Amendment of the Condition Suspending the Entry into Force of Public Contracts

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Among other legal bases, a modification of public contracts is possible if the modification is a so-called non-substantial modification. The law lays down the definition of a non-substantial modification. The present study seeks to answer the question of whether a non-substantial modification is the correct legal basis for a modification of a contractual term in a contract which suspends its entry into force. It may be necessary to agree with the position of the Authority/Arbitration Committee, which considers another legal basis (reference to unforeseeable circumstances) to be more appropriate, provided that the conditions for such a basis are met.
Keywords: *public procurement, contract modification, entry into force, suspensive condition, layer of law theory*

Introduction

Contracts concluded under the Public Procurement Act in force (hereinafter referred to as „public contracts") may be amended under strict conditions, on the basis of the situations specified in the legislation, the so-called „cases"[1]. The case-law is laid down in Directive 2014/24/EU (the Directive), which is the codification of the findings of the Court of Justice of the European Union in the Presstext case (C-454/06)[2]. Cases, or legal bases, are distinct sets of facts, which are distinguished one by one, the so-called de minimis modifications, modifications based on special circumstances and cases where the modifications are not considered to be substantial modifications[3].

1 Act CXLIII of 2015 on Public Procurement, Kbt.
2 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC
3 See Article 141a of the Public Procurement Act and Article 72 of the Directive.

The purpose of the Directive is not to limit private contractual will, but to define the new procurement need.[4] The limit to modifications is in fact the circumstance whose emergence constitutes a new procurement need on the part of the contracting authority, forcing the parties to renegotiate the terms of the contract[5].

The present study examines the case of non-substantial modifications, comparing them with the provisions of the current Civil Code governing the formation of a contract and ‚agreement on matters which are material and which are considered by either of them to be material[6]. The essence of the analysis is to determine whether there is a link between the private law ‚material issue' and the public law ‚material term' or ‚significant term'. The study also discusses the recent decision of the Arbitration Committee for Public Contracts, which found an infringement in relation to the modification of an entry into force condition, and which has been received with interest by the jurisprudence[7].

The main question is whether a modification of a contract that has not entered into force, where none of the conditions for performance are changed, but only the condition that brings the contract into force is modified by the parties, can be considered as non-substantial or whether another legal basis is clearly required. The essence of the term, floating line' used by László Leszkoven, following Szászy-Schwarz, is to highlight the difficulties and blurring of the boundaries, where there are no clear lines and where the application of the law may be difficult[8].

The present study seeks to clarify whether the modification of an effective condition can be considered as a new procurement requirement and whether the parties should terminate the contract in the absence of any other element or whether the condition is not an essential element for which the

4 For a comparison between classical civil law and public procurement contract law, see in detail: Arató, Balázs: A klasszikus polgári jogi szerződéses jogviszony és a közbeszerzési szerződéses jogviszony összehasonlítása, In: Boóc, Ádám; Csehi, Zoltán; Homicskó, Árpád Olivér; Szuchy, Róbert (szerk.) 70: Studia in Honorem Ferenc Fábián; Budapest, Magyarország: Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar (2019) 546 p. pp. 31-35., 5 p.

5 Dezső Attila: Magyarázat az Európai Unió közbeszerzési jogához (Szerk. Dezső Attila) Wolters Kluwer Hungary Kft. Budapest, 2015. p. 757.

6 Ptk. 6:63 § (2) para.

7 D.134/12/2023 https://dontobizottsag.kozbeszerzes.hu/adatbazis/megtekint/dbhatarozat/portal_588334/

8 Leszkoven László: „Érvénytelenségi határkérdések" – úszó határok az érvénytelenség és hatálytalanság problémakörében (MJSZ 2021/2.) Különszám p. 24. illetve Szászy-Schwarz Gusztáv: „Úszó Határok a jogban"

application of the legal basis under Article 141 (6) of the Public Procurement Act is appropriate[9].

Essential question, contractual intent in private law contracts

According to the Public Procurement Act, an amendment is relevant if the new conditions could have had an impact on the willingness to tender and if they change the economic balance of the contract or introduce a new element into the contract. As established by case law and doctrine, the above limits must always be assessed in the light of all the circumstances of the case

According to the provisions of the substantive law, a contract is formed when the parties mutually and unanimously declare their intention to that effect and agree on the material matters which either of them considers material[10]. It is not necessary to specify here that a contract under the Civil Code is a consensual contract, no other legal fact (real act) being necessary for its formation. What is more important is what is to be regarded as the material element of the contract and the point of reference of the material element. The material elements of a contract are not defined by the law, but must be identified by the court on the basis of the will of the parties, in the event of a dispute, taking into account all the circumstances of the case.

On the basis of the case law, the definition of service and consideration is clearly an important issue. Thus, in the case of a contract for the sale of immovable property, the property to be purchased is clearly identifiable by the terms of the contract, and this material element of the contract can be considered to be given[11]. Furthermore, agreement on the purchase price is necessary for the conclusion of a contract of sale[12].

However, „agreement on a matter which is regarded as material is a condition for the conclusion of the contract if the party expressly states that, in the absence of agreement on that matter, it does not intend to conclude the contract[13] „. The clarifying rule (based on the previous GK Resolution No 5) avoids cases where, in the course of performance, the parties are faced with the situation that, in the absence of agreement on the material elements, the contract has not been concluded. Under the current rules, if a party has not indicated during the pre-contractual process, negotiations, etc., that it does not intend to conclude the contract in the absence of agreement on the mate-

9 Legal layer theory: hell
10 Ptk. 6:63 § (1)-(2) para.
11 EBH 1999.98
12 BH 2003.409
13 Ptk. 6:63 § (2) second sentence

rial terms, it cannot subsequently claim that the contract has not been concluded (unless the issue is considered by law to be material)[14].

Importantly, under the above approach, the contracting party, in fact one of the parties, is the benchmark on whom the law makes it dependent whether an element (‚issue') of the contract is, in legal terms, material[15]. In fact, it is the latter circumstance that has made it necessary to go into the material element of the contract, since, in the case of a public contract, the agreement on the material elements is not made in the manner typical of private law contracts.

Material terms of public contracts

In the process leading to the conclusion of public contracts, the contractual freedom of the parties in the award procedure is exercised in a specific, clausal manner. The terms of the contract to be concluded are determined by the contracting authority, the freedom of the tenderer to accept these terms in full, or, to put it another way, the parties' freedom to determine the content is limited[16]. If the tenderer does not accept them, it cannot participate in the award procedure (and the contract is not concluded with it). Contract terms (material terms) cannot be negotiated in public procurement procedures, except in certain less frequent cases[17]. In this case, the case-law must look elsewhere for reference points when it comes to taking a position on the agreement on the material element.

In view of the fact that there is no possibility to negotiate the contract terms on the merits, the CBA places the reference point of „material question" (or „material modification" in the award procedure) outside the legal relationship. When Article 55(6) of the Public Procurement Act states that ‚the amendment of the invitation to tender and of the other tender documents may not have the effect of modifying the terms and conditions relating to the subject-matter of the procurement or the terms and conditions of the contract to such an extent that knowledge of the new terms and conditions could have had a

14 Vékás Lajos új Ptk. - Kommentár a gyakorlat számára, (szerk: Wellmann György) HVG-ORAC Lap- és Könyvkiadó Kft., 2022.

15 Szalma József: A francia Code Civil kötelmi jogi reformjáról, különös tekintettel az új magyar Ptk. korrelativ, vagy konvergens szabályaira I. rész (MJSZ, 2021/1., 1/1. szám p 13.)

16 Juhász Ágnes, A közbeszerzésről másképpen közjog és magánjog határán Lectum Kiadó Szeged 2014, p. 195.

17 Such procedures are the negotiated procedure under Section 85 of the Public Procurement Act, the competitive dialogue (Section 90 of the Public Procurement Act) and the innovation partnership (Section 95 of the Public Procurement Act), as well as concession procedures.

significant influence on the decision of the economic operators concerned as to whether they were able to participate in the procurement procedure or to submit a tender', the yardstick is in fact set from the point of view of economic operators who are not parties to the procedure and who do not participate in it. In so doing, the legislature in practice makes the subjective element objective, since, in the absence of a precise definition, it is possible to infer what is to be regarded as a material change in the light of all the circumstances of the case. On the other hand, the specific law cannot do otherwise, since the legal relationship is ‚open' at the stage of the tendering procedure, before the opening of the tenders, since only the identity of one of the parties (the contracting authority, later the contracting entity) is known. Therefore, in the absence of any other option, the legislator places the principles in the position of the beneficiary, enforcing the principles of transparency and equal treatment[18].

The connection between the above-quoted provision of the Public Procurement Act and Paragraph 141 (6) of the Public Procurement Act is based on the existence of the ‚material question', the ‚material condition', in that the legal relationship is already complete in the performance of the contract, since the parties have concluded the contract. Both provisions are intended to give effect to the requirements of the principles of equal treatment and transparency already mentioned[19]. In essence, the rules do not allow any modification, including at the award and performance stages, which could have an impact on the willingness of economic operators not participating in the procedure or not winning the tender[20]. This cannot, of course, be objective, as it is not possible to identify all the factors which may influence the decisions of economic operators, and it is therefore up to the application of the law to fill in the gaps. The practice is consistent in that all the circumstances of the case will determine what is to be considered a material (or significant in the award) condition, but the time limit for performance, the quantity of the procurement are conditions whose variation will clearly affect the willingness to tender[21].

As it can be seen, in the case of private law contracts, the ‚material question' is a condition relating to the formation of the contract which is linked to its validity. In private contracts, the reference point for the ‚material element' is a party to the legal relationship, and therefore the examination (and decision) in the application of the law can be limited to the will of the parties. In contrast, for public contracts, the reference point for the ‚material element'

18 Directive 2014/24/EU Recital 81
19 See. D.438/14/2019.
20 Hubai Ágnes: Nagykommentár a közbeszerzési törvényhez (szerk: Dezső Attila) Wolters Kluwer Hungary Budapest, 2021. p. 345.
21 D.608/6/2017

remains outside the legal relationship throughout, since the law enforcement will be looking for the answer to the question of which other party would have concluded the contract (or made the offer) under the changed conditions. In effect, what is happening is that the Public Procurement Act is hypothetically replacing the successful tenderer with another (ideal?) economic operator, thereby assuming that another contract has been concluded on the modified terms. If this is the case, the enforcement authorities must establish the infringement and, where appropriate, apply the legal consequences, since, in view of the principle of sound management of public funds, there cannot be more than one public contract for the same subject and the same service[22].

Countless variations of the facts can be imagined, so deciding on non-substantial changes can easily be a speculative exercise, and the benchmarks remain principles and principled decisions[23]. In conclusion, any change in the subject matter of a public contract, in its consideration and in the time limit for performance must always be considered material, any change in other terms and conditions requires careful consideration. As indicated in the introduction, this can be illustrated by a case law.

Brief summary of the case

According to the facts, the parties entered into a contract for the supply of goods, the entry into force of which was conditional upon the occurrence of a certain condition within a certain period[24]. As the condition did not occur within the specified period, the parties extended the period for entry into force by approximately twice the period (by amending the contract, the parties increased the period for the condition suspending the entry into force from the original 90 days to a further 120 days). Otherwise, none of the terms of the contract were changed. The parties have referred to Article 141(6) of the Public Procurement Act as the legal basis for the amendment, i.e. they have invoked a non-substantial amendment.

22 The legal consequence of the unlawful amendments, apart from the finding and imposition of a fine by the Public Procurement Arbitration Committee, is nullity, which the court is competent to judge (Art.175 (1) of the Public Procurement Act).

23 Kristian Hartlev - Morten Wahl Liljenbøl - Changes to existing contracts under the EU public procurement rules and the drafting of review clauses to avoid the need for a new tender - Public Procurement Law Review 2013/2. Sweet & Maxwell and its Contributors p. 4

24 In private law, the term „purchase of goods" means a contract of sale, see Art.8 (2) of the Public Procurement Act.

Following an ex officio initiative by the Public Procurement Authority, the Public Procurement Arbitration Committee found that the amendment was unlawful. It is worth quoting verbatim the relevant part of the Arbitration Committee's decision:

„The Arbitration Committee points out that the Public Procurement Act does not contain a normative definition of what constitutes a condition in the case of a call for tenders, the tender documents and, within them, the draft contract. In the absence of normative rules, the Arbitration Committee has thus interpreted which definitions and specifications of the contracting authority may constitute a condition. According to the legal interpretation established in case law, as set out in Decision D.561/7/2007 of the Arbitration Committee, the term „condition" means a condition necessary for the existence or realisation of something, a stipulation concerning the requirements to be fulfilled.[25] This means, in the context of public procurement procedures, that the contracting authorities must specify in their invitation to tender and in their contract documents all the requirements and conditions which must be fulfilled in order to ensure the valid submission of a tender, the fulfilment of the eligibility criteria, the selection of the successful tenderer, the conclusion of the contract and its performance. In the view of the selection board, the essential condition for the conclusion of the contract is the date of entry into force. Therefore, for the purposes of the application of Article 141(6) of the Public Procurement Act, it can certainly be considered a material change of substance if the period of time fixed in advance as a suspensive condition for entry into force is more than doubled by the parties"[26].

As can be seen, the Arbitration Committee decided the dispute on the basis of case law, rather than on a normative basis, in the absence of a specific definition. It is a question of what kind of findings an exploration of the doctrinal and fundamental layers of law may lead to in the present case.

Analysis using legal layer theory as a method of interpretation

According to the layer theory, law is composed of a layer of written law, a layer of legal doctrine, a topical layer of judicial casuistry, and a layer of fundamental rights[27]. With respect to the layers, the interpretative functions are

25 See in detail how public procurement remedies have evolved over the years: Arató, Balázs: A közbeszerzési jogorvoslat története; in: Jogelméleti szemle 16: 3; 2015, pp. 2-33., p. 32.

26 Decision D.134/12/2023, points 61-63

27 Pokol, Béla Jogelmélet: Társadalomtudományi trilógia II. Budapest: Századvég Kiadó 2005. pp 11-195

the focus of this study, as legislative and interpretative sections of the layers of law can be distinguished[28].

With regard to the material question and material element, the text admittedly does not give any guidance as to which terms and conditions should be classified as such for certain contracts. According to the Civil Code, all terms which a party to a contract treats as such are to be regarded as such. A substantially different substantive condition in the case of the CBA is one which, if it had been included among the conditions of the award procedure, could have had an impact on the award of the contract. In effect, the rule defines itself by itself - the material by the material[29]. The Directive is somewhat more specific when it considers as a material modification (condition) the terms and conditions that define the scope of the contract and the mutual rights and obligations of the parties[30].

Private law doctrine considers the definition of a material element, a material question, as an open question, and under this heading, the analysis of the case law of the judiciary is found, with the conclusion that it is possible to determine which condition or question is material on the basis of all the circumstances of the case. This is logical, with reference to what has been said above, since it is not possible to identify all the variables which may be regarded as material in a legal relationship within a single type of contract, even at the normative level.

The public procurement law doctrine provides somewhat more specific answers, given that the reference point mentioned above is not identified within the legal relationship. It is interesting to note, moreover, that the doctrinal statements of public procurement law on the material terms have largely been developed by case law (Pressetext judgment[31]. Accordingly, (material) conditions cannot be altered where economic operators who were not able or did not intend to participate in the original procedure would have been able or would have intended to participate in the procedure if the altered conditions had been included in the original invitation to tender[32]. As highlighted in the related literature: for example, which can be linked to the technical requirements (e.g. functional or performance specifications), suitability requirements (e.g. professional, technical equipment), evaluation criteria of

28 Cservák, Csaba A jog rétegelméletének új kihívásai In: A Jog többrétegűsége (szerk. Tóth J. Zoltán) Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar 2020. p. 111
29 Smaraglay Gábor, A közbeszerzés jog, kommentár a gyakorlat számára (Szerk: Patay Géza) HVG-ORAC Lap- és Könyvkiadó, Budapest 2023.
30 See recital 107 of the Directive
31 Press release news agency (C-454/06).
32 Hartlev-Liljenbov 2013. p 54

the subject of the procurement. More importantly for the present topic, they are linked to the conditions of contracting (e.g. liability insurance) or are a material condition for the performance of the contract (e.g. delivery date)[33]. This circumstance in itself does not say much without the layer of fundamental rights/principles to be mentioned later, and it is therefore necessary to return to this later. Suffice it to note here that the limit to modification in the case of a public contract - both in general and in relation to the legal basis under consideration - is in fact the emergence of a new procurement need. This is not relevant in the case of private contracts. The parties may subsequently modify any of the conditions, including the legal title of the commitment[34].

In private contracts, the case law of the courts remains to explore the will of the parties and all the circumstances of the case[35]. The case law of the arbitration panel, referring to the above, concludes that all the conditions imposed by the contracting party as contracting authority in the award of the contract can be considered material (taking into account all the circumstances of the case[36]). In fact, it is an exemplification which, given the diversity of legal relationships, is an understandable interpretation.

Condition determining entry into force

According to the case-law cited, the parties did not change any of the performance conditions of the contract. Neither the subject-matter of the contract, nor the consideration, nor the time-limit for performance were changed. Only the time-limit for entry into force was extended, on the ground that this could not have affected the willingness to tender and that the amendment also complied with the conditions of Article 141(6)(b) and (c) of the Public Procurement Code.

It is worth mentioning the legal nature of the condition to be put into effect. The public procurement law allows the application of the condition precedent to contracts concluded on the basis of conditional tendering procedures. In essence, if, in the contract notice, the contracting authority has drawn the attention of economic operators to the fact that it will be released from the obligation to conclude the contract in the event of the occurrence of a specific uncertain future event outside its control. Such circumstances

33 Fazekas Szilvia In. A közbeszerzésekről szóló 2015. évi CXLIII. törvény kommentárja, Magyar Közlöny Lap- és Könyvkiadó Kft. Budapest, 2019 p. 497
34 Cf. 6:191 (1).
35 Cf.: precedent-setting decision of the Curia Pfv.20725/2022/6.
36 See also: D.103/11/2023, D.85/10/2023

include, inter alia, the - unfavourable - assessment of a grant application. The CBA also allows contracting authorities to impose such a condition as a condition suspending the entry into force of the contract[37].

The Civil Code sets out the conditions for the duration of a contract under Title VII of Book Six[38]. In essence, the concept of ineffectiveness means that a contract has been validly concluded but has no legal effect. The legal consequence of a contract without effect is that performance cannot be claimed. The period between the creation of the contract (typically its signature) and its entry into force is a so-called ‚contingent situation', during which any conduct prejudicial to the rights of the other party is prohibited, having regard to the principles[39].

The question is whether the extension of the period of pending legal status, in relation to public contracts, is a condition that affects the willingness to bid. The entry into force itself can be stated to be a material condition, since the obliged party is not indifferent as to the time within which performance must begin, resources must be allocated, etc., after the conclusion of the contract. However, all this can only be inferred from the interpretation of the doctrine and case-law, since the text does not contain any specific reference to this. In similar cases, the Arbitration Committee has referred to a previous decision as justification for declaring an amendment unlawful[40]. The reasoning must be accepted, the key being knowledge of the contract portfolio, since it is sometimes the case that, in the knowledge of a shorter entry into force period, all those operators whose capacity has been reserved in advance for the period in question will withdraw their interest. However, if they had known of the longer period, they would have taken a different decision.

Conclusions

In the case of the arbitration panel decisions cited above, it seems as if they omit any reference to specific circumstances, remaining within the framework of a general statement of the infringement with regard to the modification of the suspensory condition[41].

37 This is a legal exemption from the obligation to keep the offer. Cf. § 53 (5)-(6) and § 135 (12) of the Public Procurement Act.
38 Cf. 6:116. §
39 Wellmann György A Ptk. Magyarázata (Szerk: Wellmann György) HVG-ORAC Lap és Könyvkiadó Kft. 2018. Budapest, p.270.
40 See: D.561/7/2007. Interestingly, the decision was based on Act CXXIX of 2003.
41 https://www.palyazat.gov.hu/download.php?objectId=72649

As a consequence of Article 28 of the Fundamental Law, originalism necessarily complements textualist interpretation, i.e. if there are several interpretations of the legal text, the interpretation must be led in the direction that corresponds to the legislator's purpose and is in accordance with the Fundamental Law[42]. As can be seen from the above, the analysis of the textual layer (textualism) provides little guidance, and the other layers of interpretation (dogmatics and the application of the law) are interlinked, often remaining at the level of generality. At the same time, the fourth layer of law (and thus of interpretation), that of fundamental law, can support and complement interpretation. According to Advocate General Kokott's Opinion in Presstext (Opinion C-454/06, Opinion 76-77), a change in the performance conditions is relevant if it is liable to distort competition on the market in question and to favour the contractor over other economic operators[43]. This interpretation is also a way of enforcing the principles of transparency and equal treatment already mentioned. If a new request for a contract is made, the terms and conditions are renegotiated and the principles invoked are therefore necessarily infringed.

It can be seen from the above that, where a floating boundary is identified in the application of the law, an interpretation according to the principle layer can and should be useful. If the new procurement requirement cannot be identified on the basis of the facts (all the circumstances of the case), it is necessarily not possible to establish a distortion of competition, and such a modification may therefore be lawful. In fact, it is the combination of the four layers, considered in conjunction with each other, that provides an interpretation of the norm that can lead to a decision that is in line with the legislator's purpose and with the Fundamental Law.

42 Varga Zs. András: Törvényjavaslatok indokolása – az Alaptörvény hetedik módosításának 8. cikkéről – Philosophus trium scientiarium Pokol Béla 70 Századvég Kiadó Budapest, 2021. p. 372
43 Miklós Gyula (2015.) p. 784