INSIGHT

GOOD CONTRACTING AUTHORITIES CAN PREDICT THE FUTURE: A NOTE ON *FINN FROGNE*

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ABSTRACT: In a coherent line of case law, developed in particular in *pressetext Nachrichtenagentur GmbH*, the CJEU has recognised that the awarding authorities can change, under certain conditions, existing public contracts. The principles developed by this case law have been eventually incorporated in the 2014 Public Procurement package (Directives 2014/23, 2014/24 and 2014/25). The main principle is that commonly referred to as the substantial modification test. When a potential change is so relevant that it would amount to a *new award*, such a change may not be implemented without first *retendering* the contract. In its *Finn Frogne* decision (judgment of 7 September 2016, case C-549/14, *Finn Frogne A/S v. Rigspolitiet ved Center for Beredskabskommunikation*), the Court of Justice has further developed this case law, examining a type of situation which had not, until now, been the object of specific attention by the Court: namely situations of unforeseen events that lead to modifications to the contract which are not intended to change the way in which the contract is performed, but rather, are designed to "cut losses" of the parties in the context of ending existing contracts. A modification which, as the Court acknowledges, can be described as an agreement with a *dispute settlement* component). Along with some useful contributions, the judgment leaves some doubts and concerns on the adequateness of the Court's approach.

KEYWORDS: modifications – public contracts – retendering – settlement contracts – Directives 2014/23, 2014/24 and 2014/25 – *pressetext* case law.

I. MODIFICATIONS TO PUBLIC CONTRACTS: *FINN FROGNE* IN CONTEXT

It is hardly debatable that a contract concluded on the basis of a competitive award procedure and then, in the execution phase, is materially changed, amounts to a suspicious situation, to say the least, in what regards compliance with EU law.[1] Competition

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[1] J.M. HEBLY, P. HEIJNSBROEK, *When Amending Leads to Ending: a Theoretical and Practical Insight into the Retendering of Contracts after a Material Change*, in G. PIGA, S. TREUMER (eds), *The Applied Law and Economics of Public Procurement*, Oxon, New York: Routledge, 2013, p. 163.

and non-discrimination concerns should be respected not only in the course of the award phase, but throughout the entire duration of the contract, including the implementation phase.[2] The competitive award procedure therefore introduces an element of *rigidity* in the execution of the contract, restricting the general private law rule which allows for contracts to be modified by mutual agreement,[3] and also the traditional *ius variandi* power of unilaterally changing the contract, recognised to public authorities in countries inspired by the *contrat administratif* tradition.[4] As commentators have put it, this is important both for reasons of public interest in the outcome of the contract (*promised quality* should coincide with *delivered quality*) but also for reasons of integrity, since evidence suggests that corruption is more often carried out at the execution phase of public contracts.[5]

The principle that prevents material changes to occur in the implementation phase of a contract is not new to EU law (and it is also a part of Member State's legal traditions).[6] A judgment by the Court of Justice dating back to 2000 (*Commission v. France*)[7] highlights the importance of the topic, which was later on developed in a string of case law which has *pressetext Nachrichtenagentur*[8] as the main leading case.[9]

[2] R. CARANTA, *The Changes to the Public Contract Directives and the Story They Tell About How EU Law Works*, in *Common Market Law Review*, 2015, p. 449; see also K. HARTLEV, M.W. 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*, in *Public Procurement Law Review*, 2013, p. 53.

[3] S.T. POULSEN, *The Possibilities of Amending a Public Contract Without a New Competitive Tendering Procedure under EU Law*, in *Public Procurement Law Review*, 2012, pp. 168-170; M.A. RAIMUNDO, *A formação dos contratos públicos. Uma concorrência ajustada ao interesse público*, Lisbon: AAFDL, 2013, pp. 118-119; J. BRODEC, V. JANECEK, *How Does the Substantial Modification of a Public Contract Affect its Legal Regime?*, in *Public Procurement Law Review*, 2015, p. 92.

[4] M.A. RAIMUNDO, *A formação dos contratos públicos*, cit., p. 119.

[5] G.M. RACCA, R.C. PERIN, *Material Changes in Contract Management as Symptoms of Corruption: a Comparison between EU and U.S. Procurement Systems*, in G.M. RACCA, C.R. YUKINS, *Integrity and Efficiency in Sustainable Public Contracts*, Bruxelles: Bruylant, 2015, p. 265.

[6] These traditions, namely of "continental administrative law" Member States, focused on the public authority's power to modify contracts (*ius variandi*), but the issue of the protection of competition against material changes was already present in earlier writings, well before EU law assumed this as a principle. See, e.g., J.M. BOQUERA OLIVER, *La selección de contratistas. Procedimiento de selección y contrato*, Madrid: IEP, 1963, p. 22 *et seq*.

[7] Court of Justice, judgment of 5 October 2000, case C-337/98, *Commission v. France*.

[8] Court of Justice, judgment of 19 June 2008, case C-454/06, *pressetext Nachrichtenagentur GmbH v. Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH e APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung*.

[9] For extensive review of this case law, J.M. HEBLY, P. HEIJNSBROEK, *When Amending Leads to Ending*, cit., p. 167 *et seq*.; S. ARROWSMITH, *The Law of Public and Utilities Procurement. Regulation in the EU and UK*, Vol. I, London: Sweet and Maxwell, 2014, p. 579 *et seq*.; S.T. POULSEN, *The Possibilities*, cit., p. 169 *et seq*.

Case law definitely had its impact, not the least among legislators. Although in the 2004 Directives on Public Procurement,[10] the matter was not yet explicitly mentioned in general terms (the theme of "additional performance", that is, the possibility of extending the contract to goods, services or works not initially provided for, was the "historical exception", but it had quite a narrow scope),[11] some Member States began to draft legislation in line with the European case law that was developing.[12] And eventually, in the 2014 Public Procurement package,[13] consensus formed around the need to include to the provisions which are now Arts 43 and 44 of Directive 2014/23, Arts 72 and 73 of Directive 2014/24 and Arts 89 and 90 of Directive 2014/25. These provisions, received by commentators as incorporating previous case law "with some adjustments and embellishments",[14] not only set out the situations in which a change to an existing contract is permitted, but also refer to the applicable regime in case a material change occurs or is intended to occur (in short: termination, retendering, or publishing a notice of change of the contract are the possible consequences).[15]

In this overall context, the judgement of the Court of Justice of 7 September 2016 in *Finn Frogne*[16] must be considered. Although the decision is not entirely surprising, it adds clarity to some still open points of the previous case law. In the Author's view, it also raises new questions.

The paper is divided into three sections. The first section presents the facts of the case and the arguments of the parties (I.1) and the contents of the ECJ decision, with a view to pointing out the elements of continuity or possible advancement vis-à-vis the

[10] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

[11] J. Brodec, V. Janecek, *How Does the Substantial Modification*, cit., p. 91. This possibility was provided for by art. 31, para. 4, let. b), of Directive 2004/18/CE.

[12] Several references in J. Brodec, V. Janecek, *How Does the Substantial Modification*, cit., p. 93. Art. 313, paras 1 and 2, of the Portuguese Public Contracts Code (2008), available at www.pgdlisboa.pt, is also an example of such concerns.

[13] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

[14] A. Brown, *Whether a New Tendering Procedure is Required When a Public Contract is Amended under a Settlement Agreement: the EU Court of Justice Ruling in Case C-549/14 Finn Frogne A/S*, in *Public Procurement Law Review*, 2017, p. NA5 *et seq*.

[15] For an analysis of the said provisions, see S. Treumer, *Contract Changes and the Duty to Retender under the New EU Public Procurement Directive*, in *Public Procurement Law Review*, 2014, p. 148 *et seq*.

[16] Court of Justice, judgment of 7 September 2016, case C-549/14, *Finn Frogne A/S v. Rigspolitiet ved Center for Beredskabskommunikation*.

previous case law (I.2). The second section discusses some of the most relevant points of the judgment and, in particular, what appears to the current author as a lack of a *comprehensive* view of the contract (II.1), and the Court's view on how option clauses could serve as a *counterweight* to its strict understanding of the law (II.2). Finally, we present some concluding remarks (III).

I.1. Facts of the case and parties' arguments

The contract which gave rise to the judicial contest and eventually the request for a preliminary ruling by the Court of Justice was awarded by the Danish State, by means of a competitive dialogue (an entity named CFB, took the position of contracting authority later on). From the facts of the case, the contract appears to be qualified as a services contract. Its subject matter was the supplying and maintenance of a global communications system for emergency response systems in Denmark.[17]

The contract had an initial value of *circa* Euro 70 million, split over a basic package worth about Euro 40 million of minimum services, and the rest of the value regarding options and other services which could, or not, be called upon by the contracting authority.[18] The duration of the contract is not clearly stated in the decision: the Court simply mentions that it would last for "several years".[19]

The contract was entered to on 4 February 2008, but "difficulties arose in meeting delivery deadlines, with CFB and *Terma* both disagreeing as to which party was responsible for making it impossible to perform the contract as stipulated".[20] After negotiations,

> "the parties agreed to a settlement under which the scope of the contract was to be reduced to the supply of a radio communications system for regional police forces, worth approximately [...] EUR 4.69 million, while CFB would acquire two central server farms, worth approximately [...] EUR 6.7 million, which *Terma* had itself acquired with a view to leasing them to CFB in performance of the original contract. As part of that settlement, each party intended to waive all rights arising from the original contract other than those resulting from the settlement".[21]

The settlement in question was concluded on 17 December 2010,[22] after the contracting authority had published an *ex ante* voluntary notice in the *OJEU,* pursuant to Art. 2, let.

[17] *Finn Frogne A/S v. Rigspolitiet ved Center for Beredskabskommunikation*, cit., para. 8.
[18] *Ibid.*, para. 9.
[19] *Ibid.*, para. 8.
[20] *Ibid.*, para. 10.
[21] *Ibid.*, para. 11.
[22] *Ibid.*, para. 14.

d), subpara. 4 of Directive 89/665 (so-called "Remedies Directive")[23] – the effects of which the Court safeguarded,[24] and which we will also overlook in this comment.

The settlement agreement in question was challenged by *Finn Frogne,* a competitor of the contractor *Terma*. The challenge was made on the basis that the settlement constituted a material change to the contract, awarded without competition.

The contracting authority took the view that the settlement in question was not subject to the procurement rules, in the sense that the parties' objective while changing the contract had not been to change the relative obligations in order to continue performance in different terms, but rather, it had been the result of unpredictable circumstances that caused the breaking up of the contractual relationship, and because of that, the contract was changed, but only in order to *end it*, and reduce losses for both parties. The intention, the contracting authority stated, was clearly not to circumvent public procurement rules regarding the award of new contracts, but to solve a problem without litigation between the parties. Additionally, the Danish authority argued that the *reduction* of the services was not subject to EU law limitations.

The question was brought before Danish authorities for dispute settlement, which gave decisions dismissing Finn Frogne's claim, except in regard to the question of the acquisition of the server farms (which the Danish Eastern Regional Court considered to be without a link to the initial contract). This partial win did not result in any real gain to the claimant, because of the abovementioned *ex ante* notice. The question was eventually referred to the Danish Supreme Court, which, uncertain as to the right interpretation of EU law on the matter, submitted a request for a preliminary ruling.[25]

1.2. The Court of Justice's decision

The Court's decision was to consider that the settlement in question was in breach of EU law and specifically Art. 2 of Directive 2004/18 (which sets the scope of application of the Public Procurement rules regarding services). The decision was handed down by a three-judges Section and AG Sharpston did not present an opinion. This, in the Author's view, might be surprising, since the case presented some elements which differed from the factual basis of previous case law. It could be that the decision not to hand down an

[23] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by several acts; the version in force at the date of the facts was the version amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

[24] *Finn Frogne A/S v. Rigspolitiet ved Center for Beredskabskommunikation*, cit., para. 39.

[25] *Ibid*., para. 26.

opinion relates to the Court's understanding of *Belgacom*,[26] for example; but that understanding could be challenged, as we will argue later on.

The Court began by recalling the three main categories of cases in which, according to *pressetext*, modifications are considered material and should therefore be subjected to competition: when they (i) "extend the scope of the contract considerably to encompass elements not initially covered", or (ii) "change the economic balance of the contract in favour of the successful tenderer", or (iii) "are liable to call into question the award of the contract, in the sense that, had such amendments been incorporated in the documents which had governed the original contract award procedure, either another tender would have been accepted or other tenderers might have been admitted to that procedure".[27]

First of all, the Court, unsurprisingly, dismissed the argument regarding the possible non-application of EU limits on modifications to *reduction* of the scope of a contract.[28] It is true that the criteria set out in *pressetext* referred to *extension* of the contract, but that was obviously due to the fact that those are probably the most likely situations to result in a *material* change, one that would have resulted in changes in the award procedure. As the Court rightly states, it is clear that a reduction in the object of a contract may very well summon the interest of a *different market*. Also, changes to reduce the subject matter of contracts are even quite common "in the current age of austerity".[29]

The Court also dismissed the argument relating to the *intention* of the parties regarding the contract. In a point of some importance to the question of the application of the *material change* test, the Court noted that such a test must be conducted in an *objective* manner,[30] therefore indifferent to the parties' intentions.

One must admit that, if the question is placed in this light, the Court's statement is hardly rebuttable. However, one might also ask whether this was merely a matter of the parties' intentions, or if there was an *underlying reality* that rendered the settlement necessary with that specific economic operator. On this note, it is interesting to remark that the Court *did not question* that the modification was "a type of settlement agreement".[31] We will resume this point in section II.1 below.

Finally, the Court also dismissed the argument about the unpredictability of the circumstances that gave cause to the contract. Again, the Court did not question that there had been "objective difficulties encountered in the performance of the contract", or that they had been "objectively unpredictable".[32] However, it stated, this, in itself, is

[26] Court of Justice, judgment of 14 November 2013, case C-221/12, *Belgacom NV v. Interkommunale voor Teledistributie van het Gewest Antwerpen (INTEGAN) and others.*

[27] *Finn Frogne A/S v. Rigspolitiet ved Center for Beredskabskommunikation*, cit., para. 28.

[28] *Ibid.*, para. 29.

[29] A. BROWN, *Whether a New Tendering Procedure is Required*, cit.

[30] *Finn Frogne A/S v. Rigspolitiet ved Center for Beredskabskommunikation*, cit., para. 33.

[31] *Ibid.*, paras 27, 40.

[32] *Ibid.*, para. 32.

not sufficient to exempt the contracting authority from following non-discrimination principles and rules in dealing with the situation at hand.

In this crucial part of the judgment,[33] the Court gives particular emphasis to three points: *first*, competition principles are not set aside by the simple fact that the contract emerged in order to solve a dispute among the parties (citing *Belgacom*); *second*, the unforeseen nature of a situation is relevant, as grounds for dispensing competition, according to Art. 31 of Directive 2004/18, but those situations are exhaustive, and the one at hand is not one of those; and *third*, the contracting authority could, and in fact, *should have anticipated* the need for future changes, and, consequently, it would have been able to provide, in the tender documents, "for the option [...] to adjust certain conditions, even material ones, of that contract after it has been awarded".

Afterwards, the Court went on to conclude that, according to EU law, the amendment was not permitted, adding, remarkably, that '[t]he position would be different only if the contract documents provided for the possibility of adjusting certain conditions, even material ones, after the contract had been awarded and fixed the detailed rules for the application of that possibility".

II. Discussion

As mentioned, the Court's decision in *Finn Frogne* has some largely acceptable assertions. Some others, however, bring further doubt, or may at least be challenged *per se*, if not by the implications they entail. The following discussion does not purport to present a full disapproval of the final judgment in the case: as we know, it is particularly hard to make absolute statements about the correctness of preliminary rulings judgments, given the absence of contact with the full array of the facts. However, we do have some critical remarks as to some of the arguments and assertions of the Court, which we will present right away.

II.1. The lack of a *comprehensive* approach to the contract

Taken by itself and unaccompanied of other elements, the decision to consider as a material change one in which a services contract is converted into a purchase contract is perhaps not surprising.

One could say that such a decision is in line with the traditional understanding according to which, if the *main obligations* which form part of the object of the contract, and which *qualify* the contract as a works, services, acquisition or lease of goods, concession, and so on, are changed, then we have a new contract.

It is submitted that this is an insufficient approach. A contract by which someone obtains goods or services and pays a value to the provider is, in abstract, a public con-

[33] *Ibid.*, paras 34-37.

tract, subject to competition, *or not*, considering all the factors of the contractual relationship. Take, for instance, in house arrangements, or public-public cooperation (now provided for in Art. 12 of Directive 2014/24): in such cases, there is the provision of goods, services or works for consideration, between the controlling entity and the controlled entity (in in house arrangements), or between the cooperating parties, but the existence of certain other elements in the relationship, like a relationship so close between the parties that one is just the extension of another (like in in house arrangements), or the existence of a cooperation between public entities for their public missions, and based exclusively in public interest motivations (like in public-public cooperation) exclude competition in the award of the contract.[34] *It depends on context*. And this is not a problem of subjective *intentions* of the parties, as the Court states: it is an objective assertion, given by elements of the contract. Perhaps, on this point, the discussion before Danish authorities was not very precise, and we admit that the Danish authorities' reference to the *objective* of the parties lead to the Court's approach.

Nevertheless, in the Author's view, the fact that the Court acknowledged that there was *"*a type of settlement" contract, and that it occurred because of "unpredictable" situations, should have given rise to an analysis of the very simple question as to whether such a contract is a procurement according to EU rules. Indeed, it is submitted that the Court had all the elements necessary for asking whether or not public procurement rules were designed to apply to these types of arrangements, which not only have an *exchange* function, but also have a *dispute settlement* function.[35]

Settlement contracts have the well-known characteristic of only being possible with one counterpart: the one with which there is a previous dispute. This same characteristic, the *special connection of a contractor to a contract*, is found in many EU public procurement law provisions exempting competition: to mention just a few provisions that were part of Directive 2004/18, Art. 31, para. 1, let. b), para. 2, let. b), para. 4, let. a) and b), all come to mind. The specific provision of Art. 31, para. 2, let. c), of the said Directive 2004/18, in the part where it allows for supplies contracts to be awarded on the basis of an *agreement with creditors*, has close parallels with the situation of settlement agreements. It is surprising that the Court simply dismisses the subject of Art. 31 with a sim-

[34] Regarding these two exemptions (in house and public-public cooperation) to Public Procurement EU law, see M. KARAYIGIT, *A new type of exemption from the EU rules on public procurement established: "in thy neighbour's house" provision of public interest tasks*, in *Public Procurement Law Review*, 2010, p. 183 *et seq.*; J. FALLE, *Hamburg Again: Shared Services and Public Sector Cooperation in the Case of Technische Universitat Hamburg-Harburg v Datenlotsen Informationssysteme GmbH*, in *Public Procurement Law Review*, 2014, p. NA123 *et seq.*; J. WIGGEN, *Directive 2014/24/EU: The New Provision on Co-operation in the Public Sector*, in *Public Procurement Law Review*, 2014, p. 83 *et seq*.

[35] Remarking, in this vein, that settlement agreements or transactions should not be considered exchange contracts, but rather, "organisation" or "association" contracts, L. MARCUS, *L'unité des contrats publics*, Paris: Dalloz, 2010, p. 407.

ple vague sentence.[36] The need to interpret all competition exemptions strictly is no excuse for this: in house arrangements and public-public cooperation are pure creations (and good ones, at that) of the Court of Justice, and they emerged, and survived, *without any explicit legal provision*, until they were put into law in 2014, which is proof that the Court sometimes departs from a narrow view of a few isolated provisions and tries to see *the whole picture*. Regrettably, it did not do this here.

The Court's reliance on *Belgacom*, in this point of the decision, also deserves some critical attention, since the facts appear to be considerably different. In *Belgacom*, the decision to set aside competition was taken because there was some legal doubt as to whether the contractor, *due to a previous legal relationship,* had the exclusive right to perform a part of a new contract's contents. The contract in question was used as a means to *avoid problems.* This, in the Author's view, arguably puts *Belgacom* in the realm of a *convenience* arrangement, insufficient to justify setting competition aside. In *Finn Frogne* the situation does not appear quite the same. If it is accepted that the objective breaking down of the contractual relationship took place, the modification apparently seemed like a coherent solution for the problem of the very same contract that was being modified. The solution remains within the "spirit" of the initial contract, and aims at reducing costs incurred by the parties with a view to that initial contract. This last point reduces some, if not all, of the "shocking effect" of buying a server farm as a modification to a communications services contract: if the server farm was acquired by the contractor for use in the contract, its connection to the contract is clear, and it is also clear that the acquisition will be used to support (although in a different manner) the very same activity that was procured in the first place.

These remarks show yet another point: since the facts of the case are somewhat incomplete, the Court could have done what is common in preliminary rulings, and award the national court with a measure of discretion in evaluating the specific facts and national legal context. It is argued that if that had been done, it could have amounted to a more balanced decision. The Court could have indicated that the national court should evaluate, for example, the actual possibility of applying any of the grounds provided for in Art. 31 of Directive 2004/18; or if there was any actual fault of the contracting authority in not foreseeing the possible need for future modification.

One can understand caution in opening the door to new exemptions from competition. And certainly not all modifications with a "dispute settlement component" should be exempted from competition. But a more *comprehensive* look at all the elements of the contract, and the general objectives of EU public procurement law, and EU law altogether, would be welcomed. This more comprehensive approach would give proper attention to a notion of *public interest*, which acts, in many cases, as a valid reason to set aside competition. Indeed, the EU's legal order does not aim to protect the market re-

[36] *Finn Frogne A/S v. Rigspolitiet ved Center for Beredskabskommunikation*, cit., para. 35, *in fine*.

gardless of anything else: it accepts that competition does not apply if there are good reasons for that.[37] This is perhaps more easily accepted, in other areas of EU Law, where the Treaties draw up explicit exemptions based on other relevant values and interests, such as, but not limited to, the public interest. For example, in EU Competition Law, Art. 106, para. 2, and probably also Arts 101, para. 3 and 107, paras 2 and 3, of the TFEU can be cited. But it should also be the case in Public Procurement law. The above-mentioned example of public-public cooperation as an exemption to public procurement rules is proof of this. The Court, in creating (or recognizing) that exemption, has considered that, where there is a cooperation between public parties, *guided by public interest goals*, public procurement has no place in setting up the contractual framework supporting that cooperation.[38] The fact that the law explicitly allows for public procurement being used as a driver for horizontal policies in other relevant areas of public interest, with clear support to such use by the EU Institutions, and namely the Commission,[39] is also proof that there is more to public procurement besides the protection of competition in the market.

II.2. The Court's take on option clauses as *counterweight* for strict interpretation of the law

The other point in which, to the Author's opinion, the judgment causes some doubts, or even concerns, is the one regarding option clauses.

It is understandable that the Court tries to offer some alternatives to its very strict (perhaps too strict) interpretation of the law. In the Author's view, this is a demonstration that the Court recognizes the very difficult situation in which it places contracting authorities in similar predicaments.

[37] See, in general, T. Prosser, *The Limits of Competition Law: Markets and Public Services*, Oxford: Oxford University Press, 2005; M. Krajewski, U. Neergaard, J.W. van de Gronden (eds), *The Changing Legal Framework for Services of General Interest in Europe. Between Competition and Solidarity*, The Hague: Asser Press, 2009; G. Dellis, *Régulation et droit public «continental». Essai d'une approche syntétique*, in *Revue du Droit Public et de la Science Politique en France et à l'étranger*, 2010, p. 957 *et seq.*; A. Jones, J. Davies, *Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate*, in *European Competition Journal*, 2014, p. 453 *et seq.*; W. Sauter, *Public Services in EU Law*, Cambridge: Cambridge University Press, 2015.

[38] See, on the matter, with further references, J. Falle, *Hamburg Again: Shared Services and Public Sector Cooperation in the Case of Technische Universitat Hamburg-Harburg v Datenlotsen Informationssysteme GmbH*, in *Public Procurement Law Review*, 2014, p. NA123 *et seq.*; J. Wiggen, *Directive 2014/24/EU: The New Provision on Co-operation in the Public Sector*, in *Public Procurement Law Review*, 2014, p. 83 *et seq*.

[39] See, for exemple, European Commission, *Green Paper on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market*, COM/2011/0015 final, nrs. 3 and 4; European Commission, *Public Procurement as a Driver of Innovation in SMEs and Public Services (guidebook series)*, 2014; European Commission, *Buying Green! A handbook on green public procurement*, 2016.

However, some of the statements made by the Court in this regard seem questionable, and the overall appreciation of this part of the judgment is possibly the opposite to what the Court intended.

The main question is whether the Court is not mixing two very different problems: *option clauses* and *unforeseen circumstances.* These are really two different problems. Option clauses, now provided for in Art. 72, para. 1, let. a), of Directive 2014/24 (and corresponding provisions in Directives 2014/23 and 2014/25), need to be clear, precise, and unequivocal, and must indicate "the scope and nature of possible modifications or options as well as the conditions under which they may be used". This means that option clauses are, first and foremost, meant for situations of foreseeable, quantifiable and manageable risks or even discretionary (i.e. susceptible of a choice later on) alternatives. Some risks bear some of these traits, but not all: for example, in a 30 years contract, it is almost certain that there will be legislative changes affecting the contract's economic balance; but obviously, it is rather difficult to guess their nature and quantify their impact in advance, thus making it difficult (although not impossible) to create "clear, precise and unequivocal" variation clauses.[40] For this reason, Art. 72 provides for *a different modification ground*, exactly, that of *unforeseen circumstances*, in para. 1, let. c): they are, as we said, two different problems.

In *Finn Frogne*, the Court seems to "corner" contracting authorities into drafting clear, precise and unequivocal variation clauses for all situations: foreseeable *and* unforeseeable. This, it is submitted, is not only a very strict interpretation: it is also a wrong picture of the law in force. And looking at the particulars of the case, it is even more difficult to accept the standard the Court demands from the contracting authority. The Court seems to indicate that there is, somewhere, abstractly, a contract clause that could have provided *unequivocally* for all the cases in which a Euro 40 million communications services contract could, after two years, turn into an Euro 11 million communications and server supply contract.

It is argued that this level of detail is virtually impossible to achieve beforehand in many cases, possibly like the one here. Although we do not know the whole facts, it is easy to admit that the acquisition of the communications system for regional authorities, and the server farms, were, at the end of the contractual relationship, the only two points where the parties, after the dispute arose, saw the *possibility* to enter into a settlement agreement, cutting their losses and ending the contract quickly. It is almost impossible to say that this would have been predictable at the start.

Also, contrarily to what the Court appears to argue, the fact that the contract had a complex and innovative object is a reason *against* predictability, not in favour of it; and

[40] Stressing yet other constraints on the use of options or review clauses, see K. HARTLEV, M. W. LILJENBOL, *Changes to Existing Contracts*, cit., pp. 58-59.

therefore, an argument for flexibility, not against it.[41] As Poulsen put it sharply: "[f]or such contracts more is required for amendments to be regarded as material".[42] This, by the way, is another downside of the judgment: innovation is characterised by uncertainty, and calls for added flexibility. The Court's take seems to go in the opposite direction.

Furthermore, the "option possibility" is tricky for another reason: the fact that an option is specifically mentioned in the tender that leads to the contract is not always sufficient in order to consider it exempted from competition in the future, as per previous case law,[43] and confirmed by the 2014 Directives (see Art. 72, para. 1, let. a), of Directive 2014/24). The alternative provided for by the Court risks being highly ineffective.

As Albert Sánchez Graells has put it, the *Finn Frogne* judgment seems to be quite indifferent to commercial reality.[44] A trait often pointed out by commentators as common to the CJEU's decisions regarding modifications.[45] For the reasons stated above, it is hard not to agree with those comments.

Fortunately, the 2014 Directives seem to have taken a somewhat more sensible and balanced approach to the matter of changes to existing contracts.[46] However, in light of decisions such as *Finn Frogne*, one might ask if the EU's institutions are all in line with this approach. This is not to say that the Court of Justice should have applied, directly, the new Directives to the case at hand; but, given the absence of specific provisions in the 2004 Directives, and the fact that the 2014 provisions are largely understood as receiving that case law, the Court could have considered the main principles arising from such a regime, namely, the relevance of unforeseen circumstances as a reason for changing the contract.

III. Conclusion

We finish as we started: in agreeance with the general principle of limitations to the material change of existing contracts. One cannot seriously argue, in the current state of the law, that modifications could be permitted without limitation. That would result in the practical ineffectiveness of the whole EU public procurement law system. The

[41] Citing the example of IT contracts as exactly the type of case where it is difficult to foresee the outcome of contract execution, S.T. Poulsen, *The Possibilities*, cit., p. 167; see also p. 170 *et seq*.

[42] S.T. Poulsen, *The Possibilities*, cit., p. 171.

[43] A. Brown, *Changing a Sub-Contractor under a Public Services Concession: Wall AG v Stadt Frankfurt am Main (C-91/08)*, in *Public Procurement Law Review*, 2010, p. NA160 *et seq*., nr. 3.1.

[44] See A. Sánchez Graells, *CJEU ignores commercial realty and sets unjustified boilerplate requirements for contractual modifications*, in *How to Crack a Nut: A Blog on EU Economic Law*, 15 September 2016, www.howtocrackanut.com.

[45] See, in the same line, Hélène Hoepffner, *La modification du contrat administratif*, Paris: Dalloz, 2009, p. 107, regarding *pressetext.*

[46] S. Treumer, *Contract Changes*, cit., p. 151.

agreeance with that principle does not mean that there are not difficulties in its practical application.

The 2014 Public Procurement Directives give a clear signal that legislators want to give contracting authorities some leeway to manage contractual modifications in a way that does not curb flexibility and adaptation to evolving needs. Flexibility is a main point in any procurement system, and it is even more necessary if we are to adequately integrate innovation as a core value.

In this context, decisions such as *Finn Frogne* might give rise to some questions. The Court's approach seems insufficient in the alternatives it presents for a contracting authority in the position of the contracting authority of the case. The alternatives seem to be either to predict the unpredictable and draft an option clause for that, or to tender a modification to a contract that is inextricably linked to the person of the current contractor. These do not seem like real alternatives. Real alternatives are those which are possible to implement, they do not place excessive burdens on contracting authorities, and they must have the ability to meet the actual and legitimate needs of a contracting authority.

Some decisions on public procurement matters appear to result more from what P.B. Faustino,[47] in a different, but close, context, has termed a "blind fear of corruption". The problem is that this fear, unfortunately, sometimes replaces the "informed effort" of looking for solutions that strike the appropriate balance between the imperative to protect competition, and the imperative to keep public procurement true to its nature: an instrument for fulfilling public buyers' needs. Limitations to changing existing contracts are necessary, but they must be proportional, not too strict. They must be defined with a view to how contracts really work, and not based in purely abstract concerns or assumptions, distant from reality. Sometimes, flexibility is used improperly, but we must never forget that, given the undenying fact that reality changes, adequate flexibility is a crucial element of good contract management. It is, therefore, necessary to meet public interest goals.

[47] P.B. FAUSTINO, *Regulating Discretion in Public Procurement: an Anti-Corruption Tool?*, in G.M. RACCA, C.R. YUKINS, *Integrity and Efficiency*, cit., p. 151.