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Compliance with Sustainability Clauses

To Monitor or Not to Monitor

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Law and public management

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Presentation Overview

Part 1: Sustainability Clauses and Contract Law

Part 2: Sustainable Public Contracts

Part 3: Compliance in Public Procurement

Part 4: To Monitor or Not to Monitor

Transnational Private Regulation

Regulatory gap

Public → private

A construct in which «*coalitions of nonstate actors codify, monitor, and in some cases certify firms' compliance with labour, environmental, human rights, or other standards of accountability*»



Bartley (2007)

Governance of Private Actors

- Public regulation + private regulation
- Hard law + soft law
- Hybrid regulatory system
- Private law → Freedom of contract (?)
- **Governance through contracts**
- **Contractualisation of Sustainability**
- CSDDD and contractual cascading

This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 956696.

Contractualisation of Sustainability



Terminology

- Sustainability clauses
- CSR clauses
- Regulatory clauses
- Labour standard clauses..
- **Sustainability contractual clauses (SCCs)**

«contractual provisions covering social and environmental obligations that are not [required to be] directly connected to the subject matter of a specific contract and which pursue long-term business objectives and public interests, by frequently aiming to extend their applicability to third parties and employing relational monitoring and enforcement tools»

(Mitkidis, 2015)

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Limits of Contract Law

Draft Common Frame of Reference

Principles of European Contract Law



- «Mere reference» for «incorporation by reference»?
- Sustainability as an implied contract term?
- Principle of privity ??
 - Enforcing on third parties
 - Enforcement by third parties
- Obligation of means vs obligations of result
- Non-conformity: Fitness for purpose?? Quality??
- Fundamental non-performance for termination?
- Suitability of remedies?

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Solutions

- Exception-based private law
- New and responsive rules on contract law
- Less stringent rules on privity
- Broader scope of «performance»
- Sustainability adjusted contract law
- Three-step Best practice
- Marriage of contract law and tort law

Sustainable Public Contracts?

DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 26 February 2014
on public procurement and repealing Directive 2004/18/EC
(Text with EEA relevance)

What happens after the award?



Sustainability Clauses in Public Contracts?

Sustainability-related contractual obligations regardless of the criteria they arise

- **technical specifications**
e.g. Supply of organic food
- **award criteria** (provided that tender submitted responds)
e.g. Employment of long-term unemployed in a contract for cleaning services
- **contract performance conditions**
e.g. delivery of office supplies with electric cars in a framework agreement for office supplies
- **selection criteria** (provided that it is forward looking)
e.g. Environmental management system in the performance of construction of a new hospital

Guidance from SCCs?



BUSINESS CONTRACTS (European Contract Law DCFR/PECL)	PUBLIC CONTRACTS (European Public Contract Law Dir 2014/24)
Freedom of/to contract	Principles of Procurement (Art. 18)
Incorporation by reference	«in writing» «Full direct access» to additional documents required to be published (Arts. 2 and 54)
Not (necessarily) linked to the subject matter	Linked to the subject matter (Arts. 42, 67 and 70)
Long-term Partnership and Continuity	One-time contract
Consequences of Non-compliance Non-conformity? Fundamental non-performance?	Consequences of Non-Compliance???

Compliance Under Directive 2014/24

Compliance in Contract Award → Published criteria/conditions vs Tenders

Why? Principles of Procurement requires Verification of Compliance

- Abnormally Low Tenders Too good to be true

Compliance in Contract Performance → Contract vs Performance

What is promised vs what is delivered

extending principles of procurement to performance?

YES and NO

Undue profit?

→ compass of compliance in performance → ban on contract changes

Article 72 → freedom to ~~(modify) contract~~



Modifications under Directive 2014/24

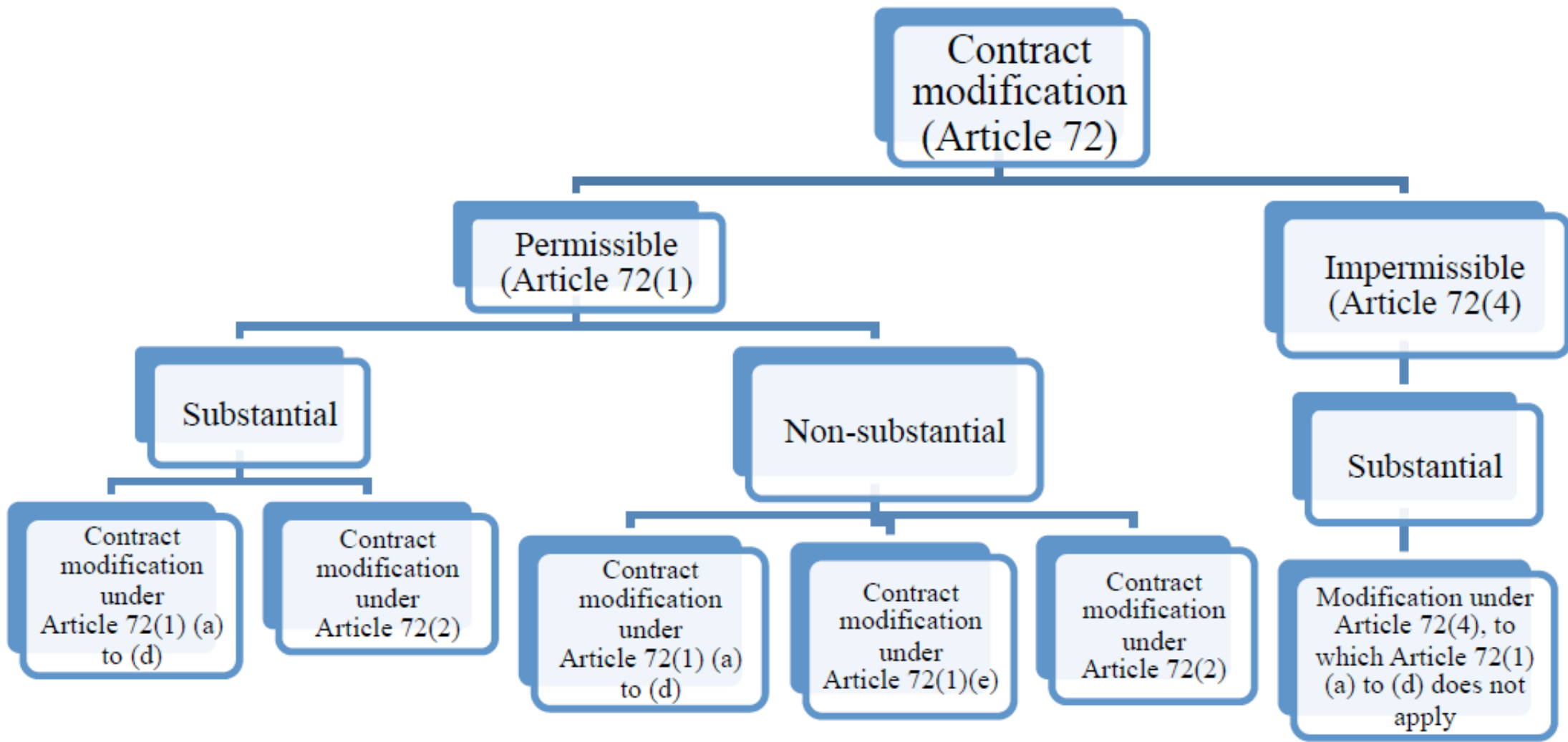
Modifications do not require a new tender if:

- (1)(a) contains a “*clear, precise and unequivocal*” review clause or options
 - (b) Additional works, services or supplies by the same contractor becomes necessary
 - (c) the need for change is due to circumstances that a diligent contracting authority could not have foreseen;
 - (d) Change of contractor
 - (e) changes not substantial
- (2) below *de minimis*

Modifications are substantial, if

- (4)(a) modified conditions were included in the initial procedure, they would have allowed the interest of other participants or participation of other candidates or selection of another tender (hypothetical new procurement)
- (b) it alters the economic balance of the contract in favour of the contractor
- (c) it extends the scope of the contract or
- (d) the contractor is replaced but the change does not fall under one of the permissible contractor changes.

Modifications under Directive 2014/24



Bogdanowicz, (2021)



Duty to Retender – Possibility to Terminate

Art. 72(5)

Non-permissible change → duty to retender

Art. 73

Non-permissible change → Possibility to terminate

**DUTY/POSSIBILITY ONLY ARISES
WHEN NON-PERMISSABLE CHANGE
IS REALIZED (*EX POST*)**

WHAT CAN A CONTRACTING AUTHORITY DO *EX ANTE*?



The Scope of Art. 72

It covers «contract modifications» but what is a contract modification?

de facto new award

the intention of the parties to renegotiate the essential terms of the contract (C-337/98 Commission v. France)

*it consequently falls to the Commission, in its capacity as contracting authority, **strictly to comply** with the criteria which it has itself laid down on that basis not only in the tendering procedure per se, which is concerned with assessing the tenders submitted and selecting the successful tenderer, but also, more generally, **up to the end of the stage during which the relevant contract is performed (C-496/99 P Succh, di Frutta)***

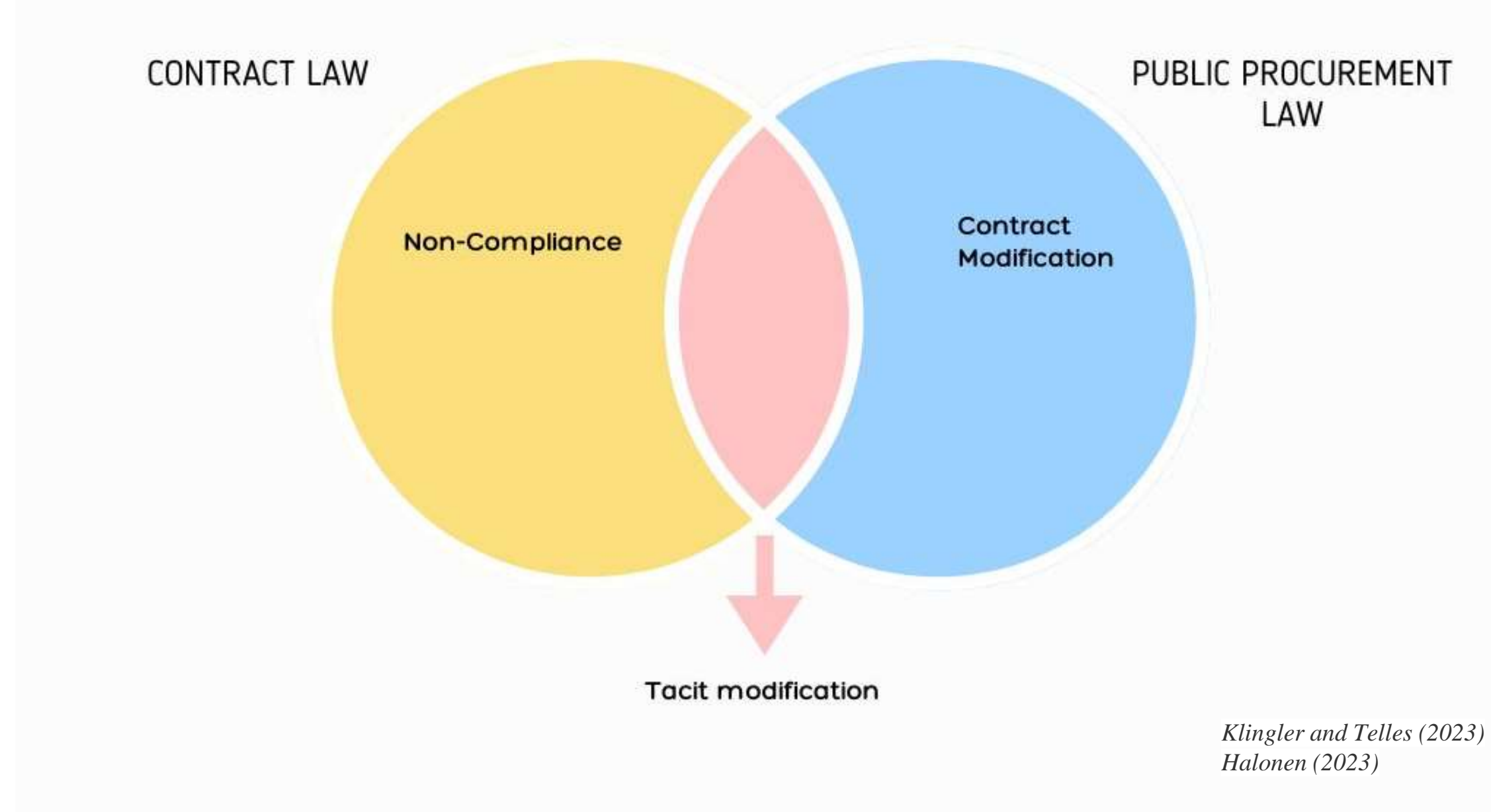
*That legal imperative and that practical necessity are reconciled, first, **through strict compliance with the conditions of a contract as they were laid down in the contract documents up to the end of the implementation phase of that contract**, but also, second, through the possibility of making express provision, in those documents, for the option for the contracting authority to adjust certain conditions, even material ones, of that contract after it has been awarded (C-549/14 Finn Frogne)*

does not require the *intention of the parties to renegotiate*; the **intention to reach a settlement** suffices (C-549/14 Finn Frogne)

*by definition, such a modification is **consensual** in nature and, accordingly, the agreement of the successful tenderer is required (C-23/20 Simonsen & Weel)*

common intent of the contracting parties to renegotiate can be deduced from communications between the parties, in particular written elements (C-441/22 and 443/22 Obshtina Razgrad)

Non-Compliance vs. Modification



Failure of contracting authority to ensure compliance with the criteria it established

Making the Case for Compliance Monitoring



Sustainability Clauses under Article 72

Is the change substantial?

Art. 72(4)(a)

«the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure»

Do Sustainability clauses affect (i) *Number of interested economic operators*, (ii) *Number of bids received*, (iii) *Winning tender*

If yes, change is significant → non-compliance requires retendering

How to prevent retendering → MONITORING





THANK YOU

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