

**PERFORMANCE AND AND RENEGOTIATION OF PUBLIC
CONTRACTS**

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1. INTRODUCTION

Literature has paid insufficient attention to the performance of public contracts. The disregard towards this matter even by the doctrine dealing with public law¹ can be explained in the light of two antithetical critical perspectives. The first one considers any stage of an obligation performance as provided by the civil law, due to the absence of implications relating to the public law², also with regard to the specific issue of *ius variandi*. The second one considers, instead, the entire phase of performance as a mere

¹ The investigation on the performance of a public contract is absent even in wide-ranging researches as that carried out by ROEHRSEN DI CAMMERATA, *I contratti della pubblica amministrazione*, Bologna, 1971. It is however described in detail in the accounting literature (see BUSCEMA, *Trattato di contabilità pubblica*, Milano, 1981, 965 ff.; BENTIVENGA, *Elementi di contabilità di Stato*, Milano, 1960, 119). As some exceptions, see CAVALLO PERIN-RACCA, *La concorrenza nell'esecuzione dei contratti pubblici*, *Dir. amm.*, 2010, 325; COMBA, *L'esecuzione di opere pubbliche. Con cenni di diritto comparato*, Torino, 2012; BENEDETTI, *I contratti della pubblica amministrazione tra specialità e diritto comune*, Torino, 1999; MASSERA, *Lo Stato che contrae e che si accorda*, Pisa, 2011, 22.

² See ORLANDO, *Principii di diritto amministrativo*, Firenze, 1891, 359, who says that “nei rapporti giuridici patrimoniali, il diritto moderno, non che ammettere che alcuno sia superiore al diritto, non ammette neanche alcun regime di privilegio (...) Il patrimonio dello Stato, cioè l'insieme dei mezzi economici con cui esso sopperisce ai suoi bisogni, è sottoposto, come tutti i patrimoni privati, al diritto comune, salvo deroghe che naturalmente discendono dalla intima varietà dei rapporti, e che quindi, per ciò stesso, non vanno considerati come privilegi”. See also ROMANO (*Corso di diritto amministrativo. Principi generali*, Padova, 1937, 14) shares the same opinion by stressing that the performance of a contract does not deal with the administrative law properly understood due to the public nature of negotiation is relevant only in relation with the spending decisions and the identification of the contractor as unilaterally taken in by the administration. On the contrary, “dopo questo stadio, la valutazione dell'interesse pubblico e quindi la funzione amministrativa propriamente detta si può considerare esaurita e quell'atto, di fronte al venditore o al locatore, appare come ogni altro negozio di compravendita o locazione e conseguentemente di diritto privato”.

appendage of the administrative activity³ aimed at ensuring the impartiality and transparency in choosing the best contractor, therefore not worthy of special scientific investigation.

Even the legislation deserved a limited interest to the matter: the performance was traditionally given a very restricted discipline and mostly related to the field of work (see law no. 109/1994 and following amendments). Even with the entry into force of the Code of public contracts, the situation did not change: the rules relating to the performance are still few and are mainly concerned with the field of works, considered as one where the occurrences risk to have a greater impact on the fulfillment of public interest involved in each contract.

In spite of this, the phenomenon of *ius variandi*, when the impartiality and transparency in choosing the best contractor is to be ensured, is very complex and heterogeneous. It develops along two different perspectives: that of the unilateral possibility of revision, that is imposed by the public contractor, and that of the consensual possibility of revision, characterized by the convergence of the parties' agreement on the amendment to be made to the negotiation content.

The unilateral modifiability has aroused the most interest by the traditional doctrine, which, influenced by the French theory of the *mutabilité du contract administratif*⁴, has issued the existence of a principle of immanent unilateral possibility of

³ See MANTELLINI, *Lo Stato e il codice civile*, Firenze, 1882, 680, who, taking into consideration the French doctrine on the *contracts administratifs*, states that “non è dunque e non può essere del tutto contrattuale lo stesso rapporto giuridico dell’impresario, avendola da fare con l’amministrazione, non meno come autorità, che come contraente. Donde interceda pur l’istrumento, i contratti dello Stato si preparano e concludono sempre e poi sempre per atto d’autorità”.

⁴ See: JEZE, *Théorie générale des contrats de l’Administration*, Rev. dr. pub., 1930, 130; MAYER, *Théorie des françaisischen Verwaltungsrechts*, Berlino, 1876, 291; PEQUINOT, *Contribution à la théorie générale du contrat administratif*, Montpellier, 1945, 364, which states that “est de reconnaître que le contrat administratif ne lie pas l’administration de la même manière qu’un contrat ordinaire lie un particulier”; similarly MORAND DEVILLER,

revising a public contract, as a result of the supremacy whose the administration would be endorsed even when acting according to forms of negotiation. In this perspective, the *ius variandi* was then investigated through the power/subjection dialectic.

The directive of the consensual possibility of amendment, in which the problematic aspects do not affect the balance of power between the parties, but rather the risks of neutralizing the procedures in favor of a competitive selection of the private contractor, suitable for a negotiating object different from that one possibly resulting from renegotiation, has been much more neglected.

2. UNILATERAL AMENDMENTS IN PRIVATE LAW

The unilateral possibility of amending the content of a contract is not alien to the civil law.

Cours de droit administratif, Montchrestien, 2001, 396, stating that “le contrats administratifs échappent au caractère obligatoire de la convention à son immutabilité puisque les obligations contractuelles ne naissent pas seulement de la commune intention des parties mais parfois de la volonté unilatérale de l’administration”. See also DE LABAUDERE, MODERNE, DEVOLVE, *Traité des contrats administratifs*, LGDJ, 1983, 694, 700. About the *modification unilatérale* see LLORENS, *Réflexions sur le pouvoir de modification unilatéral du maître de l’ouvrage dans le marchés de travaux publics et privés*, *Droit et ville*, 1984, 50; LIBERT, *Les modifications du marché en cours d’exécution*, *AJDA*, 1994, 65; DE LABAUDERE, *Du pouvoir de l’administration d’imposer unilatéralement des changements aux dispositions des contrats administratifs*, *Rev. dir. Pub.*, 1954, 36 which includes the *mutabilité* among the “notions dominantes de la théorie de l’exécution des contrats administratifs”. More recently, see HOEPFFNER, *La modification du contrat administratif*, Paris, 2009; BRECHON MOULENES, *Liberté contractuelle des personnes publiques*, *AJDA*, 1998, 643. On the contrary, the necessity of overcoming the theory of the unilateral possibility of amending, is to be taken into consideration; see BENOIT, *De l’inexistence d’un pouvoir de modification unilatérale dans les contrats administratifs*, *JCP*, 1963, 25; on the relationship between the theory of amending and the pro-competitive possibilities provided for by the European law of public contracts, see YANNAKOPOULOS, *L’apport de la protection de la libre concurrence à la théorie du contrat administratif*, *Rev. dir. pub.*, 2008, 2, 421.

In particular, there are categories of rules of private law that deal with the theme of *ius variandi* relating to duration.

The first category includes rules prohibiting or restricting the phenomenon of unilateral possibility of amendment, even where it has first been contemplated by the parties during signing. Among the most significant rules the following ones should be mentioned: art. 6 of the law no. 192/1998, which prohibits the formulation of *ius variandi* clauses in subcontracts; art. 333, paragraph 2, letter m) of the decree no. 206/2005 (Consumer Code)⁵, which qualifies the *jus variandi* clauses existing in the consumer contracts as a presumptively vexatious, and art. 118 of the decree no. 385/1993 (Consolidated Banking Law), subordinating the application of the *ius variandi* by banks to the existence of a valid reason as far as the bank contracts are concerned⁶.

The second category contains rules that make the contractor subject to the *ius variandi* responsible for a choice between acceptance of the unilaterally stated amendment and the early termination of the contract. The doctrine defines this situation “withdrawal in self-defense against the counterpart *ius variandi*”⁷. As an example, the art. 33, paragraph 4, of the Consumer Code assigns the practitioner the right to change the content of a contract giving the counterpart the opportunity of choosing between acceptance of the amendment and right of withdrawal. Similarly, the articles 1897 and 1898 of the Civil code related to the insurance contract allow each party, in the presence of certain conditions, the right to increase or reduce the premium originally agreed, without prejudice of the right to withdraw from the contract by the counterpart.

⁵ On the *ius variandi* in the consumers’ contracts, see SCARPELLO, *La modifica unilaterale del contratto*, Padova, 2010, 4.

⁶ On the *ius variandi* in the bank contracts, see GAGGERO, *La modificazione unilaterale dei contratti bancari*, Padova, 1999, 373.

⁷ See ROPPO, *Il contratto*, Milano, 2001, 553.

Finally, the third category collects rules that give one party the right to impose amendments that, if not acknowledged by the other party, determine a non-performance of the contract by the latter. See art. 1664 Civil code, where in a contract between private parties⁸, the contractor may require a price revision if, due to unforeseen circumstances, increases or decreases in the cost of materials or labor, such as to cause an increase or decrease greater than the tenth of the total agreed price, have occurred. Or again, still about a contract, see art. 1661 Civil code, under which the contractor may make changes to the project, provided that their amount does not exceed the sixth of the total agreed price. Or, finally, in the contract of carriage, see art. 1685 Civil code, which establishes the so-called “right to countermand”, namely the right of the sender to suspend carriage or to order its delivery to a consignee other than the consignee originally designated, or even decide otherwise.

Despite the first impression, it should be noted that none of the three categories of rules mentioned so far takes into consideration a case of real unilateral amendment.

In the first case, in fact, rules affect the negotiations autonomy, prohibiting or restricting the agreements whereby the parties by mutual agreement (and therefore not unilaterally) assign the *ius variandi* to one of the contract party.

The second category includes rules that assign the right to amend the negotiating regulation to one of the parties, giving the counterpart, however, a parallel right of withdrawal, which neutralizes the unilateral nature - that is authentically mandatory - of the *ius variandi*⁹.

⁸ See MAUCERI, *Sopravvenienze perturbative e rinegoziazione del contratto*, Catania, 2006, 48. On the author’s opinion, art. 1644 Civil code would introduce the general principle of risks management not only within the kind of contracts named “tender”, but within all contracts where a special performance is foreseen.

⁹ On the contrary, that is the *ius variandi* of a party, even when balanced by the counterpart’s withdrawal, is against the binding principle as provided for by art. 1372 Civil code, see DE NOVA, *Il contratto ha forza di legge*,

Finally, the third category, includes provisions that grant to one party the right to change counterbalanced by no right of withdrawal. And yet, even in this case, no real unilateral circumstance occurs, due to the mandatory character of the rules in hand¹⁰, whose force can be voided by a mutual agreement by the parties. If the *jus variandi* can be applied to this kind of circumstances provided by the civil law it means that the parties have tacitly agreed not to neutralize the force of the rules giving the above mentioned right to amendment. Once again, the unilateral character is absent.

The situation just described leads to the conclusion that the civil law does not regulate genuine case of unilateral possibility of amendment, due to the mandatory nature of the *jus variandi* rules belonging to the third category just mentioned. It represents the main character of discontinuity from the situations related to the public contract, where, in contrast, the norms of *jus variandi* are mandatory and therefore excluded from the negotiating autonomy.

3. UNILATERAL AMENDMENTS IN PUBLIC CONTRACTS

Under the influence of the French literature on the matter, the traditional doctrine has stated the existence of a regime of implicit mutability of the public contract, in force of which the administration could unilaterally amend the terms of negotiation, also after the conclusion and even in the absence of a rule that explicitly assigns that power to it. These theories can nowadays be considered as obsolete, even in force of the art. 1, paragraph 1 *bis*,

Milano, 1999, 25; see also VETTORI, *La vincolatività*, in *Trattato di diritto privato*, Torino, 2001, 5.

¹⁰ See SCHLESINGER, *Poteri unilaterali di modificazione (jus variandi) del rapporto contrattuale*, Giur. comm., 1992, 22; GAZZONI, *Manuale di diritto privato*, Napoli, 2008, 768; RESCIGNO, *Appalto*, Enc. dir., Roma, 1991, II, 391.

of the law no. 241/90¹¹, which prevents to detect, within the consensual performance, powers dealing with the public law not governed by the law. This, in turn, is an inevitable consequence of the legality principle, considered in terms of legality-guarantee.

Therefore the amendments that can be applied unilaterally to the content of a contract are only those provided for by the positive law. The most relevant institutions, in this sense, are the prices revision and the amendment in the course of the contract.

3.1 Price revision¹²

In the case of labor contracts, the art. 133 of the Code of public contracts requires the so-called “system of closed price”, which is not equivalent to “unmodifiable price”, but consists of the cost of the work after the auction reduction and plus a percentage (in the case the difference is more than 2%) calculated on the price related to the work to be done per each year until the work completion. This percentage is fixed by a decree issued by the Ministry of Infrastructures.

However, notwithstanding this rule, the same article provides that, where the price of individual building materials, as a result of exceptional circumstances, increases or decreases more than 10% compared to the price recorded by the Ministry of Infrastructures in the year of the tender submission, compensations in increase or decrease corresponding

¹¹ On the possible application of the new paragraph *1bis* to the contracts involving public parties, allowing to get over the theories concerning the so-called intrinsic specialty of the discipline concerning the negotiating relationship, see DE PRETIS, *L'attività contrattuale della P.A. e l'art 1 "bis" della legge n. 241 del 1990: l'attività non autoritativa secondo le regole del diritto privato e il principio di specialità*, in *Tipicità e atipicità nei contratti pubblici* (Mastragostino ed.), 2007, Bologna, 29.

¹² A historical excursus on the introduction of the revision mechanism is in VARANESE, *La revisione dei prezzi*, Milano, 1947.

to the half of the percentage greater than 10% have to be applied¹³.

The institution of price amendment is in both the discipline of contracts between privates and in that of public tenders. The regulation of the price amendment in the contracts between private parties and in public tenders has experienced significant fluctuations over time, sometimes approaching each other and sometimes moving away each other. The most relevant difference between the two institutions, however, is not contained in the rules of the respective (and oscillating) disciplines, but in a structural feature of the rules dedicated to each of them. In public contracts the price revision is, in fact, a right that cannot be disposed of. The administration, as well as the successful undertaking of a public contract cannot waive in advance the right to demand the revision of rising or falling pricing. This is for obvious reasons of protection of the public interest¹⁴,

¹³ According to the paragraph 4 of the art. 133, above the limit of 10% the amount of the sums referred by the paragraph 7 of the same article 133, is not to be exceeded. It provides that “per le finalità di cui al comma 4 si possono utilizzare le somme appositamente accantonate per imprevisti, senza nuovi o maggiori oneri per la finanza pubblica, nel quadro economico di ogni intervento, in misura non inferiore all’1 per cento del totale dell’importo dei lavori, fatte salve le somme relative agli impegni contrattuali già assunti, nonché le eventuali ulteriori somme a disposizione della stazione appaltante per lo stesso intervento nei limiti della relativa autorizzazione di spesa. Possono altresì essere utilizzate le somme derivanti da ribassi d’asta, qualora non ne sia prevista una diversa destinazione sulla base delle norme vigenti, nonché le somme disponibili relative ad altri interventi ultimati di competenza dei soggetti aggiudicatori nei limiti della residua spesa autorizzata; l’utilizzo di tali somme deve essere autorizzato dal CIPE, qualora gli interventi siano stati finanziati dal CIPE stesso” (for the purposes referred to in paragraph 4, the funds specially set aside for unforeseen circumstances can be used, without any new or additional cost to the public finance, in the economic context of each intervention, to an extent not less than 1 percent of the total amount referred to the work, except the amounts relating to the contracts already paid, as well as any additional sums at the disposal of the contracting authority for the same action within the limits of its authorization of expenditure. Similarly sums deriving from bidding discounts can also be used, if not provided for a different destination as provided by the rules in force and the funds available for other completed interventions under the responsibility of the contracting authorities within the limits of the remaining authorized expense, the use of such sums must be authorized by the CIPE, where interventions are financed by the same CIPE).

¹⁴ The goals of the institution of price revision are of public nature and are unknown by the discipline of the same contract between private parties; see Cons. St., 12 ottobre 1984, n 723; Mass. Compl. Cons. Stato, 1984, 371;

intended as an interest in a helpful (public) resource allocation invested in the contract, by means of an efficient balance between quality (of goods or services acquired) and saving.

The revision of prices of a public contract is therefore a genuinely unilateral prerogative¹⁵, since the parties, during the negotiation, cannot effectively come to an agreement in the sense of the inapplicability of the legal discipline dedicated to this institution¹⁶.

3.2 Amendments in the course of the contract

The article 132 of the Code of public contracts allows the contracting authority to impose amendments to the work in progress, provided three conditions.

The first one is the existence of a situation categorically provided by the same art. 132¹⁷: law amendments, design errors, etc. This case concerns, however, only the variations in increase. As far as those ones in decrease, leading to cost saving for the government and

Corte dei conti, sez. controllo per la regione Sardegna, n. 55/2009/PAR.

¹⁵ The price revision in public assignments would consist in an act resulting from the application of the public law which from outside affects the contract; see GIANNINI, *Corso di diritto amministrativo*, op. cit., 85 e NICOLÒ, *Diritto civile*, Enc. dir., Milano, 1964, XII, 916.

¹⁶ Differently, in tenders among private parties “la norma che disciplina la revisione dei prezzi nel contratto di appalto (art. 1664 c.c.) non ha carattere imperativo, per cui le parti hanno facoltà di derogarvi, sia limitando la revisione e modificandone le condizioni di legge, sia anche escludendola completamente” (the rule governing the revision of prices in the contract (art. 1664 civil code) is not mandatory; therefore the parties may derogate or by limiting the revision and changing the legal conditions, or completely excluding it) (Cass. civ., 12 giugno 1987, n. 5148, in *Rep.*, voce *Appalto* 1987, n. 42).

¹⁷ As far as services and supplies are concerned, the typing of the premises to amend is governed by the art. 311, paragraph 2, of the regulations contained in the Code of public contracts.

lower earnings for the contractor, this typing regime is excluded by the article no. 162, paragraph 1, of the d.P.r. no. 207/2010. On the other hand, in a contract between private parties the client's right to impose amendments during the contract is not subject to any system of premises typing.

The second condition concerns the *quantum* of the amendment, which may be imposed by the public client up to a fifth of the total value of the contract¹⁸, whereas, in contracts between private parties this limit coincides with a sixth¹⁹ (art. 1661 Civil code).

Finally, the third condition concerns the non-essential character of the amendment, which cannot determine substantial alterations of the assigned task. This limit was introduced for the first time by the Merloni law, which determined, in that respect, a convergence with respect to the regulations about the contracts between private parties, where the prohibition of the introduced essential variations was set forth by the art. 1661 of the Civil Code.

The prohibition of introducing essential amendment is inspired by different objectives: in the contracts between private parties it protects the principle of assignment and protection of the "weak" contractor in public tenders; on the other hand, in public contracts it also presides over objectives of transparency and competitiveness in tenders, with an obvious benefit for the not allottee third parties. This explains why, once again, in contracts between private parties this rule can be waived with the consent of both parties,

¹⁸ A very similar rule is stated in the art. 311, paragraph 4, with reference to contract of services and supplies.

¹⁹ According to some of the authors who have investigated these topic, the different amount of the taxable income would show the public nature of the institution and therefore the provisional character of the act in which it is expressed; see MOSCARINI *Profili civilistici del contratto di diritto pubblico*, op. cit., 131; STICCHI DAMIANI, *La nozione di appalto pubblico*, Milano, 1999, 51. *Contra*, that is on the unsuitability of the quantity and quality difference showing the assumed public character of the amendment in a public contract, see BENEDETTI, *Contratti della pubblica amministrazione*, op. cit. 202.

while in public contracts it cannot be revised by mutual consent²⁰.

Therein the most authentic character of discontinuity with respect to the corresponding civil institutions of *jus variandi* is provided; even if they were to be governed as for the public cases, they could still be distinguished from them because the relating discipline could be derogated. The same principle can be applied to the quantitative (see the limit of a fifth beyond which the variation cannot be imposed by the administration) and etiological (see the typing of the conditions allowing the introduction of a variation) limits supporting the institution of the amendments in the public contracts, which cannot be changed after an agreement because of the potential risks in terms of the effectiveness of the principles of good performance (understood as the economic efficiency of public procurement) and fairness in the market of public assignments²¹.

These considerations show a new meaning of the specialty concept, as an attribute of the public contracts. While traditionally the right of public contracts was considered as a

²⁰ In the recent case-law: Cons. St., sez. III, 9 maggio 2012, n. 2685, www.giustizia-amministrativa.it. Moreover, the mandatory nature of the rules relating to the possible amendment in the public contract was sometimes expressly stressed by the legislator: see for example the former art. 33, law no. 41/1986, which provided for the rules on the prices revision in works contracts, pointing out the invalidity of any contrary agreement.

²¹ See TAR Umbria, sez. I, 7 giugno 2008, n. 247, Urb. app., 2008, 1176 stating that “le varianti in corso d’opera comportano un *vulnus* ai principi della concorsualità e della *par condicio*, come ogni altra ipotesi di rinegoziazione a trattativa privata fra l’appaltante e l’aggiudicatario, e rappresentano dunque una lesione degli interessi legittimi degli altri concorrenti; d’altra parte, in quanto sottratte alla verifica della gara, rappresentano un pericolo per gli interessi della stessa stazione appaltante. In questa luce, la figura della variante in corso d’opera (...) è ammissibile solo come rimedio eccezionale nell’ipotesi che si debba far fronte a sopravvenienze impreviste e imprevedibili” (variants in the course of work involve a *vulnus* referred to the principles of invitation to tenders and to the *par condicio*, as any other case of private renegotiation between the contracting party and the contractor, and therefore represent an injury to the legitimate interests of the other competitors; on the other hand, as excluded from the control of the tender, they are a danger to the interests of the contracting authority itself. In this light, the variation in the course of work (...) is only admissible as an exceptional remedy in the case of unforeseen and unforeseeable contingencies).

special private law as bearing advantage prerogatives (i.e. “privilege”) to the public contractor²², to date it seems more likely to accept a “diminutive” meaning of “specialty”. Specialty is summed up in a reduction of public prerogatives, given the impossibility for the administration to renounce to the *jus variandi* assigned to it by the rules on performance, that is to redefine the content by agreement.

From this point of views, therefore, the situation of the administration, far from taking into consideration the conceptual horizons of supremacy (see above), reminds somewhat of the so-called weaker party, which the common law deprives of some negotiating autonomy (relating to the opportunity of renouncing or disposing of his rights) because of a “congenital” restriction of self-determination freedom. As far as the public contractor is concerned, this limitation is regulated by the function constraint, intended as the need to get public investments and, therefore, as a prohibition to implement anti-economic or excessively risky negotiating initiatives.

²² See RESTA, *Sulla natura speciale del contratto di appalto. Sulla natura speciale del contratto di appalto per l'esecuzione di opere pubbliche e sulla proponibilità dell'azione giudiziaria di adempimento dell'amministrazione*, Foro amm., 1932, II, 189. Consistently with the premise that inspired the public law theory, the author points out that “il noto principio che di fronte ad un potere discrezionale non sussistono diritti subiettivi perfetti, ma solo interessi legittimi, non può conciliarsi con la sussistenza di rispettivi diritti ed obblighi giuridici creati dai contraenti in virtù dell'incontro dei reciproci consensi”. Hence the denial of the contractual character of the public tender. Consistently see VITALE, *Appalti: commento alle note che riguardano l'esecuzione delle opere pubbliche*, Milano, 1938, 10; FRAGOLA, *Il collaudo di opere pubbliche*, Napoli, 1955, 8. Among the critics of the notion of private law, instead AMORTH, *Osservazioni sui limiti dell'attività amministrativa di diritto privato*, Arch dir. publ., 1938, 478-479, who points out that the private law is “fondamentalmente stabilito a tutela degli interessi dei privati, pei quali domina il principio dell'uguaglianza, ove l'amministrazione agisca secondo le sue norme essa deve, per forza di cose, perdere quella condizione di superiorità che le compete altrimenti, per la tutela di quei particolari interessi collettivi che essa persegue”.

4. BILATERAL AMENDMENTS

4.1 Bilateral amendments in private law

The Italian civil law, unlike that of many European countries²³, as well as the main experiences of transnational law²⁴, does not contain any rule under which a party of a

²³ See, in this regard, the German civil code, which now, in absence of agreement between the parties, endorses the judge of the power to amend the contents of the contract become excessively onerous in progress (this is the so-called institution of *Anpassung*). This rule has been introduced by the law on the modernization of the obligations law (*Gesetz zur Modernisierung des Schuldrechts* dated 26 November 2001), which has implemented a well-established case-law attitude already considering as possible the judge's corrective action on the basis of a wide-ranging interpretation of the clause of good faith regulated by the paragraphs 157 and 242 BGB (see AMBROSOLI, *La sopravvenienza contrattuale*, Milano, 2002, 366). For a punctual investigation on the contract content, see RESCIGNO, *La codificazione tedesca della Störung der Geschäftsgrundlage*, in *La riforma dello Schuldrecht tedesco: un modello per il futuro diritto europeo delle obbligazioni e contratti?*, Padova, 2004, 10; DI MEMMO, *Il nuovo modello tedesco della responsabilità per inadempimento delle obbligazioni*, op. cit. 821; CIAN, *Significato e lineamenti della riforma dello Schuldrecht tedesco*, Riv. dir. civ., 2003, 1, 9; TRAISCI, *Soppravvenienze contrattuali e rinegoziazione nei sistemi di civil law*, Napoli, 2003. Consistently see also the recent reform of the Dutch Civil Code (*New Burgerlijk Wetboek - New Civil Code - 1992*) whose art. 11 provides that the judge, on a party's request, may change the contract whenever events occur that do not make it in accordance with justice and equity in the performance of the services under the terms and conditions originally agreed. Of similar content is also the art. 373 of the Greek Civil code dated 1946. On the subject of "forced" renegotiation see also the draft reform of the French Civil code, where it is expected to introduce a rule that, upon the occurrence of contingencies such as to significantly alter the original equilibrium, the judge may order the parties to make a new agreement (see the art. 1335, paragraph 2, of the *avant projet* of the reform of the French obligations law drawn up on the initiative of Professor Catala). On the attempts to reform the French Civil see BOTTONI, *Buona fede e rimedi conservativi del contratto nel sistema francese e nell'avant projet di riforma del diritto delle obbligazioni. In medio stat virtus?*, Rass. dir. civ., 2009, 2, 591; FAUVARQUE-COSSON, *La réforme du droit français des contrats*, Rev. contr., 2006, 15.

²⁴ See the Unidroit Principles, which provide for the famous hardship clause (art. 6.2.3). At this regard, see VOLPE, *I principi Unidroit e l'eccessivo squilibrio del contenuto negoziale*, Riv. dir. priv., 1999, 40. On the transnational codification projects providing for mandatory renegotiation, the projects of codification of the so-called European private law (Lando principles, art. 6.111) and the Code européen des contrats, drawn up by the Academy of the European experts in private law whose leader is Professor Gandolfi, have also to be mentioned.

contract, in the case of events able to alter the economic balance of the contract bilaterality, can claim, including in the courts, the contract renegotiation. This follows from the art. 1467 of the Civil code, providing that the contractor disadvantaged by the contingent event can only get the early termination of the contract, unless the other party voluntarily proposes to modify equitably the contract conditions. This implies, obviously, the absence of a regime of mandatory and enforceable renegotiation.

4.2 Bilateral amendments in the european law of public contracts

Neither the legislation on public contracts provides for any rule devoted to renegotiation both in terms of its feasibility, both in terms of its possible limits, and, finally, with regard to its proceduralisation.

This regulatory gap cannot be closed in any way through the civil law, not only because it, as seen above, has not yet issued any explicit rule with regard to this case²⁵, but also, and above all, because the renegotiation of public contracts meets a topic unrelated to the contracts between private parties, that is the one concerning the possible avoidance of the impartiality rules that govern the contractor choice.

The suggestions from the case-law, in particular that of the European Community, which on several occasions has stigmatized that the renegotiation of essential clauses of the negotiation content often results in surreptitious (and illegitimate) contracts awarded without tender, to the prejudice of third parties aspiring to become contractors, are more

²⁵ In the debate that preceded the codification of 1942, the doctrine about the civil law had formulated authoritative advices and suggestions in favor of positivization of the mandatory amendment of the contract become too expensive. See, in particular, the famous article by ANDREOLI, *Revisione delle dottrine sulla sopravvenienza contrattuale*, Riv. dir. civ., 1938, 309 ff., in which the author argued the need to introduce in the former code a rule requiring the parties to make the renegotiation of the contract, in the case of significant contingencies.

useful.

The Court of Justice, inspired by the recent U.S. federal law²⁶, has proposed over time a dual paradigm of essentiality.

First, the Court considered as diriment to the aim of an amendment its impact on the original economic balance between the benefits derived from a contract. The Court of Luxembourg took into consideration the so-called “scope of the contract test”, which tended to consider as essential, and therefore inapplicable, the amendment suitable to disrupt the contract economy, i.e. the center of gravity of the original bilaterality of the contract²⁷.

In more recent times, however, the European judges adopted a different point of view, which finds the amendment essence (and therefore its unlawfulness) in the outcome of a subsequent prognosis, i.e. an ex-post assessment on the attitude of the amendment to compromise, according to a metaphorical way-back, the originally celebrated impartiality in the procedure selecting the private contractor.

The more recent cases concerning renegotiation accepted the functional criterion (i.e. the pro-competitive one) of the *scope of the competition test*²⁸ to ensure that

²⁶ See J.A. Constr. v. Lehrer McGovern Bovis Inc., 89 P.3d 1009 (Nev. 2004), Chapman Law firm Co. V. United States, 81 Fed. Cl. 323, 2008 U.S. Claims Lexis 92.

²⁷ See Corte di giust., *Commission v. France*, 5 ottobre 2000, C-337/984, Racc., 2000, I, 8377. The adoption of the economic criterion by the European justice is in conformity with the case-law of the Conseil d’Etat, which traditionally has rigorously censored changes which determine the so-called *bouleversement de l’économie du contract initial*, foreseeing the art. 20 of the *Code des marchés publics* (“sauf suggestions techniques imprévues ne résultant pas du fait des parties, un avenant ou une décision de poursuivre ne peut bouleverser l’économie du marché ou de l’accord-cadre, ni en changer l’objet”) (unless except technical unforeseen suggestions not caused by the parties, an amendment or a decision to prosecute affect the market or the amendment economy or change the object).

²⁸ See Corte di giust., *Commissione v. CAS Succhi di frutta SpA*, 29 aprile 2004, C-496/99, Foro amm., 2004, 985;

renegotiation, even if it does not represent an institution expressly regulated by the positive law, is consistent with the principles founding the entire discipline of public contracts, first of all fairness and transparency, in the market of orders.

4.3 Bilateral amendments in the national law of public contracts

The rules of the domestic law relating to performance provide for a further confirmation of the greater persuasiveness of the functional (i.e. pro-competitive) meaning of the concept of amendment essentiality. A first proof of the greater “harmony” of the regulations in force with a pro-competitive paradigm of essentiality consists in the so-called worsening amendments, that is those involving a review of the negotiating content not profitable for the private contractor.

If the pro-competitive meaning of essentiality is accepted, the worsening amendments cannot be considered as essential²⁹, being unsuitable to give any unlawful advantage directly to the contractor. The domestic positive law confirms this hypothesis: the decree no. 163/2006 and the d.P.r. no. 207/2010, in fact, form a regime in which the application of the variant in decrease is significantly easier than the application of the supplementary one, which implies not only a greater outlay of public money, but also (and consequently) the attribution of a “benefit” potentially in contrast with the principles of impartiality that govern public assignments to the private contractor.

The same rigidity towards improving amendments can be found in the case of the

id., *Presstext Nachrichtenagentur GmbH*, 19 giugno 2008, C-454/06, www.europa.eu. Consistently the European Commission in the communication no. C(2007) 6661 on the application of the European law of the public contracts and concession to the public-private partnerships (PPPI).

²⁹ See MARCHETTI, *Atto di aggiudicazione e potere di rinegoziazione della pubblica amministrazione*, *Giorn. dir. amm.*, 2003, 505.

assignment of the so-called supplementary works and services (art. 57, decree no. 163/2006), also subjected to a number of restrictions and prohibitions³⁰ precisely imposed by the need of countering the potential anti-competitive nature of the “additive” amendment.

And again, a similar restrictive regime characterizes the discipline of the temporary amendments, as in the case of the art. 23, paragraph 2, of the law no. 62/2005 stating a prohibition of extending the duration contracts. The extendible character, in particular, is permitted by the rule in question only in respect of two limitations. The first is of chronological kind: the extension was allowed only for contracts already expired or expiring within six months after the entry into force of the law dated 2005, provided that it does not in any case exceed six months and that the next tender was published within 90 days after the entry into force of the same law. The second limitation concerns the aim: the extension was in fact only permitted as it was necessary for the preparation of the tender procedures suitable for the assignment of new contracts.

³⁰ Particularly timely and comprehensive is the opinion no. 19 dated 29 April 2010 (accessible on the website of the Supervisory Authority for public contracts) where it is noted that “possono ritenersi complementari [e dunque affidabili in via diretta, ove siano rispettati gli ulteriori requisiti legali] soltanto le opere che da un punto di vista tecnico costruttivo rappresentano un’integrazione delle opere principali” (can be considered as complementary [and therefore reliable in a direct way, where additional legal requirements are met] only those works that represent a relevant integration of major works from a technical point of view). These works have to be included in the original work-plan, lacking as such of their own individuality distinct from that of the original work. In this regard it should also be pointed out that the norm on similar services is applicable only in respect of contracts originally assigned through an open or restricted procedure (as provided by art. 57, paragraph 5, lett. b). The rule can be explained taking into account the legislator’s intention to contain the anti-competitive risks inherent the institution of similar services by providing, in fact, that only those operators that have already been successfully passed a competition based on the maximum openness and competitiveness can benefit from this direct assignment. In the case-law see TAR Lombardia, sez. III, 3 novembre 2004, no. 5575, Foro amm., 2004, 2838, where the administrative judge considered as illegitimate (since not subject to art. 57, paragraph 5, letter. a) decree no. 163/2006) the assignment to the contractor originally selected for the construction of road junctions in addition to those included in the content of the original contract.

Leaving aside the more technical aspects of the various rules mentioned so far, the following conclusion can be drawn: the positive law shows a regime of greater openness to the worsening/"diminutive" amendments, while providing for stricter rules in the cases of "additive"/improving amendments. This confirms that the problematic nature of the post-assignment amendments emerges especially when the amendment becomes the means to assign a contract "supplement" (that is a new and distinct assignment) to the private contractor.

In confirmation of the preference of the "diminutive" amendments, that is those involving lower outlay for the administration, the recent reform called spending review is to be reminded. The reference concerns the art. 1, paragraph 13, of the decree no. 95 dated 6 July 2012, which assigns a contractor the right to back out of contracts that the private contractor refuses to renegotiate "on a fall", that is in order to adapt the case to the conditions - the most convenient for the client - proposed by the CONSIP after the completion of each contract. The rule, therefore, not only allows the application of amendments worsening the negotiating situation of the private contractor, but also strongly stimulates it, giving the client a right of withdrawal as a deterrent against uncooperative attitudes by the private party.

The thesis that identifies the essential nature of amendment, and therefore its unlawfulness, depending on the renegotiation attitude aiming at giving unfair advantages to the private contractor, selected through a procedure not consistent with the actual objective of the executed contract, is corroborated even by such a recent reform.

Accepting this assumption, even outside the regulated institutions, some further amendments characterized by essentiality, considered as functional/pro-competitive, can be found.

The adoption of the pro-competitive standard leads, for example, to consider always as essential the amendments that result in an increase in the value of the contract suitable to raise the limit of the European relevance. In this cases, the economic impact of the amendment introduced in progress is not relevant as a factor of upheaval of the report

economic balance, but as a “symptomatic figure” of the potential anti-competitive nature of the case, which has been entrusted by the - less stringent - sub-threshold rules.

On the other hand, the acceptance of the pro-competitive parameter should lead to consider as practicable all the amendments that have been somehow “budgeted” in the tender, of course provided that it is formulated in order to actually make aware the actual or potential competitors of the exact content of the amendment to be introduced in progress³¹.

Even in the case of mixed contract, that is marked by performances attributable to several sectors (works, services, supplies), the concept of essentiality plays an important role. In line with the contents of the directive no. 18/2004, the art. 14 of the Code of public contracts provides that, in order to determine the sector rules applicable at the award stage, the main field from the functional point of view is to be taken into consideration³²; however, as a presumptive index of this functional prevalence, the parameter of the

³¹ See Corte di giust., Commissione europea v. Spagna, 22 aprile 2010, C- 423/07, Racc. 2010, I, 3429. Even in the earlier decision issued by the Commission in relation to the contract concerning the construction of the London underground, among other arguments to prove the legality of the renegotiation procedure implemented by the contracting authority, the fact that “the possibility of post selection changes was made known to all bidders in advance” (decision of the Commission dated 2 October 2002 C(2002) 3578, GUCE C309 dated 2002, 14) is mentioned. On the topic see ZANETTINI, *Le procedure di aggiudicazione degli appalti pubblici nel Regno Unito, in Le gare pubbliche: il futuro di un modello*, op. cit., 248 ff.

³² Before the entry into force of the Code of public contracts, the criterion for identifying the sector rules to be applied in the assignment was of economic nature. The most significant reference is art. 1, law no. 415 dated 18 December 1998, (so-called Merloni-ter), stating that “nei contratti misti di lavori, forniture e servizi e nei contratti di forniture o di servizi quando comprendano lavori accessori, si applicano le norme della presente legge [i.e. le norme sul settore dei lavori] qualora i lavori assumano un valore economico superiore al 50%” (in the mixed contracts for works, supplies and services and contracts for supplies or services when they include ancillary works, the rules of this law [i.e. the rules on public works] where the work value in over 50%). The quantitative criterion set by the Merloni law had led to the opening of an infringement procedure (no. 2001/2182) against Italy, because of the contrast of the domestic legislation with the functional criterion stated by art. 16 (*considerando*) of the so called Direttiva servizi (later confirmed by directive 2004/18).

economic proportions between the sector importance of the order components is to be exploited. Therefore, the amendment that, subverting these economic proportions, i.e. acting directly on the functional importance of each sector component, alters the relationship between the performance considered to be deducted in the assignment in hand, making *ex post* the selection procedure originally adopted for the identification of the contractor illegal, is to be considered as essential.

Finally, considering that the amendment essentiality reflects the elusive potential of the same amendment, even the relationship between the renegotiating character of the contract and the extent of the “rigidity” of the celebrated assignment procedure, understood as more or less opening to the contribution of bidders in determining the negotiating content, is to be taken into consideration. The amendment essentiality, in fact, is naturally intended as insisting especially on the amendments affecting the parts of the contract which the creative/proponent tenderer contributes to, as suitable to orient the assignment of the contract to him. In other words, the procedure flexibility seems as inversely proportional to the renegotiation character of the contract signed at the end of the same procedure: the greater the flexibility of the assignment stage, the lower the margins of amendment of the next contract.

5. THE PROTECTION OF THIRD PARTY AGAINST THE ELUSIVE AMENDMENTS

If it is agreed that the investigation on the amendment essentiality affects the relevance of the assignment fairness, the problem that arises therefore is to define how to access to the protection of the parties damaged by renegotiation, i.e. the not-assignee third parties. At this subject, there are two controversial profiles.

The first concerns the third parties provided with an appropriate active legitimization. In other words, in order to enjoy protection, the prior participation in the contract procedure or whether the so-called potential bidders are to be protected are to be checked, with related risks of further objectification of the contracts rite. The European law,

in line with the U.S. case law, extends the protection enjoyment also to the so-called *perspective bidders*, provided that they prove that, if the tender had originally been banished in presence of changed conditions (i.e. the conditions resulting from renegotiation), they would have had serious *chances* of being assignee of a contract³³.

The domestic case-law is not so clear, basically anchored to the legitimating assumption of the prior participation in the assignment procedure³⁴.

The second uncertain profile concerns the possible remedies. The third parties, as such, are not provided with appropriate instruments of civil law to counter the renegotiation because of the rule of *res inter alios acta*. The procedures theoretically feasible, for the third party, seem rather to refer to two alternative options.

The first is the belief that the third party, if considered as damaged by an elusive renegotiation of the tender principle, can appeal at the administrative court the elusive modification, as an implicit act of assignment in favor of the already assignee of the original contract³⁵.

³³ Corte di giust., *Presstext Nachrichtenagentur*, op. cit. Among the most relevant researches, see BROWN, *When Do Changes to an Existing Public Contract Amount to the Award of a New Contract for the Purposes of the EU Procurement Rules? Guidance at Last in Presstext Nachrichtenagentur GmbH (Case C-454/06)*, *Public Procurement Law Review*, 2008, 253. As far as U.S., see: *Northorp v. Grumman*, 5Fed Cl. 443, 456, 2001; *HDM Corp v. U.S.*, 1 June 2005 Lexis 431; *CCL. Inc. v. U.S.*, 3Fed. Cl. 780, 79, 1997; *Memorex Corporation*, 23 October 1981, 81-2 CPD 334.

³⁴ For an overall investigation on the matter, see Ad. Plen., 7 aprile 2011, n. 4.

³⁵ See Goisis, *Principi in tema di evidenza pubblica e di rinegoziazione successiva del contratto: conseguenze della loro violazione sulla serie pubblicistica e privatistica, autotutela e riparto di giurisdizione*, *Dir. proc. amm.*, 2011, n. 815. The author is in favor of the appeal of the implicit act (i.e. the renegotiation acting as assignment) from whose acceptance would result, according to the author, the invalidity (a form of nullity) of the contract entering in the burdened act. The solution of the amendment appeal, understood as a genuine administrative measure, has been widely tested by the French legal system, which over the time has applied the suggestions

The second is instead the idea for which the renegotiated contract can be directly censured, making it null and void before the ordinary courts for violation of mandatory rules³⁶ (those which require the celebration of public procedures consistent with the object and the entity of the assignment).

The proposed solutions are both theoretically appropriate to secure the same result, i.e. the enjoyment of the protection by parties unrelated with the contract. However, there is sufficient evidence to suggest that the first option is more in line with the inspiring lines of

attributable to the theory of actes détachables (literally “separated acts”). In order to understand the basis for the separation mechanism just mentioned it should be stated first that in France the dispute on the contrat administratif is assigned to the juge du pleine contentieux, who, until recently, could only be called by the parties entering in a contract. This circumstance raised to a two problems. The first concerned the non-allottee third party, which, as such, could not act in the presence of the above mentioned judge. The second concerned the type of solution that could be given by the judge in question, which, in the phase of stipulation, could decide on the validity of the contract but not undo individual modifying initiatives, as the juge administratif could have done in the presence of an action pour excès de pouvoir. In this context, the recourse to the separability archetype proved to be an effective tool to avert the risk of lack of protection. Paradigmatic in this sense: Cons. Et., Ass., 2 février 1987, Société TV6, RFDA, 1987, 29, stating that “le recours pour excès de pouvoir n’est pas recevable contre le contrat administratif mais il l’est dans certaines conditions contre les actes détachables du contrat notamment. En l’espèce, le REP- est recevable contre les actes postérieurs la conclusion du contrat” (the appeal for abuse of power is not admissible against the administrative contract but, under certain conditions, against the removable acts of the contract, i.e. the REP is admissible against acts subsequent the contract conclusion).

³⁶ See MARRA, *Rinegoziazione del contratto dopo l’aggiudicazione e riparto di giurisdizione*, Dir. proc. amm., 2004, 1168, who argues that the nullity in question should consider the ordinary judge as the judge who should know the circumstances related to the entering in force of the contract. On the front of case-law, the reference to the claims, somewhat contradictory, of the Council of State in the famous case of the milk plant (sentenza del 14 luglio 2003, sez. V, n. 4167, in Cons. Stato, 2003, 1586), where the nullity of the contract affected by renegotiation (characterized in terms of essentiality) is argued on the basis of the alleged inability of action by the administrations with respect to the drawing up of renegotiating agreements, cannot be omitted. Of course, in addition to denying the principle, now accepted, of the overall capacity of the public administration according to private law, the judges’ thesis also refutes the civil law rule of invalidity of a contract drawn up by a legally incompetent person, which is voidable at the initiative of one legally incompetent party (see articles 1425 and 1441 Civil code).

the existing regulations in the field of public contracts. The solution of nullity would introduce, in fact, a remarkable stickiness between the public and the negotiating phases, in contrast to the necessity of keeping them as separated, as recommended by the European law, for example through the introduction of the *standstill* terms.

In contrast, the appeal of the elusive amendment, as equivalent to a direct assignment, is more persuasive, since oversees a more general principle of equality in the enjoyment of judicial protection. In this way the legal system would prepare the same reaction tools for both the explicit and illegitimate acts of direct assignment and for the surreptitious initiatives of assignment without competition. Otherwise, if the solution of nullity is adopted, a regime of acquisitive action could be enjoyed - for each amendment corresponding to an implicit direct assignment - whereas, in the case of assignments without tender carried out within specific administrative acts, the protection should accept the stringent limits of forfeiture in force in the tender rite.

6. COMPARATIVE AND DE JURE CONDENDO PERSPECTIVES

In the French legal system there is a rule regulating the opportunity of making amendments relevant from the economic point of view. The article in hand is art. 8, law no. 127 dated 8 February 1995, establishing that any proposed amendment to a public contract involving a price increase of at least 5% of the original price should be subjected to a mandatory but non-binding opinion by the tender commission who had decreed the assignment.

The choice of regulating an amendment sub-procedure allows to ensure a careful consideration of a decision full of problematic implications also in the extra-contract field, as the review of the negotiating content is. In particular, the decision to involve in the decision-making process the original tender committee shows the awareness of the attitude from the post-assignment amendments to undermine the impartiality of the original selection of the tenders.

However, the sub-procedure in question foresees a decision-making process within the contracting authority. In other words, no institution designed to submit the amendments of the negotiating content to a minimum standard is foreseen, so as to enable potential counterparties to oppose to them not only in the courts, but also through the participation in the decision-making process concerning the amendment with desirable deflationary effects of litigation.

The introduction of the above-mentioned principle of information would constitute a goal of considerable interest for the Italian legal system, too, which, unlike the French one, provides for no discipline concerning the revision sub-process³⁷.

Taking into account these considerations, special attention is to be paid to the proposal for the reform of the directives unified in 2004, when for the first time the problems related to the renegotiation of the public contract in progress (see the art. 72 of the proposal for a directive of the European Parliament and of the Council presented in Brussels on 20 December 2011) were taken into account.

The new rule, indeed, does not create significant new features: it doesn't impose any system of making the amendment public nor strictly formulates the notion of essentiality with respect to which the indices developed by the case-law are simply reported. In particular, the following amendments are classified as essential, and therefore unlawful:

1. those introducing conditions which, if they were introduced in the initial

³⁷ The failed proceduralization of the amending decisions was also used as a useful topic in terms of allocation of jurisdiction on post-assignment initiatives. See ALESIO, *Il Consiglio di Stato distingue l'esecuzione dall'adempimento del contratto. Privatizzazioni, c'è giurisdizione esclusiva del G.a.*, Dir. e giust., 2003, 32. The Author is inclined to the jurisdiction of the civil judge (a.g.o.) on the renegotiating cases, mentioning, as an element in favour of that thesis, precisely the failure to make an appropriate procedural discipline: it is a circumstance that would denounce the reference of the case in question to the dialectics between the credit situations of the parties entering in a contract.

tender, would have allowed the selection of tenderers different than those initially selected or would have allowed the assignment of the contract to another tenderer;

2. those changing the economic balance of the contract in favor of the private contractor;

3. those significantly extending the scope of the contract to encompass supplies, services or works not originally foreseen.

There are indeed wide fields of application, whose scope is, however, significantly restricted by the limitations, exceptions and derogations listed in the other paragraphs of the same article.

The question concerns the usefulness of this type of positivization that, rather than stating a certain rule, proposes a series of mere symptomatic hypotheses, whose actual functioning seems anyway regulated by the case-law.

It seems to be a sort of “manifesto-rule” which wants to testify the European attention to the issue of renegotiation and the awareness of the risks associated with it, without formulating a clear rule of conduct.

It is, therefore, a pseudo-positivization, which does not limit at all the role of the case-law, still considered the most appropriate body to investigate the changing nature of the elusive occurrences in renegotiation.