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Review article
UDK 658.7:341.218.3]:340.142(4-67EU)
DOI: https://doi.org/10.25234/pv/25753
Paper received on 14 March 2023
Paper accepted on 4 December 2023

INTERPRETATION OF THE SUBJECT CHANGE OF PUBLIC PROCUREMENT CONTRACTS BASED ON SUCCESSION THROUGH JUDGMENT NO C-461/20 OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Summary: *During the performance of public procurement contracts such circumstances may arise that require modification of the original conditions. The freedom of classical public law contracts may not predominate as a result of the European Union directive regulations, since it is a basic requirement that the contract be fulfilled within the conditions of the original tender announcer and the offer, however the possibility of amending the contract must be ensured in cases where it is necessary. The question of the change of subject may be mentioned as a particular case. The Court of Justice of the European Union in its decision, case no C-461/20 examined the question of the change of subject arising from legal succession and examined the framework for the interpretation of the directive conditions, with regards of the context and without questioning other non-codified conditions. Based on the judgment, further issues such as the general theoretical foundations of the contract amendment, the relations between the change of subject and the contract amendment, the deviations from other directive cases due to the change of subject, the necessity of a new public procurement procedure and the unlawful omission of the public procurement procedure, may be investigated. Contract amendment options regulated in European Union directives like the above-mentioned C-461/20 of the Court of Justice of the European Union raise many questions of legal interpretation. The study analyses the legal basis that provides the possibility of subject change based on legal succession, going beyond the framework of traditional legal case analysis, comparing it with other legal bases for amending contracts, contrasting the arguments in the judgment, and relying on other relevant court decisions.*

Keywords: *public procurement contracts, amendment of contracts, change of subject, succession, preliminary ruling procedure*

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1. INTRODUCTORY THOUGHTS

One of the fundamental questions related to the performance of public procurement contracts is how to deviate from the requirements specified in the public procurement documents and the commitments contained in the winning tender, i.e. how the parties can change certain conditions of performance. The basic starting point is that 'a public procurement contract is a special legal relationship'[1] and that 'public procurement contracts differ from classic civil law contracts on several points. Among other things, the principle of freedom of contract does not fully apply'[2] in contrast to classical civil law contracts. It is also an important question whether the entity of the contracting party as the winning tenderer may change during the performance, so that whether the originally selected economic operator can be replaced in the contractual relationship, and if so, under what conditions this can be done.

Article 72 of the Directive 2014/24/EU (hereinafter: Directive) lists the cases in which the public procurement contract (framework agreement) can be legally amended without a new public procurement procedure.[3] While for contracts not covered by the Directive, amendment of contract may be an effective tool for solving incidental problems during performance, such freedom cannot exist for public procurement contracts because tender announcers have to settle for less efficiency in exchange for competition and transparency. Therefore, if a substantial amendment is required, a public procurement procedure must be reset for the given contract.[4] In case there is a change in the position of the contracting party, it is considered as a fundamentally essential and therefore prohibited contract amendment. Therefore, the rules of the contract amendment Directive allow for exceptions, in which case it is not necessary to conduct a new public procurement procedure. However, it is not unusual that the contract is replaced with another one for whom it was originally awarded. The reason for this could be, for example, that the contractor party appears to be unreliable or become insolvent in the meantime, or perhaps may not keep the contractual conditions.[5] In order to avoid resetting new public procurement procedure to implement the change of subject each time, which is expensive and time-consuming. In certain cases, the Directive allows another economic operator to take the place of the original contracting party.

Court of Justice of the European Union (hereinafter: CJEU) in its judgment rendered on February 3, 2022 in case No. C-461/20 (hereinafter: Judgment)[6] as a result of the preliminary decision-making procedure, it took a position regarding the change in the subjects of the contract, raising some questions outside the framework of the interpretation of the Directive provisions, which can be examined from the perspective of theoretical approaches and previ-

1 The Public Procurement Decision Committee (Közbeszerzési Döntőbizottság HU) decision no D.381/19/2018. <https://dontobizottsag.kozbeszerzes.hu/adatbazis/megtekint/dbhatarozat/portal_338738/> accessed 22 June 2022.

2 *Ibid.*

3 European Parliament and Council Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

4 Rafael Dominquez Olivera, 'Modification of Public Contracts' (2015) 10 Eur Procurement & Pub Private Partnership L Rev 35, 35.

5 Abby Semple & Marta Andrecka, 'Classification, Conflicts of Interest and Change of Contractor: A Critical Look at the Pubic Sector Procurement Directive' (2015) 10 Eur Procurement & Pub Private Partnership L Rev 171, 184

6 Case C–461/20 *Advania Sverige AB, Kammarkollegiet v Dustin Sverige AB* [2022] ECLI:EU:C:2022:72.

ous EU jurisprudence. Thus, the general theoretical foundations of the contract amendment, the relationship between the change of subject and the contract amendment, the need for a new public procurement procedure and the unlawful disregard of the public procurement procedure, the private law content of succession or the possibility of filing a claim for the nullity of contracts may be analysable. This study provides an overview of these main issues after a brief summary of the facts and the legal position of the Judgment, as well as the presentation of specific approaches from several legal systems, along with the utilization of relevant theoretical approaches mentioned in the literature. The fundamental objective is to explore how directive provisions can be interpreted through methods of legal interpretation, as well as how a particular situation – the change of parties – can be situated within the framework of modifying public procurement contracts.

First, it is necessary to mention that, based on Article 72 (4) of the Directive, it is considered a substantial and unauthorized modification of the contract if a new contracting party takes the place of the party to whom the tender announcer originally awarded the contract. There are three cases which can be mentioned as exceptions defined in the Directive, point d) of Article 72, paragraph (1), of which ii. subsection was interpreted by the Judgment.

2. SUMMARY OF THE FACTS UNDERLYING THE LEGAL PROBLEM

According to the facts underlying the case, a Swedish contracting authority (national service agency) awarded several framework agreements for the procurement of IT equipment. During the performance of the contract, the winning tenderer was adjudged insolvent, so it asked the tender announcer for permission to transfer the framework agreements to another economic operator. The liquidation commissioner of the contracting party as the winning tenderer entered into an agreement about the transfer with the new oblige, and the transfer was finally approved by the tender announcer in February 2018. However, one of the economic operators competitor considered that these framework agreements affected by the transfer are null and void, since according to this competitor's point of view, the legal condition required for the legality of the transfer was not fulfilled according to which universal or partial succession must take place for the change of subject. Accordingly, the competitor filed a lawsuit to the Swedish court.

The Swedish court proceed in the first instance accepted the legal position of the tender announcer, since the succession in question was the result of a reorganization, the framework agreements and the necessary sectors of activity were acquired by the new economic operator. Therefore, the authorization complied with both Swedish law and the Directive provisions transposed by Swedish law.

However, the appellate court, as result of appeal judged the legal dispute differently and established the nullity of framework agreements, since the new economic operator cannot be considered the absolute or particular successor of the contracting party as the original winning tenderer. This was based on the fact, that practically nothing else was transferred apart from the framework agreements, only one employee joined the new economic operator, it was not supported by any evidence that they took over the subcontractors, customers (who also

changed service providers) or other public procurement framework agreements also in which the original contracting party took part.

The tender announcer submitted an appeal to the Supreme Administrative Court, in which the court's assessment of the transaction was not dispute, but the tender announcer argued that the transfer met the conditions of universal or partial legal succession, and also argued that the new contracting party is only obliged to take the place of the original contracting party. The transfer of other activities or properties is not required with regard to the rights and obligations arising from the contract (framework agreement). It is important that the new contracting party should be adequately able to fulfil the contract in accordance with the original requirements.

The new contracting party, replacing the original party, argued that the Directive does not require that (in addition to the framework agreements) activities of a specific nature or of a certain scope be transferred to the new contracting party, for which replaces the party whom the tender announcer originally awarded the contract. However, the adverse party who filed the claim referred to the condition regarding the succession of the original contracting party following a corporate reorganization, which applies to those situations in which the sectors affected by the contract are taken over by the new contracting party, and the transfer of the contract is only supplementary in comparison to the transfer of the activity. If the transfer of the activity were not a condition, this could lead to trade in public procurement contracts.

The Swedish Supreme Administrative Court suspended the procedure and turned to the CJEU for a preliminary decision-making. The Swedish Supreme Administrative Court requested the interpretation of subsection of Article 72(1)(d)(ii) of the Directive, in which they were looking for an answer to the following questions; may the succession be realized in such case, is it sufficient if the new contracting party took over the rights and obligations of the original contracting party under the framework agreement; after the original contracting party was declared insolvent and the agreement was transferred from the assets subject to insolvency proceedings.

3. THE POSITION TAKEN BY THE CJEU

The CJEU had to answer the question of whether the condition for the universal or partial succession of the original contracting party after insolvency is met if the new contracting party only takes over the rights and obligations arising from the framework agreement concluded with the tender announcer, (and does not take over transfer all or part of the activities of the original contracting party under the scope of this framework agreement).[7]

As a starting point, the CJEU stated that the replacement of a contracting party with another economic operator 'a change affecting one of the fundamental conditions of the relevant public procurement contract, and consequently a substantial modification of the contract.' This rule is contained in point d) of Article 72 (4) of the Directive, namely CJEU C-454/06. on the basis of its judgment[8] and as the motion of advocate general also pointed out that the

7 *Ibid.* para 22.

8 Case C–454/06 *Pressetext Nachrichtenagentur GmbH v Republik Osterreich (Bund) and Others* [2008] I-04401

change of the contracting party may be considered as a modification which is affecting in general one of the basic conditions of the public procurement contract.[9] The other starting point was, on the one hand, the requirement of equal treatment and, on the other hand, the requirement of transparency excludes the possibility of significantly modifying the provisions of the contract after its conclusion. In this round, the CJEU referred to the case C-549/14. and to its sentencing.[10] (According to this decision, otherwise, the contract 'cannot be substantially modified without starting a new public procurement procedure, if this modification objectively means a dispute settlement involving mutual waivers on the part of the two parties in order to close a legal dispute with an uncertain outcome arising from difficulties encountered during the performance of this contract.')[11] Otherwise, equal treatment means, on the one hand, that 'the tenderer must be in an equal position at the time of the preparation of the offer, and its purpose is to promote the development of healthy and efficient competition between the enterprises participating in the public procurement procedure,'[12] and on the other hand, it is 'required from the tender announcer not to treat similar situations differently, and not to treat different situations equally, unless such treatment can be objectively justified.'[13]

In the end, the Court, accepting the contents of the advocate general's motion, took the opinion that the transfer was legal, as the Directive conditions for legal succession were met. On the one hand, Article 72 (1) point d) ii of the Directive subsection must be interpreted on the basis of the general meaning of the terms contained in the provision without the establishment of additional criteria to which the competing economic operator who filed the claim referred. Such additional requirements cannot be derived from the text of the Directive. On the other hand, the Court, referring to their judgment in case no C-454/06. in which stated that the internal reorganization of the original contracting party can be considered as a non-essential modification of the contract that does not necessitate the initiation of a new public procurement procedure. The recital (110) of the Directive lists insolvency without restraint as an example of structural changes of the original contracting party. Finally, the reason for the directive regulation, (authorizing the amendment of the contract) is that a in the case of insolvency preventing the performance of the contract a flexible solution should be available and the problem arising from insolvency does not arise differently depending on whether the activities of the contracting party as the winning tenderer who became insolvent are at least partly maintained or completely disannulled. As a result of the above, the Court took the position that 'Article 72 (1) d) point ii. shall be interpreted by meaning that an economic operator which, following the declaration of insolvency of the original contracting party leading to its liquidation, has only taken over the rights and obligations of this party resulting from the framework agreement concluded with the tender announcer, shall be regarded as, pursuant to this provision following a corporate reorganization, replacer of the original contracting party within a partial legal succession.'

9 *Ibid.* (n 6) attorney general's motion ECLI:EU:C:2021:729, para 26.

10 Case C–549/14 *Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation* [2016] ECLI:EU:C:2016:634.

11 *Ibid.* para 40.

12 Case C–598/19 *Confederación Nacional de Centros Especiales de Empleo (Conacee) v Diputación Foral de Guipúzcoa és Federación Empresarial Española de Asociaciones de Centros Especiales de Empleo (Feacem)* [2021] ECLI:EU:C:2021:810, para 37.

13 Case C–434/02 *Arnold André GmbH & Co. KG v Landrat des Kreises Herford* [2004] ECR I-11825 para 68 és a Case C–210/03 *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* [2004] ECR 11893 para 70.

4. LEGAL ARGUMENTS EXPRESSED IN THE MOTION OF ADVOCATE GENERAL

Besides the juridical legal interpretation, it is also expedient to briefly review the arguments which are included in the motion of the advocate general.[14] The starting point is that the reason behind the succession should be the corporate reorganization, and this may be realized in different ways. The legislator lists four examples of this, but this list is not in exacting details. The first three examples, i.e. corporate takeover, merger or acquisition are similar, as these involve the continuation of the concerned business, and to take further the activities, the necessary material and human resources are carried forward. However, in the case of the insolvency, mentioned as the fourth example, the company does not necessarily survive: it may continue to operate, but it may also be terminated, its assets may be sold one by one. In this case the framework agreement, which is one of the company's assets, can be independently transferred to a third party without taking over any other assets of the company.[15]

The rules of the Directive ensure that in the event of insolvency (which, although an extraordinary situation, is not rare) a new, substitute legal entity can be appointed without delay or a new procedure that makes public procurement disproportionately more expensive. The Directive provision offers a solution to this problem that serves the interests of the tender announcer, the winning tenderer as contracting party and also the interests of the creditors. However, it is important that other essential changes cannot be made in the contractual conditions apart from the involvement of the new economic operator. Due to the extraordinary nature of the insolvency, it is possible to avoid that this involvement does not mean circumventing the Directive obligations. It is the task of national courts to examine whether such an intention has arisen. Moreover, if a shorter time elapsed between the conclusion of the contract and the occurrence of insolvency, it may indicate that the financial and economic suitability of the offeror was not properly examined. The intention to circumvent is also limited by the fact that it is not the procuring entity that selects the substitute economic operator, but the appointed liquidator, who in any case represents the interests of the contracting party as the winning tenderer, not the procuring entity, under judicial control.[16] 'In this way, in the absence of selection by the tender announcer organization, in view of Directive 2014/24, public procurement does not have to be adopted, even if the tender announcer's organization approval is necessary for the contracting party.'[17] It is not even sufficient to establish that the tender announcer has selected the new contracting party if the parties have already consulted, as in the discussed case. The advocate general also acknowledged that the possibility of appointing a new contracting party (without a new public procurement procedure) provides considerable room for manoeuvre in the field of public procurement, but this corresponds to the intention of the legislator.[18]

14 *Ibid.* (n 6) paras 46–47 and paras 83–96.

15 *Ibid.* paras 46–47.

16 *Ibid.* paras 85–88.

17 *Ibid.* para 88.

18 *Ibid.* paras 89–90.

The motion also addressed the evaluation of the position of the economic operator submitting the claim and to the position of the European Commission. According to their opinion, a new contracting party can only be appointed if it takes over at least the part of the original contracting party's activities that enables the performance of the contract. On the one hand, according to the advocate general, the legislator did not specifically stipulate this (the transfer of a part of the activity of the original contracting party is not included in the text), and on the other hand, this approach 'raises more problems than it solves.' They substantiated this finding with the following: it would not be clear what proportion of the activity he would have to transfer in order to fulfil the condition, and such an obligation would make the liquidator's task significantly more difficult, and could even be contrary to the powers granted by national law to negotiate in the interests of creditors. In addition, the subject of the contract may also be relevant: the transfer of a major construction project in the event of the insolvency of a contractor may also include the transfer of building materials or professionals, but this is not necessarily the case with IT services or procurement of goods, for example. Finally, the advocate general emphasized that it is also possible that a company which has become insolvent can still continue to operate, provided that it transfers a public procurement contract. If this option were excluded, not only the replacement of the contracting party would become impossible, but it could also jeopardize the realization of the goals of the insolvency procedure, which is to maintain the existing business as much as possible for the benefit of the creditors.[19] The goal can be to save businesses which are economically viable but in a difficult situation, or to provide them a second chance.[20] In any case, it may be in the best interests of an insolvent business to be subject to rules that make it more likely to survive, or if it eventually has to go out of business, to be able to exercise its control rights for a longer period of time. In contrast, creditors may prefer a system that maximizes the company's expected profits in the event of insolvency, because creditors can only get their money from profits.[21]

The motion also addressed the interpretation (solution) of an option, for which the Commission also referred to, namely that in such a case the tender announcer should turn to the original tenderers, and the exception to the initiation of a new public procurement procedure would only be applicable if the tender announcer offers the contract to all original tenderers who meet the selection criteria in the order of their ranking. (The Commission referred to the Italian legal solution[22] in this context.) The advocate general emphasized that such a condition is not included in the Directive, and a different interpretation would be contrary to the intention of the legislator. Although it was suggested during the preparatory work that a special procedure of this kind should be followed in case of insolvency, in the end this was not included in the Directive, nor was it replaced by another solution. It follows from all of this that the legislator clearly rejected this kind of obligation to contact the original tenderer, the application of which would otherwise have two main disadvantages. On the one hand, it is necessary to start from the fact that, although the Directive does not require it, it is still

19 *Ibid.* paras 83–96.

20 See the European Parliament and Council Regulation 2015/848/EU of 20 May 2015 on insolvency proceedings [2015] OJ L 141/19 Recital 10.

21 Buckley, F. H., Editor. Fall and Rise of Freedom of Contract. Durham, Duke University Press 289.

22 See Decree No. 50/2016, Article 110 of the statutory decree on Italian public procurement. These rules apply not only to insolvency, but also to other contract termination situations. Paragraph 2 of Article 110 states that 'The award shall be made under the same conditions as those offered by the original tenderer at the time of the tender'

necessary for the tender announcer to approve the substitution, since the contract contains mutual obligations for the parties, so this approval is necessary in accordance with the law of the member states regarding contracts. Thus, if the contract is to be offered in the order of ranking of the original tenderer, it means that it should be awarded to the first one of them to accept it. Finally, if the liquidator were obliged to go to the original tenderer, he might not have the opportunity to find a receiver who made the best offer for the benefit of creditors. It does not follow at all from the Directive that the EU legislator intended to limit the powers that may be conferred on liquidators by national law in this way. The motion of the advocate general therefore did not intend to derive additional legal requirements not included in the text of the Directive.[23]

5. EVALUATION AND LEGAL INTERPRETATION OF CERTAIN LEGAL ISSUES MENTIONED IN THE JUDGMENT

5.1. CHANGE OF SUBJECT AS A CASE OF CONTRACT AMENDMENT

The first question that must be examined is the place of the change of subject in the legal regulation, the rules of which are regulated by both the Directive and the Swedish law underlying the case under discussion in the area of 'contract amendment'. The civil law legal literature classifies assignment and assumption of debt[24] as contract amendments, but in connection with this, the civil law regulation of contract assignment may also appear. The starting point is that the change of subject is also considered a modification of the contract, but at the same time, the rules regarding the performance of the public procurement contract and the modification must be interpreted and examined as a unit.[25] Moreover, the general counsel's motion pointed out that, as a general rule, apart from the exceptional cases in the Directive, 'The replacement of the original winning tenderer is considered to be a substantial modification of the contract that entails the conduct of a new public procurement procedure.'[26] Thus, the replacement of the original contracting party is considered a substantial contract amendment, for example, according to German jurisprudence, if the customer terminates the contract due to defective performance of the contract, then the tender announcer will have the service performed by another economic operator who was the losing party in the original public procurement procedure.[27] The same approach applies in the Hungarian jurisprudence. Hungarian regulations allow the tender announcer to indicate in the tender evaluation summary the economic operator that submitted the second most favourable tender, and if the winning tenderer withdraws before the conclusion of the

23 See *Ibid.* (n 6) paras 96–102.

24 Gyula Eörsi, *Kötelmi jog* (Nemzeti Tankönyvkiadó 2003) 121.

25 The *Public Procurement Authority of Hungary* (HU) (Közbeszerzési Döntőbizottság) decision no. D.365/9/2007. <https://dontobizottsag.kozbeszerzes.hu/adatbazis/megtekint/hirdetmeny/portal_15755_2007/> accessed 21 June 2022.

26 *ibid.* (n 6) para 27.

27 Tobias André et. al, *Vergaberecht: Gesamtkommentar zum Recht der öffentlichen Auftragsvergabe* (*GWB – 4. Teil -, VgV, SektVO, VSVgV, KonzVgV, VO (EG) 1370/2007, VOB/A, UVgO*) (W. Kolhammer Verlag 2021) 356

contract, the tender announcer can conclude the contract with the second place.[28] However, on the other hand, if the contract has been concluded and it is terminated, the contracting authority is not entitled to conclude a contract with the second most favourable tenderer.[29]

A fundamental question is how legal succession can be implemented, Article 72(4)(d)(ii) of the Directive lists several options. In the case analysed in the Judgment, the contract was transferred without branches of activity after the determination of insolvency, so it is appropriate to briefly examine the issue of contract transfer and its private law nature. The starting point was that the subject change should be considered an amendment of the contract, however, there are civil law approaches that qualify this statement. These civil laws approaches state an opinion that assignment of the contract as one of the possible cases between 'in the narrow sense contract amendment and innovation', the sui generis legal institution related to assignment and assumption of debt, which results in a change or legal succession in the subjects of the already existing legal relationship, without affecting the other content elements of the contract (without the express intention of the parties to do so), without terminating the legal relationship identical to itself, and without renewing the contract.'[30] The assignment of contracts is also regulated by Hungarian civil law,[31] but under a different title than contract amendments (in a separate structural unit).

From a legal point of view, the change of subject can be classified as a contract amendment, but it also comes close to the award of a contract in public procurement law, since in this case the parties do not change the content (the contractual obligations) of the legal relationship. This is indicated by the above-discussed legal interpretation of the Commission regarding the involvement of the original tenderer and the special procedure of Italian law, which refers to the selection of the new economic operator to be involved. Thus, if the unlawful contract amendment can be traced back solely to the contracting party's violation of law, then the party contracting as the winning bidder will not necessarily be fined. In the case of a declaration of insolvency, for example, the liquidator may have decisive powers with regard to transfer and succession.

Member States have room for manoeuvre when it comes to implementing the Directive's contract amendment rules, as they do not necessarily follow the structure of the Directive. The Directive also includes restrictions on subject change in the context of contract amendments, however, an example can also be mentioned when the national legislator fixes them not in the amendment, but in other rules for contracts. Thus, for example, in the Hungarian Public Procurement Act, prior to the conditions for amending the contract, the legislator cod-

28 See CXLIII of 2015 on public procurement. Act (Kbt.) § 131, paragraph (4): 'The tender announcer may conclude the contract only with the winner of the procedure, or, in the event of the winner's withdrawal, with the tenderer who was qualified as the next most favorable tenderer during the evaluation of the tenders, if he was indicated in the written summary of the tender evaluation.'

29 See the *Public Procurement Authority of Hungary* (HU) (Közbeszerzési Döntőbizottság) decision no D.761/9/2011. 'With regard to the termination of the concluded contract, the situation regulated in the *Kbt*. could not arise that the winning tenderer withdrew from the conclusion of the contract before the specified contract conclusion deadline, since the contract was concluded, only the tender announcer terminated it later during performance for known reasons. In view of this, the legal option to conclude the contract with the organization or person classified as the next most favorable tenderer was not open to the tender announcer.'

30 The Curia of Hungary (A Kúria) 7/2021. PJE decision on the validity of the contract assignment rules of Act V of 2013 on the Civil Code para 25 < https://kuria-birosag.hu/en/node/16215> accessed 22 June 2022.

31 See Act V of 2013 on the Civil Code 6:208-6:211. §§

ified the Directive rules on the involvement of the new contracting economic operator in the rules naming 'those involved in the performance of the contract', did not prescribe any special additional procedure apart from the provisions of the Directive. In addition to this, however, it also contains a provision for changes in the person of the contracting party as contracting authority, however, in view of this – omitting the application of a strict system of conditions – it only records that 'Succession occurring in the person of the contracting party as the contracting authority may not be aimed at circumventing the application of this law.'[32]

5.2. THE LEGAL CONSEQUENCE OF AN ILLEGAL CHANGE OF SUBJECT: THE NULLITY OF THE TRANSACTION

According to the facts on which the Judgment is based, an economic operator originally filed a claim with the Swedish administrative court, asking them to declare that the legal framework for the amendment had been exceeded and that the framework agreements were null and void. If the contract is amended illegally by the parties, then the nullity of the amendment may arise if it was concluded by unlawfully omitting the public procurement procedure, since a contract concluded by unlawfully omitting the public procurement procedure is invalid.

The regulation of nullity (invalidity) is based on European Union Directive provisions. On the one hand, it is a general requirement that the invalidity is not automatic, it must be established by an independent legal remedy body, or it must be a consequence of the decision of such a body. On the other hand, they consider invalidity as the starting point to be the most effective way to restore competition and create new business opportunities for economic operators who have been unlawfully deprived of their ability to compete.[33] In other words, if the economic operator submitting the claim can establish the invalidity, then the contracting authority must start a new public procurement procedure, and in this case the opportunity to submit an offer and obtain the right to enter into a contract opens up.

The type of body entitled to declare nullity is determined by the type of legal remedy forum system that the given member state has established when transposing the legal remedies directives,[34] how it distributes the individual powers, or how it reconsiders, as the case may be. The member states also have the possibility to ensure the possibility of legal redress against contracting authorities' decisions and contracts through the courts, but they can also do that by operating a suitable mechanism within the public administration organization system and referring the conduct of the necessary procedures to the competence of an administrative body specifically established to adjudicate public procurement disputes. Of course, the possi-

32 See *Ibid.* (n 28) s 139(1)–(3).

33 See the European Parliament and Council Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L 335/31 Recital 13., 14., 21. and 27.

34 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L076/14

bility of legal redress must be ensured not only in relation to decisions made during the public procurement procedure, but also in relation to illegally concluded contracts or amendments to contracts. A member state solution can be if the violation of public procurement law (i.e., the illegal omission of the public procurement procedure or the amendment of the contract in conflict with public procurement law) is established by a public administrative body, and then this organization initiates a lawsuit to have the contract (amendment) null and void. However, it is also possible that for the sake of simplification, a public administrative body declares its nullity in a public administrative decision, regardless of the fact that the given legal system does not treat public procurement contracts as public law contracts. Such a solution saves the parties from unreasonably prolonged and costly litigation.[35] However, the decision of these questions is already within the competence of the national legislator, that is, it is also possible for the member states to prescribe judicial or administrative procedures for such situations.

5.3. INTERESTS AND BREACH OF INTERESTS OF THIRD PARTIES

In public procurement procedures, economic operators compete for the right to enter contracts, so of course a contract amendment may harm the interests of other tenderers, since it is conceivable that if the amended conditions had been the original requirements, then other economic operators could have joined the procedure, or offers would have been submitted, or the procedure would have ended with a different result. If, instead of the amendment, a new public procurement procedure had to be conducted, then the interests of those economic operators who could have participated in the new procedure but were prevented from doing so due to the illegal amendment, would obviously be harmed. Of course, one of the prerequisites for learning about the violation of interests (the violation of rights) is the enforcement of the requirement of publicity and transparency. The interests of third parties must also be protected, since if someone decides to follow the path of a contract, effective means must be provided.[36] One of the guaranteed provisions regulated by the Directive is that a notice of the amendment must be published,[37] member States may supplement this with additional obligations. Thus, for example, they can stipulate that the amendment of the contract (its full text) must also be published, or that when certain elements (for example, the basis of evaluation in the procedure) are amended, the original bidders participating in the public procurement procedure must also be notified of the amendment separately, by the competitors can be exercised for a greater degree of control.[38]

However, the possibility of filing a public interest lawsuit is not guaranteed, as it is also necessary to examine whether the economic operator really has the right to challenge the ille-

35 See *Ibid.* (n 28) § 145, paragraph (3a). In the system of Hungarian Public Procurement Law, the solution has been in place since 2018 that the *Public Procurement Authority of Hungary* (HU) (Közbeszerzési Döntőbizottság) does not initiate a separate lawsuit before a civil court to establish the nullity of the contract, but is itself entitled to rule on this and its legal consequences in a public administrative decision.

36 Erik Plas, 'Amendments to Public Contracts: In Search of a Sufficient Degree of Transparency' [2021] PPLR 1, 5.

37 See *Ibid.* (n 3) Art. 72(1).

38 Such a special procedure was regulated in the Hungarian Public Procurement Law, for example, by the no longer valid CVIII of 2011. § 132 of the Act. The operative legislation (Kbt) no longer imposes such a notification obligation.

gality of an amendment before a legal remedy body. It is a general obligation that the member states must ensure – according to the detailed rules they define – that 'at least a legal remedy procedure is available to the persons in whose interest it is or was in their interest to win a given contract, and to whom the alleged infringement caused or there is a risk of this.'[39] The provisions of the Remedies Directives are intended to 'protect economic operators from the arbitrariness of the contracting authority and thus ensure that effective legal remedies are available in all member states in order to effectively apply the European Union's rules on public procurement, in particular when breaches of the rules can still be remedied.'[40]

The interest in submitting a request (lawsuit) objecting to a contract amendment must be judged according to different criteria than in a public procurement procedure, since in this case the economic operator submitting the claim may have the goal of forcing the conduct of a public procurement procedure, which can be achieved if the amendment can be declared null and void and therefore the contracting authority is obliged to initiate a new procedure. The CJEU took a position regarding the extension of a concession under the scope of Directive 2014/23/EU, that it is irrelevant whether or not the economic operator participated in the original procedure for awarding the concession, but at the time when the concession is extended, economic operator must prove their interest in the granting of this concession.[41] At the same time, in this context, this economic operator is not obliged to prove that they actually participate in this new awarding procedure, the existence of such an opportunity should be considered sufficient, they should be given the opportunity to submit a legal remedy request for the examination of the amendment.[42] In the case on which the Judgment is based, the right to bring an action was not in dispute, given that the economic operator who submitted the action had previously participated in the procedures conducted by the tender announcer and had been awarded other framework agreements.[43] In addition, it can be mentioned that the use of the prescribed public procurement legal remedies is also important because the member states can make it a condition for the enforceability of any civil law claim that a legal remedy forum (arbitration committee, court) establishes the violation as legally binding.[44]

39 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33 Art. 1(3). Ld. még Joined Cases C–496/18 and C–497/18 *Hungeod Közlekedésfejlesztési, Földmérési, Út- es Vasúttervezési Kft., Sixense Soldata, Budapesti Közlekedesi Zrt., Budapesti Közlekedesi Zrt. v Közbeszeresi Hatóság Közbeszerzési Döntőbizottság* [2020] ECLI:EU:C:2020:240, para 71.

40 *Ibid.* para 72, Case C–263/19 *T-Systems Magyarország Zrt., BKK Budapesti Közlekedési Központ Zrt. v Közbeszerzési Hatóság Közbeszerzési Döntőbizottság, Közbeszerzési Hatóág Elnöke* [2020] ECLI:EU:C:2020:373, para 51.

41 Case C–333/18 *Lombardi Srl v Comune di Auletta, Delta Lavori SpA, Msm Ingegneria Srl, Interventing Party: Robertazzi Costruzioni Srl* [2019] ECLI:EU:C:2019:675, para 34.

42 Joined Cases C–721/19 and C–722/19 *Sisal SpA, Stanleybet Malta Ltd, Magellan Robotech Ltd v Agenzia delle Dogane e dei Monopoli, Ministero dell'Economia e delle Finanze, en Presence de: Lotterie Nazionali Srl, Lottomatica Holding Srl, Anciennement Lottomatica SpA* [2021] ECLI:EU:C:2021:672, paras 56–65.

43 *Ibid.* (n 6) para 7.

44 Case C–300/17. *Hochtief AG v Budapest Főváros Önkormányzata* [2018] ECLI:EU:C:2018:635, para 59.

5.4. QUESTION OF LEGAL INTERPRETATION

The Advocate General's Motion raises the need to investigate an interesting aspect, as it deals with the issue of grammatical interpretation, systematic interpretation and purposive interpretation separately when it revealed the content of the Directive's provisions. The application of none of the methods supported the legal interpretation of either the Commission or the economic operator submitting the claim. It is important, on the one hand, that the legal practitioner chooses the method of interpretation correctly, and on the other hand, what rules the legislator establishes in this regard. The application of grammatical interpretation cannot be avoided, 'because the legislation becomes recognizable in linguistic form. [...] the so-called purposeful interpretation becomes primary among other methods of interpretation after getting to know the linguistic content, and then after its failure.' However, with goal setting as a method, it is possible to avoid that the judge's verdict leads to an absurd result.[45] The fundamental question is, therefore, when it can be declared that the grammatical interpretation does not lead to a result in the given case, and therefore the method that results in a more flexible and reasonable decision must be used instead, because 'it is an elementary formal logical requirement that if the grammatical meaning would lead to an absurd result, it must be rejected and, based on other methods, another meaning different from the literal (exegetical) meaning, and in some cases opposite to it, must be attributed to the legal text.'[46] It is therefore worth examining in a few sentences how these legal interpretation activities could have led to the aforementioned conclusion.

The first question is the grammatical interpretation, the application of which was sufficient to answer the legal question examined in the Judgment and to interpret the legal norm. (As the Supreme Court of the United States of America put it in an earlier decision, 'generally the well-known and accepted meaning of words provides the basis for the interpretation of the law.')[47] In such a case, the application of the law starts from the general meaning of the words, the content of the expressions used, conjunctions and, where appropriate, punctuation marks, and the general counsel did not want to depart from this, he carried out a comparison of the guidelines and the individual text versions (English, French, Swedish).[48] So, for example, touched on what 'part' and 'succession' mean, and also stated that the concept of 'insolvency' cannot be interpreted in the narrow sense in contrast to the Commission's position. 'Based on a mere study of the text of the disputed provision, I do not see anything that would lead to the conclusion that in the event of insolvency of the original contracting party (in addition to the transfer of the framework agreement applicable to it) some of the other assets owned by it should necessarily be transferred to the new contracting party.'[49] In addition, it was also pointed out that the examination of the textual context also supports this position. Certain terms may appear differently in individual rights, however, according to the advocate general, they can be considered equivalent. Thus, in the English and French versions of the text, the term

45 The Curia of Hungary's (HU) (Kúria) decision no. Kfv.IV.35.631/2013/8.

46 The Constitutional Court of Hungary 15/2014. (V. 13.) [2014], para 33, ABH 2014 337, 350.

47 Maillard v. Lawrence. 57 US 251 (1853).

48 See *Ibid.* (n 9) paras 36–51.

49 See *Ibid.* (n 9) para 48.

'succession' is used, but the Swedish instead states that another economic operator 'replaces completely or partly' the original service provider.

As part of the examination of textual contexts, the motion examined the legislative process (the original proposal) as well as the structure of the Directive: the rules in Article 72 of the treaty amendment and the relationship of recital (110). 'Since it is an exception to the general rule for awarding a public procurement contract, the contested provision must be interpreted strictly with regard to the concept of 'insolvency'. It cannot be inferred from the text and context of this provision that part of the activities of the original contracting party must be transferred to the new contracting party in order for the exception related to the insolvency of the original contracting party to apply.'[50] The basic purpose of the Directive provision can be summarized as ensuring the possibility that, in the event of insolvency, another contracting party can take the place of the original contracting party, without delays or the affected public procurement becoming disproportionately more expensive due to a new procedure. This solution is in the interest of both the tender announcer, the winning tenderer and the creditors.[51]

It should be noted accordingly that in addressing certain legal disputes, attention must also be paid to the legislative provisions expressed in the preamble paragraphs, as they may contain various concepts, obligations, and substantive provisions. ('This implies that several considerations in the recitals are provisions in disguise.')[52] The advocate general's motion therefore did not wish to depart from the text of the legislation, and did not reveal any circumstances from which it could be concluded that the application of the provision would lead to an absurd result. It also refrained from arguing in favour of the existence of a procedure not included in the Directive. If this had taken place, it would have already made the limits of legal application uncertain. As a Hungarian court judgment put it: 'it is not the task of the law enforcer [...] to "invent" procedural rules and forms of behaviour [...] Prescribing any specific public procurement behaviour, holding it accountable, establishing and sanctioning the violation in case of non-compliance is only possible based on a legal provision'.[53] If the Commission's position had been accepted, the tender announcer would have been charged with an essentially non-existent obligation.

5.5. COMPARISON OF THE SUBJECT CHANGE BASED ON SUCCESSION WITH THE OTHER TWO DIRECTIVE CASES

The Directive mentions two more possibilities for subject change. Pursuant to Article 72 (1) point a), it is considered a permissible contract amendment if the tender announcer is clear, precise and unambiguous, so-called provided for review clauses in the original contract. Such a clause may relate to a change in price (such as price indexation) or other options.[54]

50 See *Ibid.* (n 9) paras 62–65.

51 See *Ibid.* (n 9) para 83.

52 Steen Treumer, *Into the grey area: implementation of the Public Procurement Directive in* Denmark in Steen Treumer & Mario Comba (eds), *Modernising Public Procurement* (Elgar 2018) 29.

53 Budapest Court of Appeal's (HU) (Fővárosi Ítélőtábla) decision no. 3.Kf.27.440/2007/4.

54 About the examples see *Ibid.* (n 3) Recital 111.

Such a choice may be possible, for example, if the contract allows the contracting party to change if the tender announcer could achieve a more favourable price on the market, but the original contracting party cannot provide this price. Nothing prevents the tender announcer from applying such a clause even immediately. Article 72 (1) d) point i of the Directive. point a) of Article 72 (1) referred to by subparagraph – in contrast to Article 72 (1) point d) point ii. – does not define further restrictions. For example, it does not put it in writing that any replacement contractor must meet the original selection criteria or that such a change cannot be intended to circumvent the application of the Directive. It only contains as a limitation that 'The clauses may not provide for modifications or options that would change the general nature of the contract or framework agreement.' It would have been open to the legislator to include such conditions, as in Article 72(1)(d)(ii). occurred in the case of the provision specified in subsection. (The possibility of applying such clauses was first examined by the CJEU in its judgment in the Succhi di Frutta case.[55])[56] It may be mentioned that national legislation may extend the aforementioned restrictions to these clauses, even though the Directive does not expressly require this. Hungarian legal regulations, for example, prescribed them in the same way for both cases, while the third, Article 72 (1) point d) point iii of the Directive subsection is not regulated.[57] Otherwise, the member states have the right to 'maintain substantive and procedural rules, or establish new rules, the purpose of which is to ensure respect for the principle of equal treatment in the field of public procurement, as well as the resulting principle of transparency, which principles govern all public procurement procedures to tenderers. [...] However, in accordance with the principle of proportionality, which is a general legal principle of Community law [...] such measures shall not exceed what is necessary to achieve this objective.'[58]

It is an important requirement from the Directive that the clauses – as stated in recital (111) of the Directive – cannot provide the tender announcer with unlimited discretion, therefore regulations with overly general wording cannot be accepted.[59] Thus, if, for example, a contractual provision is based on the fact that the parties must discuss the essential parts of the amendment in addition to purely technical issues, there is already a risk that the amendment violates the principle of equal treatment. The limits of such clauses are not clear, the exact definition of the possibilities is the task of national and European jurisprudence.[60]

The other (third named in the Directive) case is when the tender announcer organization takes over the obligations of the main contractor towards the subcontractors, for example, if the contract is terminated and the performance of the contract is continued by the main subcontractor or another member of the consortium. The acceptance of this possibility depends on the decision of the member state, Hungarian law does not include this in the rules for

55 Case C–496/99 *Commission of the European Communities v CAS Succhi di Frutta SpA.* [2004] ECR I–03801

56 *Ibid.* (n 5) 185.

57 See *Ibid.* (n 27) paragraph 139. § (1).

58 Case C–213/07 *Michaniki AE v Ethniko Simvoulio Radiotileorasis and Ipourgos Epikratias* [2008] ECR I–9999, paras 56–57.

59 Rudolf Ley and Michael Wankmüller, *Das neue Vergaberecht 2016* (Hüthig Jehle Rehm 2016) 178.

60 Vincent P. Wangelow, ‚EU Public Procurement Law: Amendments of Public Works Contracts after the Award due to Additional Works and Unforeseeable Circumstances' (2020) 15 Eur Procurement & Pub Private Partnership L Rev 108, 111.

amending or fulfilling the contract, however, for example, in the German public procurement regulations this possibility of change of subject can be found.[61]

The Directive, as in the case of a change of subject based on a review clause, does not require an examination of the selection criteria and exclusionary reasons for the new contracting party here either. The reason for this may be that, in the case of the subcontractor, the tender announcer was able to examine these once during the procedure, so this is not necessary again and on the other hand, the subcontractors cannot necessarily fulfil all the selection criteria, but they may have the technical capacity necessary to fulfil a part of the contract and they may have expertise and experience.[62] (On the other hand, it can be a problem if, after the conclusion of the public procurement procedure, a reason for disqualification has arisen against the subcontractor.)

Summarizing the above, in the case of the Directive provision interpreted by the Judgment, the following main characteristics and differences can be established compared to the other option:

- In the case of the review clause, the legal basis for the change of subject is based on the clear and unambiguous conditions announced in advance during the original public procurement procedure, i.e., primarily based on the tender announcer's decision. This solution is the closest to the basic provisions, since the conditions were already known during the original public procurement procedure. Neither in the case of succession nor in the case of taking over, such prior notification cannot logically arise. ('Furthermore, the occurrence of the insolvency of the winning tenderer, although not a rare event, is considered an extraordinary situation that is usually not expected by the original tender announcer or the tenderer and is not desirable either.').[63]
- In the case of a change of subject based on succession, circumstances independent of the tender announcer decide which economic operator will be the successor, the tender announcer is faced with the decision (e.g., reorganization, acquisition) or situation (insolvency) of other economic operators, the tender announcer cannot influence these circumstances, the award of the contract is carried out essentially by others. The application of the clause and the acceptance basically depend on the decision of the tender announcer.
- In the case of a change of subject based on succession, the Directive requires additional restrictions (the selection criteria must be met by the new economic operator, and the change of subject cannot be aimed at circumventing the Directive). In the other two cases, the Directive does not contain such express limitations.
- The creation of the rules on takeover depends on the decision of the member state, such rules do not necessarily form part of the national public procurement legal rules.

61 See Gesetz gegen Wettbewerbsbeschränkungen, §132, (2) 4. *c*).

62 Piotr Bogdanowicz, *Contract Modifications in EU Procurement Law* (Edward Elgar Publishing 2021) 104–105.

63 *Ibid.* (n 6) para 85.

5.6. IS THE TENDER ANNOUNCER'S PERMISSION NECESSARY TO APPROVE THE SUBJECT CHANGE?

When summarizing the facts of the legal dispute, the Judgment mentions that the Swedish tender announcer approved the transfer, thus accepting the new situation. The fundamental question is whether the tender announcer's permission is really necessary, or whether the fact of succession should be accepted without further ado?

This issue was also addressed in the advocate general's motion, since it is necessary to start from the fact that, although the Directive does not require it, it is still necessary for the tender announcer to approve the substitution, since the contract contains mutual obligations for the parties, so this approval is necessary in accordance with the law of the member states regarding contracts.[64]

A different approach would hardly be supportable, since the issues of contractual legal relations have already arisen several times in the jurisprudence of the CJEU. They start from the fact that the theoretical legal characteristics of contracts also apply to public procurement contracts, so these aspects cannot be ignored when judging a specific legal dispute. Thus, for example, based on what was stated in the Teckal case, it is not necessary to conduct a public procurement procedure if, although formally, the legal relationship is established between two independent legal entities, but the situation of a legal entity that undertakes to provide a given service is no different from when it operates as part of the customer. And if this is the case, the essential basic assumption of the contractual legal relationship is not fulfilled, i.e. that the agreement is based on the unanimous will of the two parties: in fact, there is a party, an actor on both sides of the contractual relationship.[65] In other words, although such an agreement appears to be a contract, it is not, since there is a lack of the unanimous will of the two parties. Based on the Directive, a change of subject is also considered an amendment to the contract, and just like the contract, its amendment presupposes mutual agreement, in the absence of this, without the parties, the amendment of the contract cannot be implemented. Although indeed there can exist unilateral contract modifications alongside bilateral modifications.[66] Additionally, it is necessary to examine who actually possesses the authorization on behalf of the parties to modify the contract.[67]

The responsibility of the contracting party as the winning tenderer can also be mentioned if the illegality of a contract amendment is determined, given that after the conclusion of the contract, the economic operator became part of a public procurement contractual relationship, and by entering into this special legal relationship, it is also subject to the public procurement contracts, so also the rules related to the amendment of the contract.[68] According to the CJEU's point of view, it does not conflict with the Directive if the legal redressal body

64 *Ibid.* para 89.

65 Case C–107/98 *Teckal Srl. Kontra Comune di Viano v Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [1999] ECR I–8121.

66 Richard J. Prevost, *Contract Modification vs. New Procurement: An Analysis of General Accounting Office Decisions* (1985) 15 Pub Cont LJ 453, 454.

67 James F. Donnelly, *Treatise on the Law of Public Contracts*. Boston, Little, Brown, and Co. 258–260.

68 The *Public Procurement Authority of Hungary* (HU) (Közbeszerzési Döntőbizottság) decision no. D.62/19/2020. para 69 <https://dontobizottsag.kozbeszerzes.hu/adatbazis/letoltes/portal_722999/?pdf=1> accessed 22 June 2022.

of a member state imposes a fine not only against the tenderer but also against the tender announcer in the event of a violation of law (however, the basic principles of European Union law, such as proportionality, must be respected). It was possible to consider, among other things, the fact that the tenderer initiated the amendment of the contract, or that the tenderer suggested it to the tender announcer, or that the tenderer demanded the omission of the new public procurement procedure. On the other hand, the fact that the new procedure did not take place in the end cannot be blamed on h, since the relevant decision falls solely within the authority of the tender announcer.[69] Thus, if the unlawful contract amendment can be traced back solely to the tender announcer's violation of law, then the party contracting as the winning tenderer will not necessarily be fined.[70]

In other words, it is the joint decision and responsibility of the contracting party as the tender announcer and the winning tenderer to implement the change of subject, the contract amendment is based on the consent of both parties, so the tender announcer's approval is necessary for the subject change, even though the Directive does not specifically require it. This 'approval' or 'permission' can be interpreted as acceptance of an offer to modify the contract, which the tender announcer must reject if the modification would conflict with public procurement law.

6. SUMMARY

It is a basic requirement for public procurement contracts that they be fulfilled according to the original conditions, the principle of freedom of contract does not apply in the field of amending public procurement contracts. Accordingly, the Directive determines in which cases the contract can be modified and in which cases it cannot. In this way, it is possible for the contract to be 'saved', as a result, it is not necessary to conduct a new costly and time-consuming public procurement procedure based on each request for amendment. One of these cases includes ensuring the possibility of a change in the parties involved when another party steps into the position of the contracting party without altering contractual obligations.[71] In the case of a legal succession-based change of parties, one essential characteristic is that independent circumstances determine which economic entity becomes the successor, beyond the control of the contracting authority. These circumstances involve decisions made by other economic entities (such as reorganization, acquisition) or situations (such as insolvency) that the contracting authority faces and cannot influence. From a legal point of view, the change of subject can be classified as a contract amendment, but it also comes close to the award of a contract in public procurement law, since in this case the parties do not change the content of the legal relationship (contractual obligations). It is necessary to regulate not only the contractual conditions, but also the issue of changes to the subject, given that an illegal contract

69 Case C–263/19 *T-Systems Magyarország Zrt., BKK Budapesti Közlekedési Központ Zrt. v Közbeszerzési Hatóság Közbeszerzési Döntőbizottság, Közbeszerzési Hatóág Elnöke* [2020] ECLI:EU:C:2020:373, paras 72–75.

70 See the *Public Procurement Authority of Hungary* (HU) (Közbeszerzési Döntőbizottság) decision no. D.38/26/2021. para 119 <https://dontobizottsag.kozbeszerzes.hu/adatbazis/letoltes/portal_776295/?pdf=1> accessed 22 June 2022.

71 Nicolas Gabayet, *Change of the identity of the contractual partner* in Bogdana Neamțu, Dacian C. Dragos, Kirsi-Maria Halonen, Steen Treumer (eds), *Contract Changes. The Dark Side of EU Procurement Law* (Elgar, 2023) 36.

change unlawfully excludes external economic actors from the possibility of participating in a new public procurement procedure.

However, directive rules use expressions that raise issues or contradictions between corporate law, insolvency law, and public procurement law since the objectives and foundations of these two areas differ. It is important that the legal regulation of public procurement seeks to strike a balance between ensuring the possibility of transferability to maintain public interest in the continuation of contract performance and the principles of equal treatment and transparency. In contrast, insolvency law primarily aims to protect[72] the creditors' interests of an insolvent company, while corporate law is tasked with regulating the operational and alteration conditions of companies.[73]

As Hélène Hoepffner said, the need to amend the contract is not a sign of its illness, but rather one of the elements of its life and survival.[74] The legislator must therefore find a balance that excludes the circumvention of public procurement rules but must ensure that the legal entity of the contracting party changes within a reasonable and acceptable framework. If it defines too broad frameworks, it may raise the possibility of trading in public procurement contracts (as stated by the business operator who submitted the claim in the procedure on which the Judgment is based), while overly narrow frameworks may result in unjustified public procurement procedures.

When interpreting certain rules based on succession, the CJEU did not wish to deviate from the text of the Directive, and did not wish to ask for additional, non-codified obligations, although the member states may prescribe special procedural rules based on which tenderers in the original public procurement procedure must be offered the contract. Since the European Union legislator did not finally include such a rule in the Directive, the adoption of such an approach would have really exceeded the Directive framework, even though it was in vain to prescribe such solutions during the preparatory work of the Directive. As a result, member states can create rules of this kind, but only within the limits of European Union law regarding the transposition of Directive rules, especially regarding the requirement of proportionality and equal treatment.

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72 *Ibid.* 45.

73 Susanne Kalss, *The Interaction Beetween Company Law and the Law of Succession – A Comparative Perspective* in Susanne Kalss (ed), *Company Law and the Law of Succession* (Springer 2015) 6.

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TUMAČENJE PROMJENE PREDMETA UGOVORA O JAVNOJ NABAVI NA TEMELJU SUKCESIJE–PRESUDA SUDA EUROPSKE UNIJE U PREDMETU C-461/20

Sažetak

Tijekom izvršenja ugovora o javnoj nabavi mogu nastati okolnosti koje zahtijevaju izmjenu prvobitnih uvjeta. Sloboda u provedbi klasičnih javnopravnih ugovora kao posljedica direktiva Europske unije možda se neće ostvariti, budući da je osnovni uvjet da ugovor bude ispunjen sukladno uvjetima izvornog ugovaratelja i ponude; međutim, mogućnost izmjene ugovora mora se osigurati u slučajevima kada je to nužno. U tom se smislu može kao poseban slučaj navesti pitanje promjene predmeta ugovora. Sud je presudom u predmetu C-461/20 ispitao pitanje promjene predmeta koja proizlazi iz pravnog nasljeđivanja kao i okvir za tumačenje uvjeta direktive s obzirom na kontekst i bez propitivanje ostalih nekodificiranih uvjeta. Na temelju presude istražuju se i ostala pitanja kao što su opće teorijske osnove izmjene ugovora, odnosi između promjene predmeta i izmjene ugovora, odstupanja od drugih slučajeva zbog promjene predmeta, nužnost novog postupka javne nabave i nezakonitog propuštanja provođenja postupka javne nabave. Mogućnosti izmjena ugovora regulirane u direktivama Europske unije kao i navedene presude u predmetu C-461/20 Suda Europske unije pokreću mnoga pitanja pravnog tumačenja. U radu se analizira pravna osnova koja omogućava promjene predmeta na temelju pravnog nasljeđivanja, izlazeći iz okvira tradicionalne analize pravnog slučaja, a u usporedbi s drugim pravnim osnovama za izmjenu ugovora, suprotstavljajući argumente u presudi i oslanjajući se na druge relevantne sudske odluke.

Ključne riječi: *ugovori o javnoj nabavi, izmjena ugovora, promjena predmeta, sukcesija, prethodni postupak*

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