entailing that: (a) the contracting authority considers the award of the contract without prior publication to be permitted by Part 2 of the 2015 Regulations; (b) the voluntary notice was published expressing the contracting authority's intention to enter into the contract; and (c) the contract is not awarded before the end of a period of at least 10 days beginning on the date on which the voluntary transparency notice was published in the Official Journal;
[782] See chapter 2 section 2.4.3 on remedies and further section 7.5.2 below;
[783] See chapter 2 section 2.4.3 on remedies and further section 7.6.3 below; PPL10;
[784] 2015 Regulations, Regulation 92; Regulations 47D and 47E of The Public Contracts (Amendments) Regulations 2009, SI 2009 No 2992;

breach giving rise to the claim. This therefore may give the contracting authority comfort that this remedy will not be granted if the relevant period passes without a damages claim being made.

It was commented that the law could be clarified to confirm whether the consequences of ineffectiveness would "strike down" the original contract or whether it would just be the variation which would be found to be ineffective.[785]

7.4.3 Contract award notices

Contracting authorities are required to publish, not later than 30 days after the conclusion of a contract, a contract award notice on the results of the procurement.[786] This obligation is separate to the publication of a voluntary transparency notice which may be published as described in section 7.4.2 above.

Contract award notices were referred to by three of the 21 private practice lawyer respondents[787] to mitigate ineffectiveness risk.[788] The publication of a contract award notice would notify contractors of whatever the content of that notice was and would thus have the potential to commence the time period in which contractors could challenge the contracting authority. Where the relevant period passes without a challenge being made a contracting authority may be reassured that a successful challenge will not arise.

[785] On remedies see chapter 2 section 2.4.3 and further section 7.5.2; PPL6;
[786] 2015 Regulations, Regulation 50;
[787] PPL1, PPL2, PPL16;
[788] PPL16 (note that PPL16 also acknowledged other forms of publicity may be used to mitigate the ineffectiveness risk, stating that in the case of the specific adjustment on which advise had been provided a notice was published on the contracting authority's website);

7.4.4 Severable variations

In circumstances where a contract has been entered into the UK courts must, if satisfied that any of the grounds for ineffectiveness apply, make a declaration of ineffectiveness.[789] As explained in chapter 2 section 2.4.3, the consequence of ineffectiveness is that the contract is considered to be prospectively ineffective from the time that the declaration is made and that the contractual obligations not yet performed are not to be performed.

Two of the 21 private practice lawyer respondents stated that they considered providing for an adjustment in a severable way with the objective that if a finding of ineffectiveness was made it would just affect the adjustment rather than the original contract.[790]

7.4.5 Procurement indemnity deed

A procurement indemnity deed may be agreed with the contractor whereby the contractor contributes to the cost of defending any challenge.[791] Agreement may also be reached between the contractor and the contracting authority to share the costs of damages or civil penalties required to be paid by the contracting authority following successful challenge.[792] These mitigants focus on dealing with the financial consequences of a procurement law challenge.

This suggests that contracting authorities are aware of the financial consequences of a procurement law challenge and seek to enter into arrangements to limit their exposure to this. It is uncertain whether contractors are prepared to enter into arrangements which may have negative financial consequences for them because they apparently recognise that they should share the risk with the contracting authority, or whether

[789] 2015 Regulations, Regulation 98; the relevant obligations are Regulation 89 or 90 of the 2015 Regulations;
[790] PPL2, PPL16;
[791] PPL14;
[792] PPL7;

contractors understand the risk and thus cost of procurement law challenge to be negligible or irrelevant. If the latter was the case then it may evidence that procurement law is either not understood or is not viewed as a substantive risk by contractors when adjusting existing contracts.

7.4.6 Interim contracts

Three of the 21 private practice lawyer respondents said that in order to avoid adjusting a contract where there was doubt as to whether such an adjustment would be in compliance with the applicable law on contract adjustments, short term below threshold contracts were awarded to achieve the same effect instead.[793] An example given was where the original contractor was insolvent and a short term below threshold contract was awarded to a third party for those services.[794]

7.5 Relevance of consequences of challenge

7.5.1 Introduction

Fifteen of the 21 private practice lawyer respondents described advising on the consequence of challenge when providing advice on a contract adjustment.[795] Of the remaining respondents, PPL4 and PPL20 omitted to mention consequences of challenge and PPL7 mentioned consequences of challenge generally rather than confirming he had provided specific advice to contracting authorities on the consequences of challenge. PPL3 and PPL15 indicated they had not advised contracting authorities on the consequences of challenge and PPL9 said that ineffectiveness risk was discussed with contractor clients but omitted to mention advice on remedies to contracting authorities.

[793] PPL10, PPL11, PPL19;
[794] PPL10;
[795] PPL1, PPL2, PPL5, PPL6, PPL8, PPL10, PPL11, PPL12, PPL13, PPL14, PPL16, PPL17, PPL18, PPL19, PPL21;

As described further in this section, the private practice lawyer respondents who advised contracting authorities on remedies identified the remedies of ineffectiveness and damages and interim relief and also referred to the reputational risk of challenge.

7.5.2 Ineffectiveness

The remedy of prospective ineffectiveness was identified by five of the 21 private practice lawyer respondents as available where a contract is adjusted other than in accordance with the applicable law.[796]

The prospect of a contract being declared ineffective was also identified by some private practice lawyers as being a concern of the contractor.[797] If contractors considered that the benefit of the adjustment was not worth the risk that the contract will be "undermined" then the adjustment is not agreed.[798] PPL2 commented that it would be unlikely for ineffectiveness to be sought in respect of an adjustment to a PFI because "there is too much water under the bridge by the time challenges can be brought", indicating that ineffectiveness may not necessarily be a remedy of interest to contractors.

7.5.3 Damages

PPL2 had advised that a claim for damages claims may be bought by aggrieved contractors challenging contract adjustments.[799] Otherwise damages were not specifically cited as a concern when adjusting a contract.

7.5.4 Interim remedies

The possibility of an interim remedy being granted and the contract consequently not proceeding on time was identified by PPL11 as an

[796] See chapter 2 section 2.4.3 on remedies; PPL2, PPL6, PPL9, PPL15, PPL16;
[797] PPL6, PPL9 but PPL15 stating that it was not a concern;
[798] PPL9;
[799] See section chapter 2 section 2.4.3 on remedies;

important concern to contracting authorities.[800] Otherwise interim remedies were not specifically referred to.

7.5.5 Reputational risk

PPL8 commented that contracting authorities may be concerned about reputational risk and the way in which their actions may appear when subject to external scrutiny.[801] PPL8 did not explicitly identify what the nature of the reputational risk was.

7.6 Relevance of likelihood of challenge

The likelihood of challenge was emphasised by 19 of the 21 private practice lawyer respondents as an important factor in the practical application of the law on contract adjustments.[802] Of the remaining respondents PPL3 and PPL15 indicated that they did not advise on the likelihood of procurement law challenge.

Different respondents identified different factors that were relevant to the likelihood of challenge and these are set out below, illustrating the types of considerations that private practice lawyer respondents understand to be relevant to the likelihood of challenge and to the advice provided to contracting authorities on contract adjustments.

PPL10 said he would consider the identity of participants in the market and whether they have brought a challenge before and PPL1, PPL18 and CA7 said they would assess whether there are any specific contractors who may bring a challenge. Therefore contracting authorities are advised to indentify whether there are any contractors who have previously made a challenge or

[800] PPL11;
[801] PPL8 stating that for example the Chief Executive or Chairman may be required to appear before the Public Accounts Committee;
[802] PPL1, PPL2, PPL4, PPL5, PPL6, PPL7, PPL8, PPL9, PPL10, PPL11, PPL12, PPL13, PPL14, PPL16, PPL17, PPL18, PPL19, PPL20, PPL21;

who may, in the case of the relevant adjustment, make a challenge in this case.

Where a contract is coming up for renewal the contractor may not challenge an adjustment as by the time the proceedings are dealt with by the courts a new competition may have started and it was not worth the resource bringing the claim.[803] PPL20 made the converse point that where an adjustment was made mid-term during a long term services contract there may be appetite to challenge as otherwise a contractor is locked out of a contract for 10 to 12 years.[804]

The relative economic importance of the particular contract to the aggrieved contractor in question was described as being relevant by four of the 21 private practice lawyer respondents.[805] This could be understood perhaps in terms of the value of the contract and adjustment but also there may be factors specific to a contractor which impact on the relevant economic importance, such as the strategic significance of that contract to that contractor.

Two private practice lawyer respondents commented that contractors were understood to consider the potential financial cost of making a procurement law challenge[806] with PPL8 saying that nobody would issue proceedings in response to a variation worth less that £50,000. PPL9 commented that aggrieved contractors will bring challenges where they feel they are likely to succeed and therefore not throw good money after bad.[807] This suggests

[803] PPL8, PPL10 and PPL11 stating that whether someone was looking at contracts coming back up for tender was relevant to the likelihood of challenge;
[804] PPL20;
[805] PPL3 indicating that contractors would not challenge minor changes. PPL11 couched this as "how interested people are in the contract", PPL16, PPL20 saying contractors who were "locked out" of a contract may seek to challenge;
[806] PPL8, PPL16;
[807] PPL9;

that the contracting authority will attempt to ascertain whether the contractor has sufficient financially incentive to challenge.[808]

Contractors were described as understanding that there will be a certain amount of change associated with an awarded contract so are unlikely to be interested in challenging incremental adjustments.[809] They may also have contracts of their own that have been adjusted and may be potentially challengeable, leading to a "don't ask, don't tell" mentality with contractors failing to challenge as they don't want their own contracts to come under scrutiny.[810]

This suggests there may be a market acceptance that change which may be legally challengeable is something inherent in the performance of PPP contracts, and that therefore it is not something that should be challenged, particularly if there is a perceived risk that a contractor's own contracts may be subject to review if they disrupt the status quo.

There was recognition by four private practice lawyer respondents that a challenge would not be made unless the contractor felt it had unfairly been denied an opportunity to compete for a contract.[811] This was articulated by PPL4 stating that contractors are concerned about "really blatant" changes that amount to the unlawful award of a contract. PPL14 spoke of contractors being "aggravated" into bringing a claim.[812] PPL18 also indicated there would be a higher risk of challenge where the contracting authority was "obviously robbing a contractor of the opportunity to tender".

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[808] Note the finding that the cost of bringing a legal challenge is relevant to the likelihood of challenge is consistent with empirical research undertaken on contractor litigation in public procurement, which established that reasons relating to the cost and nature of legal remedies in the UK were one of the most important factors for contractors to decide not to litigate, Arrowsmith and Craven, (forthcoming, 2016), fn 709, p. 18;
[809] PPL4;
[810] PPL7;
[811] PPL3, PPL4, PPL14, PPL18, and CA8 commented that a contract would only be extended other than pursuant to a review clause where the contract was in the process of or about to be re-procured, suggesting that providing an opportunity to compete for a contract may deter challengers;
[812] Also PPL18 talked about an adjustment "getting someone's back up" generating an actual challenge;

PPL9 said that contractors may raise grievances with contracting authorities without actually bringing a challenge, the objective being to "keep the contracting authority on its toes," to incentivise it to re-tender contracts rather than extend them. PPL7 also said that a contractor may bring a challenge by way of a warning to other contracting authorities to make the point that they "are not going to stand for this" and that they want things to be done fairly. This indicates that contractors are viewed in some instances as policing adjustments and the compliance by contracting authorities with the applicable legal framework.[813]

PPL8 and PPL16 said that contractors were influenced by the perception contracting authorities may form of them if they challenged a contract adjustment. However, PPL7 stated that in his experience contractors would not be deterred by potential reputational issues where they believed their challenge was reasonable. This suggests that the private practice lawyers advising contracting authorities are considering whether contractors will challenge or not based on the contractor's reputational concerns.[814]

The visibility of an adjustment was cited as a practical factor in whether or not a procurement law challenge was made.[815] Respondents commented that potentially aggrieved contractors needed to be aware of an adjustment to bring a challenge[816] and some respondents acknowledged that keeping the

[813] Given that contracting authorities undertake market analysis described at the start of this section as to whether there are any contractors who have or may challenge, a "virtuous circle" may be created whereby contractors challenge adjustments that are made, and contracting authorities then take this outcome into consideration when evaluating the risk of making future adjustments, perhaps leading to better compliance with the applicable law;
[814] Note that the finding that reputational concerns are relevant to the likelihood of challenge is consistent with empirical research undertaken on contractor litigation in public procurement which established that a very important factor in deterring legal challenge by contractors was fear of reprisals from contracting authorities; Arrowsmith and Craven, (forthcoming, 2016), fn 709, pp. 21-22;
[815] PPL1, PPL7, PPL9, PPL10, PPL18;
[816] This awareness could be generated via a VEAT notice (see PPL10); PPL9 made the point more generally that an aggrieved contractor needs to be aware of an adjustment before being in a position to bring a challenge, PPL7;

adjustment out of the awareness of the relevant market was a practical strategy for reducing the risk of procurement law challenge.[817]

PPL9 and PPL11 commented that because there were so few challenges in practice that often contracting authorities will take the risk that nobody will challenge the adjustment. The likelihood of successful challenge is also important as if this is minimal then even if a challenge is made there is confidence that it can be defeated and that will embolden the contracting authority to make the adjustment.[818]

Private practice lawyers discussed the risk of challenge with contracting authorities. PPL11 said that in some cases the risk of challenge is extremely small and in others the likelihood becomes greater, and then you get into a situation of discussing options and the risk of what the contracting authority wants to do. This suggests that the likelihood of challenge is considered when contracting authorities are deciding whether or not to make an adjustment.

However, this assessment is not necessarily straightforward. PPL14 commented that someone might bring a claim where they have no claim at all, and someone with a very good claim might not challenge, and "everything in between". This indicates that the likelihood of challenge cannot be solely determinative as to whether or not an adjustment is made, as it is impossible to ascertain with precision.

A balance is therefore struck between the importance of the adjustment and the risk of a successful challenge. If the adjustment is necessary and the likelihood of challenge is relatively low then the risk of adjusting the contract is taken.[819]

[817] PPL10;
[818] PPL11;
[819] PPL9;

7.7 Relevance of contracting authority objectives

7.7.1 Introduction

This section is concerned with explaining the analysis described as being undertaken by contracting authorities when deciding whether or not to proceed with an adjustment. Section 7.7.2 describes the relevance of the procurement objectives of the contracting authority in seeking to make or accept the adjustment. This explains the benefits the contracting authority is hoping to obtain (or the disadvantage it is seeking to avoid). The following section, 7.7.3, explains in the context of these objectives, the way in which contracting authorities were described as applying the law by private practice lawyers.

7.7.2 Consequences of contracting authority not making the adjustment

Twelve of the 21 private practice lawyer respondents identified that the consequence to the contracting authority of not making the adjustment was relevant to the legal advice given. [820] For example, PPL8 spoke of the need to understand the practical and commercial consequences of the adjustment when providing legal advice and PPL5 stated that the benefits of making the adjustment were relevant to the legal advice.

Of the remaining respondents, four private practice lawyer respondents indicated that the objectives of the contracting authority in making the adjustment were not relevant to the advice and two private practice lawyer respondents omitted to mention the consequences for the contracting authority of not making the adjustment. In addition, PPL1 and PPL20 stated that it is for the contracting authority to understand commercially what the consequences would be of not making the adjustment, and PPL14 said that it was for contracting authorities to decide what level of risk they were comfortable with.

[820] PPL2, PPL4, PPL5, PPL6, PPL8, PPL9, PPL10, PPL11, PPL16, PPL17, PPL18, PPL21;

Where potential procurement law risk was identified in making an adjustment, PPL8 said he would advise on whether there was another way of achieving the same commercial and operational end. PPL2 said he would try to find a solution which would be procurement law compliant or would look for an alternative "safer" solution. PPL4 gave an example of a contract which had been extended for a shorter period of time than that initially proposed because of procurement law concerns. This suggests private practice lawyers are working with contracting authorities to facilitate the achievement of contracting authorities' procurement objectives whilst attempting to reduce the risk of procurement law challenge when adjusting contracts.

7.7.3 Contracting authorities' application of the law

Private practice lawyer respondents described instances of contracting authorities making an adjustment in circumstances where they had advised that making the adjustment created a risk of procurement law challenge. PPL4 spoke of an instance where the contracting authority extended the service using the terms of the additional services exemption where they probably did not have the right to. PPL10 described a contracting authority adjusting a contract following a force majeure event where he had advised there was a procurement law risk in doing so.

PPL2 said that he sees it as his job to identify the "least bad way" of doing it and to try and find a solution that "they can live with" and to advise on the risks. This illustrates that contracting authorities are making adjustments notwithstanding advice received that such adjustments may create procurement law risk. This evidences that in some circumstances pursuance of other objectives of the contracting authority take precedence over the need for compliance.

The practical consequences of not making the adjustment were relevant to whether or not an adjustment is made in circumstances where procurement

law risk was identified.[821] Sometimes the contracting authority accepts procurement law risk because the consequences of not making the adjustment are unacceptable to the contracting authority. PPL14 explained, "Quite often it can be the lesser of two evils, you know, you take the procurement risk but it means you get your problem solved".[822]

PPL18 commented that often it is "extremely good value for money, expedient and practically sensible to use an incumbent to do something rather than retender". An example of this was given by PPL2 where there was an adjustment to extend the scope of works in a hospital PFI because construction costs had become more affordable, enabling the contracting authority to expand the project. PPL2 commented that "there was no safe way through" but the contracting authority and the Department of Health decided to proceed with the adjustment.[823]

PPL18 said that on advising on a change of control he gave "pragmatic advice" as the alternative would be to terminate the contract, re-procure, and for the contracting authority to end up paying twice as much as before. This indicates awareness that contracting authorities will be considering the practical consequences of not making an adjustment, and that this is reflected in the content of advice given by private practice lawyers.

The fact that contracting authorities apply the law on contract adjustments so as to best further their procurement objectives is supported in the contracting authority responses. Numerous examples of why adjustments were required cited changes in requirements to support procurement objectives such as delivering enhanced education for pupils, and ensuring patient needs were met.[824] CA1 commented that a key reason for

[821] PPL2, also CA20;
[822] PPL14,
[823] PPL2,
[824] CA3 stating that education is a "key part of the picture"; CA17 commented that the adjustment is usually for educational purposes and the legal advice would be in relation to how to most effectively deliver the adjustment – the major determinative factor would be

adjustments in "recent years" has been the need to generate cost savings, for example, through reducing the scope of services. This example suggests that the objective of delivering value for money may be relevant to a contracting authority's approach to contract adjustments.[825]

There are instances of contracting authorities balancing legal risk upon making an adjustment against the adverse consequences of not making the adjustment. CA20 spoke of assessing the risk and the operational impact of making or not making the adjustment before making a decision as to whether or not to proceed with the adjustment. This position was reinforced by CA14 who commented that they would look at the wider context of making an adjustment including consequences of not making the adjustment and likelihood and consequences of challenge. The need to balance legal risk against the consequences of not making an adjustment were also alluded to by CA7 who mentioned that there were instances where the contract is underway and more budget becomes available and the contracting authority has to take a "very pro-active view on whether we would be able to amend that contract substantially".

There is evidence therefore of contracting authorities accepting legal risk when adjusting contracts. This was articulated by CA9 who said that risks were fully considered during the decision making process and that the contracting authority has always been happy that these were minimal. CA19 said that procurement law risk was identified in the case of some adjustments but that adjustments made and no challenge arose. CA4 explained that his role as an in-house lawyer at a contracting authority is to provide a view on risk involved in making an adjustment, and that the "client" department makes the decision whether to proceed. CA5 made a

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value for money including the cost of the advice and any consequential impact of the changes; CA19 stating that adjustments were required to meet the changing requirements of clinical capacity and organisation in the context of a hospital PFI;

[825] This was also suggested by CA14 who commented that the Council took fiduciary duties in respect of "spending the tax payers' money" very seriously so this practical aspect would need to be considered when making an adjustment;

similar observation, stating that in the case of an adjustment the client made a decision based on risk analysis to proceed, and in that case there was no challenge.

CA19 and CA2 spoke of consulting external legal advisers and implementing the mitigating steps that they were advised to take (CA2 specifically referenced a voluntary notice), also suggesting the acceptance of some degree of legal risk by these contracting authorities.

Contracting authorities also indicated that there was uncertainty in the application of the legal position to specific instances of contract adjustments. CA3 said, in the context of uncertainty as to whether an adjustment can be made pursuant to a review clause, that there have been difficult judgments about whether an adjustment is permitted particularly where there is a proposal to extend a contract to allow for additional investment in the service. CA1 referred to the fact that on a number of occasions a judgment has been necessary as to whether an adjustment is permitted or not.

Legal risk was cited by two of the 24 contracting authorities as a reason for not pursuing an adjustment. CA8, an in-house lawyer at a contracting authority, said that he advised the contracting authority not to proceed with a proposed extension of scope of a health PPP to include a library and other health services. CA2 referred to a decision not to proceed with an adjustment because it may breach EU procurement law or the local authorities' contract standing orders.

Finally, non-legal factors were cited by some contracting authorities as reasons for not making an adjustment, indicating again that legal risk is not the sole reason for not proceeding with an adjustment. Cost was cited as a reason for not proceeding by four of the 24 contracting authorities.[826] The

[826] CA3, CA9 (enhancements requested by schools more expensive than initially thought), CA20, CA21 (where Chief Executive wanted to redesign the front of a hospital but the costs were prohibitive);

time taken to negotiate an adjustment was identified as a reason for not proceeding by CA5, who said in that case it took so long that the contract became close to expiry and the adjustment was therefore not necessary.

Chapter 8: Conclusion

8.1 Introduction

The focus of this study is on the public procurement law applicable to situations in which contracting authorities seek to adjust the provisions of their existing contracts. This study has identified the law applicable to contract adjustments and through empirical research has explored how this law is applied in practice. As outlined further in the concluding remarks section below, the way in which the law is applied in practice may contribute to the development of future law and policy.

In order to achieve the objectives of firstly establishing the content of the applicable law and secondly analysing how that law is applied in practice, chapter 2 of this study set out the substantive law applicable to contract adjustments (including that arising from the TFEU, the Procurement Regulations, and case law) and chapters 3, 4, and 5 considered respectively the content of that law specifically in the cases of review clauses, adjustments upon operation of law, and other adjustments. Chapter 6 set out the method applicable to the empirical research and chapter 7 set out the conclusions of that research, furthering the achievement of the second objective of this study.

This study has drawn together the existing scholarship on contract adjustments in a comprehensive manner, categorising and defining these adjustments so as to enable meaningful analysis. The categories are as set out in the above paragraph, namely adjustments pursuant to review clauses, adjustments upon operation of law, and other adjustments and each of these chapters defines the adjustments that fall within these categories. This study also, in chapter 2, defines and articulates the Substantial Modification Test, which brings together the principles from existing case law, in particular *Pressetext*, and Regulation 72(8) of the 2015 Regulations to provide a

coherent test which can be applied to contract adjustments to ascertain whether a new procurement process is required.[827]

The conclusion to chapter 3 sets out based on relevant existing case law and the 2015 Regulations in particular Regulation 72(1)(a) of the 2015 Regulations, a test which can be applied to adjustments pursuant to review clauses. This test offers a comprehensive set of steps against which adjustments pursuant to review clauses can be assessed to confirm whether or not the adjustment made pursuant to that review clause is acceptable from a procurement law perspective.[828]

The tests described in the above paragraphs have provided a useful framework within which to assess the law applicable to contract adjustments in this study. They may also be of wider assistance in understanding the existing law, for example, they may provide helpful guidance to those seeking to apply the law in practice (such as contracting authorities).

The first substantive part of this chapter sets out conclusions which can be drawn from chapters 3, 4 and 5 in respect of the content of the applicable law, focusing on commenting on those ambiguities which have been identified in the existing legal framework applicable to contract adjustments. This addresses this study's first research aim, which was to establish the content of the applicable law.

The second substantive part of this chapter articulates the overall approach taken in practice by contracting authorities when adjusting contracts, drawing on the empirical conclusions set out in chapter 7. This follows on from the exercise of drawing together the ambiguities identified in the first substantive section of this chapter 8, as the overall approach taken is relevant to the resolution of ambiguities which arise in practice. This directly

[827] See chapter 2 section 2.6.2;
[828] See chapter 3 section 3.2.4;

addresses this study's second research objective, namely to analyse how the law on contract adjustments is applied in practice.

A final section then brings this study to a close suggesting, in light of the findings set out in the first two substantive parts of this chapter, ways in which the law on contract adjustments could be clarified or developed to achieve a legal framework which is better equipped to meet the objectives of those seeking to apply it, which was the third research aim set out in chapter 1 section 1.5.

This study comprehensively reviews the existing law and literature on contract adjustments and, as such, brings together the relevant existing law, developing a system of categorisation and suggesting tests that may be applied to contract adjustments. The study also investigated how this law was applied in practice through empirical research, the method for which is set out in chapter 6 and the findings in chapter 7.

The major original contribution made by this study is through the empirical research undertaken. This study has surveyed private practice lawyers and contracting authorities to explore how the law on contract adjustments is applied in practice in the UK. This is novel enquiry and its findings and the conclusions drawn therefrom make an original contribution to the scholarship on contract adjustments in the UK. Furthermore the review of existing law and literature in this study is more comprehensive than that previously existing, contributing also in this respect to the understanding of and scholarship on contract adjustments in the UK.

8.2 Ambiguities in the existing legal framework applicable to contract adjustments

This study identified some important ambiguities in the law applicable to contract adjustments. As explained in chapter 1, contracting authorities may need to adjust contracts during their term and where there is uncertainty as

to whether or not an adjustment can be made lawfully difficulties may arise. It may therefore be appropriate for the ambiguities identified in chapters 3, 4 and 5 of this study, as summarised in this section, to be addressed to remove or reduce any uncertainty, for example through supplementary guidance which could include perhaps examples of how the law could be applied to specific instances of contract adjustments (which could be issued by the UK government or by the EU Commission) or through amendments to the 2015 Regulations.

It will be recalled that chapter 3 defined review clauses as terms included in contracts that provide for adjustments to be made during the term of the contract. As explained in that chapter, there is a distinction between adjustments that are made pursuant to review clauses and those that are not and that Regulation 72(1)(a) of the 2015 Regulations now confirms the position hitherto set out in case law and academic commentary that adjustments made pursuant to review clauses do not necessarily require a new procurement procedure. This study identified some important ambiguities in the law applicable to contract adjustments made pursuant to review clauses.

Ambiguity was found to exist in the case of sub-contracting pursuant to review clauses. *Pressetext* is unhelpful in this regard, because the requirement for "substitution" of a contractual partner to be provided for in the procurement documents set out in *Pressetext* does not provide sufficient guidance as to the level of detail required in the procurement documents to provide protection from challenge.[829] Secondly, the reference to "substitution" of a contractor may not cover situations where some but not all of the services are delegated by the contractor to a third party, but may

[829] Chapter 3 section 3.4.2;

apply to a situation where there is a wholesale delegation. This creates uncertainty as to the content of the applicable law.[830]

The decision in *Wall*, which found that the substitution of a sub-contractor was a material amendment notwithstanding the inclusion of a review clause allowing for substitution with the consent of the contracting authority may also create ambiguity as it may be difficult to determine whether or not the substitution of a particular sub-contractor is material.[831]

Ambiguity was also identified in the case of step-in, which is where a contracting authority or funder steps into the position of the contractor to perform some or all of the services, pursuant to a step-in review clause. The ambiguity arises as it is uncertain on what basis funder step-in can occur without a new procurement process being required.[832] It is unclear whether the absence of a requirement to follow the Procurement Regulations in the case of funder step-in where step-in provisions were provided for in a review clause was because the adjustment was made pursuant to that review clause or whether the role of the funders (perceived to be commercially focussed and therefore non-discriminatory) made the Procurement Regulations irrelevant.[833]

In practical terms, however, in the case of step-in, it may be difficult to draft a review clause to meet the requirements of Regulation 72(1)(a) of the 2015 Regulations, (which requires review clauses to be clear, precise and unequivocal) because of uncertainties in knowing in advance what the nature of the step-in would be, and there are no provisions confirming the second interpretation in the preceding paragraph namely that the actions of the

[830] To note that, as stated in chapter 3 section 3.4.4, Regulation 72(1)(d) of the 2015 Regulations applies to the substitution of a contractor and does not clarify whether it is applicable where the whole contract is sub-contracted, so does not provide assistance on this point;
[831] Chapter 3 section 3.4.6;
[832] Note that in chapter 3 section 3.5 it was concluded the step-in by the contracting authority would not constitute a material amendment;
[833] Chapter 3 section 3.5.2;

funders are not subject to the Procurement Regulations, suggesting uncertainty as to the basis of the applicable legal position.

Another area of ambiguity is apparent in the case of assignment and novation pursuant to a review clause. Assignment and novation are characterised as operations of law within this study.[834] It appears possible for such a review clause to meet the test set out in chapter 3 section 3.2.4 and therefore to take place without requiring a new procurement process.[835] However, the legal position would have been clearer had an explicit reference to Regulation 72(1)(a) of the 2015 Regulations been included in Regulation 72(8)(e), which is the provision that provides that a substitution of a contractor other than in the circumstances set out in Regulation 72(8)(e) will be a substantial modification requiring a new procurement process.

Indigo found that an extension in contract duration constituted a material amendment as services were being provided for a new period. However, this author submitted that the Substantial Modification Test should be applied to assess whether the adjustments was permitted or not as it may be the case that a short extension in the context of a long term contract may not constitute a material amendment.[836] This submission appears consistent with existing law applicable to contract adjustments, including Regulation 72 of the 2015 Regulations and *Pressetext*. The position in *Indigo*, however, appears to create inconsistency with this existing law, suggesting uncertainty in the content of the applicable law.

Furthermore, ambiguity has been introduced in the case of *Edenred* in which the UK Court of Appeal appeared to suggest that the requirement for a review clause to be clear, precise and unequivocal as set out in Regulation 72(1)(a) of the 2015 Regulations may be applied differently depending on the

[834] Chapter 4 section 4.1;
[835] Chapter 4 section 4.4.4;
[836] Chapter 3 section 3.2.3;

contract in question.[837] Applying this may lead to difficulties as it potentially opens to different interpretations the precise requirements to be satisfied on a case by case basis in order to safely make an adjustment pursuant to a review clause. This indicates uncertainty in the content of the applicable law and also in its future practical application.

Finally, it is difficult to draft a review clause with the certainty required to give the best protection from challenge, whilst allowing flexibility required to respond to various scenarios, some of which may be unknown.[838] Ambiguity may therefore arise in practice when assessing the way in which the law applies to a specific adjustment made pursuant to a review clause as the extent to which the review clause is clear, precise and unequivocal may not be clear cut.

Ambiguities were identified in the case of adjustments made as an operation of law, defined as a supervening event which causes the nature of the contractual relationship between the parties or the substance of that relationship to change as a consequence of that event rather than at the instigation of either party.[839]

Pressetext appeared to introduce ambiguity as to the whether or not the operation of law being the change of control as a result of the transfer of shares constituted a material amendment.[840] The ambiguity results from an apparent inconsistency between the statement of the Advocate General to the effect that a transfer of shares to a third party would not constitute an internal reorganisation and would be an impermissible change of contractor, and the Advocate General's statement that where a contractor has legal status it is that entity that is the contractual counterparty and, as such,

[837] Chapter 3 section 3.2.3;
[838] Chapter 3 section 3.2.3 and chapter 7 section 7.3.2;
[839] Chapter 4 section 4.1;
[840] Chapter 4 section 4.3.2;

changes to the membership of that entity would not constitute a material amendment.

This ambiguity has not been wholly resolved by Regulation 72(1)(d)(ii) of the 2015 Regulations which concerns the succession of the contractor, as this provision does not refer specifically to transfer of shares to a third party. However, the transfer of shares is a mechanism through which corporate restructurings (a term used in Regulation 72(1)(d)(ii)) are often achieved, and as such if this was intended to be excluded from Regulation 72(1)(d)(ii), this would presumably have been made clear.[841] Whilst Regulation 72(1)(d)(ii) appears to depart from *Pressetext* in the sense that it appears to permit transfer of shares to a third party, it arguably clarifies an ambiguity which existed in the previously applicable law, following the Advocate General's statements in *Pressetext*. It would, however, have been helpful if Regulation 72(1)(d)(ii) was more explicit on this point.

The application of Regulation 72(1)(d)(ii) of the 2015 Regulations is ambiguous in terms of what precisely is required to demonstrate that the qualitative criteria of the original procurement has been met, a requirement which must be satisfied to rely on this provision.[842] It is unclear whether this means that any minimum criteria must be met, or whether the requirement is wider, implying that the new contractor must be as good as the original contractor against the qualitative criteria established. This indicates uncertainty in the content of the applicable legal position.

Regulation 72(1)(c) of the 2015 Regulations is also relevant to adjustments made as a consequence of a change in law. This allows for modifications where the need for this has been brought about by circumstances which a diligent contracting authority could not have foreseen. However the requirement for the modification not to alter the overall nature of the

[841] Chapter 4 section 4.3.2;
[842] Chapter 4 section 4.3.4;

contract which must be met to allow this provision to be relied upon may create ambiguity as it may be difficult to define what constitutes a change to the overall nature of the contract. Similarly, the inclusion of value thresholds, specifically that any increase in price must not exceed 50% of the value of the original contract, may introduce ambiguity in circumstances where it is difficult to quantify the value of the adjustment. There may therefore be uncertainty in the application of this law.

Ambiguity was also identified in respect of adjustments made other than pursuant to a review clause or as a consequence of an operation of law. For brevity, these adjustments are referred to as "other adjustments" in this study.[843]

In the context of other adjustments increasing the scope of a contract the decision of the Supreme Court in *Edenred* has arguably introduced ambiguity into the legal position.[844] This author suggests that the Supreme Court has taken a wider definition of "scope" than had previously been understood to be the case, considering the content of the procurement documents and the overall context of the contract. Previously "scope" had arguably been understood to mean the terms of the contract (including review clauses). Whilst the Supreme Court's approach may provide greater flexibility, it is uncertain what degree of precision is required in the references in the procurement documents and whether *Edenred* can be applied to all types of contracts (as it may be the case that the *Edenred* approach is only permissible in complex contracts). This evidences ambiguity in the content of the law applicable to other adjustments.

Contracting authorities may also encounter difficulties in relying on Regulation 72(1)(c) of the 2015 Regulations where they wish to adjust the scope of the contract to deliver improvements. This provision allows for

[843] See chapter 5;
[844] Chapter 5 section 5.2.2;

adjustment where the need for adjustment has been brought about by a circumstance that a diligent contracting authority could not have foreseen provided that the overall nature of the contract is unchanged, and any increase in price does not exceed 50% of the original contract value. There is arguably uncertainty as to what level of knowledge is required to meet the requirement in that provision that the need for the adjustment could not have been foreseen by a diligent contracting authority. This may create an issue in practice as, for example, the contracting authority may be aware of a developing technology without knowing the specifics, so uncertainty may arise as to whether this precludes reliance on Regulation 72(1)(c) of the 2015 Regulations. [845]

Regulation 72(5) allows for *de minimis* adjustments, specifically those which fall below the thresholds set out in Regulation 5 of the 2015 Regulations, and below 10% of the original contract value for services and supply contracts and 15% for works contracts, provided the modification does not alter the overall nature of the contract. This provision may introduce uncertainty in its application in circumstances where the calculation of the value of the adjustment cannot be readily calculated.[846] Furthermore, the requirement for the modification not to alter the overall nature of the contract is arguably unclear as it is difficult to see in practice what circumstance the *de minimis* requirement could be met and yet the overall nature of the contract changed.

Price adjustments may constitute other adjustments. The comments of the Advocate General in *Pressetext* in the context of a price reduction, suggesting that such reductions may distort competition creates ambiguity.[847] This is because in this case the Advocate General appears to suggest that contracting authorities should undertake an assessment at the time the adjustment is made as to whether competition is distorted. However, it is

[845] Chapter 5 section 5.2.4;
[846] Chapter 5 section 5.2.5;
[847] Chapter 5 section 5.3.2;

uncertain how the contracting authority could confirm the prices available at the time that the adjustment was made, without running a competition, so would be unable to ascertain whether there was a distortion of competition leading therefore to uncertainty in the application of the law in this regard.

Uncertainty is also arguably introduced in the case of the adjustment comprising the waiver of a right to terminate in *Pressetext*, as it appears that the Advocate General is looking at the facts existing at the time of the adjustment rather than assessing the theoretical impact on the original competition.[848] This reasoning appears inconsistent with the approach taken in the "Introduction of Conditions Limb" which is a backwards looking test that requires consideration of whether the selection of bidders or award of the contract would be affected by the relevant adjustment, and thus creates ambiguity in the application of the relevant tests in this regard.[849]

8.3 Approach taken in practice by contracting authorities

Overall, it appears that contracting authorities are adopting a pragmatic approach to the application of the law on contract adjustments. Both they, and their legal advisers, are considering the ways in which the contracting authorities' objectives can best be met and are providing advice on this basis. In the event of difficulties in applying the existing law, it appears that contracting authorities, and those advising them, are striving to interpret and apply the law in a manner which has the best chance of meeting the desired objective.

This is demonstrated in the empirical research, where private practice lawyers identified that the consequences to the contracting authority of not making the adjustment was relevant to the legal advice given.[850] The empirical research also showed evidence of private practice lawyers

[848] Chapter 5 section 5.4.2;
[849] Chapter 2 section 2.6.2;
[850] Chapter 7 section 7.7.2;

attempting to achieve the same commercial or operational result for contracting authorities within the law on contract adjustments, or minimising the risk of successful procurement law challenge.[851]

Furthermore, this study has demonstrated that the likelihood and consequences of challenge were relevant to the advice provided by private practice lawyers.[852] This is focussed on actual risk rather than a theoretical risk of challenge. Contracting authorities demonstrably obtained legal advice from private practice lawyers,[853] and there is evidence of such advice being included in the consideration of a contracting authority as to whether or not to adjust a contract.[854]

The empirical research indicted few instances of contracting authorities not proceeding with adjustments because of legal risk.[855] There were, however, numerous instances of contracting authorities identifying legal risk and making the required adjustment notwithstanding the existence of this risk.[856] This shows that legal risk is accepted by contracting authorities when adjusting existing contracts, indicating that legal risk alone is not decisive in influencing whether or not to proceed with a contract adjustment.

Existing empirical research is relevant to the understanding of why contracting authorities are willing to accept legal risk when adjusting contracts. The UK has been described as having a "deeply rooted non-litigation culture" in the field of public procurement.[857] A non-

[851] Chapter 7 section 7.7.2;
[852] Chapter 7 sections 7.5 an 7.6;
[853] Chapter 7;
[854] Chapter 7 section 7.7.3;
[855] *Ibid*.;
[856] *Ibid*.;
[857] Boch, (2007), fn 312, pp. 416-417, note that Boch's empirical research on the implementation of the public procurement directives found that litigation was not the preferred option in the UK in the case of a breach of procurement law;

confrontational legal culture was cited by Pachnou in her empirical research on remedies as a deterrent to litigation.[858]

Furthermore, Braun concluded in his study of PFI practice in the UK, that the risk of challenge arising as a consequence of the PFI procurement process he described was negligible, leading him to conclude the balance between following a relaxed approach to procurement law and the benefits obtained from adopting a more pragmatic interpretation were in favour of the latter.[859] More recently, the work of Arrowsmith and Craven shows that whilst there has been an upward trend in the number of procurement law actions brought from 2007-2012, the number of contractors in the UK taking legal action or seeking legal advice remains relatively low.[860]

These studies are of relevance to the acceptance of legal risk by contracting authorities when adjusting contracts and demonstrate that in practice the likelihood of successful procurement law challenge occurring is low. The low practical likelihood of a procurement law challenge actually arising, when balanced against the objectives that the contracting authority seeks to achieve in making the adjustment, would arguably influence whether or not the contracting authority would accept the legal risk. As explained in chapter 7 section 7.6, the low practical likelihood of challenge was commented on by respondents in the empirical section of this study, along with the point that a low likelihood of successful challenge may embolden a contracting authority to make an adjustment.

This conclusion is also consistent with the findings of Braun outlined in the above paragraph.

[858] Pachnou, (2005), fn 717, p. 259, note that the other deterrents cited are firstly high legal costs and secondly the unpredictability of the outcome at trial;
[859] Braun, P., "The practical impact of EU public procurement law on PFI procurement practice in the United Kingdom", PhD thesis, University of Nottingham, 2001, p. 333;
[860] Arrowsmith, and Craven, (forthcoming, 2016), fn 709;

Where actual risk of challenge is low then contracting authorities may place less weight on the risk of challenge when deciding whether or not to adjust a contract and a correspondingly greater weight on the attainment by the contracting authority of their procurement objectives. This may lead them to make adjustments in circumstances where they may have chosen not to in circumstances where the actual risk of challenge was higher. This suggests that the contracting authority's focus is driven by a pragmatic desire to achieve their objectives. As explained in the opening paragraphs of this section with reference to chapter 7, this focus appears to be recognised by those private practice lawyers advising contracting authorities on contract adjustments who consequentially seek to provide pragmatic advice with reference to the contracting authority's objectives.[861]

Whilst the findings of this study are, as described above, consistent with existing empirical literature, the consideration of the way in which the law is applied in practice to contract adjustments in the manner undertaken in this study is novel. This study therefore contributes to the understanding of contract adjustments and contributes to the wider debate about the way in which contracting authorities apply procurement law in practice, building on the studies cited above.[862]

8.4 Suggestions for improvement or clarification of existing law

This study has shown that contracting authorities take a pragmatic approach to the application of the existing legal framework when adjusting contracts so as to enable them to, in their view, best meet their specific procurement objectives. Contracting authorities are accepting legal risk when making contract adjustments in circumstances where they perceive the benefit of making the adjustment (with reference to their objectives) to outweigh the consequences of a successful challenge.

[861] See in particular chapter 7 sections 7.6 and 7.7;
[862] Arrowsmith and Craven, (forthcoming, 2016), fn 709;Braun, (2001), fn 879; Pachnou, (2005), fn 717;

The acceptance of legal risk arguably reflects the tension between the objectives of the EU in the context of public procurement (recalling, of course, that the Procurement Directives implemented by the Procurement Regulations are EU law[863]) and the objectives of the contracting authorities. The objectives of the EU were set out in chapter 2 section 2.2 and were: (i) the establishment of the single market and removal of barriers to trade; (ii) competition; and (iv) transparency. The objectives of the contracting authority were set out in chapter 1 section 1.3 as being: (i) competition and value for money; (ii) procurement efficiency; (iii) equal treatment; (iv) preventing corruption; and (v) transparency.

The lack of complete alignment between the objectives of the contracting authority and those of the suggests that the law does not wholly support the achievement by contracting authorities of their objectives. Furthermore, in applying the law, contracting authorities appear to have regard to the satisfaction of their own objectives, rather than those of the EU. In practical terms, therefore, it may not necessarily be the case that the objectives of the EU as framed within the existing law are being promoted or achieved.

As explained in this study, the reasons for a contractor bringing a challenge are varied but are not linked in any way to the procurement objectives of the EU or the contracting authority. Arguably an instance could arise where an adjustment is made and is subject to challenge in circumstances where the objectives of the EU were not prejudiced and where the adjustment would bring significant advantage to the contracting authority. Similarly, an adjustment could occur which significantly prejudiced the attainment of the EU procurement objectives and did not generate a significant benefit to the contracting authority where there was no challenge, for example, because there was no economic incentive for a contractor to do so.

[863] For detail on the law applicable to contract adjustments, see chapter 2;

An enhanced transparency requirement may enable both the objectives of the EU and the contracting authority to be better served than the pragmatic approach to adjusting contracts taken by contracting authorities articulated at section 8.3 above. This could be achieved through further enhancing the existing transparency requirements set out in Regulation 72 of the 2015 Regulations,[864] widening the circumstances in which contracting authorities are required to publish information about adjustments and expanding the content of such publications. In particular, contracting authorities could be required to give a full account of the content of and reason for the adjustment in all cases where an adjustment is made, the value of it (including an assessment of whether the adjustment constitutes value for money).

In circumstances where the contracting authority is required to disclose adjustments, they are likely to be incentivised to ensure that the published information reflects the efforts they have gone to, for example, to secure value for money and to act with probity. Where they have failed to demonstrate this the contracting authority is likely to be subject to criticism, for example from service users, the media, and other interested parties, and may contravene the fiduciary duty placed on contracting authorities as custodians of public funds.[865]

Therefore, linking the making of adjustments to increased transparency, rather than the likelihood of challenge, would incentivise and provide the opportunity for contracting authorities to demonstrate that they have met their procurement objectives (or that the making of the adjustments was, in the circumstances, the best option available).

[864] As discussed in chapter 2 section 2.4.1, transparency requirements exist for adjustments made pursuant to Articles 72(1)(b) or (c) of the 2014 Directive, implemented by Regulations 72(1)(b) and (c) of the 2015 Regulations;
[865] See further chapter 1, in particular section 1.3.2, also chapter 7 section 7.7.3, which found that the cost of making or not making an adjustment was relevant to whether an adjustment was made in practice;

It may be the case that the data collected as a consequence of this enhanced transparency requirement could usefully inform the discussion on the identification and perhaps prioritisation of the objectives of the EU and contracting authorities on contract adjustments. The basis for this is that if there was a detailed body of information setting out, for example, the nature of the adjustment and the reason for it and the value of it, such information would be relevant to understanding the objectives of the contracting authority and may (in cases where the adjustment was demonstrably to further these objectives as set out in chapter 1 section 1.3) allay concerns that the EU might otherwise have that adjustment are being used improperly as a tool to frustrate EU objectives.

If, for example, the majority of adjustments are to extend the scope of existing contracts in circumstances where, for example, extra budget has been received or where service users requirements have been met, but there is financial and operational justification for the existing contractor to carry out the extra services, such a justification may reduce concern that the adjustment is intended to favour domestic contractors. A body of evidence to this effect may, for example, lead to de-prioritising the EU objective of removing restrictions to the single market, as it may demonstrate that this is unwarranted as a priority as contracting authorities are not in fact discriminating on this basis.

An enhanced transparency requirement is likely to increase administrative overhead as relevant information will need to be collected and processed. This is likely to be viewed as a disadvantage of the above proposal. Care should also be taken to ensure that confidentiality arrangements in existing contracts are not contravened.

Furthermore, contracting authorities may feel that an enhanced disclosure requirement may put them at increased risk of legal challenge from aggrieved contractors. However, evidence in this study suggests that

contractors are only in fact likely to challenge where they have a significant economic interest in doing so or where there is a perception that the contracting authority has acted unfairly.[866] It would remain to be seen, however, what, if any, impact an enhanced transparency requirement would have on that position.

[866] Chapter 7 section 7.6.1, this finding was also evident in the work of Arrowsmith and Craven, (forthcoming, 2016), fn 709; Pachnou, (2005) fn 717;

Annex A

Contracting Authority Questionnaire

Background

- Name of respondent
- Contracting authority currently working for and current position
- Relevant qualifications and professional experience

Relevant contract(s)

- Name of relevant contract(s) and brief description

Contract adjustments

What is an "adjustment"?
This means any change or variation in the way in which the contract is performed.

Adjustments include the following:
- a change made pursuant to a change control or variation clause in the contract;
- the use of a clause which has been included in a contract to provide flexibility, such as an option to extend or shorten the length of the contract, or to bring additional services in scope;
- where the contract is performed by someone other than the contractor (for example sub-contracting, or where the contractor assigns the contract);
- a change arising following negotiations between the parties;
- where one party performs the contract other than in accordance with its terms;
- where the performance of the contract changes as a result of external events, such as the insolvency of the contractor or an "act of God".

- How often is the contract(s) referred to in the above question adjusted? Please select from the following: (a) never (b) one adjustment per year per contract; (c) two to five adjustments per year

per contract; (d) six to ten adjustments per year per contract; (e) eleven or more adjustments per year per contract.

- Why are adjustments required?
- Have you ever decided not to proceed with an adjustment? Please explain what the proposed adjustment was and why you did not proceed with it.
- Do you think the law on contract adjustments is clear? Yes/No
- Can you suggest any ways in which the law on contract adjustments could be improved?

Legal advice

- From where (e.g. case law, Regulations, legal or other advisers, government guidance, books, training courses) do you get your knowledge?
- Do you obtain internal or external legal advice on adjustment(s)? From who is advice sought (e.g. internal legal department or external law firm).
- If legal advice is not sought, why not?
- Does legal advice influence your decision as to whether or not to make adjustments? Why/why not?

Involvement of others

- Do you decide whether or not to proceed with adjustments?
- If not, who makes the decision?
- Are any third parties (other than legal advisers) consulted/involved in the adjustment (e.g. external funders, the incumbent contractors, any other contractors/interested parties in the market/wider community, government departments or similar)?
- Do these third parties influence the decision whether or not to proceed with the adjustment?

Review clauses

What is a "review clause"?
This means a clause included in a contract which provides for an adjustment. This can include, for example:
- a change control or variation clause;
- a clause which provides for sub-contracting;
- a clause which alters the length of the contract (such as an extension or break clause);
- a clause which changes the contract price payable (such as indexation, benchmarking or market testing).

This can include for example, a change control clause or variation mechanism, drafting concerning events beyond the control of the parties, and any other clauses which change the way in which the contract is performed.

- To what extent do the contract(s) you refer to above contain review clauses? If so, please give examples
- What do you take into account when drafting/negotiating a contract to enable adjustments to be made pursuant to a review clause? (for example, the possibility of a foreseen/unforeseen event occurring, the need to extend the duration of the contract or scope of services etc)
- Have you ever been uncertain as to whether an adjustment pursuant to a review clause is permitted or not? (for example, because of uncertainty as to whether the adjustment was within the scope of the clause, or because of the risk that the adjustment might contravene EU procurement law even when made within the terms of the review clause)
- Is it necessary or usual practice to make bidders aware that review clauses will be included in contracts?

Potential contract issues

The occurrence of the following may create contract management and procurement law issues:

- the insolvency of the contractor;
- where there is a change in the owner of the contractor (a "change in control");
- assignment or novation to another contractor (that is where some or all of the obligations under the contract are transferred to someone other than the original contractor);
- a change to the way in which the contract is performed because the law applying to the contract has changed (for example, where it was necessary to do extra works to ensure compliance with the Disability Discrimination Act);
- when an "Act of God" (a force majeure event) occurs.

- Have you experienced or considered any of the above? If so:

  - did you consider procurement law?

  - if so, did you identify any procurement law risk (such as challenge from an unsuccessful bidder)?

  - where you identified risk, how did you proceed?

  - where no risk was identified, please explain why this was the case.

Private Practice Lawyer Questionnaire

Background

- Name of respondent
- Law firm currently working for and current position
- Relevant qualifications and professional experience

Accommodation PPP/PFI contracts that you have advised on

- Name of contract and brief description

Contract adjustments

What is an "adjustment"?

This means any change or variation in the way in which the contract is performed.

Adjustments include the following:

- a change made pursuant to a change control or variation clause in the contract;
- the use of a clause which has been included in a contract to provide flexibility, such as an option to extend or shorten the length of the contract, or to bring additional services in scope;
- where the contract is performed by someone other than the contractor (for example sub-contracting, or where the contractor assigns the contract);
- a change arising following negotiations between the parties;
- where one party performs the contract other than in accordance with its terms;
- where the performance of the contract changes as a result of external events, such as the insolvency of the contractor or an "act of God".

- Were you instructed to provide procurement law advice on adjusting the contract(s) you refer to above?
- Are any of the following relevant to your advice:
  - consequence of not making the adjustment;
  - likelihood of successful challenge;

- consequences of successful challenge;
- other(s)?

- Do you think the law on contract adjustments is clear? Yes/No
- Can you suggest any ways in which the law on contract adjustments could be improved?

Involvement of others

- Were any third parties consulted/involved in respect of the adjustment (e.g. external funders, the incumbent contractors, any other contractors/interested parties in the market/wider community, government departments or similar)?

Areas of ambiguity

Review clauses

> What is a "review clause"?
> This means a clause included in a contract which provides for an adjustment. This can include, for example:
> - a change control or variation clause;
> - a clause which provides for sub-contracting;
> - a clause which alters the length of the contract (such as an extension or break clause);
> - a clause which changes the contract price payable (such as indexation, benchmarking or market testing).
>
> This can include for example, a change control clause or variation mechanism, drafting concerning events beyond the control of the parties, and any other clauses which change the way in which the contract is performed.

- To what extent do the contract(s) you refer to above contain review clauses? If so, please give examples
- What should be taken into account when drafting/negotiating a contract to enable adjustments to be made pursuant to a review

clause? (for example, the possibility of a foreseen/unforeseen event occurring, the need to extend the duration of the contract or scope of services etc)

- Have you ever been uncertain as to whether an adjustment pursuant to a review clause is permitted or not? (for example, because of uncertainty as to whether the adjustment was within the scope of the clause, or because of the risk that the adjustment might contravene EU procurement law even when made within the terms of the review clause)
- Is it necessary or usual practice to make bidders aware that review clauses will be included in contracts?

Potential contract issues

The occurrence of the following may create contract management and procurement law issues: - the insolvency of the contractor; - where there is a change in the owner of the contractor (a "change in control"); - where the contract is assigned or novated to another contractor; - where it is necessary to change the way in which the contract is performed following a change in the applicable law; - when a force majeure event occurs.

- Have you advised in connection with any of the above? If so:
  - did you identify any risk of procurement law challenge?
  - where no risk was identified, please explain why this was the case.

Bibliography

Yves Allain, "The New European Directives on Public Procurement: Change or Continuity?", *Public Contract Law Journal*, 2005-2006, 35, pp. 517-536.

Rand L. Allen, “Integrity: maintaining a level playing field”, *Public Procurement Law Review*, 2002, 2, pp. 111-114.

Peter Arden, “Legal regulation of multi-provider framework agreements and the potential for bid rigging: a perspective from the UK local government construction sector”, *Public Procurement Law Review*, 2013, 5, pp. 165-182.

Teresa Medina Arnaiz and Miguel Angel Bernal Blay, “Recent reform of Spanish public procurement legislation in compliance with EU law: the issue of modifications to concluded contracts”, *Public Procurement Law Review*, 2011, 6, NA 256-261.

Sue Arrowsmith, “The application of the EC Treaty rules to public and utilities procurement”, *Public Procurement Law Review*, 1995, 6, pp. 255-280.

Sue Arrowsmith, “Amendments to specifications under the European public procurement directives”, *Public Procurement Law Review*, 1997, 3, pp. 128-137.

Sue Arrowsmith, “The Way Forward or a Wrong Turning? An Assessment of European Community Policy on Public Procurement in Light of the Commission’s Green Paper”, *European Public Law*, 1997, 3, pp. 389-411.

Sue Arrowsmith, “Some problems in delimiting the scope of the Public Procurement Directives: privatisations, purchasing consortia and in-house tenders”, *Public Procurement Law Review*, 1997, 5, pp. 198-204.

Sue Arrowsmith, “The problem of discussions with tenderers under the EC Procurement Directives: the current law and the case for reform”, *Public Procurement Law Review*, 1998, 3, pp. 65-82.

Sue Arrowsmith, “The Community Legal Framework on Public Procurement: “The Way Forward” at Last?”, *Common Market Law Review*, 1999, 36, pp. 13-49.

Sue Arrowsmith, “Public private partnerships and the European procurement rules: EU policies in conflict?”, *Common Market Law Review*, 2000, 37, pp. 709-737.

Sue Arrowsmith, “The EC Procurement Directives, national procurement policies and better governance: the case for a new approach”, *European Law Review*, 2002, 27(1), pp. 3-24.

Sue Arrowsmith, *The Law of Public Utilities and Procurement*, 2nd edition, Sweet & Maxwell, London, 2005.

Sue Arrowsmith, “The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?”, *Public Contract Law Journal*, 2005-2006, 35, pp. 337-384.

Sue Arrowsmith, “Implementation of the new EC procurement directives and the Alcatel ruling in England and Wales and Northern Ireland: a review of the new legislation and guidance”, Public Procurement Law Review, 2006, 3, pp. 86-136.

Sue Arrowsmith, "Methods for Purchasing On-Going Requirements: The System of Framework Agreements and Dynamic Purchasing Systems Under the EC Directives and UK Procurement Law", in Sue Arrowsmith, (ed), Reform of the UNCITRAL Model Law on Procurement: Procurement Regulations for the 21st Century, Thomson Reuters, 2009, pp. 131-192.

Sue Arrowsmith, “Modernising the European Union’s public procurement regime: a blueprint for real simplicity and flexibility”, *Public Procurement Law Review*, 2012, 3, pp. 71-82.

Sue Arrowsmith, “The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies”, Cambridge Yearbook of European Legal Studies, 2012, 14, pp. 1-47.

Sue Arrowsmith, *The Law of Public Utilities and Procurement*, 3rd edition, Sweet & Maxwell, London, 2014.

Sue Arrowsmith and Richard Craven, “Public procurement and access to justice: a legal and empirical study of the UK system”, *Public Procurement Law Review*, Forthcoming, 2016.

Sue Arrowsmith, John Linarelli, and Don Wallace, Jr., *Regulating Public Procurement: National and International Perspectives*, Kluwer Law International, The Hague, 2000.

Sue Arrowsmith, Hans-Joachim Preiss, and Pascal Friton, “Self-cleaning as a defence to exclusions for misconduct: an emerging concept in EU public procurement law?”, *Public Procurement Law Review*, 2009, 6, pp. 257-282.

Sue Arrowsmith and Steen Treumer (eds), *Competitive Dialogue in EU Procurement*, Cambridge University Press, Cambridge, 2012.

Rory Ashmore, “Fresh hope for a fresh award but realism must prevail: High Court upholds automatic suspension on contract-making in a public procurement action but finds no illegal award or material variation: R (Edenred (UK Group) Limited) v HM Treasury and others”, *Public Procurement Law Review*, 2015, 3, NA88-NA93.

Rory Ashmore, “Variations on a theme (Pressetext in action) – changes to development plans in favour of commercial developer successfully challenged: R (on app. Gottlieb) v Winchester City Council”, *Public Procurement Law Review*, 2015, 5, NA81-NA87.

Rory Ashmore, “Case Comment: Maintenance of an automatic suspension and the relevance of the not-for-profit status of a tenderer: Bristol Missing Link Limited v Bristol City Council”, *Public Procurement Law Review*, 2015, 5, NA161-167.

Rory Ashmore, “Case Comment: Double jeopardy for authorities? The High Court ruling in Energy Solutions that claimants are entitled to commence proceedings after expiry of the mandatory standstill period and that the court does not have discretion not to award damages in such circumstances”, *Public Procurement Law Review*, 2015, 5, NA168-172.

Rory Ashmore, “The Supreme Court’s ruling in Edenred on the issue of material variation of a concluded contract under EU law”, *Public Procurement Law Review*, 2015, 6, NA202-207.

Vito Auricchio, “The problem of discrimination and anti competitive behaviour in the execution phase of public contracts”, *Public Procurement Law Review*, 1998, 5, pp.113-130.

Penny Badcoe, “Public private partnerships in local government: the legal, financial and policy framework”, *Public Procurement Law Review*, 1999, 6, pp. 279-301.

Penny Badcoe, “The national procurement strategy for local government”, *Public Procurement Law Review*, 2004, 6, NA181-192.

S.H. Bailey, “Judicial review and the public procurement regulations”, *Public Procurement Law Review*, 2005, 6, pp. 291-312.

Patrick Bajari, Stephanie Houghton and Steven Tadelis, “Bidding for Incomplete Contracts: An Empirical Analysis of Adaption Costs”, *American Economic Review*, 2014, 104(4), pp. 1288-1319.

Patrick Bajari, Robert McMillan and Steven Tadelis, “Auctions versus Negotiations in Procurement: an Empirical Analysis”, *Journal of Law, Economics and Organisation*, 2009, 25(2), pp. 372-399.

Fiona Banks and Michael Bowsher, "Damages Remedy in England and Wales and Northern Ireland", in *Public Procurement Law Damages as an Effective Remedy*, in Duncan Fairgrieve and Francois Lichere (eds), Hart Publishing, Oxford, 2011, pp. 61-74.

Celine Barroche, “Case Comment: JB Leadbitter & Co Ltd v Devon County Council”, *Public Procurement Law Review*, 2009, 5, NA192-195.

Robin Barton, “Social services of general interest: the case for greater harmonisation of the competition and public procurement rules”, *European Law Review*, 2012, 38(3), pp. 293-315.

H. G. Beale (General Editor), *Chitty on Contract Law: Volume 1 General Principles: Thirty First Edition*, Sweet & Maxwell, London, 2012.

Christine Boch, “The implementation of the Public Procurement Directives in the UK: devolution and divergence?”, *Public Procurement Law Review*, 2007, 6, pp. 410-434.

Phillippe Bolmin, “Co-development: towards a new system of partnering in the public and private sectors in the execution of major infrastructure projects”, *International Business Law Journal*, 1999, 2, pp. 131-157.

Christopher Bovis, “The Regulation of Public Procurement as a Key Element of European Economic Law”, *European Law Journal*, 1998, 4, 2, pp. 220-242.

Christopher Bovis, *Public Procurement in the European Union*, Palgrave Macmillan, Basingstoke, 2005.

Christopher Bovis, *EU Public Procurement Law*, Edward Elgar, Cheltenham, 2007.

Michael Bowsher, "EC Procurement Law and Change During the Tender or the Contract", *The International Construction Law Review*, 2003, pp.154-176.

Rosemary Boyle, "Regulated procurement – a purchaser's perspective", *Public Procurement Law Review*, 1995, 3, pp. 105-118.

Rosemary Boyle, "EU procurement green paper on the modernisation of EU public procurement policy: a personal response", *Public Procurement Law Review*, 2011, 5, NA171-184.

Peter Braun, "A matter of principle(s) – the treatment of contracts falling outside the scope of the European public procurement directives", *Public Procurement Law Review*, 2000, 1, pp. 39-48.

Peter Braun, "The practical impact of EU public procurement law on PFI procurement practice in the United Kingdom", PhD thesis, University of Nottingham, 2001.

Peter Braun, "Strict Compliance versus Commercial Reality: The Practical Application of EC Public Procurement Law to the UK's Private Finance Initiative", *European Law Journal*, 2003, 9, 5, pp. 575-598.

Peter Braun, "Selection of bidders and contract award criteria: the compatibility of practice in PFI procurement with European law", *Public Procurement Law Review*, 2011, 1, pp. 1-14.

Jan Brodec and Vaclav Janecek, “How does the substantial modification of a public contract affect its legal regime?”, *Public Procurement Law Review*, 2015, 3, pp. 90-105.

Adrian Brown, “European Communities: an overview of the Court of Justice case law on the EC public procurement rules”, *Public Procurement Law Review*, 1993, 2, CS34-47.

Adrian Brown, “Case Comment: Post tender changes in the membership of a bidding consortium: Case C-57/01 Makedoniko”, *Public Procurement Law Review*, 2003, 3, NA56-59.

Adrian Brown and Christos Golfinopoulos, “Case Comment: The permissibility of post selection modifications in a tendering procedure: decision by the European Commission that the London Underground Public Private Partnership does not involve state aid”, *Public Procurement Law Review*, 2003, 3, NA47-55.

Adrian Brown, “The impact of the new Procurement Directive on large public infrastructure projects: competitive dialogue or better the devil you know?”, *Public Procurement Law Review*, 2004, 4, pp. 160-177.

Adrian Brown, “Seeing through transparency: the requirement to advertise public contracts and concessions under the EC treaty”, *Public Procurement Law Review*, 2007, 1 pp. 1-21.

Adrian Brown, “When do changes to an existing public contract amount to the award of a new contract for the purposes of the EU procurement rules? Guidance at last in Case C-454/06”, *Public Procurement Law Review*, 2008, 6, NA253-267.

Adrian Brown, “EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives”, *Public Procurement Law Review*, 2010, 5, pp. 169-181.

Adrian Brown, “Case Comment: Changing a sub-contractor under a public services concession: Wall AG v Stadt Frankfurt am Main (C-91/08)” *Public Procurement Law Review*, 2010, 5, NA160-166.

Adrian Brown, “Case Comment: the Court of Justice rules that a contracting authority may accept the late submission of a bidder’s balance sheet, subject to certain conditions: Case C-336/12 Danish Ministry of Science, Innovation and Higher Education v Manova A/S”, *Public Procurement Law Review*, 2014, 1, NA1-NA3.

Adrian Brown, “When will the publication of a voluntary ex ante transparency notice provide protection against the remedy of contract ineffectiveness? Case C-19/13 Ministerio dell’Interno v Fastweb SpA”, *Public Procurement Law Review*, 2015, 1, NA10-NA16.

Ian Brown, “The contract to negotiate: a thing writ in water?”, *Journal of Business Law*, 1992, Jul, pp. 353-368.

Steven Brunning, “Case Comment: Equal treatment and fairness in the tender process”, *Public Procurement Law Review*, 2011, 5, NA198-200.

Steven Brunning, “United Kingdom – Cabinet Office provides advice to contracting authorities: Public Services (Social Value) Act 2012, *Public Procurement Law Review*, 2013, 3, NA57-60.

Steven Brunning, “Date of knowledge for bringing a procurement claim: Nationwide Gritting Services Limited v The Scottish Ministers”, *Public Procurement Law Review*, 2013, 6, NA184-187.

Cabinet Office, Public Policy Note – Progress Update on the Modernisation of the EU Procurement Rules, Information Note 08/12 24 August 2012.

Cabinet Office, UK Transposition of new EU Procurement Directives: Discussion Paper: Termination of Contracts, 2013.

Cabinet Office, Consultation Document UK Transposition of new EU Procurement Directives: Public Contract Regulations 2015, undated.

Roberto Caranta and Steen Treumer, (eds) *Enforcement of the EU Public Procurement Rules*, DJOF Publishing, Copenhagen, 2011.

Peter Carroll and Peter Stearne, "Public-private partnerships: sectoral perspectives", in Stephen P. Osborne (ed.), *Public Private Partnerships: Theory and practice in international perspective*, Routledge, London, 2000, pp. 36-56.

Michael-James Clifton, "Ineffectiveness - the new deterrent: will the new Remedies Directive ensure greater compliance with the substantive procurement rules in the classical sectors?" *Public Procurement Law Review*, 2009, 4, pp. 165-183.

Commission Interpretative Communication on Concessions under Community Law (2000/C 121/02).

Commission Interpretative Communication on the Community Law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02).

Commission Interpretative Communication on the application of Community Law on Public Procurement and Concessions to Institutionalised PPP (IPPP) (2008/C 91/02).

Commission of the European Communities, Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June), Brussels 14 June 1985 COM(85) 310 final.

Commission of the European Communities, Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions, Brussels 30.4.2004 COM (2004) 327 final.

Mark Cook, "Putting the community at the core of procurement practice: how local authorities can take the lead", *Journal of Local Government Law*, 2003, 6(1), pp. 3-8.

Brian Coote, "Case Comment: Consideration and variations: a different solution", *Law Quarterly Review*, 2004, 120 (Jan), pp. 19-23.

Fiona Cownie, *Legal Academics: Culture and Identities*, Hart Publishing, Oxford, 2004.

Richard Craven, Procurement procedures under the Private Finance Initiative: the operation of the new legal framework, Thesis submitted to the University of Nottingham for the degree of Doctor of Philosophy, November 2011.

Crown Commercial Service, The Public Contracts Regulations 2015: Guidance on Amendments to Contracts During Their Term, updated August 2016.

Federica Curtol, Gloria Pesarin and Tom Vander Beken, "Testing the Mechanism on EU Public Procurement Legislation", *Eur J Crim Policy Res*, 2006, 12:337-364.

Jonathan Davey, "Procedures involving negotiation in the new Public Procurement Directive: key reforms to the grounds for use and the procedural rules", *Public Procurement Law Review*, 2014, 3, pp. 103-111.

Clive Davies, “ICT outsourcing contracts – life after signature”, *Communications Law*, 2008, 13(5), pp. 160-163.

Clive Davies, “A brief history of UK government IT contracting”, *Communications Law*, 2012, 17(2), pp. 53-55.

Paul L. Davies, *Gower's Principles of Modern Company Law*, 6th edition, Sweet & Maxwell, London, 1997.

Omer Dekel, "The Legal Theory of Competitive Bidding for Government Contracts", *Public Contract Law Journal*, 2008, 37, p. 246.

Vernon Dennis and Alexander Fox, *The New Law of Insolvency: Insolvency Act 1986 to Enterprise Act 2002*, Law Society Publishing, London, 2003.

Geert Dewulf, Anneloes Blanken and Mirjam Bult-Spiering, *Strategic Issues in Public Private Partnerships*, 2nd edition, Wiley Blackwell, 2012.

Peter A. M. Diekman, “Corruption and money laundering: the role of the private sector”, *Journal of Money Laundering Control*, 1999, 3(2), pp. 115-124.

Martin Dischendorfer, “Service concessions under the EC Procurement Directives: a note on the Teleaustria case”, *Public Procurement Law Review*, 2001, 2, NA57-63.

Nicholas Dorn, Michael Levi and Simone White, “Do European procurement rules generate or prevent crime?”, *Journal of Financial Crime*, 2008, 15(3), pp. 243-260.

John Dorter, “Variations”, *Construction Law Journal*, 1991, 7(4), pp. 281-302.

David Elvin and Charles Banner, “The application of the Public Contracts Directive to planning: the position at the beginning of 2011”, *Journal of Planning and Environmental Law*, 2011, 5, pp. 508-521.

Stefan Echelmaier, “Always at your service (within limits): the ECJ’s case law on Article 56 TFEU (2006-11)”, *European Law Review*, 2011, 36(5), pp. 615-650.

Marnix Elsenaar, “Law, accountability and the private finance initiative in the National Health Service”, *Public Law*, 1999, Spr, pp. 35-42.

Carmen Estevan de Quesada, “Competition and transparency in public procurement markets”, *Public Procurement Law Review*, 2014, 5, pp. 229-244.

EU Focus, 2008, Case Comment, “Transfer of service contract to subsidiary not new contract”, 2013 Sweet & Maxwell westlaw.uk.

EU Focus, 2010, Case Comment, “Obligations attaching to service concession contracts examined”, 2013 Sweet & Maxwell westlaw.uk.

European Commission, Green Paper: Public Procurement in the European Union: Exploring the Way Forward, COM (96) 583 final, November 1996.

European Commission, Green Paper on the Modernisation of EU Public Procurement Policy: Towards a More Efficient European Procurement Market, Brussels 27.1.2011 COM (2011) 15 final.

European Commission, Commission Staff Working Paper: Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation, Part 1 and Part 2, Brussels 27.06.2011 SEC (2011) 853 final.

Simon Evenett and Bernard Hoekman, “Government procurement: market access, transparency, and multilateral trade rules”, *European Journal of Political Economy*, 2005, 21, pp. 163-183.

Simon Evers Hjelmborg, Peter Stig Jakobsen, and Sune Troels Poulsen, *Public Procurement Law – the EU directive on public contracts*, DJOF Publishing, Denmark, 2006.

Peter K. Falconer and Kathleen McLaughlin, "Public-private partnerships and the 'New Labour' Government in Britain", in Stephen P. Osborne (ed.), *Public Private Partnerships: Theory and practice in international perspective*, Routledge, London, 2000, pp. 120-133.

Jose Maria Fernandez Martin, “Case Comment: Case C-243/89, Commission v Denmark (The Storebaelt Case), judgement of June 22, 1993”, *Public Procurement Law Review*, 1993, 5, CS153-156.

Jose Maria Fernandez Martin, “Case Comment: Commission of the European Communities v Italy Case C272/91”, *Public Procurement Law Review*, 1994, 5, CS211-216.

Jose Maria Fernandez Martin, “Case Comment: Commission of the European Communities v Belgium (C87/94) (Unreported, 1996) (ECJ)”, *Public Procurement Law Review*, 1996, 5, CS133-139.

Jose Maria Fernandez Martin, *EC Public Procurement Rules: A Critical Analysis*, 1996, Clarendon Press, Oxford.

Christoph Fischer, “Unilateral variations in construction contracts”, *Construction Law Journal*, 2013, 29(3), pp. 211-233.

Andrea Fontana and Anastasia H. Prokos, *The Interview: From Formal to Post Modern*, Left Coast Press, Walnut Creek, California, 2007.

Anne Galletta, *Mastering the Semi Structured Interview and Beyond*, New York University Press, New York, 2013.

John Gelissen, (ed.), *Qualitative Research Methods*, 2nd edition, Sage, London, 2012.

Carri Ginter, Nele Parrest, Mari Ann Simovart, "Access to the content of public procurement contracts: the case for a general EU-law duty of disclosure", *Public Procurement Law Review*, 2013, 4, pp. 156-164.

Abby Ghobadian, David Gallear, Nicholas O'Regan and Howard Viney, *Public Private Partnerships: Policy and Experience*, Palgrave Macmillan, Great Britain, 2004.

Pritha Gopalan, *PPP Paradox: Promise and Perils of Public Private Partnership in Education*, Sage, New Dehli, 2013.

Kate Gough, "Case Comment: The first case on automatic suspension before the Court of Appeal: DWF LLP v Secretary of State for Business, Innovation and Skills, acting on behalf of the Insolvency Service", *Public Procurement Law Review*, 2014, 6, NA179-182.

Kate Gough, "Case Comment: Automatic suspensions: the High Court rows back from recent trends in the interpretation of the American Cyanamid test? OpenView Security Solutions Limited v The London Borough of Merton Council", *Public Procurement Law Review*, 2016, 3, NA90-92.

Brigitte Gutknecht, "Case Comment: The judgment of the Court of Justice in Case C81/98 Alcatel Austria AG v Federal Ministry for Science and Transport – "Okopoints" and the consequences for Austrian procurement law", *Public Procurement Law Review*, 2000, 1, CS14-19.

Roger Halson, “Opportunism, economic duress and contractual modifications”, *Law Quarterly Review*, 1991, 107(Oct), pp. 649-678.

Ian Harden and Diane Longley, “National Health Service Contracts” in John Birds, Ribert Bradgate and Charlotte Villiers (eds), *Termination of Contracts*, Wiley Chancery, London, 1995.

Keith Hartley, “Problems of Using Partnering and Similar Private Sector Practice in the Public Sector Environment: The Example of PPPs/PFI”, in Sue Arrowsmith and Martin Trybus (eds), *Public Procurement: The Continuing Revolution*, 2003, Kluwer Law International, pp. 187-195.

Kristian Hartlev and Morten Wahl Liljenbol, “Changes to Existing Contracts under the EU Public Procurement Rules and the Drafting of Review Clauses to Avoid the Need for a New Tender”, Public Procurement Law Review, 2013, 2, pp. 51-73.

Paul Henty, “Case Comment: R (on the application of the Law Society) v Legal Services Commission”, *Public Procurement Law Review*, 2008, 1, NA12-18.

Paul Henty, “Case Comment: The decision of the Court of Appeal in R (Law Society) v Legal Services Commission”, *Public Procurement Law Review*, 2008, 3, NA108-111.

Paul Henty, “Remedies Directive implemented into UK law”, *Public Procurement Law Review*, 2010, 3, NA115-124.

Paul Henty, “Case Comment: Extensions to the tender deadline: the case of Azam & Co v Legal Services Commission”, *Public Procurement Law Review*, 2010, 5, NA206-208.

Paul Henty, “Case Comment: Lifting an automatic suspension: Indigo Services (UK) Ltd v Colchester Institute Corp”, *Public Procurement Law Review*, 2011, 3, NA87-90.

Paul Henty, “Case Comment: the derogation from EU advertising on grounds of urgency and damages for failure to advertise”, *Public Procurement Law Review*, 2015, 2, NA37-40.

Paul Henty, “Legislative Comment: Implementation of the EU Public Procurement Directives in the UK: the Public Contracts Regulations 2015”, *Public Procurement Law Review*, 2015, 3, NA74-80.

Paul Henty, “Case Comment: A declaration of ineffectiveness in the UK: Lightways (Contractors) Limited v Inverclyde Council”, *Public Procurement Law Review*, 2016, 2, NA63-65.

Paul Henty, “Case Comment: damages for breach of public procurement rules: the case of EnergySolutions EU Limited v Nuclear Decommissioning Authority”, *Public Procurement Law Review*, 2016, 3, NA86-89.

Paul Henty and Chris Manning, “The public sector transparency agenda”, *Public Procurement Law Review*, 2011, 2, NA45-50.

Ignacio Herrera Anchustegui, “Case Comment: EFTA Court case E-24/13 Casino Admiral AG v Wolfgang Egger: the obligation of transparency and consequences of it when awarding services concessions”, *Public Procurement Law Review*, 2015, 1, NA1-NA9.

HM Treasury, PFI: Meeting the Investment Challenge, July 2003.

HM Treasury, Operational Taskforce Note 1: Benchmarking and Market Testing guidance, October 2006.

HM Treasury, Standardisation of PFI Contracts Version 4, March 2007 ("SOPC4").

HM Treasury, Operational Taskforce Note 2: Project Transition Guidance, March 2007.

HM Treasury, Change Protocol Principles, August 2007.

HM Treasury, Operational Taskforce Note 3: Variations Protocol for Operational Projects (entered into prior to Standardisation of PFI Contracts Version 4), March 2008.

HM Treasury, Operational Taskforce Note 4, October 2009.

HM Treasury, Major Project Approval and Assurance Guidance, April 2011.

HM Treasury, Making Savings in Operational PFI Contracts, July 2011.

HM Treasury, "Managing Public Money", July 2013, with annexes revised as at August 2015.

Erik Pijnacker Hordijk and Maarten Meulenbelt, "A bridge too far: why the European Commission's attempts to construct an obligation to tender outside the scope of the Public Procurement Directives should be dismissed", *Public Procurement Law Review*, 2005, 3, pp. 123-130.

Irene Hors, "Shedding light on corrupt practices in public procurement", *Public Procurement Law Review*, 2003, 5, NA101-108.

Bill Hutchings and Dorothy Livingston, "Legal issues arising from the introduction of the Euro", *Journal of International Banking Law*, 1997, 12(2), pp. 63-66.

Morten Hviid, “Relational contracts, repeated interaction and contract modification”, *European Journal of Law and Economics*, 1998, 5(2), pp. 179-194.

Alison Jones and Brenda Sufrin, *EU Competition Law*, 5th edition, Oxford University Press, Oxford, 2014.

Stephen G. Kahn, “Unilateral modification clauses in long term contracts”, *International Business Law Journal*, 1986, 2, pp. 145-160.

Peter Kalbe, “Public-private partnerships under the constraints of EC procurement rules”, *Public Procurement Law Review*, 2005, 6, NA176-185.

Steven Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance*, The AEI Press, London, 1990.

Ciara Kennedy-Loest, “What can be done at the preferred bidder stage in competitive dialogue?”, *Public Procurement Law Review*, 2006, 6, pp. 316-326.

Hubert Konarski, “Force majeure and hardship clauses in international contractual practice”, *International Business Law Journal*, 2003, 4, pp. 405-428.

Vasiliki Kosta, “Case Comment: European Court of Justice: Case C-213/07, Michaniki AE v Ethniko Simvoulio Radiotileorasis Ipourgos Epikratis”, *European Constitutional Law Review*, 2009, 5(3), pp. 501-516.

Totis Kotsonis, “Case Comment: Italian law on the automatic exclusion of abnormally low tenders: SECAP SpA v Commune di Torino (C-147/06)”, *Public Procurement Law Review*, 2008, 6, NA268-273.

Totis Kotsonis, “Case Comment: The award of a works concession contract containing additional works which had not been defined adequately in the original advertisement: Commission v Spain (C-423/07)”, *Public Procurement Law Review*, 2010, NA167-173.

Totis Kotsonis, “Green Paper on the Modernisation of EU Public Procurement Policy: Towards a More Efficient European Procurement Market”, *Public Procurement Law Review*, 2011, 3, NA51-58.

Totis Kotsonis, “Case Comment: The basis on which the remedy of damages must be made available under the Remedies Directive: Stadt Graz v Strabag AG (C-314/09)”, *Public Procurement Law Review*, 2011, 3, NA59-63.

Totis Kotsonis, “Case Comment: Award of contracts for additional services without the prior publication of a contract notice: Commission v Greece (C-601/10)”, *Public Procurement Law Review*, 2012, 2, NA55-61.

Matthias Krugner, “The principles of equal treatment and transparency and the Commission Interpretative Communication on Concessions”, *Public Procurement Law Review*, 2003, 5 pp. 181-207.

Peter Kunzlik, “Neoliberalism and the European Public Procurement Regime”, *Cambridge Yearbook of European Studies,* 15, 2013, pp. 283-356.

Lisabeth La Cour, Anders Milhoj and Grith Skovgaard Olykke, “Transparency notices in the EU public procurement regime: an empirical study of the use of transparency notices in Denmark, Sweden and the United Kingdom”, *Public Procurement Law Review*, 2015, 5, pp. 164-192.

Stephen D. Lapan, Maryann T. Quartaroli and Frances Julia Riemer (eds), *Qualitative Research: An Introduction to Methods and Designs*, John Wiley and Sons, 2012, San Francisco.

Marianne K. Larsen, “The new EU Public Procurement Directives”, in Ruth Nielsen and Steen Treumer (ed.), *The New EU Public Procurement Directives*, DJOF Publishing, Denmark, 2005, pp. 9-15.

John Lester, “Corruption: how to minimise corruption in public works construction contracts”, *Journal of Financial Crime*, 1999, 7(2), pp. 161-169.

John Lister, *The NHS after 60: for patients or profits?*, Middlesex University Press, 2008.

Mark Lewis, “New wine into cracked bottles: the new EC law of public procurement”, *International Company and Commercial Law Review*, 1992, 3(3), pp. 100-106.

Jean-Marc Loncle, “The English Private Finance Initiative”, *International Business Law Journal*, 1999, 8, pp. 865-873.

Jean-Marc Loncle, “Transfer of risks in PFI projects”, *International Business Law Journal*, 2000, 2, pp. 143-150.

Peter Loose and Michael Griffiths, *Loose on Liquidators: 6th edition*, Jordans, Bristol, 2010.

Pascale Accaoui Lorfing, “The contractually unforeseen renegotiation”, *International Business Law Journal*, 2010, 1, pp. 35-55.

Marsela Maci, “Bid rigging in the EU public procurement markets: some history and developments”, *European Competition Law Review*, 2011, 32(8), pp. 406-413.

Roman Madej, “Case Comment: Application of the TFEU and the implied contract governing the tendering process: a note on Sidey Limited v

Clackmannanshire Council", *Public Procurement Law Review*, 2012, 3, NA141-143.

Yseult Marique, "Cooperation and competition in complex construction projects: implementation of EU procurement rules in England and Belgium", *International Journal of Law in the Built Environment*, 2013, 5(1), pp. 53-70.

Sylvia de Mars, "The limits of general principles: a procurement case study", *European Law Review*, 2013, 38(3), pp. 316-334.

Donald L. Marston, "The impact of subsurface ground conditions on project participants – a Canadian perspective", *Construction Law Journal*, 1992, 8(2), pp. 107-117.

Aaditya Mattoo, "Economic Theory and the Procurement Agreement", in *Law and policy in public purchasing: the WTO agreement on government procurement*, Bernard M. Hoekman and Petros C. Mavroidis, University of Michigan Press, 1997, pp. 57-71.

Bill McCabe, Jim McKendrick and John Keenan, "PFI in Schools – Pass or Fail?", *Journal of Finance and Management in Public Services*, 2001, 1, pp. 63-74.

Patrick McGovern, "Case Comment: Challenge to termination of a procurement competition", *Public Procurement Law Review*, 2009, 4, NA172-180.

Patrick McGovern, "Two important decisions of the European Court of Justice on time-limits in proceedings for review procedures in public procurement: the Uniplex Case (C-406/08) and Commission v Ireland (C-454/08)", *Public Procurement Law Review*, 2010,3, NA101-111.

Patrick McGovern, “Case Comment: Challenge and lifting of automatic suspension: the case of Rutledge Recruitment and Training Ltd v Department for Employment and Learning”, *Public Procurement Law Review*, 2011, 6, NA282-286.

Patrick McGovern, “Case Comment: An example of the application of principles of objectivity and transparency under the Public Contracts Regulations: the case of Easycoach Ltd v Department for Regional Development”, *Public Procurement Law Review*, 2012, 5, NA260-266.

Patrick McGovern, “Rejection of use of the Cynamid guidelines, including the adequacy of damages condition and undertaking in damages requirement: the case of OCS One Complete Solutions Ltd v Dublin Airport Authority Plc”, *Public Procurement Law Review,* 2014, 5, NA138-144.

David McGowan, “Clarity at last? Low value contracts and the transparency obligation”, *Public Procurement Law Review*, 2007, 4, pp. 274-283.

David McGowan, “Below-threshold contracts and changes to the technical specifications during evaluation: Case C-278/14, SC Enterprise Focused Solutions SRL v Spitalul Judetean de Urgenta Alba Iulia”, *Public Procurement Law Review*, 2015, 5, NA156-158.

Ewan McKendrick, *Contract Law: Fifth Edition*, Macmillan, 2003, p. 312.

Jonathan Miller and Lewis Cohen, “One change too many! Is there any position for the American concepts of “cardinal changes” and the “cumulative impact doctrine” in English law?”, *Construction Law Journal*, 2002, 18(5), pp. 378-390.

Florian Neumayr, “Value for money v equal treatment: the relationship between the seemingly overriding national rationale for regulating public

procurement and the fundamental EC principle of equal treatment", *Public Procurement Law Review*, 2002, 4, pp. 215-234.

Grith Skovgaard Olykke, "How does the Court of Justice of the European Union pursue competition concerns in a public procurement context?", *Public Procurement Law Review*, 2011, 6, pp. 179-192.

Office of Government Commerce, EU procurement guidance: Introduction to the EU procurement rules, March 2008.

Despina Pachnou, "Bidders' Use of Mechanisms to Enforce EC Procurement Law", *Public Procurement Law Review*, 2005, 14, pp. 256-263.

Chris Parker and Simon Chapman, "Escaping from a bad bargain: suspending, modifying or terminating performance of long term energy contracts", *International Energy Law Review*, 2010, 7, pp. 243-246.

Martin Partington, *Introduction to the English Legal System*, *7th edition*, Oxford University Press, Oxford, 2012.

Partnerships for Schools, Building Schools for the Future, Standard Form PFI Contract, 2007.

Gustavo Piga and Steen Treumer (eds), *The Applied Law and Economics of Public Procurement: the economics of legal relationships*, Routledge, 2013.

Zsofia Petersen, "Case Comment: Principle of equal treatment in IT procurement: Evropaiki Dynamiki v Commission (T-50/05)", *Public Procurement Law Review*, 2011, 1, NA1-5.

Elisabetta Piselli, "The scope for excluding providers who have committed criminal offences under the EU Procurement Directives", *Public Procurement Law Review*, 2000, 6, pp. 267-278.

Enzo Pontarollo, “Regulatory aspects and the problem of corruption in public procurement in Italy”, *Public Procurement Law Review*, 1995, 5, pp. 201-212.

Sune Troels Poulsen, “The possibilities of amending a public contract without a new competitive tendering procedure under EU law”, *Public Procurement Law Review*, 2012, 5, pp. 167-187.

Nicolas Pourbaix, “The future scope of application of Article 346 TFEU”, *Public Procurement Law Review*, 2011, 1, pp. 1-8.

Hans-Joachim Priess, “EC public procurement law”, *International Company and Commercial Law Review*, 1996, 7(4), pp. 123-133.

Hans-Joachim Piess, “The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive”, *Public Procurement Law Review*, 2014, 3, pp. 112-123.

Helen Randall, “Preparation by local authorities for commissioning and procurement”, *Journal of Local Government Law*, 2002, 5(1), pp. 12-15.

Helen Randall and Malcolm Iley, “Latest developments in strategic partnerships – where to now?”, *Journal of Local Government Law*, 2003, 6(6), pp. 140-143.

Ben Rayment, “Case Comment: The remedy of ineffectiveness in the English courts: ALSTOM Transport v Eurostar International Ltd”, *Public Procurement Law Review*, 2011, 6, NA262-267.

Ben Rayment, “Case Comment: Public-public agreements and modifications to existing contracts: the Court of Appeal decision in Edenred”, *Public Procurement Law Review*, 2015, 4, NA124-128.

Susan L. Robertson, Karen Mundy, Antoni Verger and Francine Menashy (eds), *Public Private Partnerships in Education: New Actors and Modes of Governance in a Globalizing World*, Edward Elgar Publishing Limited, Cheltenham, 2012.

Sally Roe and Christof Lessenich, "Case Comment: Submission of a bid by a person who has carried out preparatory work for a procurement", *Public Procurement Law Review*, 2005, 4, NA93-97.

Anne Rubach-Larsen, "Competitive Dialogue", in Ruth Nielsen and Steen Treumer (ed.), *The New EU Public Procurement Directives*, DJOF Publishing, Denmark, 2005, pp. 67-79.

Albert Sanchez Graells, "Interaction between EU Competition and Procurement Rules" presentation delivered 27 February 2013 Public Procurement Seminar Series 2012-2013, University of Nottingham.

Albert Sanchez Graells, *Public Procurement and the EU Competition Rules*, 2nd edition, Hart Publishing 2015, Oxford.

Albert Sanchez Graells, "Public procurement and state aid: reopening the debate?", *Public Procurement Law Review*, 2012, 6, pp. 205-212.

Albert Sanchez Graells, "New rules for health care procurement in the UK: a critical assessment from the perspective of EU economic law", *Public Procurement Law Review* 2015, 1, pp. 16-30.

David Silverman, *Doing Qualitative Research: A Practical Handbook*, Sage Publications, 2000.

David Silverman, *Interpreting Qualitative Data*, 4th edition, Sage Publications, 2011.

Mari Ann Simovart, “Amendments to Procurement Contracts: Estonian Law in the Light of the Pressetext Ruling”, *Juridica International XVII/2010*, pp. 151-160.

Jennifer Skilbeck, “The private finance initiative and public procurement”, *Public Procurement Law Review*, 1996, 4, pp. 148-159.

Susie Smith, “Application of EU procurement law to public ambulance services: Case C-160/08, Commission v Germany”, *Public Procurement Law Review*, 2010, 5, NA180-185.

John E Stannard, *Delay in the Performance of Contractual Obligations*, Oxford University Press, Oxford, 2007.

Michael Steinicke, “Public procurement and the negotiated procedure – a lesson to learn from EU law”, *European Competition Law Review*, 2001, 22(8), pp. 331-339.

Richard Stephens, “Contract terms and project realities: the built in collision course”, *Computer and Telecommunications Law Review*, 1998, 4(8), pp. 277-282.

Celine Strassarino and Caroline Mollers, “Transforming Government procurement: a report by HM Treasury”, *Public Procurement Law Review*, 2007, 5, NA147-151.

James Taylor and Clive Davies, “Change management in technology outsourcing contracts”, *Communications Law*, 2011, 16(4), pp. 148-151.

Geert R. Teisman and Erik-Hans Klijn, "Public-private partnerships in the European Union: officially suspect, embraced in daily practice", in Stephen P. Osborne (ed.), *Public Private Partnerships: Theory and practice in international perspective*, Routledge, London, 2000, pp. 165-186.

Hannah Thomas and Kate Gough, “Case Comment: Maintenance of an automatic suspension: the case of Counted4 Community Interest Company v Sunderland City Council”, *Public Procurement Law Review*, 2016, 4, NA144-147.

Guenter Treitel, *The Law of Contract*, 11th edition, Sweet & Maxwell, London, 2005, pp. 672-704, 866-925.

Peter Trepte, P., "Public Procurement and the Community Competition Rules", *Public Procurement Law Review*, 1993, 2, pp. 93-114.

Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, Oxford University Press, Oxford, 2004.

Peter Trepte, “Transparency Requirements”, in Ruth Nielsen and Steen Treumer (ed.), *The New EU Public Procurement Directives*, DJOF Publishing, Denmark, 2005, pp. 49-65.

Steen Treumer, “Competitive Dialogue”, *Public Procurement Law Review*, 2004, 4, pp. 178-186.

Steen Treumer, “Towards an obligation to terminate contracts concluded in breach of the EC public procurement rules – the end of the status of concluded public contracts as sacred cows”, *Public Procurement Law Review*, 2007, 6, pp. 371-386.

Steen Treumer, “Regulation of contract changes lading to a duty to retender the contract: the European Commission’s proposals of December 2011”, *Public Procurement Law Review*, 2012, 5, pp. 153-166.

Steen Treumer, “Transfer of contracts covered by the EU public procurement rules after insolvency”, *Public Procurement Law Review*, 2014, 1, pp. 21-31.

Steen Treumer, "Contract changes and the duty to retender under the new EU public procurement Directive", *Public Procurement Law Review*, 2014, 3, pp. 148-155.

Steen Treumer and Erik Werlauff, "The leverage principle: secondary Community law as a lever for the development of primary Community law", *European Law Review*, 2003, 28(1), pp. 124-133.

Charlotte Tullis, "Correction of errors in tenders: the case of JR Jones and Legal Services Commission", *Public Procurement Law Review*, 2011, 4, NA134-139.

Jean-Jacques Verdeaux, "Public Procurement in the European Union and in the United State: A Comparative Study", *Public Contract Law Journal*, 2002-2003, 32, pp. 713-738.

Steven Verschuur, "Competitive dialogue and the scope for discussion after tenders and before selecting the preferred bidder – what is fine tuning etc?", *Public Procurement Law Review*, 2006, 6, pp. 327-331.

Matthew Vinall, "If you start to feel the pinch, will a price review clause ease your suffering?", *International Energy Law Review*, 2009, 1, pp. 17-19.

Tanya Wilkie, "Case Comment: Award of damages for a breach of the EU's general procurement principles: a note on Woods Building Services v Milton Keynes Council", *Public Procurement Law Review*, 2015,6, NA211-214.

Rhodri Williams, "The evaluation of and the impact and effectiveness of the EU public procurement legislation", *Public Procurement Law Review*, 2011, 6, NA237-240.

Rhodri Williams, "Commission proposals to modernise public procurement", *Public Procurement Law Review*, 2012, 3, NA101-105.

Rhodri Williams, “Anti-corruption measures in the EU as the affect public procurement”, *Public Procurement Law Review*, 2014, 4, NA95-99.

Sope Williams, “The mandatory exclusions for corruption in the new EC Procurement Directive”, *European Law Review*, 2006, 31(5), pp. 711-734.

Sope Williams and Ama Eyo, “Fighting corruption in public procurement through the OECD: a review of recent initiatives”, *Public Procurement Law Review*, 2009, 3, NA103-113.

Laura Wisdom, “United Kingdom: automatic suspensions in the TCC: the cases of NATS and Group M”, *Public Procurement Law Review*, 2015, 2, NA44-NA50.

Laura Wisdom, “Another automatic suspension lifted in the TCC: Solent NHS Trust v Hampshire County Council”, *Public Procurement Law Review*, 2015, 4, NA140-NA143.

Frank Wooldridge, “Public procurement in the European Community”, *Journal of Business Law*, 1987, Nov, pp. 505-513.