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APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY: THE CASE OF PENALTY CLAUSES IN ESTONIAN PUBLIC CONTRACTS

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ABSTRACT. Developments in the EU public procurement law have attributed a new level of significance to the principle of proportionality. An aspect of public contracting where the principle of proportionality can have a notable impact is the process of drafting public contract clauses. At the same time, cases concerning drafting or interpreting public contract clauses can be subject to hardship caused by possibly overlapping regulation under the national contract law. In order to map the fundamental issues related to the requirement of proportionality when applied to public contract terms, this article looks at the possibility to challenge penalty clauses based on their disproportionality, in the case of Estonia. According to the CJEU case law that the national law must follow, proportionality is established by checking that the challenged item is appropriate and necessary. Even though the national law may provide multiple fora and/or alternative remedies applicable in the case of a dispute over public contract terms, no alternative review options can warrant the refusal to apply public procurement remedies in the award period.

INTRODUCTION

Developments in the EU public procurement law have attributed a new level of significance to the principle of proportionality. While the public and utilities procurement directives of 2004 (European Parliament and of the Council, 2004) did not refer to proportionality as a general principle, the growing body of the ECJ case law has nevertheless often relied on that principle in public procurement matters (Arrowsmith, 2014). This has led to direct incorporation of proportionality among the other general principles listed in the new, 2014 public procurement directives (European Parliament and of the

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Council, 2014). A close study of the principle of proportionality is therefore justified in order to help proper transposition and consistent application the newly introduced requirement under the national law. In the case of Estonia, the case law of the Public Procurement Review Board,[1] the body liable for review of public and utilities procurement cases in the first instance, has witnessed a somewhat surprising accumulation of cases concerning contents of penalty clauses in public contracts. Often, these cases focus on the principle of proportionality.[2] We therefore chose to study 100 public contracts published in the public procurement register[3] between 1 February 2014 and 28 February 2015, looking on the contents of penalty clauses *inter alia* with regard to the principle of proportionality.[4] The expected outcome of the study was to give recommendations for improved drafting of penalty clauses in public contracts.

On the other hand, the simultaneous availability of private law remedies that also address the issue of disproportionality of penalty clauses can sometimes lead to conflicting approaches, raising the question of whether remedies available under the public procurement review system should be waived when private law or other alterative remedies can be used for solving the issue of drafting, interpreting or enforcing a penalty clause.

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[1] *Vaidlustuskomisjon* (hereinafter *VaKo*), the body liable for review of public and utilities procurement cases in the first instance, was established and acts under the Act on Public Procurement - *Riigihangete seadus*, RT I 2007, 15, 76 ... RT I, 23.03.2015, 24, § 119 -, and Statutes of the Public Procurement Review Board - *Riigihangete vaidlustuskomisjoni põhimäärus*, RTL 2007, 34, 599 ... RT I, 08.05.2015, § 9.

[2] Next to proportionality, another dominant basis for challenging penalty clauses is the principle of transparency - D Koroljov (2015). Leppetrahvi määravate hanketingimuste vastavus riigihankeõiguse üldpõhimõtetele. Uurimustöö I, juhendaja M. A. Simovart, Tartu, https://dspace.ut.ee/bitstream/handle/10062/50148/koroljov%20_uurimistoo_2015.pdf?sequence=1&isAllowed=y (April 10, 2016), lk. 8-15, *passim*; M.A. Simovart, D. Koroljov (2016). Leppetrahvitingimuste sisustamine hankelepingutes. Juridica I, lk. 45-47, *passim*.

[3] The national public procurement register is available at https://riigihanked.riik.ee/register/HankedOtsing.html (April 10, 2016)

[4] Koroljov, 2015, lk. 5-6; Simovart, Koroljov (2016), lk. 44.

As such, cases challenging proportionality of penalty clauses in public contracts sketch a model of the interaction between the EU public procurement law and the national private law.

PROPORTIONALITY OF PENALTY CLAUSES SUBJECT TO THE PUBLIC PROCUREMENT REVIEW SYSTEM

The General Requirement of Proportionality

The importance of proportionality in procurement matters has for long been recognised in the case law of the European Court of Justice.[5] The Court has applied the condition of proportionality to a relatively broad scope of issues, subjecting different steps of procurement activity to the requirement of proportionality between the action undertaken and the effect pursued.[6] In addition to applicability within the phase of award procedure, proportionality has a significant part in interpreting and estimating national legislative choices, being a valuable indication for balanced interpretation of the procurement directives[7] and a proper basis for assessing the harmonization of a national legislation with the EU rules of public procurement.[8]

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[5] E.g. Serrantoni Srl and Consorzio stabile edili Scrl vs. Comune di Milano p 33, 40, 44, case C-376/08, ECLI:EU:C:2009:808; The Queen, on the application of: Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health, p 47, case C-210/03, ECLI:EU:C:2004:802; Michaniki AE vs. Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias, p 48, case C-213/07, ECLI:EU:C:2008:731; Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Investment Bank (BEI), p 88, 93; case T-461/08, ECLI:EU:T:2011:494; Consorzio Stabile Libor Lavori Pubblici vs. Comune di Milano, p 30-31, case C-358/12, ECLI:EU:C:2014:2063; Antwerpse Bouwwerken NV vs. European Commission, p 57, case T-195/08, ECLI:EU:T:2009:491.

[6] S. Arrowsmith 2014, p. 628; Evropaïki Dynamiki, case T-461/08, p 142; Antwerpse Bouwwerken, case T-195/08, p 57.

[7] Arrowsmith 2014, p 628.

[8] Consorzio Stabile Libor Lavori Pubblici versus Comune di Milano. Case C-358/12. ECLI:EU:C:2014:2063, pp 29-34, 41; Serrantoni Srl and Consorzio stabile edili Scrl versus Comune di Milano. Case C-376/08. ECLI: EU: C: 2009:808, pp 29, 33, 38; Assitur Srl versus Camera di Commercio, Industria, Artigianato e Agricoltura di Milano. Case C-538/07. ECLI: EU: C: 2009:317, p 21, 24, 30; Michaniki AE versus Ethniko Symvoulio

The new public procurement directives of 2014 now explicitly specify proportionality among the other general principles of EU public procurement law. In the case of Estonia, transposition of the new directives into national law has been prepared (but by the date of submitting this article not yet concluded) via the draft for the new Public Procurement Act (hereinafter the PPA).[9]

Even though neither the directives nor the national law (the PPA as well as the law currently in force) establish any explicit restrictions or guidelines for drafting public contract clauses, the freedom to draft public contract clauses is nevertheless limited.[10] In the course of an award procedure, a doubt as to the conformity of public contract terms with the public procurement law or the general principles allows challenging the contract terms in the Public Procurement Review Board.[11] *Inter alia*, conditions of public contracts are subject to the requirement of proportionality[12] that seems to have a relatively weigthy influence on drafting the clauses of public contracts. For example, any obviously disproportionate penalty clauses of public contracts are regarded to be in conflict with the public procurement law and bidders in the contract award procedure are entitled to challenge such clauses on the grounds of their disproportionality.[13]

Following the guidelines established in the CJEU case law as well as that of the Supreme Court of Estonia,[14] the Review Board has

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Radiotileorasis and Ypourgos Epikrateias. Case C-213/07. CLI: EU: C: 2008:731, pp 48, 61, 65, 68; Fabricom SA versus Belgia. Joined cases C-21/03 and C-34/03, ECLI:EU:C:2005:127, pp 25-36.

[9] Riigihangete seaduse eelnõu, 25.01.2016, § 3: eelnoud.valitsus.ee/main (03.04.2016).

[10] C. McCrudden (2007). Buying Social Juctice, Equality, Government Procurement and Legal Change. Oxford University Press, p. 522; M. A. Simovart (2012). Riigihanke üldpõhimõtetest tulenevd hankelepingu sisupiirangud. Näiteid vaidlustuskomisjoni praktikast. Juridica II, lk. 83;

[11] Simovart 2012, lk. 88-89.

[12] M. A. Simovart (2010). Lepinguvabaduse piirid riigihankes: Euroopa Liidu hankeõiguse mõju Eesti eraõigusele. Doktoritöö. [Limits to the freedom of contract: the influence of EU public procurement law on Estonian private law. A Doctor's Thesis]. Tartu Ülikooli Kirjastus; lk. 56, 58, 180.

[13] VaKo decision in cases 112-12/133895, p 9 and 214-14/154639.

[14] The Supreme Court of Estonia applies the same rationale for checking proportionality as does the CJEU. See, e.g, decisions in the administrative

interpreted the requirement of proportionality to mean that a requirement in the procurement procedure is proportional if it is *appropriate* and *necessary.* [15] A condition is *appropriate* if it facilitates achieving the intended purpose, and *necessary* when the same purpose cannot be achieved through some other measure that would be as effective but less burdensome.[16] In addition, *moderation* has been referred to as a third component of proportionality, requiring that the intensity of any restriction must be in harmony with its intended purpose.[17] Thus, in order to be proportional, any rules and restrictions applicable towards persons (bidders, applicants) partaking in public procurement must be relevant, necessary and moderate.[18]

Assessing Proportionality of Penalty Clauses

In public contracts, a contractual penalty can be considered to be unnecessary or not moderate when it is extensively high in comparison to the **prospective turnover** (sales revenue) of the public contract. For instance, in a review procedure concerning the clauses of the draft public contract published by the administration of the Rural Municipality of Pärsti on 7 May 2012 (reference no. 133895: awarding a service concession for the collection and transportation of mixed non-industrial waste). The claimant challenged the proportionality the following penalties:

"- a failure to empty a waste collection container according to the schedule – 500 euros on the first occasion, 1000 euros on the second, 2000 euros on the third, and 2000 euros on every following occasion;

- a failure to reply to an e-mail of the waste holder within 24 hours – 100 euros on the first occasion, 300 euros on the second, 600 euros on the third and 2000 euros on every following occasion."

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cases No 3-4-1-1-02 p 15, 3-4-1-3-04 p 31, 3-3-1-79-08 p. 18 available at http://www.riigikohus.ee/ (April 10, 2016).

[15] VaKo decision in cases No 50-10/123879, p 6; No 279-13/148288, p 7.8.

[16] Ü. Madise (koost.) (2012). Eesti Vabariigi põhiseadus. Komm vlj. 3. trk. Tallinn: Juura, lk 154-164.

[17] Arrowsmith 2014, p. 628; Antwerpse Bouwwerken p. 57;

[18] VaKo decision in case 187-13/14490, p 20.1, 21.

Even if the penalty amounts do not seem overly heavy on the first glance, the Review Board established that the prospective turnover from performing the contract would have been only ca 4500 euros a month. In comparison to that, the challenged penalties are unreasonably heavy.

In other cases, proportionality has been weighed against the **price of the contract**, and/or with regard to the **significance of the** concerned **breach.**[19] Our study[20] questioned proportionality of the following penalties: the amount of penalty was ca 18% of the total contract price for *any* occasion of selling fuel of lower than agreed quality;[21] a penalty of ca 26% of the total contract price for *any* breach of confidentiality under a software contract,[22] ca 27,5 % of the total contract price for *any* breach in a contract for purchasing a children's playground equipment.[23]

Particularly in the cases where the intensity and seriousness of violations covered by the same penalty clause can range from a minor to a significant breach as in the above examples, a differentiated penalty should be preferred. In a review case No 214-14/154639 concerning a waste-transport procurement, the Review Board explicitly denounced heavy penalties *if not differentiated* according to the intensity of the breaches. In the said case, the Rural Municipality of Põlva as the contracting authority had drafted an equal contractual penalty (1000 euros) to be paid in case of any breach registered in the course of performing the contract. The Review Board contemplated that when contractual obligations are "not comparable in terms of possible consequences", their equivalent sanctioning is "clearly disproportionate." Thus, in the Review Board's opinion, indiscriminate sanctioning of all, including minor breaches

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[19] Koroljov 2015, lk. 19, 20.
[20] *Id*, lk 19, 22, 23.
[21] Public Procurement by AS Saarte Liinid, referene No 158273, accessible at https://riigihanked.riik.ee/register/HankedOtsing.html (April 10, 2016)
[22] Procurement by Eesti E-Tervise SA, reference No 148768, accessible at https://riigihanked.riik.ee/register/HankedOtsing.html (April 11, 2016)
[23] Procurement by SA Tallinna Kultuurikatel, reference No 159796, accessible at https://riigihanked.riik.ee/register/HankedOtsing.html (April 11, 2016)

with similar consequences, can be a cause for finding of disproportionality.[24]

The above examples are directly related to another general principles of EU public procurement law, namely that of **transparency**. An unclear language of public contract can create unfair competition in the award procedure and disable suitable assessment of the clauses. I.a., proportionality of clauses cannot be satisfactorily estimated and may cause the clause to be regarded inappropriate.

Besides being established at a reasonable cost level, the requirement of proportionality seems to translate into the penalty being in harmony with its **purpose** and function. In contract law, a contractual penalty usually pursues one or more of the three main functions or purposes: firstly, a penalty is often set with the purpose of ensuring that contractual obligations are actually performed and breaches prevented. Secondly, a penalty commonly carries the purpose of facilitating and/or simplifying the process of compensating for any possible damages caused as a result of breaching the contract. As a private law remedy, the latter type of penalty warrants that in case of a breach, the creditor is able to demand payment of at least the minimum compensation agreed as a contractual penalty, relatively effortlessly. As the third option, a contractual penalty can function as a withdrawal money (repentance fee), giving the debtor, for the payment of the agreed sum of "penalty", the right to withdraw from the contract in a situation where no legal basis for contract termination would otherwise be present, e.g. no fundamental breach has been committed by the other contracting party, the creditor. Of course, a penalty can serve a combination of these functions.

With the view to the above, in order for a penalty clause in a public contract to be justly balanced, it should be drafted with regard to the risk that it protects against, or in comparison to the amount of damage that may potentially follow the breach. On the other hand, a penalty of the third type should take into account any costs that can accumulate for the contracting authority as a result of the contractor exiting the contract.

Any legal guidelines on proportionality mostly focus on the means or ways of reaching a proportionate choice as opposed to prescribing

[24] VaKo decision in case No 214-14/154639 p 9.2.

fixed limits.[25] In the case where industry-approved and balanced standard contracts are not available or do not provide necessary examples, all of the above described considerations can serve as reference points for assessing proportionality of a penalty clause. As contracting authorities must always refrain from making arbirtrary choices, when challenged, they must also be able to substantiate its decisions within the course of review.

Substantiating Proportionality of Penalty Clauses

The general principles of transaparency as well as the national administrative law require that a contracting authority must always be able to justify its choices.[26] In the case of disputes challenging contractual penalty clauses, this duty can concern the amount or any other significant term of the challenged penalty clause. Once a bidder has convincingly shown in a review case that as drafted, a penalty clause raises doubts as to its proportionality, the contracting authority has the duty to demonstrate otherwise. To do so, the contracting authority must be able explain the rationale of making its choices[27] and to erase possible doubts that the contested terms were established either arbitrarily or even in bad faith.

A failure to perform the obligation to justify can be observed, for instance, in the above-referred case of public contracting by the Rural Municipality of Pärsti (reference no. 133895). In addition to the penalty clauses appearing to be out of balance in comparison to the low prospective turnover, the Review Board also established that the contracting authority had actually drafted the penalty clauses on a copy-paste method from a waste-management contract of another municipality. However, the contracting authority in case failed to demonstrate any significant similarities between the two procurements, e.g. as to the contractual volume. Concluding that the contracting authority failed to substantiate the proportionality of the contractual penalties, the Review Board was unable to ascertain their proportionality and therefore ordered the contracting authority to

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[25] M. Triipan (2006). Proportsionaalsuse põhimõte Euroopa Liidu õiguses. Juridica 2006/3, lk 158.

[26] E.g, the Supreme Court of Estonia decisions in administrative case No 3-3-1-62-08 p. 10

[27] VaKo decisions in cases No 214-14/154639; 279-13/148288; 187-13/144900; 112-12/133895 14-12/128888. Koroljov, lk. 5.

bring the penalty clauses of the public contract into compliance with the PPA.[28]

Similar conclusions have been made in other cases. For example, a penalty clause of 8000 euros that accompanied the right of prompt termination of the contract in case of any, possibly minor failure on the part of the contractor, was successfully challenged when the contracting authority failed to explain when exactly the penalty would be applicable. Therefore, the Review Board was unable to estimate proportionality of the penalty.[29]

In such cases, the rationale for granting the decision for the benefit of the claimant is the contracting authority's inability to convincingly demonstrate the considerations that served as the basis for choosing the particular amounts and/or terms of the penalties. Non-transparent and possibly disproportionate penalty clauses established as a result of an arbitrary decision as opposed to reasonable consideration by the contracting authority, are unacceptable and not in harmony with the general principles of the public procurement law.

Naturally, we do not advocate that every contracting authority started drafting public contracts from the scratch. On the contrary, using available pre-approved standard term contracts is the logical way of following good industry practices as well as is following the examples of contracts of similar substance and volume. However, instead of blind copying of contract terms, a contracting authority must approach any model critically, acknowledging and being able to give reasons for its choices. To ensure a lawful use of its discretion and powers, a contracting authority's decisions must be reasoned and verifiable. In addition to allowing transaparency and outer administrative review, such behaviour facilitates internal review by the contracting authority itself and allows better certainty of making a right choice.[30] Thus, one cannot exclude that the above mentioned examples of contractual penalties that the Review Board denounced, could very well be regarded as justified and proportionate if the aims

[28] VaKo decision in case 112-12/133895, p. 9.1.
[29] VaKo decision in case 187-13/14490, p 21. Similarly, in cases No 112/12/133865, p 9, 54-15/160792, p 9.
[30] The Supreme Court of Estonia in administrative cases No 3-3-1-54-03, p 36, No 3-3-1-49-08, available at http://www.riigikohus.ee/ (April 10, 2016)

of the penalties, the related industry practices, or any special circumstances related to the concerned obligations would have been properly taken into account.

ALTERNATIVE REVIEW OPTIONS OF PROPORTIONALITY OF CONTRACTUAL PENALTY CLAUSES

Private Law Remedies Concerning Reasonableness of Penalty Clauses

In many Member States, incl. Estonia, public procurement contracts are regarded as private law contracts, being subject to both national private law and the general principles developed in the European Union public procurement law.[31] Respectively, any usual requirements and possibilities applicable under national contract law affect public contracts as well.[32]

Speaking of penalty clauses, the national private law offers various options for contesting or otherwise legally influencing an unreasonably heavy contractual penalty. Here, the standard of reasonableness[33] can be regarded as a private law counterpart to the public law requirement of proportionality as in the case of penalty clauses, both are primarily aimed at establishing a justified amount of the concerned penalty. These options, established under the Law of Obligations' Act (LOA), can be applied to public contracts as well.

Firstly, § 162 of the LOA allows a debtor to request that the court reduced an unreasonably heavy contractual penalty to a reasonable amount. Upon deciding over such a matter, the court takes into account, above all, the history of performance of the contract and indicators characterising the party of the debtor: the extent of performance of the obligation by them, the legitimate interest of the other party as well as the economic situation of both parties. However, this option is applicable only if and when a breach of contract has already been committed and the penalty fallen due but not yet paid (subsection 3 of § 162 of the LOA). Alteration of the amount of a penalty via such judicial transformation of the penalty

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[31] Simovart 2010, lk 9–10, 32, 176-177.
[32] PPA § 8 lg 2.
[33] The Law of Obligations' Act (LOA) - Võlaõigusseadus, RT I 2001, 81, 487 … RT I, 11.03.2016, 2, § 7

clause cannot be applied pre-emptively. The amount of the contractual penalty is never evaluated abstractively, but by taking account the specific circumstances related to the performance of the particular obligation. Due to the case-by-case approach, a mere comparison of, for instance, ordinary penalty amounts in the same types of contracts are not sufficient for identifying an unreasonably heavy contractual penalty. Instead, the presence of the particular circumstances set out in subsection 1 of § 162 of the LOA needs to be established.

Secondly, clauses that provide for an unreasonably heavy contractual penalty can turn out to be void under subsection 1 and clause 5 of subsection 3 of § 42 and § 44 of the LOA, if the public contract is made on standard terms. Most public contracts are standard terms contracts, always so when when awarded as a result of an open or resricted procedure.[34]

Neither of the above-mentioned options applies preventively before the award of the contract. Instead, a legal solution can be found no sooner than at the moment of awarding the public contract (in the case of voidness based on subsection 1 and clause 5 of subsection 3 of § 42 of the LOA), or after an actual claim for the contractual penalty has been presented by the contracting authority (under § 162 of the LOA). Thus, even though there are legal options for resolving the issue of the unreasonable penalty via private law instruments, legal clarity interests seem to support resolving the issue in the contract award stage, i.e by the Review Board instead.

Different Purposes of Private and Public Procurement Remedies

The possibility of resolving a dispute based on private law rules does not dismiss the fact that publishing unclear or ambiguous public contract terms may violate the requirement of the transparency of public procurement, and significantly disproportionate contract terms can discourage competition. Namely the diverse purposes of the different remedies systems – private law and public procurement law remedies – are the primary reason for maintaining multiple options of review.

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[34] Simovart 2010, lk 50, 181.

The EU public procurement law is primarily aimed against obstacles to open competition. [35] Disproportionate terms of procurement can become such obstacles that may prevent some bidders from joining the competition or others from winning the award. The remedies directives[36] strive to provide effective and rapid review procedures in support of the substantive EU procurement law, [37] protecting both the opening up of competition in the public procurement market in general as well as the individual aggrieved tenderers in particular. [38] It is for these purposes that review proceedings must be open for all interested parties and strive for a speedy and efficient review. [39] The possibility to contest public contract terms within review procedures is among such remedies.

The claim for decreasing an unreasonable penalty under the private law remedies on the other hand is based on the general principles of contractual justice and good faith and, as any other contract law remedy is directed at finding a resolve justified in light of the particular contractual relations between the two contracting parties. [40] These remedies have no stimulus for encouraging the situation of competition for the public contract. Postponing the resolving of a controversy concerning the public contract terms until a private law remedy becomes available, is not a viable solution with regard to the requirement for speedy and effective review in procurement either.

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[35] S. Arrowsmith., P. Kunzlik, editors (2009). Social and environmental policies in EC procurement law : new directives and new directions. Cambridge: Cambridge University Press, pp. 30-31.

[36] 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; 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, first and third recitals.

[37] Case No C-570/08, Simvoulio Apokhetefseon Lefkosias v Anatheoritiki Arkhi Prosforon para 29-30 and Case No C-337/06 Bayerischer Rundfunk and Others paras 38 and 39.

[38] Directive 89/665/EEC, recital four.

[39] Article 1 paragraph 1 of the Directive 89/665/EEC.

[40] P. Varul jt (2006). Võlaõigusseadus. I : kommenteeritud väljaanne, Tallinn : Juura, lk. 547.

Moreover, keeping in mind the dissimilar purposes of the different remedies systems, one cannot exclude that even when a penalty clause is considered disproportionate (unreasonable) for the purpose of one remedy, the conclusion may not be the same at all for the purpose of the other.

The above justifies the understanding that a review board or court should not refuse to review public contract clauses for the mere reason of private law remedies being or becoming available, should the same issue arise in the course of performing the contract.[41] Naturally, this does not change the competence of the Review Board that is still authorized to review only the presence or absence of a violation of the public procurement law and not to judge over or give preliminary assessments of possible private law disputes. For instance, while interpreting a public contract might be an answer to any confusion as to the content of non-transparent and possibly disproportionate contract terms if the confusion emerges in the course of performing the public contract, the Review Board cannot issue a ruling on the interpretation of a draft public contract. Interpreting a public contract takes place under the rules of national private law and does not belong within the competence of the Review Board.

Even though national review systems are different, the general conclusion applicable despite any differences must be that no potentially available private law remedies can exclude the access to review of equivalent issues on the grounds of the public procurement law.

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[41] The opposite was however concluded by the Tartu Administrative Court in case No 214-14/154639: referring to the contractor's right to challenge a possibly unreasonable amount of penalty under LOA § 162 in the course of performing the contract, the Court refused to review the allegedly disproportionate penalty clause in a public contract under the public procurement review system - https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=151338986 (April 10, 2016).

CONCLUSIONS

The principle of proportionality sets certain limits to drafting public contract clauses. Penalty clauses in public contracts must be appropriate, necessary and reasonable with regard to the purpose(s) that the particular penalty serves, the price and volume of the contract as well as the significance of the violation that the penalty applies to.

In case of a doubt, the clauses can be challenged in the Public Procurement Review Board. The mere fact that a dispute can be resolved using private law remedies, cannot warrant a refusal to apply public procurement remedies in the contract award period. Otherwise, the purpose of the remedies system is not fulfilled, leaving the bidders without a rapid and effective review option and possibly restricting competition for the particular public contract.

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