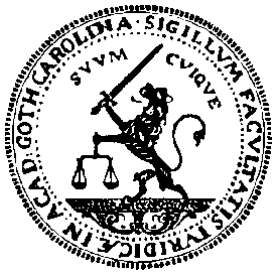

FACULTY OF LAW

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Illegal Direct Procurement in Finland

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Contents

Summary

The 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 was implemented in Finland by the Act on Public Procurement and Concession Contracts (1397/2016, hereinafter "Procurement Act") which entered into force on 1 January 2017. The most important obligation of the Procurement Act is the obligation to organise a competitive tendering. Failure to comply with this requirement without the grounds set out in the Procurement Act leads to an illegal direct procurement. The Procurement Acts list exhaustively the criteria for direct procurement as well as the situations in which it is not obligatory to organise a competitive tendering as the procurement does not fall within scope of the Procurement Act. These situations are always interpreted strictly, which is why it is likely that a procurement where a competitive tendering is not organised turns to be an illegal direct procurement. The European Court of Justice considers illegal direct procurement to be the most serious breach of European Union law in the in the field of public procurement.

This thesis does not approach the concept of illegal direct procurement by only using legal dogmatic but presents also empirical research in order to uncover what kind of procurements are in practical terms most often condemned to be illegal. For this purpose, the judgements of the Market Court of Finland from 2011–2018 related to direct procurement and to the obligation to organise a competitive tendering are examined.

Every action has consequences and the latter part of the thesis focuses on the risks resulting from making an illegal direct procurement. In the concluding chapter, some personal views on what kind of development can be expected and what kind of changes could be made to the legislation in the future are given.

Preface

According to the original plan, I was supposed to submit this thesis and graduate during spring 2017. However, this did not happen as I have been working almost full time from the beginning of 2017, completed an aptitude test to achieve the recognition of foreign qualifications in law, and pursued soon another LL.M. degree. As is customary to say, better late than never.

I would like to thank all those who have provided support for this research in its various stages. First of all, I would like to thank my thesis supervisor, PhD Julian Nowag, who proved to be the best possible supervisor to me. He gave me constructive criticism and suggestions but at the same time he allowed me my own space and time to finish this thesis.

Thanks are also due to PTCServices Oy and especially its CEO Saila Eskola who trusted in my abilities and offered me the opportunity to work part-time and write this thesis simultaneously. It is no exaggeration to say that I would not have been able to conduct such an in-depth study without my traineeship at PTCS and the support I received during it. Special thanks go to my former colleagues who responded to my survey.

Finally, I would like to thank and express my great appreciation to Max Jansson (Head of Research at the Finnish Competition and Consumer Authority) for taking the time and contributing valuable points of view based on his wide knowledge on and experience in public procurement.

This thesis is dedicated to my wife Noora and to my daughters Minea-Aurora and Mimosa-Amanda with love. They made this thesis and my studies abroad possible

25 May 2019 - Vantaa, Finland

Aarne Puisto

Abbreviations

EU	European Union
FCCA	Finnish Competition and Consumer Authority
FMC	Market Court of Finland
FSAC	Supreme Administrative Court of Finland
GP	Government Proposal
KHO	Supreme Administrative Court of Finland
KKV	Finnish Competition and Consumer Authority
MAO	Market Court of Finland
Procurement Act	Act on Public Procurement and Concession Contracts (1397/2016)
Procurement Directive	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
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Subject Matter and Background

Public procurement refers to the purchase of goods and services and the outsource of works by public funds. In the European Union (hereinafter "EU") the total value of public contracts is estimated to be over EUR 2,000 billion[1]. Finland used around EUR 35 billion on public procurement in 2013, nearly one-fifth of Finland's GDP[2]. The value of procurements made in Finland has increased considerably as in 2004 the estimate was only 20 billion euros which represented about 15% of the GDP[3].

Contracting entities, such as states, municipalities and agencies, may always carry out the procurement themselves, but that does not fall under the procurement legislation[4]. Procurement legislation consists of procedural rules that determine *how* to procure, not *what* to procure. The aim of procurement legislation is neither to direct a contracting entity as to whether carry out a procurement itself or to purchase the necessary services or products from an external organization[5].

The Procurement Directive[6] aims for its part to deepen the integration of the internal market of the EU[7]. Pursuant Recital 1 of the Procurement Directive, contracting entities shall follow particularly the free movement of goods, freedom of establishment and the freedom to provide services. Drawing up the provisions of the Procurement Directive was necessary to further open up public procurement to competition. The Procurement Directive was

[1] Petrisor and Badia (2013), p. 113.
[2] *European Commission* (2016) and *Ministry of Economic Affairs and Employment of Finland* (2017).
[3] Kaarresalo (2007), p. 9.
[4] Kontio and others (2017), p. 64.
[5] Eskola and others (2017), p. 109. See also Government Proposal (hereinafter "GP") to the Parliament for Legislation of Procurement Procedure 108/2016 ls, p 70.
[6] Directive 2014/24/EU.
[7] See Pekkala and others, (2017), p. 24.

implemented in Finland by the new Procurement Act which entered into force on 1 January 2017. Section 1 of the Procurement Act embodies its most important obligation: contracting entities shall arrange competitive tendering of their procurements[8]. The Procurement Act, however, provides certain exceptions to the general obligation to arrange a competitive tendering when contracting entities may use direct procurement[9]. If a contracting entity makes a procurement as a direct procurement without the grounds prescribed in the Procurement Act, the action constitutes illegal direct procurement. The European Court of Justice (hereinafter "ECJ") considers illegal direct procurement the most serious breach of EU law in the in the field of public procurement[10].

1.2 Purpose and Research Questions

This thesis aims to answer the following research questions:

1) *When does procurement, for which a competitive tendering has not been organised, turn out be an illegal direct procurement?*
2) *What are the most typical situations in which a contracting entity makes an illegal direct procurement?*
3) *Are the risks resulting from making an illegal direct procurement high enough?*

Direct procurement is not by any means an unexamined subject. However, previous studies[11] on direct procurement have rather examined when it is possible to make a direct procurement. That is why the matter has mainly been examined only through direct procurement criteria laid down in the Section 40 of the Procurement Act. However, as the Procurement Act obliges to organise a competitive tendering only in procurements falling

[8] GP 108/2016 ls, p. 70.
[9] For clarity, it should be noted that the term "direct procurement" does not appear in the Procurement Directive, but it is only used in Finnish procurement legislation. See *Unofficial English Translation* (2016). However, direct procurement refers directly to the use of the negotiated procedure without prior publication laid down in Article 32 of the Procurement Directive. In EU context, the term "direct award of contracts" is also sometimes used. The term "direct procurement" was introduced in the context of the Act on Public Contracts (348/2007) by stating that direct procurement describes better the nature of that procedure. See GP 50/2006 ls, p. 30.
[10] See Recital 13 of the Directive 2007/66/EC.
[11] E.g. Parikka and Pökkylä (2011).

within its scope, some of procurements can be made without organizing a competitive tendering[12]. There are several cases when a procurement that the contracting entity has considered to fall outside the scope of the Procurement Act turns out to be an illegal direct procurement as competitive tendering was not organised. Furthermore, a procurement contract may not be modified in any substantial respect during the agreement period without organizing a new competitive tendering. Thus, this thesis aims to codify the situations when a procurement turns out to be an illegal direct procurement. Therefore, when examining case-law, the focus here is on what is illegal.

Finally, to answer the third research question, risk can be considered to consist of consequence and likelihood[13]. Thus, first of all, it must be clarified, what are the potential consequences of getting caught with an illegal direct procurement. Secondly, it must be evaluated what is the likelihood of an illegal direct procurement being discovered.

1.3 Structure and Delimitations

This thesis is divided into five chapters. After this introduction chapter this thesis provides a short overview of the history and the current state of public procurement legislation in the EU and Finland. The most important rules for illegal direct procurement are also reviewed in the second chapter. The third chapter aims to answer the first and the second research questions, in other words, to find out what are the most typical situations in which a contracting entity makes an illegal direct procurement. For this reason, different situations are examined through the Procurement Directive and the Procurement Act together with case-law of the ECJ, the Supreme Administrative Court of Finland (hereinafter "FSCA"), the Market Court of Finland (hereinafter "FMC") and the Finnish Competition and Consumer Authority (hereinafter "FCCA"). The third research question regarding the risks resulting from making an illegal direct procurement will be dealt with in the fourth chapter. In addition to providing a summary of the findings of

[12] Halonen (2015a), 39. The scope and limitations of the Procurement Act are laid down in Chapter 2 of the Procurement Act. See also GP 108/2016 ls. 54.
[13] Rae (2011), p. 40.

this thesis in the fifth, concluding chapter, I will give some personal views on what kind of development can be expected and what kind of changes could be made to the legislation in the future.

This thesis will not examine reasons why a contracting entity may choose to make a direct procurement instead of organizing a competitive tendering. I will not focus on what is the typical value of illegal direct procurements[14] or whether they are made in particular industry sectors. I will neither examine the type of contracting entities, for instance, whether illegal direct procurements are made by state agencies or municipalities or what is the size of contracting entities. Due to space limitations set on this thesis, the fourth chapter will mostly focus on administrative sanctions and mainly mention the other possible consequences, such as private damages sought from general courts.

This research is solely focused on examining the topic under the Procurement Act and for this reason, the Act on Public Contracts in the Fields of Defence and Security (1531/2011)[15] and the Act on Public Contracts and Concession Contracts by entities operating in the water, energy, transport and postal services sectors (1398/2016)[16] will not be examined in more detail. However, the basic principles are very similar.

1.4 Methods, Materials and Sources

This thesis will use both legal dogmatic and empirical research as its research methods. Legal dogmatic interprets and systematises law in force[17]. In addition to the existing legal norms, this thesis uses legislative history, legal literature written on the subject, and especially case-law. Empirical research method was chosen as it can be used in describing case-law.

[14] According to *Jukka*, the higher the transaction costs associated with organizing a competitive tendering, the more attractive it is to establish an in-house entity. See Jukka (2018), p. 357 and 361. From this it can be concluded that also the use of direct procurement is more attractive in the case of procurements with a very small value (i.e. procurements just above the national thresholds), where the transaction costs are fairly high in relation to the total value of the procurement.
[15] Based on the Directive 2009/81/EC.
[16] Based on the Directive 2014/25/EU.
[17] Hirvonen (2011), p. 25.

Empirical research can be divided into quantitative and qualitative research. They can be used in parallel by focusing the research on statistical analysis and supplementing it with a descriptive analysis of interview material.[18]

The first research question will be answered by using legal dogmatic. This requires clarifying the concepts and doctrines of different kinds of illegal direct procurements in force. In order find out what kind of procurements are in practical terms most often condemned to be illegal and to answer to the second research question, the judgements of the FMC from 2011–2018 related to direct procurement and to the obligation to organise a competitive tendering are examined. Years 2011–2018 were chosen as the Directive 2007/66/EC[19] was implemented in Finland in 2010. This legislative amendment significantly improved remedies against illegal direct procurements as will be presented later in this thesis.

Illegal direct procurements do not often become public information, because a competitive tendering is not organised. For this reason, a survey to experts of PTCServices, Finland's leading public procurement consultant and trainer, was conducted. I was interested to find out, what kind of questions they are asked about regarding the conditions for the use of direct procurement, how they evaluate and point out risks in those situations to the contracting entities, and whether their answers support the collected statistics. The survey consisted of nine questions. The purpose of question 1 was to find out how often experts are asked about the possibility use direct procurement or otherwise to make a procurement without organizing a competitive tendering. The following eight questions were in pairs; the even questions related to the direct procurement criteria and the odd questions to other reasons not to organise a competitive tendering. Questions 2 and 3 examined what reasons have been asked about at all from experts and questions 4 and 5 asked the most common ones. Questions 6 and 7 focused on finding out in which situations the experts most often estimate that direct

[18] Keinänen and Väätäinen (2016), p. 251 and 254.
[19] The Directive requires Member States to ensure that decisions taken by contracting entities can be subject to effective review and, in particular, as quickly as possible.

procurement can be used. On the contrary, questions 8 and 9 asked in which situations the experts most often find that the procurement cannot be carried out organizing a competitive tendering. The questions and answers of the survey are presented in Annex 1.

2 Public Procurement in the European Union and in Finland

2.1 Public Procurement in the EU

The public procurement legislation in EU dates back to the 1970s, when the first directives were adopted[20]. Already at that time, the aim was to achieve a more competitive internal market, the need for which increased in the 1980s when the US and Japan increased their competitiveness[21]. The next overall reforms were seen in the early 1990s when services, goods and works were regulated by their own directives[22] and in 2004 these three were integrated into one directive[23]. The Procurement Directive introduced in 2014 is largely based on the previous directive from year 2004 in which rules were already extremely detailed[24]. It is not appropriate to go through all the changes introduced by the Procurement Directive; instead, those relevant to this thesis will be presented. Rules on direct procurement itself do not differ significantly from the previous ones.

The most significant change related to direct procurement is that modifications made to an agreement during the agreement term are now regulated in Article 72 and the matter is no longer based solely on case-law. The landmark case had been *Pressetext* where the ECJ had stated what kind of amendments are considered substantial and what kind of amendments should therefore oblige the contracting entity to organise a new competitive tendering[25]. In addition to the codification of *Pressetext*, Article 72

[20] Directive 71/305/EEC and Directive 77/62/EEC. Already before these directives, it was prohibited to require the use of national products and to prohibit the use of foreign products in public procurement. See Directive 66/683/EEC and Directive 70/32/EEC.
[21] Pekkala and others (2017), p. 24.
[22] Council Directive 92/50/EEC (services), Council Directive 93/36/EEC (goods) and Directive 93/37/EEC (works).
[23] Directive 2004/18/EC.
[24] Pekkala and Pohjonen (2010), p. 28–29 and Pekkala and others (2017), p. 24.
[25] C-454/06 *Pressetext*, paras 35–37 and 47.

introduced situations where a contract can be modified. Prohibited and permitted amendments will be examined in more detail in sub-chapter 3.6.

Directive 2004/18 did not contain rules on procurements made between public authorities, although the ECJ had issue a precedent already in 1999 in connection with the case of *Teckal*[26]. As the case-law was interpreted differently between Member States and even between contracting entities, provisions regarding so-called *in-house* procurements were included in the Procurement Directive[27]. In *Teckal* the ECJ required, among other things, that the in-house entity[28] must carry out the essential part of its activities with the contracting entity or entities exercising control over it. In Article 12(1), the term essential part was also given a numerical value: more than 80%. In-house procurement will be examined in sub-chapter 3.7.

Article 83 requires Member States to ensure that the application of public procurement rules is monitored. For this purpose, the FCCA was tasked with supervision of legality of public procurement. The supervision over illegal direct procurements in Finland will be dealt in the next sub-chapter.

2.2 Public Procurement in Finland

Finland did not join the European Union until 1995. However, EU-level procurement regulatory obliged Finland already a year earlier, as European Economic Area agreement entered into force in 1994[29]. The first national procurement act was enacted in 1992[30] but there had been some public procurement regulatory in Finland already since the beginning of the century[31]. It is worth mentioning that the national threshold values were significantly raised in connection with the new Procurement Act[32]. As the

[26] C-107/98 *Teckal*, paras 50–51.
[27] Recital 31 of the Procurement Directive. See also De Koninck, Ronse and Timmermans (2015), p. 23–27.
[28] For example, a city-owned subsidiary that provides services for the city.
[29] Kaarresalo (2007), p. 4.
[30] Public Procurement Act (1505/1992).
[31] Karinkanta and Lahtinen (2017), p. 14.
[32] The thresholds were raised as the costs of organizing a competitive tendering for a contracting entity had often been unreasonably high in relation to the value of the procurement. The participation in a competitive tendering also entails costs for suppliers,

Procurement Act does not apply to procurements the value of which is below the national threshold values, contracting entities do not need to organise a competitive tendering for such procurements. The Procurement Act is largely identical in substance to the Procurement Directive, but it also has its own special national characterises.

A contracting entity may be ordered to pay a compensatory fine to a supplier that would have had genuine prospects of winning the competitive tendering under a correct procedure. It is therefore a prerequisite that there has been an error in the procurement procedure and without this error, the appellant would have had a genuine opportunity to become the supplier. The compensatory fine is applicable to situations where the procurement decision cannot be annulled and the fine may not exceed 10% of the value of the procurement agreement without special cause. The compensatory fine is a purely national invention as similar remedy does not exist in the Procurement Directive.[33]

Although the in-house rules became a part of EU procurement legislation only in the new Procurement Directive, in Finland they were already included in the Act on Public Contracts (348/2007)[34]. However, at that time the percentage limit was not set for an essential part of activities. Based on case-law, it had stabilised in Finland at around 90%[35]. The new Procurement Act sets stricter limits for in-house entities than the Procurement Directive[36]. Pursuant to Section 15(1) an in-house entity may not perform more than 5% of its business operations with parties other than the contracting entities that exercise a controlling interest over it. Unlike the Procurement Directive, the Procurement Act sets also a euro-denominated limit as these business

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which had reduced the interest in public competitive tendering. See GP 108/2016, p. 51 and 114. See Section 25 for national threshold value and Section 26 for the EU threshold values.

[33] Eskola and others (2017), p. 630–637 and GP 190/2009 p. 23 and 69.

[34] See Section 10.

[35] C-295/05 *Asemfo*, para 63. However, this was not an absolute limit, and e.g. in MAO 456/11 the FMC accepted that 12% of sales were made also to other parties. Cf. MAO 50/17 where the FMC ruled that 14% of sales made to other parties was too much.

[36] Stricter limits were considered necessary as the Finnish public sector is quite extensive, and already a few percent of sales may mean millions of euros. This could distort competition and thus be contrary to competition neutrality. See GP 108/2016 ls, p. 101.

operations may be not more than EUR 500,000 per year.[37] In addition to Finland, only Poland has set stricter limits on in-house procurements[38].

The supervision over illegal direct procurements intensified significantly when the FCCA was empowered to monitor the legality of public procurement, in particular direct procurement, from 1 January 2017 onwards. Before that, there was no authority in Finland that would have on its own initiative overseen the lawfulness of procurements[39]. The primary purpose of the monitoring is to intervene in illegal direct procurements which have not been notified at all[40]. However, the supervision is not aimed to replace the ordinary review procedure that the FCCA would seek on behalf of companies, but only to supplement this review procedure[41]. The FCCA investigates matters on its own initiative and based on requests for measures submitted. The FCCA, however, may conclude after a preliminary assessment that the request for measures does not give rise to further action and close the case without issuing an appealable decision[42]. So far, only a part of the requests for measures and other kinds of tips submitted to the FCCA have concerned alleged illegal direct procurements[43]. In some cases, it has been revealed that a competitive tendering has been organised or that the procurement has not exceeded the national threshold values[44]. The sanctions which the FCCA can impose contracting entities breaching the procurement legislation will be presented in chapter 4.

[37] Sections 15(3) and 15(4) provide two exceptions, in other words, mitigations to the above-mentioned limits, but it is not appropriate to examine them further in this context. The limits entered into force on 1 January 2019. Before that (In 2017 and 2018) the limit was 10% without any euro-denominated limit. The 10% limit is still applied for in-house entities in the field of social and health services until 31 December 2021.
[38] In Poland an in-house entity may not perform more than 10% of its business operations with parties other than the contracting entities that exercise a controlling interest over it. See Hartung and Kuźma (2018), p. 174.
[39] Määttä and Voutilainen (2017) p. 445–449.
[40] In addition, intentionally inadequate or ambiguous procurement notices are comparable with illegal direct procurements. See GP 108/2016, p. 231
[41] GP 108/2016 ls, p. 231–232.
[42] This is due to fact that the rights, interests or obligations of the submitter are not affected by processing the request for action. See Kontio and others (2017), p. 375, GP 108/2015 ls, p. 232–233 and 242. This restriction is laid down in Section 164 of the Procurement Act.
[43] Taurula (2018), p. 128.
[44] Taurula and Ruuskanen (2018), p. 241.

2.3 Direct Procurement in Finland

As noted briefly above, in direct procurement the contracting entity negotiates the terms and conditions of a procurement agreement with its selected supplier without prior publication of a contract notice. *Kuusniemi-Laine* and *Takala* define direct procurement as a procurement procedure where a procurement notice is not obliged to be published even if the procurement would otherwise fall within the scope of the Procurement Act, as far as the conditions precisely defined are fulfilled[45].

A contracting entity may negotiate with more than one supplier when making a direct procurement, in other words, organise a more informal competition, for example by sending invitations to tender directly to a few companies[46]. However, this kind of more informal procedure in other context leads to an illegal direct procurement as it is not possible to arrange a competitive tender in accordance with the Procurement Act, if the contracting entity does not publish a contract notice[47].

Section 40 of the Procurement Act provides the direct procurement criteria similar to Article 32 of the Procurement Directive[48]. The use of direct procurement is possible in the following eight situations: (i) no tenders have been received; (ii) only a certain supplier can implement the procurement for technical or exclusive reasons; (iii) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance; (iv) an extreme urgency exists; (v) the goods to be procured are manufactured only for R&D purposes; (vi) the procurement is made from the commodity market; (vii) the goods are procured under particularly advantageous conditions; and (viii) a service contract is awarded to the winner of the

[45] Kuusniemi-Laine, and Takala (2007), p. 94.
[46] Pekkala and Pohjonen, (2012), p. 119 and Arrowsmith (2014), p. 1061.
[47] Siikavirta (2015), p. 145. See e.g. MAO 790/15, MAO 398/13. See also FCCA 25.1.2018, dnro 853/2015 where the municipality of Liperi had asked tenders from different companies, but not organised an official competitive tendering including the publication of a procurement notice. This may be the case in particular in small, remote areas where it is known in advance that only a few companies will submit tenders.
[48] See Section 110 for special exceptions regarding social and health service procurements. Section 119 with regard to concession contracts permits direct procurements only in situations similar to Section 40 (2)(1–3).

design contest competition. In addition to these criteria, Section 41 of the Procurement Act provides conditions under which direct procurement can be used for additional orders.

According to settled case-law of the ECJ, the direct procurement criteria must be interpreted strictly as direct procurement is an exception to the general obligation to organise a competitive tendering[49]**.** The contracting entity that is willing to use direct procurement has the burden of proving the existence of exceptional circumstances justifying the derogation from the general obligation to organise a competitive tendering[50]. Therefore, the contracting entity cannot successfully rely on its own lack of expertise. A plain statement of the use of direct procurement is not sufficient; instead, the use must be based on proven facts[51]. The direct procurement criteria are *exhaustively* listed, and mere *expediency* does not make it legal to use direct procurement[52].

The ECJ has also quite consistently stated that national legislation cannot extend the scope of direct procurement[53]. However, the ECJ has held that Articles 49 TFEU and 56 TFEU must be interpreted as meaning that they do not preclude national legislation, which allows the use of direct procurement for urgent and emergency ambulance services carried out by voluntary associations. In these situations, an additional requirement is that the

[49] See C-394/02, *Commission v Greece* (2005), para 33 and C-337/05 *Commission v Italy* (2008), para 57. See also Recital 50 of the Procurement Directive and GP 108/2016 ls, p. 133.
[50] See Case 199/85 *Commission v Italy* (1987), para 85, C-394/02 *Commission v Greece* (2005), para 33 and C-337/05 *Commission v Italy* (2008), para 58. From Finnish case-law, see KHO 1.11.2013 T 3484. See also GP 108/2016 ls, p. 133 and Bovis (2015), p. 435–438.
[51] Aalto-Setälä and others (2008), p. 642. See also C-385/02 *Commission v Italy* (2004), paras 18–21. Note that appellants may still try to refute the contracting entity's arguments. See Arrowsmith (2014), p. 1062.
[52] See C-337/05 *Commission v Italy* (2008), where the technical specificity of the helicopters and the advantages of the interoperability of the helicopters (used by its various corps) were not sufficient in themselves to justify the use of direct procurement (paras 55–59). See also KHO 2019:10, where the FSCA noted that the use of only one IT system would be the most practical option from the contracting entity's point of view, but using multiple systems was not practically impossible and, thus, there was no technical reason for direct procurement. See as well MAO 279/18 where the FMC highlighted that the short length of the transitional or procurement period are not reasons stated in the direct procurement criteria.
[53] See e.g. C-84/03 *Commission v Spain* (2005) and C-399/98 *Ordine degli Architetti and Others*.

national legislation actually contributes to the social purpose as well as the achievement of solidarity and economic objectives.[54]

Illegal direct procurements can be roughly divided into three groups: direct procurements that do not meet the criteria of Sections 40 and 41 of the Procurement Act, amendments of procurement agreements during the agreement periods (Section 136), and procurements for which a competitive tendering has not been organised, although the procurement has been covered by the Procurement Act. *Halonen* considers that situations, where a contracting entity has published a national procurement notice even though the value of the procurement exceeds the EU thresholds, can be also considered in a sense as illegal direct procurements[55]. *Määttä* does not take such an unequivocal position on the question of whether the FCCA could also intervene in such situations within its competence[56]. Furthermore, an interim arrangement may turn out to be an illegal procurement if the need for the procurement is not immediate or the arrangement prevents the FMC from annulling the procurement decision[57]. However, neither of these two situations have appeared repeatedly in the case-law, so they are not examined in more detail in this thesis.

[54] See C-50/14 *CASTA and Others*, para 67 and C-113/13 *Azienda sanitaria locale n. 5 «Spezzino» and Others*, para 65. From Finnish case-law, see KHO 2017:32 where the FSAC ruled that the hospital district was entitled to award the contract to the local rescue departments without a competitive tendering. Although there should be no exceptions to the obligation to organise a competitive tendering in other acts, the FSCA stated that the Health Care Act (1326/2010), enacted after (*lex posterior*) the entry into force of the Procurement Act, is a special act (*lex specialis)* in relation to the Procurement Act, and in this case the exception to the general obligation was based on the Health Care Act.

[55] Halonen (2013), p. 26. See also MAO 817/15 and MAO 55/13 where procurement decisions were annulled for this reason. However, these cases were not counted among the 80 illegal cases from 2011-2018, as even a national procurement notice was published, and a competitive tendering organised.

[56] Määttä and Voutilainen (2017), p. 453.

[57] GP 190/2009 ls, p. 67–68. See also Halonen (2015a), p. 38–39. From case-law, see KHO 2016:90 and MAO 536/10. See also *City of Oulu* (FCCA 8.1.2019, dnro 509/2018) where the FCCA stated that the arrangement, which continued still for about a year and a half after the decision of the FMC, could no longer be based on the interim arrangement.

3 The Most Common Illegal Direct Procurements

3.1 About the Conducted Research

High-quality statistical analysis requires the collection of reliable research data[58]. I was able to find 80 cases where the FMC had considered procurements as illegal direct procurement[59]. This means an average of 10 illegal direct procurements per year. I believe that I managed to collect at least 95 percent of illegal direct procurements ruled by the FMC from years 2011–2018. As the Finnish language has no prepositions, but nouns are declined by using grammatical cases, truncated searches were used[60]. Moreover, I estimate that I found around 15 cases by using other keywords than direct procurement[61].

As research always involves uncertainty factors[62], the research methods used may be criticised. One problem with the conducted statistical analysis is that a decision of the FMC may be overruled by the FSCA, which does not appear in the statistics. Nonetheless, there were only a few cases where the decision of FMC was changed, and I believe that 80 cases and eight years should constitute such a broad sampling that that it will withstand these deviations being still sufficiently indicative. Furthermore, as changes occurred in both directions[63], on the average they cancel out each other's

[58] Keinänen and Väätäinen (2016), p. 255.
[59] These cases are in **bold** in the table of cases. The number of illegal direct procurements is likely to be many times higher, but only in some cases potentials bidders became aware of the direct procurement and may appeal. On other hand, a procurement cannot be considered illegal before the FMC has ruled so. Therefore, the examination may only concern those procurements that has been found to be illegal.
[60] Suorahank* and kilpailuttamisvelv*.
[61] ”Kilpailuttamatta”, ”ei ole kilpailuttanut”, ”ilman kilpailutusta” and ”ilman tarjouskilpailua” (which all refer to the lack of organising competitive tendering). This is due to the fact that the illegality was sometimes in such a way that the contracting entity had acted unlawfully as it had not organised a competitive tendering or that it had failed to fulfil its obligation to organise a competitive tendering.
[62] Keinänen and Väätäinen (2016), p. 247.
[63] Some procurements were later on found to be illegal, contrary to the interpretation of the FMC (see e.g. KHO 2016:90 and MAO 374/14) and in some cases the FSCA considered

effects to the statistics. Compiling absolutely the right kind of statistics is difficult as there are also cases where the FMC has given a decision on the merits of the case and found the direct procurement illegal, but the FSCA has overturned the ruling of the FMC and left the original appeal inadmissible as submitted too late[64].

According to a research conducted by the Association of Finnish Local and Regional Authorities, the FMC found in 406 cases that the contracting entity had contravened procurement legislation during period of 1.7.2010–30.6.2011[65]. The FMC solved 587 procurement cases during year 2010 and 569 cases in 2011[66]. Thus, the annual average is 578 to which the above-mentioned research result must be set in proportion. Therefore, during that 1-year research period, in 70% of the cases the contracting entity had acted incorrectly.

It is stated in the GP of the Procurement Act that the FMC handles annually around 15 direct procurement related cases per year[67]. Based on the annual average of illegal direct procurements, around in two out of three cases, direct procurement would be found to be illegal by the FMC. The percentage is, therefore, almost the same as in the above-mentioned research. The GP also states that the FMC dealt with less than 20 cases related to direct procurement and the obligation to organise a competitive tendering in 2014[68]. In total, I collected 18 direct procurement cases from year 2014, from which 13 were illegal and 5 legal. Thus, the illegal-legal ratio (72% illegal, 28% legal) again fits nicely into the statistics mentioned above. Hence, the statistical results of my research can be considered accurate and realistic. As the FMC is not able itself to produce this kind of statistical information from its systems, this thesis can also be considered a

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that the contracting entity had been allowed to make a direct procurement (see e.g. KHO 2015:152 and MAO 57/14).

[64] See e.g. KHO 2018:126.

[65] Kiviniemi (2011), p. 1.

[66] See *Statistics and Processing Times of the FMC*.

[67] GP 108/2016 ls, p. 55.

[68] Ibid, p. 54.

significant contribution because this information is not readily available anywhere.

Now that the quality of the collected research data has been evaluated, it is possible to assess the conditions for undertaking statistical deduction. Contracting entities fairly often invoke more than one direct procurement criterion laid down in Section 40 of the Procurement Act or other reasons not to organise a competitive tendering[69]. An unclearly justified direct procurement is more likely to be illegal than legal, so it would be safer for the contracting entity to organise a competitive tendering in uncertain situations[70]. Sometimes appellants might try to invoke direct procurement criteria because otherwise the appeal would not be examined as it was submitted too late[71]. As the FCCA have an *ex officio* obligation to ensure that matters area sufficiently and appropriately examined, there is basically nothing to lose in invoking more than one criterion[72]. The FSCA has stated that the FMC may *ex officio* examine also other grounds than those expressly invoked by the appellant or other parties[73].

All this contributes to the fact that that it is extremely difficult to determine which is the most common type of illegal direct procurement. However, the following graph illustrates which reasons were raised most often in the

[69] E.g. in MAO 279/18 and MAO 837/17, four different (unsuccessful) reasons were raised: a technical reason, an urgency, an additional order and a contract modification. More than one criterion was presented in 16 cases total. Instead, in MAO 664/16 the contracting entity did not even claim that the conditions for direct procurement had existed.

[70] Kontio and others (2017), p. 169. Sometimes it seems that justifications for a direct procurement are found afterwards. E.g. in *City of Parainen* the contracting entity first stated that the direct procurement was made from its in-house entity. In the later statement the contracting entity stated that it had a misconception about the status of its in-house entity, but according to the contracting entity, there was still no obligation to organise a competitive tendering, as the procurement made was a hybrid agreement falling outside the scope of the Procurement Act. See FCCA 10.4.2018, dnro 1021/2017, paras 17–18.

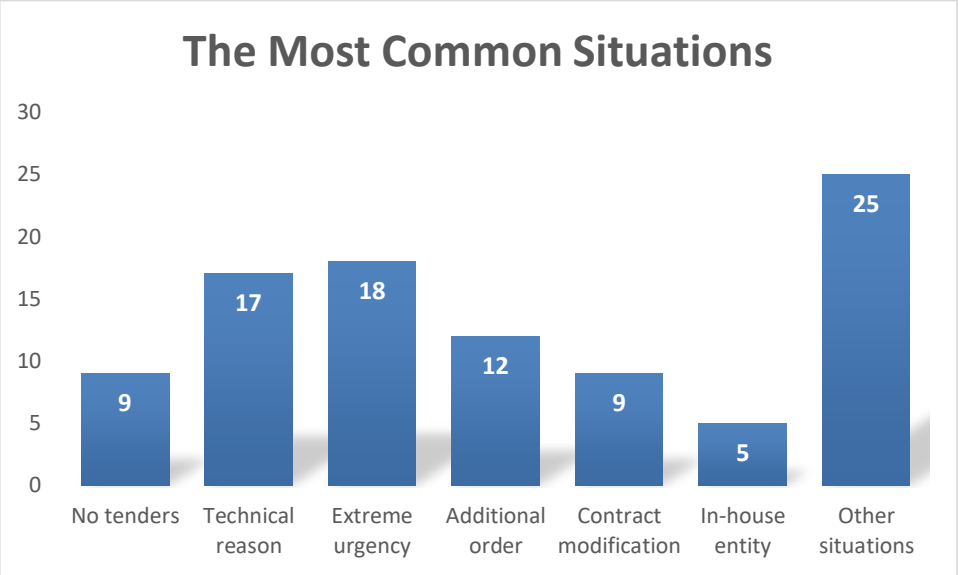
[71] The time for appeal is only 14 days, but if the contracting entity has not published a direct procurement notice, the time for appeal is six months. See e.g. MAO 603/18.

[72] E.g. in *City of Akaa* (FCCA 10.10.2018, dnro 779/2018) the FCCA examined on its own initiative whether the contracting entity would have been entitled to use direct procurement on the basis of extreme urgency.

[73] See e.g. KHO 2015:151 where the FMC had annulled the procurement decision as considered the call for tenders too ambiguous although the appellant had not claimed that. See also MAO 407/16 where the FMC examined whether the contracting entity was entitled to make a direct procurement under the exception on social and health service procurements (Section 110), even though the contracting entity had not even mentioned such a reason. See as well C-315/01 *GAT*, paras 44–49.

analysed cases. As in some cases the contracting entity referred to more than one reasons, the sum of the reasons is over 80.

Graph 1: The Most Common Situations



Other situations refer to procurements for which a competitive tendering was not organised as the contracting entity had considered that the procurement would fall outside the scope of the Procurement Act. The most common issues among these were procurements, the value of which were falsely estimated to remain below the national threshold values or that were artificially broken into lots[74] in order to avoid exceeding the national threshold values[75]. The other situations will not be examined in more detail, as the following sub-chapters will clarify the concepts and doctrines of only the most common type of illegal direct procurement in force.

3.2 No Suitable Tenders

Pursuant to Section 40(2)(1) a contracting entity may use direct procurement if it is the contracting entity has not received any suitable tenders or no tenders at all. However, when using direct procurement for this reason, the contracting entity may not make any substantial changes in

[74] These also include situations where goods, services or construction works of the same type were purchased within a short period of time without organising a competitive tendering. See GP 108/2016 ls, p. 121–122.
[75] See e.g. MAO 740/17, MAO 214/16, MAO 790/15, MAO 890-891/14 and MAO 398/13.

the terms and conditions of the original call for tenders[76]. The ECJ has quite narrowly interpreted the concept of "no suitable tenders"[77]. The contracting entity must be able to provide an explanation for why the tender is seen as inappropriate and, thus, that the tender completely failed to comply with the call for tenders[78]. The mere fact that the only bid received in a competitive tendering is considered to be too expensive by the contracting entity does not entitle it to make a direct procurement from another company[79]. Thus, even one acceptable tender prevents the use of direct procurement[80]. In MAO 510/12, the FMC stated that although the tender contained parts that failed to comply with the call for tenders, the contracting entity had not been able to prove that the tender would have been *completely inappropriate*[81].

3.3 Techinal Reasons

Pursuant to Section 40(2)(2) a contracting entity may use direct procurement if only a certain supplier can implement the procurement for a technical reason, or for a reason related to protecting an exclusive right. I will use the term "technical reason" for this criterion hereinafter in this thesis, as it seems that while the courts interpret this criterion strictly, the contracting entities interpret it broadly, and from time to time completely forget the beginning of the paragraph 2 and fairly generally argue that only a certain supplier can implement the procurement[82]. Both the ECJ and the FSCA have held that the short geographical distance of the service provider

[76] See e.g. MAO 370/14 where the contracting entity had not received any tenders due to faulty call for tenders (wrong CPV code), whose terms and conditions were, however, changed before the contracting entity used the direct procurement illegally. See MAO 194/12 where the bus route was changed from the original and MAO 153/11.
[77] See e.g. Joined Cases C-20/01 and C-28/01 *Commission v Germany* (2003), para 58, C-250/07 *Commission v Greece* (2009), paras 34-35 and C-601/10 *Commission v Greece* (2011), para 32.
[78] See e.g. MAO 457/11 the FMC considered that the only tender had been inappropriate. The tender must therefore be so significantly contrary to the call for tenders, that the situation would assimilate to the fact that a tender would not have been submitted at all. See GP 108/2016 ls, p. 134.
[79] Siikavirta (2015), p. 101.
[80] Aalto-Setälä and others (2008), p. 636.
[81] See also MAO 296/16.
[82] See e.g. MAO 553/15 and MAO 436/15. The FCCA has also found by following direct procurement notices that direct procurements are made, in particular, for technical reasons on fairly flimsy grounds. See Taurula and Ruuskanen (2018), p. 256.

to the contracting entity cannot be considered as a technical reason[83]. In MAO 519/12 the subject of the procurement was an Angry Birds theme park. The arguments of the contracting entity for the use of direct procurement were not accepted as the FMC considered that also other suppliers could possibly have had the opportunity to obtain a license from Rovio Entertainment Oy for the trademark in question.

A further condition for this exception is that there are no reasonable alternatives or substitute solutions. A contracting entity may be expected to conduct some market research not only on the domestic market but also at the European level in order to prove that no other suppliers are able to implement the procurement[84]**.** In *Commission v Greece* (2005) the contracting entity had asked also another supplier to carry out the procurement which showed that there were other suppliers available. Furthermore, the ECJ stressed that that the contracting entity had previously organised a competitive tendering for a similar procurement.[85] Lastly, the absence of competition may not be due to an artificial narrowing of the terms and conditions of the procurement.

3.4 Extreme Urgency

Pursuant to Section 40(2)(4) a contracting entity may use direct procurement if it is absolutely essential to conclude the agreement and the prescribed time limits cannot be observed due to extreme urgency arising from unforeseen circumstances beyond the control of the contracting entity. The ECJ has referred to only three cumulative conditions in its cases[86],

[83] See Joined Cases C-20/01 and C-28/01 *Commission v Germany* (2003), para 65 and KHO 1.11.2013 T 3484.
[84] See T-54/11 *Spain v Commission* (2013), para 54, C-275/08 *Commission v Germany* (2009), para 61 and MAO 409/17. See also Steinicke and Vesterdorf (2019), p. 436. However, cf. MAO 463/15 where the contracting entity had conducted a comprehensive market research and had been able to prove that due to IT and security reasons only the certain supplier was able the implement the update.
[85] C-394/02 *Commission v Greece* (2005), paras 37–38.
[86] See e.g. C-394/02 *Commission v Greece* (2005), para 40 and C-275/08 *Commission v Germany* (2009), paras 68–69. The ECJ mentioned, however, in paragraph 73 of the latter case that the contracting entity had neither provided any justification as to whether the procurement was absolutely essential.

although, in my opinion, there are more than three cumulative conditions to be met in order for the direct procurement not to be illegal.

First, there must be an unforeseen circumstance that causes the need for the procurement[87]. Second, an urgency must exist, and specifically an extreme urgency[88]. Third, there must be a causal link between the extreme urgency and the unforeseen circumstance. Fourth, the urgency must prevent the observation of time limitations[89]. Fifth, the unforeseen circumstance must be beyond the control of the contracting entity[90]. Sixth, it must be absolutely essential to conclude the agreement. The FSCA has clarified the concept of absolute essentiality by stating that a direct procurement made on the basis of extreme urgency may not be longer in duration or otherwise wider than is actually necessary. The contracting entity cannot therefore conclude a contract for years to come, but only for the duration that a competitive tendering has been organised and carried out.[91] Thus, the necessity can be further divided into two cumulative sub-conditions: it must be absolutely essential to conclude the agreement *at the time the agreement is concluded* and the agreement may only be concluded *for a period of time* that is absolutely essential. However, regardless of the number of cumulative

[87] See e.g. C-107/92 *Commission v Italy* (1993) where the ECJ stated that the use of direct procurement for an avalanche barrier was not allowed in an area where avalanches were predictable, as the urgency did not arise from unforeseen circumstances (paras 9–10).
[88] See e.g. C-275/08 *Commission v Germany* (2009) where the ECJ found that the extreme urgency was not present in the case, as there was several months between the procurement decision, negotiations and signing the contract (paras 70–71).
[89] The ECJ has consistently held that it is not possible to rely on extreme urgency if there had been enough time to organise a competitive tendering within the time limits set by law. See e.g. C-126/03 *Commission v Germany* (2004), para 23. Instead of making an urgency-based direct procurement, the contracting should use the accelerated procedure referred to in Section 57 of the Procurement Act, which allows a tendering period of only 15 days. See Kuoppamäki (2018), p. 475. See also Articles 27(2), 28(3) and 29(1) of the Procurement Directive.
[90] See e.g. KHO 2019:10 where the FSCA stated that the planned social welfare and healthcare reform in Finland was beyond the control of the contracting entity, but the urgency did not arise from arising unforeseen circumstances. See also MAO 891/15, where the FMC held that the urgency existed, but it was due to the contracting entity itself.
[91] See KHO 2011:59. The threat of industrial action was considered arising from unforeseen circumstances. However, the agreement had been signed only after the threat of industrial action had ceased to exist, and the agreement had been extended for a further three years. See also MAO 652/15 where the contracting entity had justified the urgency with tourist seasons of summer 2014. As the contract still continued beyond the end of the tourist season, the FMC ruled that the direct procurement was illegal.

conditions, it can be said that it is extremely difficult to make a legitimate direct procurement on the grounds of the extreme urgency[92].

3.5 Direct Procurement in Additional Orders

Section 41 provides two exceptions whereby the contracting entity may use direct procurement by making an additional order. Firstly, a contracting entity may make a direct procurement if the purpose is to partially replace or expand a previous delivery of goods or installation of equipment. However, the contracting entity must be able to prove that the change of supplier would result in procuring goods with different technical characteristics causing incompatibility or disproportionately great technical difficulties in operation and maintenance.[93] In KHO 2010:20 the FSCA found the additional order illegal as other student administration programs were available on the market[94].

Secondly, a contracting entity may use direct procurement if an earlier service or works agreement includes an option and value of the option was included into the total value of the original agreement[95]. Furthermore, the additional order must be similar to the original service or works. In MAO

[92] In only 3 cases from 2011-2018 the extreme urgency was accepted whereas in 18 cases it led to an illegal direct procurement. In MAO 12/12 the contracting entity had organised a competitive in order to procure medical helicopter services. However, the winning supplier refused on the same day that the contract was to be signed and the second-best bidder was no longer interested. Thus, the contracting entity had no other choice than to make a direct procurement from a supplier that had not participated in the competitive tendering. The FMC considered that the refusal was based on reasons beyond the control of the contracting entity and it had been unforeseeable. Furthermore, arranging the service in question had been absolutely essential and the contract had been made only for a fixed period. The other cases were MAO 525/16 and MAO 218/12. See also T-148/04 *TQ3*, paras 93–103.

[93] As these conditions are fairly similar to the conditions of the technical reason, see also cases mentioned in sub-chapter 3.3.

[94] Cf. MAO 663/16, where the FMC found that the comparison of the systems carried out by the contracting entity proved that there were at least two possible suppliers and, thus, the additional order was illegal.

[95] See e.g. MAO 309/13 where the possibility of continuation of the transportation services for a new academic year was not mentioned in the original agreement. Cf. MAO 75/16 where the FMC stated that although the contract did not include an option, the additional order was not illegal as the option had already been mentioned in the contract notice and the value of the option had been included into the value of the procurement

194/15 the FMC found that contracting entity had not updated its ICT system as an additional order but procured a completely new system[96].

A further requirement is that the additional order must be made, or the option used within three years of concluding the original agreement. The ECJ has clarified in *Commission v Italy* (2004) that the three-year period starts from the moment when the original contract was entered into force and not from the moment when the procurement had been carried out[97]. It should be noted that the first exception applies only for goods and the second only for services and works. However, an additional order may be possible by amending the original agreement as well. The conditions for amendments will be examined next.

3.6 Amending the Procurement Agreement

As stated earlier, it was already forbidden by previous case-law of the ECJ to make substantial amendments to a procurement agreement during its term if those amendments modify the general character of the agreement[98]. Section 136 of the Procurement Act provides conditions similar to Article 72 of the Procurement Directive[99]. The prohibition applies to procurements that exceed the EU threshold values as well as service procurements and concession contracts under Schedule E[100] that exceed the national threshold values[101].

[96] See also MAO 551/10 and MAO 243/11 where the additional orders were found illegal as the bus routes awarded to the existing suppliers were completely new.
[97] C-385/02 *Commission v Italy* (2004), para 34. See also MAO 465-466/14 and MAO 519-520/11.
[98] See e.g. C-337/98 *Commission v France* (2000), C-496/99 P *Succhi di Frutta*, C-454/06 *Pressetext*, C-250/07 *Commission v Greece* (2009), C-91/08 *Wall*, C-160/08 *Commission v Germany* (2010), C-196/08 *Acoset* and C-576/10 *Commission v Netherlands*.
[99] See also Recital 81 of the Procurement Directive.
[100] Schedule E refers to social and health and other specific service procurements referred to in Section 107 of the Procurement Act. These procurements do not have separate EU threshold values, but only the national threshold values. Hence, it is logical that they are treated the same way as procurements above the EU threshold values. However, hereinafter in similar situations reference is made only to "procurements that exceed the EU threshold values".
[101] The FMC stated in MAO 854/17 that according to its wording, Section 136 of the Procurement Act is not applicable to procurements below the EU threshold values. For this

An amendment is at least considered substantial in the following four situations introduced in *Pressetext*[102].Firstly, an amendment is considered substantial if the amendment introduces condition that would have affected the outcome of the competitive tendering or who participated in it[103]. If these possibilities cannot be ruled out, the amendment is substantial[104]. Secondly, an amendment is considered substantial if it the agreement has been amended in favour of the supplier in a manner that was not specified in the original agreement[105]. Most commonly, this means that the prices are significantly raised[106].

Thirdly, an amendment is considered substantial if the amendment considerably broadens the scope of the agreement. This may be the case if the contracting entity purchases services or products other than originally agreed upon or if the agreement is extended to include another contracting entity. In *Finn Frogne* the ECJ clarified its previous case-law and stated that also a reduction in the scope of the agreement may constitute a substantial amendment and, thus, makes it necessary to organise a new competitive

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reason, such amendment must be considered in terms of whether the contracting entity has made a direct procurement. However, substantial amendments are most likely to be prohibited also in national procurements, at least with procurements with interest transcending the border of Member States of the EU, as the general procurement principles oblige contracting entities to treat all suppliers in an equitable and non-discriminatory manner, and act transparently, among other things. See Kontio and others (2017), p. 265 and Halonen (2015a), p. 49.

[102] C-454/06 *Pressetext*, paras 35–37 and 47.

[103] The ECJ stated in C-496/99 P *Succhi di Frutta* that substantial amendments may only be made, if they are defined already in the procurement documents (para 118).

[104] See MAO 699/14 where the bus schedules were changed so that the amendment had a real impact on the continuous working time of the drivers. Cf. MAO 945/15 where the contracting entity had made a clarification on the agreement regarding the pricing of interpretation services provided by the subcontractors. The amendment was not considered to modify the general character of the agreement, so it was not substantial. See also C-250/07 *Commission v Greece* (2009), paras 51–58 and C-576/10 *Commission v Netherlands*, paras 60–62.

[105] See above-mentioned MAO 699/14 where the change of the bus schedules was in favour of the supplier.

[106] See e.g. MAO 207/18 where the contractual partner for occupational health services changed as a result of a business acquisition. The FMC did not consider the changed contractual partner as a substantial amendment as such. However, the price of the service was changed in connection with the acquisition, and the FMC considered the change in prices to be substantial compared to the original agreement from 2007.

tendering[107]. Fourthly, an amendment is considered substantial if the supplier is replaced.

If none of these four situations is present, no substantive amendment has been made, but respectively, any of the four situations described constitutes itself a substantive amendment[108]. In this case, the contracting entity is obliged to organise a new competitive tendering. Nonetheless, a substantial amendment may be permitted (without a new competitive tendering) if one of the following criteria for an exception is met[109].

Firstly, an agreement may be amended if the amendment, irrespective of its financial value, is based on the terms and conditions defined in the procurement documents. However, in this case, the possibility of amendment must be expressed clearly, precisely and unambiguously. At its most typical, this can mean a precisely defined option. The amendment may not modify the general character of the agreement. A very topical example of this was seen in *city of Naantali* where the possibility to update and develop the existing financial management application was agreed in the original contract. However, the FCCA found that the contracting entity had procured a completely new application and not just updated the previous one. This was due to the fact that the original application had been a *on-*

[107] C-549/14 *Finn Frogne*, paras 29 and 38. The ECJ considered that a reduction in the scope of that contract may result in that contract being of interest also to smaller suppliers. The FMC had already ruled before *Finn Frogne* in MAO 542/11 that a significant reduction in the service would have required the organisation of a new competitive tendering. See also MAO 65/19 where the FMC imposed a penalty fine on the contracting entity based on the sanction proposal of the FCCA as the value of the contract was reduced by more than 10%. See also *SYKE* (FCCA 27.3.2018, dnro 685/2017) where scope of the procurement was cut by EUR 1 million corresponding to 6.8% of the total value of the contract. Cf. MAO 11/17 where the scope of the procurement was reduced, but the amendment was not substantial, and the contracting entity had made a reservation into the procurement documents.

[108] It is noteworthy that an amendment does not need to be made in written but already a conclusive amendment to the agreement is enough to constitute a substantial amendment. See e.g. MAO 469/18.

[109] As the *Pressetext* doctrine did not include these kinds of exceptions, the new Procurement Directive, therefore, provides a more permissive approach to the amendments. As the transposition deadline of the Procurement Directive by Member States was only 18 April 2016, the ECJ has not yet received any references for preliminary rulings regarding these permitted amendments. AG Sharpston gave her opinion in C-526/17 *Commission v Italy* (2019) in March 2019, but the amendment in question is assessed still under the Directive 2004/18/EC. Due to lack of new case-law, see Recitals 107– 111 of the Procurement Directive and De Koninck, Ronse and Timmermans (2015), p. 56–61.

premises model (installed and used on computers) whereas the new version was a *SaaS* (software as a service, used via a web browser). In other words, the original application had been a *goods* whereas the new one was a *service*.[110]

Secondly, an agreement may be amended if it is necessary for the original supplier to carry out additional work, services or supplies that were not part of the original agreement. However, such an amendment may only be made if the supplier cannot be changed for financial or technical reasons and if the change would cause considerable harm or a significant duplication of costs for the contracting entity. Thirdly, an agreement may be amended if the need for amendment is due to circumstances that a diligent contracting entity could not have foreseen[111]. As with the first exception, the amendment may still not modify the general character of the agreement. The additional requirements for the second and third exceptions[112] are that the value of the amendment may not exceed 50% of the value of the original agreement and that the contracting entity needs to publish a notice of changes in accordance with Section 58 of the Procurement Act.

Fourthly, an agreement may be amended if the change of contractual partner is unambiguously predefined[113] or based on a reorganisation of a

[110] FCCA 18.6.2018, dnro 753/2017 (City of Naantali), paras 15–18 and 63.

[111] It is stated in Recital 109 that these unforeseeable circumstances may arise in particular when the performance of the agreement covers a long period, and for this reason a certain degree of flexibility is needed to adapt the agreement to those circumstances without an obligation to organise a new competitive tendering. From old case-law, cf. C-549/14 *Finn Frogne* where the ECJ stated that even a substantial amendment may be considered permissible if the possibility of an amendment has been determined in advance with sufficient accuracy in the terms of the procurement contract. Instead, even an objective amendment is unacceptable if it is not provided for in the procurement documents (paras 30–40).

[112] The second and third exceptions were earlier covered by Section 28(2) of the Act on Public Contracts (348/2007) and by Article 31(4)(a) of Directive 2004/18/EEC. Partly for this reason, in many cases issues relating to additional orders and contract amendments might be overlapping. Also, the contracting entities sometimes try to invoke on both reasons (See e.g. KHO 2019:10 and MAO 279/18). However, the difference can be illustrated by the fact that an additional order is a completely new and separate purchase. See Kontio and others (2017), p. 143. Nonetheless, this difference may be crucial regarding sanctions. See sub-chapter 4.3.3.

[113] See e.g. MAO 242/13 where the contracting entity had prepared for the transfer of contract already in the original contract. Cf. MAO 652/15 where the terms of the contract transfer were so general that the change of the contractual partner was illegal.

business[114]. However, the new contractual partner must satisfy the original criteria[115] and the change of contractual partner may not be intended to circumvent the application of the Procurement Act. The change of contractual partner is not permissible only because the contracting entity is not satisfied with the quality of the service[116]. The ECJ stated in *Wall* that under certain conditions the change of subcontractor may also constitute a substantial amendment[117]. However, it seems that changes to a subcontract may not constitute a substantial amendment. The FMC ruled in MAO 610/18, without reference to *Wall*, that the supplier's unilateral amendment to the subcontract was not a decision or any other resolution made by a contracting entity and dismissed the appeal as inadmissible[118].

Fifthly, an agreement may be amended if the amendment is minor (*de minimis*). The amendment must fall below the EU threshold values and it may not modify the general character of the agreement. However, the amendment must be less than 10% of the value of the original contract[119]. In *Commission v Germany* (2010) the scope of the contract was extended by EUR 673,719.92, which was above the EU threshold value. As the original

[114] Corporate restructuring, takeovers, mergers, changes of controlling interest or insolvency. From old case-law, cf. C-454/06 P*ressetext*, where the change of the contractual partner was considered only permitted for listed companies (paras 49–52).
[114] C-91/08 *Wall*, paras 37–39.
[115] See e.g. MAO 652/15 where the original minimum annual turnover required was EUR 2 million, but the new contractual partner had no turnover at all.
[116] See Recital 110 of the Procurement Directive
[117] C-91/08 *Wall*, paras 37–39.
[118] See also MAO 603/18 where the FMC found that the wrong vehicles used by the supplier did not mean that the contract had been modified, but rather the contracting entity had neglected its examination duty.
[119] The 10% limit is applied for services, goods and concession contracts for services. See e.g. MAO 65/19 where amendment was 12%. Regarding contracting agreements or concession contracting agreements the limit is 15%. Furthermore, the fifth exception also includes a restriction on multiple successive amendments, but the legal situation over this remains somewhat unclear, at least so far. However, cf. MAO 629/17 and MAO 207/18. In the latter case the substantial amendment was not directly attributable to the new service provider as the price level did not change with the new service provider that kept approximately at the same price level that was in use at the time of the transaction. The problem was that the annual value of the contract during the old service provider had more than tripled in from 2007 to 2016.

total value of the contract was EUR 4.45 million per year, the value of the amendment was more than 15% of the value of the original agreement.[120]

As the wording of Section 136 refers explicitly to amendments during the contract term, the question arises as to what if the contracting entity signs a contract that is significantly different from the procurement decision; the amendment therefore occurs before the contract term, not during it. In *SYKE* the FCCA found that the terms and conditions of the procurement had been changed after the procurement decision. The scope of the procurement was cut by EUR 1 million corresponding to 6.8% of the total value of the contract. Furthermore, the liability for damages had been five times the value of the procurement, but it was reduced to the value of the procurement.[121] The ECJ has confirmed in its case-law that a substantial amendment of an agreement prior to the conclusion of the agreement creates an obligation to organise a new competitive tendering[122]. The FMC has stated that situations, in which a contracting entity concludes a contract with the winner of the competitive tendering under different terms and conditions as defined in the procurement documents, must be considered in the light of the principles of a substantial amendment[123].

3.7 In-house Procurement

As stated earlier, in-house principles were already applied on the basis of previous case-law of the ECJ[124]. In-house entity refers to an entity that is formally separate and independent for policymaking purposes from the contracting entity, and to which the contracting entity, alone or in combination with other contracting entities, exercises control (*control*

[120] C-160/08 *Commission v Germany* (2010), paras 99–101. Cf. MAO 461/11 where the amendment was less than 10%.
[121] FCCA 27.3.2018, dnro 685/2017 (SYKE). As no new competitive tendering was organised, the FCCA gave an admonition to the contracting entity. Cf. MAO 137/16 where the contracting entity had organised a competitive tendering, but after receiving the bids, it had sent a new call for tenders without publishing a procurement notice, which was considered illegal.
[122] C-496/99 P *Succhi di Frutta*, para 125, C-161/13 *Idrodinamica*, para 39.
[123] See MAO 646/09, MAO 153/11 and MAO 11/17.
[124] See e.g. C-107/98 *Teckal*, C-26/03 *Stadt Halle*, C-458/03 *Parking Brixen*, C-29/04, C-340/04 *Carbotermo*, C-295/05 *Asemfo*, and Joined Cases C-182/11 and C-183/11 *Econord*. From Finnish case-law, see KHO 2005:63, KHO 2011:24 and KHO 2012:61.

criterion). Furthermore, the in-house entity shall carry out the essential part of its activities with the controlling contracting entity or entities (*essential part criterion*).[125]

The ECJ ruled in *Econord* that the control may also be exercised jointly by the contracting entities. However, the control may not be exercised solely by the majority shareholder as direct procurements based on a non-controlling ownership would mean the circumvention of the procurement legislation.[126] The ECJ stated in *Carbotermo* that an indirect ownership (for example, via a holding company) is not *per se* illegal, but this kind of arrangement may weaken any control exercised. As the Articles of Association provided the Board of Directors the broadest possible powers for the management of the in-house entity, but no control or specific voting powers for restricting the freedom of action of the Boards of Directors, the control criterion was not fulfilled.[127] The threshold for fulfilling the control criterion is high, as even the right to appoint a majority of the Board of Directors is not sufficient proof of control if the in-house entity still *de facto* operates independently[128].

An additional requirement is that the in-house entity may have no capital other than the capital of contracting entities. The question of private shareholding was not covered in the *Teckal* ruling. In *Stadt Halle* the contracting the contracting entity had made a procurement from a company in which it held a 74.9% stake. The remaining 24.9% were privately owned. The ECJ held that due to the private shareholding the contracting entity was

[125] It should be noted fulfilling once these criteria does not mean that the in-house status would be everlasting. E.g. in MAO 456/11 the control criterion was fulfilled as the contracting entity owned around 20% of the shares and the had it had one member on a board of five. However, this arrangement was expanded and five years later in MAO 522/16 the control criterion was not anymore met with a contracting entity that owned only around 0.01% of the shares and did not have a board member.
[126] Joined Cases C-182/11 and C-183/11 *Econord*, paras 28–31. On other hand, the control criterion may fulfil, although the contracting entity would own only 0.25% of the shares. See C-295/05 *Asemfo*, paras 58–59.
[127] C-340/04 *Carbotermo*, paras 38–39.
[128] C-458/03 *Parking Brixen*, paras 68–70.

not able to exercise a control similar to that which it exercises over its own departments.[129]

If the control criterion fulfils, the essential part criterion will also be examined. As the percentage (and euro-denominated) limits are set in the Procurement Act and in the Procurement Directive, this criterion is now less open to interpretations, but still the fulfilment of the criterion is not a matter of course. The ECJ stated in *Carbotermo* that it is irrelevant who pays to the in-house entity and in addition to the controlling contracting entity the essential part of activities may also accrue from payments of third-party users of the services[130]. For example, water and parking fees may be such payments[131]. In *Undis* the ECJ highlighted that activities which are devoted to persons other than those which control the in-house entity, including any other public authorities, are not considered as carried out with the controlling contracting entity or entities[132]. As the business operations with third parties was reduced to 5% from the beginning of 2019, it is likely that not all in-house entities have managed to adjust their operations and illegal direct procurements will be seen.

3.8 Analysis Based on Statistics

One of the most interesting findings is that in almost every other case (33/80 or 41.25%) the procurement was illegal for another reason than that it did not fulfil the direct procurement criteria under Section 40 of the Procurement Act or the conditions for additional orders under Section 41. As mentioned in the introduction, the matter has earlier mainly been

[129] C-26/03 *Stadt Halle*, paras 49–51. The private shareholding was also considered to be contrary to the principle of equal treatment, as the private company owning part of the in-house entity could have an advantage over its competitors. Although this seems to be a fairly clear prohibition, city of Loviisa was this year imposed a penalty fine of EUR 20,000 due to a direct procurement from an in-house entity with private shareholders. See MAO 64/19.

[130] C-340/04 *Carbotermo*, para 67.

[131] See e.g. MAO 139/08.

[132] C-553/15 *Undis*, para 34. See also MAO 329/13. It is quite possible that a wholly public-owned company is not an in-house entity of any contracting entity. For example, if company A is owned by contracting entities B and C, but C does not exercise control over A, C may not make a direct procurement from A. If C still (by organizing a competitive tendering that A wins) buys most of the services provided by A, neither B can make a direct procurement from A since A does carry out the essential part of its activities with B.

examined through direct procurement criteria laid down in Section 40. This shows that there was a demand for this kind of research and the approach angle was chosen successfully.

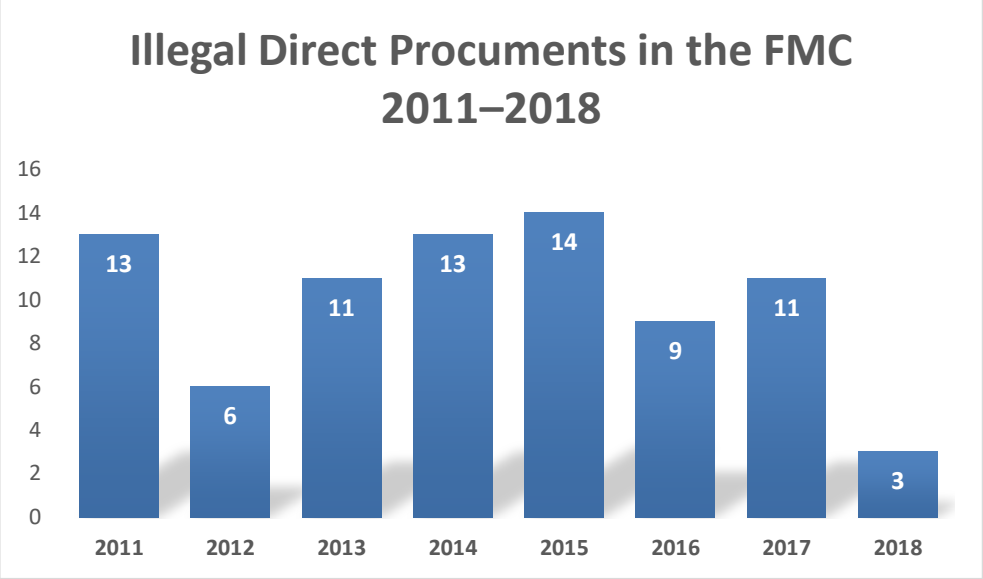
During the period under review, there were no cases in which the contracting entity had relied on points 3 (unique work of art), 5 (products for R&D purposes), 6 (procurement from the commodity market)[133], 7 (goods procured under particularly advantageous conditions), or 8 (direct procurement after a design contest)[134] of Section 40(2) of the Procurement Act as the basis for direct procurement. Lack of case-law suggests that direct procurements are made very rarely on the above grounds or, alternatively, these criteria are mainly used properly, and other companies are not willing to appeal even if they became aware of the direct procurement.

One significant finding was that in 2018 the FMC declared only three direct procurements illegal, two of which concerned a substantial amendment to the agreement. This number is significantly below the average of ten cases per year and in fact, without 2018, the average would have been 11 illegal direct procurements per year. The graph below shows how the distribution of the 80 cases throughout the time period under study.

[133] From older case-law, see MAO 575/10 where the contracting entity had made a direct procurement of construction work from a company on a nearby site. The contracting entity had justified its procurement by the fact that the idle time of machine could be utilized, and the service could be obtained at a lower cost by avoiding downtime and transmission costs. The FMC did not accept this argument but declared the direct procurement illegal.

[134] From the case-law of ECJ, see C-340/04 *Commission v France* (2004), paras 41–42. The ECJ stated that there was no direct functional link between the design contest and the direct procurement.

Graph 2: Illegal Direct Procurements in the FMC 2011–2018



There may be many reasons for this historically low number, and it is of course possible that 2018 was just an exceptional year by chance. However, it should be noted that in cases where a decision on the merits of the case is given, the average appeal time is close to one year[135]. Thus, in those three cases the procurement decision was already made during year 2017. Therefore, consequences from the Procurement Act that came into force from the beginning of 2017, were only visible in 2018.

As the Procurement Act increased the risks of illegal direct procurements, especially as a result of the FCCA's jurisdiction, it is highly possible that contracting entities have paid more attention to their practices and considered the use of direct procurement in more detail. On the other hand, the FCCA made five sanction proposals to the FMC during year 2018 and gave also six other decisions where it considered that the contracting entity had made an illegal direct procurement. The proposals of the FCCA were also based on procurements made in 2017, so if the proposals will not be rejected by the FMC, it may be thought that the figure for 2018 would be eight which is not so far from the average.

[135] The average for 2011–2018 was 6.9 months, but the statistics of the FMC do not take into account that some of the complaints are cancelled. Thus, handling cases in which a decision on the merits is given takes longer than 6.9 months. See *Statistics and Processing Times of the FMC*.

In the context of the reform of the Procurement Act, it was estimated that in the long term the number of appeals about direct procurements made to the FMC will decrease due to the FCCA's supervision. Consequently, it was considered likely that when companies start to take advantage of the opportunity to submit requests for measures, the FCCA will take a much higher number of cases to the FMC than the current 15 appeals per year.[136]

However, as shown in this thesis, only in 10 of these 15 cases the procurement was found to be an illegal direct procurement. If all these 15 cases would have been investigated by the FCCA, it would hardly have made ten sanction proposals to the FMC, but in at least a few cases it would only have issued administrative guidance. Although the effects were only expected to be visible in the long term, the number of appeals concerning direct procurements has already dropped dramatically in the short term. After 2017, the FMC has resolved only one appeal in which the question has solely been whether the direct procurement meet the criteria of Section 40 of the Procurement Act[137].

As a result of raising the national threshold values, it was estimated that approximately 1.800 procurements (13%) will fall outside the scope of the Procurement Act in the future[138]. It seems that also the increase in the thresholds[139] particularly targeted the amount of illegal direct procurements, as there were many cases in 2011–2018 in which the value of the illegal direct procurement was just above the old national threshold values[140].

It is also possible that the suppliers do not longer consider appealing such a potential option, because, even if the appeal was successful, it would not have any direct benefit to the appellant. As a compensatory fine is only a theoretical consequence in direct procurement cases, the FMC most likely only orders the contracting entity to pay the legal costs of the appellant and

[136] GP 108/2016 ls, 46.
[137] MAO 279/18.
[138] GP 108/2016 ls, p. 52.
[139] For example, the national threshold for procurements of goods and services was raised from EUR 30,000 to EUR 60,000.
[140] See e.g. MAO 214/16, MAO 398/13 and MAO 32/13.

oblige the contracting entity to organise a competitive tendering if it still wants to make that procurement. In practice, the greatest benefit to the appellant is, therefore, *an opportunity to participate* in the next tendering process which, of course, does not guarantee that the appellant will win it. It is much more cost-efficient for companies to provide a hint or submit a request for measures to FCCA that has extensive rights for requesting information from contracting entities and that will investigate the matter for free. On the other hand, the FCCA may not make a sanction proposal to the FMC in a case of which it is not entirely certain, as the burden of proof lies with the FCCA. Thus, it is possible that there are cases where the FCCA issues only administrative guidance even if the FMC might impose other sanctions if the matter had been appealed by a supplier.

3.9 Results of the Survey

The survey was conducted in February 2019. 11 experts out of 18 contacted answered to the survey (61%), which can be considered a fairly good response rate to an internet survey. The number of answers *per se* is small, but on the other hand, every expert has worked with dozens of contracting entities, so the answers should give a good overall picture. It should also be remembered that the purpose of the survey was only to find out whether the answers given support the statistics, so this kind of time-effective way was more appropriate for the purposes of this thesis than a comprehensive survey on direct procurement carried out by *Halonen* in 2013[141]. As the number of answers is fairly small, it is not expedient to analyse the answers received throughout, but to make observations, especially with regard to those multiple-choice answer options which all, or none of the experts have chosen.

The first observation is that the experts are asked fairly often (63.6%) or at least sometimes (27.3%) about the possibility to use direct procurement or otherwise to carry out a procurement without organizing a competitive tendering. Each expert has been asked about the technical reason to make a

[141] Halonen (2015b).

direct procurement and the possibility to make an additional order or to modify the contract[142]. The extreme urgency and in-house procurements have been asked from the majority of experts (72.7%). Instead, the experts have never been asked about the possibility to use direct procurement for buying goods from the commodity market or under particularly advantageous conditions. Such cases were neither found from years 2011–2018 (Graph 1).

The fourth and fifth questions correlate to questions 2 and 3; the direct procurement criteria asked about the most often were the technical reason (90.9%) and the extreme urgency (63.6%). Similarly, the most frequently asked other situations were additional orders and modifications (72.7%). Regarding question 6, it is noteworthy that more than half of the experts (54.5%) most often estimate that the use of direct procurement is not possible under the direct procurement criteria. It is also extremely interesting that *no one* has recommended the use of direct procurement on the grounds of extreme urgency. Pursuant to question 8, the most common situations where the experts find that the contracting entity may not use direct procurement were technical reasons (63.6%) and extreme urgency (72.7%). As the case-law shows, these are also in practice the most common type of illegal direct procurement. All in all, it can be said that the answers given to the survey explicitly support the findings made based on statistics (Graph 1).

[142] Contract modifications were asked about more often than they appear in the statistics presented (Graph 1). One reason for this may be that it is a new rule with uncertainties in its application due to lack of well-established case-law. Furthermore, the planned social welfare and healthcare reform was certainly an issue which has been asked about as in many cases it would have been necessary to transfer many contracts from municipalities to regions. The statistics may also be distorted by the fact that cases related to the current Section 136(2)(2) were earlier assessed as additional orders (See e.g. MAO 113/12 and MAO 464/15). On the other hand, there was also cases in which the issue was assessed as a substantial modification, even though there were no such rules in the Act on Public Contracts (See e.g. MAO 699/14 and MAO 436/14). In addition to contract modifications, additional orders were also asked about more often than they appear in the statistics (Graph 1). This may be due to the fact that they are related to procurements for which a competitive tendering has been organised and the likelihood of getting caught is lower. It is also possible that they are used as a justification for direct procurement less illegally than, for example, the technical reason or the extreme urgency.

4 The Risks

4.1 The Consequences

The potential consequences of getting caught with an illegal direct procurement can be divided into administrative sanctions, which will be discussed in more detail below, and other consequences. Section 169 of the Procurement Act establishes liability for damages in the event of violation of procurement rules. Damages may be sought from the competent district court. There are interesting questions related to damages that, however, cannot be dealt with in more detail in this thesis. Nonetheless, it should be stated that the contracting entity may, at least in theory, be held liable for damages for an illegal direct procurement in relation to both the company from which the direct procurement was made and to the appellant.[143]

As a procurement decision maker has the responsibility of an official for the legality of his actions, it is possible that an official who has made an illegal direct procurement may be charged with violation of official duty laid down in the chapter 40, Section 9 of the Criminal Code of Finland (39/1889). However, it seems that to this day, there has been nobody convicted of the crime in question, as the charges have fallen either in the district court[144] or in the court of appeal[145]. Disclosure of an illegal direct procurement may also cause bad reputation to the contracting entity. Furthermore, if the procurement decision has been annulled, the contract has been declared ineffective or the contract period has been shortened, the contracting entity needs to organise a new competitive tendering, which will result in additional costs.

[143] On damages in public procurement, see more detail Saarinen (2008) and Halonen (2015a).
[144] Helsingin KäO 18.3.2011 t. 11/2879.
[145] Vaasan HO 2.3.2018 R 16/335.

4.1.1 Sanctions Imposed by the FMC

Section 154 of the Procurement Act provides for sanctions imposed by the FMC. Sanctions can be divided into primary sanctions referred to in subsections 1 to 3 and secondary sanctions laid down in subsections 4 to 7. The primary sanctions are the annulment of the procurement decision in a whole or in part, prohibition of adhering an incorrect procedure, and order to rectify the incorrect procedure[146]. These sanctions are only available if the contracting entity has not yet awarded the contract[147]. The secondary sanctions include a compensatory fine to the appellant[148], an inefficiency sanction, a penalty fine to the State, and shortening of an agreement period[149]. Correspondingly, the secondary sanctions may be imposed only if the primary sanctions cannot be used.

One explicit reason for imposing the inefficiency sanction is a direct procurement made without the grounds prescribed in the Procurement Act. The inefficiency sanction has only *ex nunc* effects. However, the FMC may waive an inefficiency sanction on overriding public interest grounds[150]. In particular, pupils, students and school staff have been seen as a group to whom the inefficiency of the procurement agreement has been considered to cause significant harm[151].

[146] Pursuant to Section 161 the FMC may also impose a conditional fine to enforce a prohibition or duty. This may be the case especially in relation to interim arrangement of a procurement. See e.g. MAO 536/10 where the FMC imposed the conditional fine as the contracting entity had obtained a design service by means of an interim arrangement in such a way that the design service was completed. See also MAO 275/17 and MAO 473/15.
[147] See KHO 2016:37 where the FSCA annulled the FMC's decision with regard to the tender obligation imposed on the contracting entity. As the contract had been concluded before the appeal had been submitted, the primary sanctions could not be used. However, see MAO 312/17 where the contract had been concluded but the FMC was still able to prohibit the use of option years of the contract.
[148] See sub-chapter 2.2.
[149] However, apart from the compensatory fine, the secondary sanctions are only available for procurements exceeding the EU threshold values. Thus, the reform did not affect the situation with regard to national procurements, and it is still possible that, even if the direct procurement was found to be illegal, the FMC oblige the contracting entity to pay the legal costs of appellant at most. See e.g. MAO 319/16, MAO 214/16 and MAO 132/15.
[150] See e.g. MAO 141/19, MAO 790/15, MAO 464/14, MAO 189/14 and MAO 19/14.
[151] See MAO 200/13, MAO 212-213/13 and MAO 189/14. Hence, one could argue that the use of direct procurement is more acceptable in certain types of situations.

In accordance with Section 158, a penalty fine may be imposed in addition to the inefficiency sanction or in cases where the FMC has waived the inefficiency sanction on overriding public interest grounds. Shortening of an agreement period may be ordered in addition to or instead of imposing a penalty fine[152]. The nature of the error or default of the contracting entity as well as the value of the procurement must be taken in to account when the FMC considerers to impose sanctions. However, a penalty fine may not be more than 10% of the value of the agreement and the FMC must also take into account that the joint effect of sanctions does not become unreasonable for a contracting entity or its contracting party. In April 2019, the FMC imposed a penalty fine of EUR 200,000, based on the FCCA's proposal, to the city of Parainen[153]. The penalty fine imposed exceeded the previous highest fine by more than three times, as earlier the FMC had imposed a maximum fine of EUR 60,000[154]. However, it should be noted that the record fine was still only about 1% of the value of the agreement.

Pursuant to Section 147, the time limit for seeking review in direct procurement matters is 14 days if the contracting entity has published a *voluntary* direct procurement notice referred to in Section 131[155] or a contractual amendment notice referred to Section 58(1)(9)[156].[157] Otherwise the appeal shall be filed within 30 days of the date when the contract award

[152] See e.g. MAO 141/19 and MAO 189/14 where the inefficiency sanction was waived on overriding public interest grounds, but the FMC imposed the penalty fine and shortening of the agreement period.
[153] MAO 141/19.
[154] See MAO 200/13 and MAO 57/14.
[155] A standstill period of 14 days is applied to procurements exceeding the EU threshold values. The period starts from the next date of notice of the decision and the contract may not be concluded during this period. The standstill period is not applied in direct procurements, but if the contracting entity choose to publish a direct procurement notice, it may not conclude the procurement agreement if the case has been referred on appeal to the FMC, unless the FMC specifically allows implementation of the procurement decision.
[156] The contractual amendment notice shall be published within 30 days of amending the procurement agreement. Unlike the direct procurement notice, this notice is not voluntary, but mandatory. However, it is unclear whether there are any consequences of failing to publish the amendment notice. See Halonen (2015a), p. 44–45. Nonetheless, it limits the appeal time for 14 days.
[157] This time limit for seeking review is aimed to improve the legal certainty of contracting entities and their contract partners in relation to the fact that the contract would be found to be ineffective. See Recital 25 of the Directive 2007/66/EC.

notice concerning the direct procurement was published or at latest within six months of the date of concluding the procurement agreement.

4.1.2 Sanctions Imposed and Proposed by the FCCA

Section 141 of the Procurement Act empowers the FCCA to make a sanction proposal to the FMC[158]. The FCCA may call on the FMC to impose an inefficiency sanction, a penalty fine or to shorten the agreement period. If the inefficiency sanction has called, the FCCA may simultaneously propose that the FMC quash the procurement decision. Nonetheless, a proposal may not be submitted if the case is already pending at the FMC on appeal. Section 140 also provides an opportunity to issue a decision prohibiting a contracting entity from implementing a procurement decision. However, this possibility does not exist if a procurement agreement has already been concluded in the case, and the FCCA has not yet used this supervision measure.[159] If the value of the illegal direct procurement does not exceed the EU threshold values, investigative measures of the FCCA are started later than six months from the award of the contract[160] or a direct procurement notice is published[161], the FCCA can only issue administrative guidance under Section 53 c of the Administrative Procedure Act (434/2003)[162].

[158] The FCCA may make a proposal even if the contracting entity had not act intentionally in violation of the Procurement Act. See GP 108/2016 ls, p. 235.
[159] Such a decision may be appealed to the FMC. See Section 164 of the Procurement Act.
[160] The FCCA shall submit its sanction proposal to the FMC within six months of concluding the agreement, but its investigative measures interrupt and restart the passage of the period of limitation.
[161] The direct procurement notice is, therefore, the most effective way of avoiding secondary sanctions against both the appellants and the FCCA. See Taurula (2018), p. 128. However, a manifestly deficient or incorrect direct procurement notice does not preclude the FCCA for making a proposal. This may be the case if the notice concerns a substantially different procurement than the one that is being carried out as a direct procurement, or if the notice does not contain any reasons for the use of direct procurement. However, a notice is not manifestly deficient or incorrect simply because the adequacy of the reasons presented can be questioned. See GP 108/2016 ls, p. 236. A contractual amendment notice referred to Section 58(1)(9) of the Procurement Act does not prevent the FCCA to make a sanction proposal to the FMC, unlike it prevents suppliers lodging appeal after 14 days.
[162] Taurula and Ruuskanen (2018), p. 253–254. However, the also the FCCA has a margin of discretion with regard to sanctions and it may issue administrative guidance if it considers that making a sanction proposal is not necessary due to the nature of the matter or

By 24 May 2019, the FCCA had made 15 decisions on illegal direct procurement[163]. The FCCA has given eight admonitions to contracting entities[164] and it has made five sanction proposals to the FMC[165]. The FMC has confirmed the FCCA's view of the illegality in the first three cases in which it has given a ruling[166]. Furthermore, the FCCA has twice drawn the attention of contracting entities with regard to the objectives and implementation of principles referred to in the Procurement Act[167]. The reasons for the use of direct procurement which the contracting entities have presented to the FCCA have varied, but the common ones have been (as in the FMC statistics, Graph 1) contract modifications, technical reasons and extreme urgency.

4.2 Likelihood of Getting Caught

As it is difficult to estimate the total number of direct procurements, it is also challenging to estimate and measure the likelihood of an illegal direct procurement being discovered[168]. The average number of direct procurement notices during years 2013–2017 was 279 notices pear year[169]. However, these voluntary notices most likely represent only a fraction of the

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reasons relating to public interest, even if the FCCA was competent to do so. See e.g. *City of Riihimäki* (FCCA 4.6.2018, dnro 733/2017) where the contracting entity announced that it will organise a competitive tendering and terminate the contract with the supplier and *City of Vaasa* (FCCA 20.6.2018, dnro 607/2017). See GP 108/2016, p. 233

[163] See the *Decisions of the FCCA*. The cases are listed in the table of cases.

[164] I have tried to illustrate in brackets what was the reason behind the chosen sanction, although the FCCA does not always specify it. In addition to cities of Riihimäki and Vaasa mentioned above, the FCCA has given admonitions in *municipality of Liperi* (an overall assessment), in *PPSHP* (an overall assessment), in *Municipality of Vihti* (an overall assessment), in *Länsi-Pohja* (below the EU threshold value), in *city of Akaa* (below the EU threshold value and direct procurement notice), and in *city of Oulu* (investigative measures were started too late).

[165] *City of Loviisa* (the inefficiency sanction was not proposed as the procurement had already been completed), *City of Jämsä* (the inefficiency sanction was not considered necessary due to reasons relating public interest), *City of Parainen* (all the sanctions were proposed), *City of Naantali* (all the were sanctions proposed) and *Kainuun Sote* (the inefficiency sanction was not considered necessary as the leasing equipment had already been installed).

[166] MAO 64/19 (City of Loviisa), MAO 65/19 (City of Jämsä) and MAO 141/19 (city of Parainen). However, in the latest the FMC waived the proposed inefficiency sanction on overriding public interest grounds.

[167] *Kunnan Taitoa* (direct procurement notice) and *SYKE* (an overall assessment).

[168] The likelihood may also vary between different kind of direct procurements, but that not will be examined in this thesis.

[169] See *Statistics of Contract Notices*.

direct procurements made[170]. According to a Swedish study from year 2008, direct procurements are made 40 to 200 times more than national procurements and 400 to 2.000 times more than procurements over the EU threshold values[171].

The status of a party is interpreted broadly in connection with direct procurements, as any company operating in the same sector where the procurement takes place is entitled to appeal[172]. However, the minimum court fee in public procurement matters was raised by more than 700% in 2016 from EUR 244 to EUR 2,000. This is probably the major reason why the number of appeals fell by over 100 per year[173]. The change in fees is likely be particularly targeted appeals concerning direct procurements because, as stated above, an appeal may not be the most cost-efficient alternative for suppliers. It should, therefore, be noted that the discovery of the direct procurement does not necessarily mean that the informed supplier decides to appeal.

During the period under review in this thesis, the direct procurement notice was published in 20 cases, in other words, in every fourth illegal direct procurement (25%)[174]. Since many procurements were illegal for another reason than that they did not fulfil the direct procurement criteria, the likelihood might seem fairly high. However, as the total number of direct procurement notices during years 2010–2017 was 1.956, the likelihood that a direct procurement would be found illegal after a published notice is around 1%. Furthermore, as the average of illegal direct procurements found by the FMC per year was only 10, the likelihood cannot be considered high

[170] Halonen (2015b), p. 7.
[171] Bergman (2008), p. 30–31. However, the number of direct procurements in this context includes also direct procurements below the national thresholds and direct procurements not falling within the scope of procurement rules. In 2017, 8,170 national procurement notices and 3,057 EU procurement notices were published in Finland.
[172] See GP 50/2006 ls, p. 121.
[173] The average was 441 appeals per year in 2016–2018 and 548 in 2013–2015. See *Statistics and Processing Times of the FMC*.
[174] Although the contracting entity would not publish a voluntary direct procurement notice, it does not automatically mean that the FMC would find the direct procurement illegal. See e.g. MAO 525/16 where the extreme urgency was accepted.

in relation to the total number of direct procurements made.[175] In the light of the above, it may be concluded that the likelihood of an illegal direct procurement being discovered fairly low.

4.3 Analysis of Risks

Before year 2010 only sanctions under current subsections 1 to 4 existed[176]. These sanctions were not often applicable to direct procurement cases as almost always the contract had already been concluded when the FMC gave its ruling[177]. Furthermore, a compensatory fine was rarely imposed, as the appellant would have had to prove that it had had genuine prospects of winning the competitive tendering. As no competitive tendering was organised the burden of proof was too high.[178] Thus, before 2010, the only actual consequence of illegal direct procurement was the obligation to compensate the appellant's legal costs[179].

Referring to the research conducted by the Association of Finnish Local and Regional Authorities, as many as 39% of the cases in which the FMC had

[175] The FCCA has increased the likelihood of an illegal direct procurement being discovered, but the number of decisions it has made has, at least so far, been quite low.
[176] The FMC however, used the new sanctions for the first time only about 2.5 years after the law reform, when it imposed a penalty fine in MAO 403/12 and an inefficiency sanction in MAO 510/12. It may be said that the quality of appeals has generally improved over the years, as still in the early 2010's the appellants often claimed damages even though the FMC is not competent to deal with such claims (See e.g. MAO 243/12, MAO 299–300/12 and MAO 306–307/12). As the appellants are now more aware of possible sanctions, they are better able to demand them, which may lead to an increase in the number of sanctions to be imposed. On the other hand, it is possible that appellants might not have an interest in claiming all sanctions available, as it could weaken their business relationships with contracting entities.
[177] Mäkinen (2010), p. 18. However e.g. in MAO 279/18 the contract was not signed so there was no need to consider the imposition of secondary sanctions, but the FCM was able only annul the direct procurement decision.
[178] Parikka and Pökkylä (2011), p. 24. See e.g. KHO 2009:88 and KHO 2006:49. From more recent case-law, see KHO 3.1.2014 T 17 where the FSCA annulled the compensatory fine imposed by the FMC. Nonetheless, the FSCA has stated that it is possible to assess the tenderer's chances to win on the basis of a tender submitted for a previous similar competitive tendering. See e.g. KHO 2011:59 and KHO 2016:90. Before the FMC was established, the Competition Council ordered a compensatory fine to be paid for the appellant who had previously won two competitive tendering organised by the same contracting entity. See KN 27.2.2002, dnro 143/690/2001. During the period under review the only case where a compensatory fine was imposed to be paid was MAO 197/13. The only bid submitted was falsely rejected before making a direct procurement from other company. Thus, it was fairly clear that the only bidder would have had genuine prospects of winning the competitive tendering under a correct procedure.
[179] Saarinen (2008), p. 167. Regarding legal costs, see Section 149 of the Procurement Act.

held that the contracting entity had acted incorrectly, the appeal was, however, dismissed. In these cases, it was not possible to impose sanctions as the contract had already been awarded or the appeal had to be dismissed due to other reasons.[180] Thus, the 2010 law reform significantly increased the risks of contracting entities related to illegal direct procurements[181].

4.3.1 Importance of the Direct Procurement Notice

As stated earlier, a contracting entity may minimise its risks by publishing a voluntary direct procurement notice[182]. However, the ECJ's ruling in *Fastweb* raised the question of whether publishing the direct procurement is truly an effective way of avoiding the inefficiency sanction[183]. In the case, it was undisputed that the contracting entity had published the voluntary direct procurement notice and waited for the minimum standstill period before concluding the contract. The question to be resolved[184] was thus whether the contracting entity *had considered that the use of direct procurement was permissible* in accordance with the Procurement Directive[185].

The ECJ highlighted that the notice shall *clearly* and *unequivocally* indicate the reasons for the use of direct procurement in order to enable interested parties to assess the necessity of appealing. As the direct procurement criteria are exhaustively listed and they must be interpreted strictly, it was for the national court to decide whether the contracting entity had acted

[180] Kiviniemi (2011), p. 1.
[181] Halonen (2015b), p. 7. However, the problem regarding illegal direct procurements under the EU thresholds still exists, as in such cases the FMC orders at most that the contracting entity pays the legal costs (If such are demanded at all. See e.g. MAO 319/16 and MAO 214/16).
[182] A direct procurement notice may also be published in situations that are open to interpretation, if the issue is whether the procurement falls at all within the scope of the Procurement Act (e.g. in-house procurements). See GP 190/2009 ls, p. 19. However, according to *Halonen*, the direct procurement notice is mainly published in cases directly concerning the direct procurement criteria and only rarely for procurements that may be excluded from the scope of the Procurement Act. See Halonen (2015b), p. 34–35. Nonetheless, see MAO 522/16 where the direct procurement notice was published, although the case concerned an in-house procurement.
[183] C-19/13 *Fastweb*.
[184] See Article 2d(4) of the Directive 2007/66/EC.
[185] At that time still the Directive 2004/18/EC.

diligently when it made the direct procurement and whether it could have *legitimately held* that the direct procurement criteria were in fact satisfied.[186]

In MAO 472/17, the FMC, in accordance with the *Fastweb*-ruling, found that the contracting entity had not found out diligently enough the conditions for the use of direct procurement. Thus, the time for seeking review did not begin from the date of the direct procurement notice and the appeal had therefore to be investigated. The FMC found that the contracting entity had not established a technical reason that only a certain supplier could have implemented the procurement.[187] However, this was overturned by the FSCA in KHO 2018:126.

In its precedent, the FSCA stated quite straightforwardly that as the direct procurement notice had contained all the information required[188], it was necessary to assess whether the appellant had lodged its appeal within the prescribed time limit. The FSCA emphasised that lodging an appeal within the prescribed time limit is an is *an absolute procedural requirement* which a court must examine *ex officio*. According to the FSCA, the imposition of a sanction was *a matter of substantive assessment,* which, however, was out of the question, as the appeal was lodged later than 14 days after publication of the notice and, therefore, the *Fastweb*-ruling was not relevant in this case.

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[186] C-19/13 *Fastweb*, paras 48–50. AG Bot raised the contracting entities' burden of proof in this regard to a high level by stating in his opinion that contracting entities may always use legal advice in order to avoid mistakes in assessing the fulfilment of the direct procurement criteria (para 113). AG Bot also stressed that, although the direct procurement notice seeks to maximise the legal certainty and legitimate exceptions, this may not be the case, if the contracting entity 'has acted in *bad faith* and has *deliberately* and *intentionally* failed to comply with the public procurement rules' (paras 82–83) (emphasis added). *Määttä* has considered that it may be taken into account in the deficiency assessment of a direct procurement notice of whether the contracting entity has previously acted in a similar manner. See Määttä and Voutilainen (2017), p. 453.

[187] The subject of the procurement (Peppi Consortium and System) was the same also in MAO 471/17 and MAO 470/17. In these cases, the FMC also considered that there was no technical reason why only the Peppi Consortium could have met the criteria set for the system. In MAO 471/17 the contracting entity had not published the direct procurement notice, so the FMC imposed an inefficiency sanction and a penalty fine of EUR 20,000. In MAO 470/17 the contracting entity had a published a notice of the project to *implement* the system, but no direct procurement notice was published about the *procurement* of the system. For this reason, the sanctions were the same as in MAO 471/17.

[188] See Article 3a of the Directive 2007/66/EC.

The reasoning of the KHO 2018:126 can be regarded quite questionable as well as surprising since the FSCA completely ignored the unequivocal duty given by the ECJ to national courts in *Fastweb* to assess the diligence of the contracting entity[189] and, hence, also the primacy of EU law. As the FSCA stated that the *Fastweb*-ruling was irrelevant, the question arises what was the case of *Fastweb* then about? If the appeal had been lodged within 14 days in *Fastweb*, it would not have mattered whether or not the contracting entity had acted diligently if conditions for the use of direct procurement were still not met. Nonetheless, these cases seem to be almost identical, as in both cases it was undisputed that the contracting entity had published the voluntary direct procurement notice containing all the information required and waited for the standstill period before concluding the contract.

The reasoning of the KHO 2018:126 seems to be inadequate, as according to the FSCA, imposition of a sanction is *a matter of substantive assessment,* but the question of imposition of a sanction is not raised until it has been examined whether the contracting entity has acted diligently enough so that the notice may have had any legal effect[190]. This should not be a matter of substantive assessment, and that is how the FMC solved the appeal; it examined first *only* whether the contracting entity had sufficiently thoroughly investigated the existence of direct procurement criterion[191]. The FSCA itself did not even mention the word 'diligent', so the decision gives an interesting signal that diligence would be of no relevance to the beginning of the appeal period.

It is very interesting that the deficiency of a direct procurement had already been dealt with about half a year before the *Fastweb*-ruling in Finland. In MAO 189/14 the FMC found that direct procurement notice was deficient as

[189] See C-19/13 *Fastweb*, para 50, where the ECJ ruled that 'in its review, the review body *is under a duty* to determine whether (...) (emphasis added)'. See also the Opinion of AG Bot (para 80) where he states that 'it essential that (...) the review body assess the conduct of the contracting authority. In my view, it should, in particular, determine whether the contracting authority acted in good faith and with due diligence' (emphasis added).

[190] In this case, the question would be whether the time limit of 14 days would be applied.

[191] Of course, it is likely that if the contracting entity has not carried out a thorough investigation, the court will later on find the direct procurement illegal. In this case, the contracting entity had not used an external expert. Cf. Opinion of AG Bot in C-19/13 *Fastweb* (para 113) and regarding market research, see sub-chapter 3.3.

the key location information related to the procurement was missing as well as the NUTS-code indicating them. The FMC considered that the lack of such information may easily lead to the fact that the suppliers will not even find the procurement by using the search engine. The value of the procurement was also incorrectly mentioned, as the value in the notice had been EUR 350,000, but the value declared to the FMC was almost EUR 1.5 million. Due to these deficiencies, the time for seeking review was counted from the date of contract award notice. This judgment was confirmed by the FSCA in 2015, in other words, after the ECJ had given its ruling in *Fastweb*[192]. However, MAO 189/14 is not directly comparable with KHO 2018:126 as in that case the contracting entity had specified in the direct procurement notice as many as 15 different requirements for which it considered that the chosen ICT system was the only one capable of fulfilling them. Thus, the appellant was able to assess the necessity of appealing. The difference between these two cases is also that in MAO 189/14 the contract had already been concluded, whereas in KHO 2018:126 this was not done (which is why the contract award notice could neither have been published).

Taking into account the foregoing, it seems that, at least in Finland, the courts will in the future only examine whether a direct procurement notice contains manifest deficiencies or incorrectnesses. If the reasons stated in the notice are open to interpretation, it is up to the suppliers to assess within 14 days whether the reasons really exist. Instead, it should be clear that a manifestly deficient or incorrect[193] direct procurement notice may not have any legal effects. In other words, a notice that is *formally correctly* fulfilled and published seems to establish a protection against appeals after 14 days. On the other hand, it remains to be seen whether the FMC will follow the view of the FSCA in the next similar case or will it itself make a reference for a preliminary ruling to the ECJ.

[192] KHO 1.9.2015 T 2293.
[193] E.g. a notice with a false CPV code or completely different value.

4.3.2 Direct Procurement and Contract Practices of Contracting Entities

Halonen published empirical study on direct procurement and contract practices of contracting entities in 2015[194]. According to *Halonen*, contracting entities are aware of the risks resulting from making an illegal direct procurement, but major differences exists between contracting entities as to whether or not the risks are taken into account[195]. *Halonen* states that contracting entities are aware of the prohibition of amending substantially a procurement agreement during the agreement period and for this reason they are very cautious about amending agreements. As amendments are sometimes still made, it is likely that contracting entities consider it necessary to make amendments during the agreement period, as otherwise a new competitive tendering might be needed to be organised.[196]

According to *Halonen* one reason why contracting entities do not consider the inefficiency sanction and any liability for damages it may incur might be that the FMC rarely imposes the sanction in question[197]. This is due to the fact that the FMC may waive the inefficiency sanction on overriding public interest grounds as presented above. Furthermore, in many cases the contract period has already expired, and an inefficiency sanction has therefore not been imposed[198].

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[194] Halonen (2015b). She assessed the impact of the 2010 legal protection reform on the activities of contracting entities. The research included a large-scale survey conducted in spring 2013.

[195] Halonen (2015b), p. 34.

[196] Halonen (2015b), p. 37. The contracting entity may always avoid the risk of illegal direct procurement by terminating the substantially modified contract with immediate effect under Section 137(1) of the Procurement Act. See also GP 108/2106 p. 230. Although *Halonen* stated this only in connecting with contract modifications, it could be assumed that also direct procurement is used regardless of its risks if it is considered necessary i.e. as the best possible solution available.

[197] By the end of 2014, the FMC had still imposed only two inefficiency sanctions, the latter in MAO 20/14. In the period 2015–2018 the FMC imposed the inefficiency sanction in seven cases. See MAO 510/12, MAO 20/14, MAO 553/15, MAO 652/15, MAO 466/17, MAO 470/17, MAO 471/17, MAO 479/17 and MAO 469/18. The FMC imposed an inefficiency sanction also in MAO 76/16, but it was annulled by the FSCA. See KHO 14.3.2018 T 1134.

[198] Halonen (2015b), p. 37–38. See e.g. MAO 891/15, MAO 484/14, MAO 57/14, MAO 159/13 and MAO 205/13. See also *city of Loviisa* (FCCA 16.2.2018, dnro 794/2017). If, after a direct procurement notice is published, the FMC allows the implementation of the

One risk management tool, also mentioned by *Halonen*[199], is an agreement that will enter into force only 6 months after its date of signing. As the implementation of the contract and concrete measures, such as construction work, do not take place within 6 months, it is highly unlikely that potential appellants or the FCCA would become aware of the procurement and could bring the case to the FMC in time. However, the ECJ stated in *Uniplex* that the time limit for seeking review may begin to run only from the date on which the appellant received, or should have received, sufficient information on the alleged infringement of procurement rules[200]. If the above-mentioned activity of contracting entity is conscious and seeks to circumvent the application of the Procurement Act, the question arises whether other companies or the FCCA could take the case to the FMC even after 6 months by citing the primacy of EU law[201].

As the ECJ gave its ruling in *Fastweb* over one year after *Halonen* published her research, she assumed the precedent may lead to a reduction in the number of direct procurement notices[202]. However, this did not happen, as the average number of direct procurement notices during years 2013–2017 was 279 notices pear year. During this period, at least 268 and up to 293 notices per year were published, so the number of notices per year is clearly established.[203] Instead, on the basis of the KHO 2018:126 it could be assumed that the number of direct procurement notices published may increase to some extent[204].

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procurement decision, this means that the inefficiency sanction, penalty fine and shortening the agreement period are out of question and only a "theoretical" compensatory fine can be imposed. See e.g. MAO 16/16.

[199] Halonen (2015b), p. 39.

[200] C-406/08 *Uniplex*, para 35. See also C-161/13 *Idrodinamica*, paras 43–48.

[201] *Halonen* has considered it possible for a supplier to appeal even the time limit for seeking review if it is able to prove that the contracting entity knowingly contravened the procurement Act. See Halonen (2015a), p. 42–43. See also Opinion of AG Bot in C-19/13 *Fastweb* (paras 16, 80–83, 100 and 113–115).

[202] Halonen (2015b), p. 39.

[203] See *Statistics of Contract Notices*.

[204] However, as the ruling of the FSCA was given in September 2018, the potential consequences will only be visible at the end of the year 2020, when statistics for 2019 will be published.

4.3.3 Other Analysis

In some cases, the contracting entity has decided to revoke the direct procurement made after other suppliers have noticed the published direct procurement notice and contacted the contracting entity[205]. It is not obligatory to carry out the direct procurement already made, but the contracting entity may quash its own erroneous decision by making a rectifying a procurement as laid down in Section 132 of the Procurement Act[206]. Also because of this, publishing a direct procurement notice seems to be the best way to avoid the consequences.

Halonen considered in her doctoral thesis in 2015 that the effect of the inefficiency sanction may depend on whether the direct procurement is considered a contract amendment or an additional order[207]. The situation she described was realised in MAO 469/18. The contracting entity in question had purchased toner cartridges for already existing printers that were not listed as IT equipment in the procurement documents. As the scope of the original procurement had been EUR 9–10 million per year and the value of the toner cartridges was EUR 1.8 million per year, the share of toner cartridges had become a significant part of the contract so that the amendment substantially widened the scope of the contract. The purchase of products *other than those originally procured* resulted in the ineffectiveness of the entire contract, a fine of EUR 50,000, a conditional fine of EUR 500,000, and the obligation to pay the appellant's legal costs of EUR 20,000.[208]

[205]Lähde and Hannonen (2012), p. 75.
[206] See e.g. MAO 867/17.
[207] Halonen (2015a), p. 46–47.
[208] The contracting entity appealed the case to the FSCA, but the appeal was dismissed as inadmissible as it was not made within the time limit. See KHO 17.12.2018 T 5926.

Conclusion

This thesis has aimed to codify the situations in which a procurement turns out to be an illegal direct procurement and to find out what are the most typical situations in which a contracting entity makes an illegal direct procurement. For this purpose, the judgements of the FMC from 2011–2018 related to direct procurement and to the obligation to organise a competitive tendering were examined. During the period under review, 80 cases were found where the FMC had considered procurements as illegal direct procurement.

This thesis has demonstrated that illegal direct procurements can be divided into three groups. The first group consists of direct procurements that do not meet the criteria of Sections 40 and 41 of the Procurement Act. As the direct procurement criteria are exhaustively listed, the criteria consist of several cumulative conditions which are interpreted strictly, and the burden of proof lies on the contracting entities, it is highly likely that an unclearly justified direct procurement turns out to be an illegal direct procurement. The former professional football player Gary Lineker has described football as 'a simple game where twenty-two men chase a ball for 90 minutes and at the end, the Germans always win'. Direct procurement could be described in a similar fashion. The judges go through the direct procurement criteria and at the end of the day, they conclude that none of them was fulfilled.

The second group consists of amendments made to agreements during their terms, as a substantial amendment constitutes an obligation to organise a new competitive tendering. These so-called *Pressetext*[209] conditions were codified into Article 72 of the Procurement Directive in 2014, but at the same time permissible amendments that do not modify the general character of the agreement were introduced. However, the ECJ has not had a chance to take a stand on these new exceptions yet as it has not received any references for preliminary rulings.

[209] C-454/06 *Pressetext*.

Procurements for which a competitive tendering has not been organised, although the procurement has been covered by procurement legislation, form the third group. These include, for instance, procurements from in-house entities. Stricter limits, including a euro-denominated limit, for business operations with parties not exercising control over the in-house entity became applicable in Finland from the beginning of 2019. Therefore, it is likely that not all in-house entities have managed to adjust their operations and illegal direct procurements will be seen.

Based on the statistics, explicitly supported by the results of the survey sent to the experts from PTCS, the most common types of illegal direct procurement are extreme urgency, technical reasons, additional orders and contract modifications (Graph 1). As each one of these four reasons was invoked in MAO 279/18 and MAO 837/17 (followed by KHO 2019:10), these cases could be described as textbook examples. Alternatively, as ICT systems are in a major turning point, another situation that may become more common in the near future is a contract amendment by which an on-premises system, originally procured as a goods, is replaced by a SaaS-system[210]. In that case the procurement has changed into a service and a new competitive tendering should be organised. This might be extremely difficult for contracting entities to detect as the user experience may change only a little.

The statistics collected showed, perhaps somewhat surprisingly, that in almost every other case the procurement was illegal for another reason than that it did not fulfil the direct procurement criteria or the conditions for additional orders (Graph 1). For this reason, contracting entities should consider carefully if they are planning to carry out a procurement without organizing a competitive tendering because they believe that it falls outside the scope of procurement legislation.

Furthermore, during the period under review, five out of the eight direct procurement criteria were not mentioned as a cause for direct procurement

[210] See e.g. FCCA 18.6.2018, dnro 753/2017 (City of Naantali).

at all. This may be due to the fact that direct procurements are made very rarely on those grounds or, alternatively, these criteria are mainly used properly. Moreover, based on the statistics, it appears that the number of appeals related to direct procurement and to the obligation to organise a competitive tendering handled by the FMC is clearly decreasing after the new Procurement Act entered into force (Graph 2).

The latter part of this thesis was focused on the risks resulting from making an illegal direct procurement. The potential consequences of getting caught with an illegal direct procurement were examined with the focus on administrative sanctions. Remedies against illegal direct procurements have improved significantly, and thus the risks have increased, during the 2010's as new secondary sanctions, including the inefficiency sanction for procurement contracts already concluded, were introduced. In addition to appeals made by suppliers to the FMC, the FCCA can nowadays also take measures against unlawfully acting contracting entities.

However, the FMC rarely imposes the inefficiency sanction as it may waive the sanction on overriding public interest grounds. Sometimes also other reasons prevent its imposition. This may be the case if the contract period has already expired or if the FMC has allowed the implementation of the procurement decision. In 2010's the FMC has imposed the inefficiency sanction only 10 times, one of which has been overturned by the FSCA. The effect of the inefficiency sanction may depend on whether the direct procurement is considered a contract amendment or an additional order. Therefore, in order to avoid the inefficiency of the whole agreement, the contracting entities should always strive, if possible, to make a clearly separate additional order.

One interesting and topical issue has been the voluntary direct procurement notice through which a contracting entity may seek to minimise the risk of a procurement agreement to be found inefficient. The ECJ stated in *Fastweb*[211] that the direct procurement notice shall clearly and

[211] C-19/13 *Fastweb*.

unequivocally indicate the reasons for the use of direct procurement, and that the contracting entity must have acted diligently when it made the direct procurement. The FSCA, however, ignored this ruling in KHO 2018:126 by stressing instead that the 14-day time limit is an absolute procedural requirement. Hence, it seems that, at least in Finland, the courts will in the future only examine whether a direct procurement notice contains manifest deficiencies or incorrectnesses and a notice formally correctly fulfilled and published already establishes a protection against appeals after 14 days. The precedent of the FSCA may encourage the contracting entities to publish direct procurement notices.

It was concluded in this thesis that the likelihood of an illegal direct procurement being discovered is fairly low. Moreover, the discovery of the direct procurement does not necessarily mean that the informed supplier decides to appeal as an appeal may not be the most cost-efficient alternative for suppliers. It is likely that direct procurement is used or amendments during the agreement period made regardless of risks if they are considered necessary, in other words, as the best possible solutions available. Thus, taking into account all the foregoing, it can be argued that the risks resulting from making an illegal direct procurement are not high enough.

As stated above, the number of appeals concerning direct procurement has been decreasing since 2017 (Graph 2). Although it is recognised that the observation period is not very long, the fact is that the FMC has ruled only in one appeal-based direct procurement case after 2017. This can be, and probably is, a sum of many issues but I believe that this trend will continue in the future. It is possible that the presence of the FCCA works as a deterrent and contracting entities pay now more attention to their procurements. Thus, the observation made by *Halonen* on the cautiousness of the contracting entities with regard to the explicit direct procurements seems to be correct[212]. If this is the case, the target set for the FCCA has been met, even if it would not make a single proposal to the FMC.

[212] Halonen (2015b), p. 34.

As the national threshold values were significantly raised in 2017, it is also possible that the number of illegal direct procurements caught will decrease in the future. The Procurement Act does not apply to procurements below the national threshold values, so it is not possible that such procurements would no longer be found to be illegal. Moreover, the significant raise in court fees has not probably increased the willingness of suppliers to appeal. It can also be assumed that when the fully electronic and highly flexible dynamic purchasing system becomes more common, it will reduce the need for contracting entities to make direct procurements, which will further reduce the amount of illegal direct procurements.

On the other hand, it is possible that the FCCA will receive more tips and become more efficient, so that the number of direct procurement cases handled by the FMC will not decrease much. The FCCA may also try out the limits of its powers by making a proposal in a case where it considers that the direct procurement notice published is manifestly deficient or incorrect or in a case where the value of the procurement actually exceeded the EU threshold values but only a national procurement notice was published.

As the sanctions available on illegal direct procurements below the EU threshold values are still limited, it could be considered whether the jurisdiction of the FCCA should be extended so that the FCCA could propose a penalty fine also on illegal direct procurements below the EU threshold values. On the other hand, as the FCCA shall concentrate its resources especially on irregularities that are economically, socially or fundamentally significant, it would probably be inappropriate to use public funds for a full investigation and a proceeding before the FMC to impose a fine of just a few thousand euros. For this reason, it could be assessed whether the jurisdiction of the FCCA regarding proposing penalty fines should be extended to, for example, works contracts over EUR 1 million, but still below the EU threshold of about EUR 5 million. Similarly, this kind of special limit for penalty fines on high value works contracts could be introduced also for the FMC in cases brought by appellants.

Moreover, it is noteworthy that the time limits for seeking review and for FCCA to make a sanction proposal are aimed at only improving the legal certainty of contracting entities and their contract partners in relation to the fact that the contract would be found to be ineffective. Therefore, the jurisdiction of the FCCA could be extended so that it could make a penalty fine proposal to the FMC in cases where it has started its investigative measures later than six months from the award of the contract. This would also help with the potential problem of signing a direct procurement agreement 6 months before the date of entry into force.

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Annex 1 – The Survey

Question	Answer	Number of answers given	Percentage of answers given
1. How often are you asked about the possibility to use direct procurement or otherwise to make a procurement without organizing a competitive tendering for any other reason?	a) Often	0	0%
	b) Fairly often	7	63,6%
	c) Sometimes	3	27,3%
	d) Rarely	0	0%
	e) Never	0	0%
	f) I do not know	1	9,1%
2. For which direct procurement criteria has the possibility been asked? (Select 1 or more)	a) No suitable tenders were received (40.2.1 §)	4	36,4%
	b) There is a technical, artistic or exclusive reason for direct procurement (40.2.2 §)	11	100%
	c) The aim of the procurement is the creation or acquisition of a unique work of art or artistic performance (40.2.3 §)	2	18,2%
	d) Direct procurement is due to extreme urgency (40.2.4 §)	8	72,7%
	e) The goods to be procured are manufactured only for R&D purposes (40.2.5 §)	1	9,1%
	f) Direct procurement from the commodity market (40.2.6 §)	0	0%
	g) The goods would be procured under particularly advantageous conditions (40.2.7 §)	0	0%
	h) Direct procurement from a winner of a design contest (40.2.8 §)	1	9,1%

	i) I have not been asked any of the above	1	9,1 %
	j) I do not know	0	0%
3. For which other reasons has the possibility been asked? (Select 1 or more)	a) The procurement is not made by a contracting entity (5 §)	2	18,2%
	b) The main subject of the hybrid agreement is not a procurement covered by the Procurement Act (7 §)	5	45,5%
	c) Procurement concerns purchase or lease of land, existing buildings or other immovable property (9.1 §)	2	18,2%
	d) Procurement from an in-house entity (15 §)	8	72,7%
	e) Procurement from another contracting entity (16 §)	4	36,4%
	f) The estimated value of the procurement falls below the national threshold (25 §)	7	63,6%
	g) Procurement is made within a framework agreement (42-43 §)	3	27,3%
	h) Interim arrangement of a procurement for the duration of the appeal process (153 §)	7	63,6%
	i) Direct procurement in an additional order (41 §)	11	100%
	j) An amendment of a procurement agreement during the agreement period (136 §)	11	100%
	k) I have not been asked any of the above	0	0%
	l) I do not know	0	0%
4. Which direct procurement criteria is most often asked about? (Select	a) No suitable tenders were received (40.2.1 §)	0	0%
	b) There is a technical, artistic or exclusive	10	90,9%

1–5)	reason for direct procurement (40.2.2 §)		
	c) The aim of the procurement is the creation or acquisition of a unique work of art or artistic performance (40.2.3 §)	1	9,1%
	d) Direct procurement is due to extreme urgency (40.2.4 §)	7	63,6%
	e) The goods to be procured are manufactured only for R&D purposes (40.2.5 §)	0	0%
	f) Direct procurement from the commodity market (40.2.6 §)	0	0%
	g) The goods would be procured under particularly advantageous conditions (40.2.7 §)	0	0%
	h) Direct procurement from a winner of a design contest (40.2.8 §)	0	0%
	i) I have been asked none of the above	0	0%
	j) I do not know	0	0%
5. Which other reasons are most often asked about? (Select 1–5)	a) The procurement is not made by a contracting entity (5 §)	0	0%
	b) The main subject of the hybrid agreement is not a procurement covered by the Procurement Act (7 §)	1	9,1%
	c) Procurement concerns purchase or lease of land, existing buildings or other immovable property (9.1 §)	1	9,1%
	d) Procurement from an in-house entity (15 §)	6	72,7%
	e) Procurement from another contracting entity (16 §)	0	0%

	f) The estimated value of the procurement falls below the national threshold (25 §)	3	27,3%
	g) Procurement is made within a framework agreement (42-43 §)	0	0%
	h) Interim arrangement of a procurement for the duration of the appeal process (153 §)	1	9,1%
	i) Direct procurement in an additional order (41 §)	8	72,7%
	j) An amendment of a procurement agreement during the agreement period (136 §)	8	72,7%
	k) I have been asked none of the above	0	0%
	l) I do not know	0	0%
6. In which situations do you usually find that the contracting entity may use direct procurement? (Select 1–5)	a) No suitable tenders were received (40.2.1 §)	5	45,5%
	b) There is a technical, artistic or exclusive reason for direct procurement (40.2.2 §)	4	36,4%
	c) The aim of the procurement is the creation or acquisition of a unique work of art or artistic performance (40.2.3 §)	0	0%
	d) Direct procurement is due to extreme urgency (40.2.4 §)	0	0%
	e) The goods to be procured are manufactured only for R&D purposes (40.2.5 §)	0	0%
	f) Direct procurement from the commodity market (40.2.6 §)	0	0%
	g) The goods would be procured under particularly advantageous conditions	0	0%

	(40.2.7 §)		
	h) Direct procurement from a winner of a design contest (40.2.8 §)	0	0%
	i) I have not found that the contracting entity could use direct procurement	6	54,5 %
	j) I do not know	0	0%
7. In which situations do you most often find that the procurement can be carried out without organizing a competitive tendering? (Select 1–5)	a) The procurement is not made by a contracting entity (5 §)	0	0%
	b) The main subject of the hybrid agreement is not a procurement covered by the Procurement Act (7 §)	0	0%
	c) Procurement concerns purchase or lease of land, existing buildings or other immovable property (9.1 §)	0	0%
	d) Procurement from an in-house entity (15 §)	6	54,5%
	e) Procurement from another contracting entity (16 §)	2	18,2%
	f) The estimated value of the procurement falls below the national threshold (25 §)	5	45,5%
	g) Procurement is made within a framework agreement (42-43 §)	2	18,2%
	h) Interim arrangement of a procurement for the duration of the appeal process (153 §)	2	18,2%
	i) Direct procurement in an additional order (41 §)	3	27,3%
	j) An amendment of a procurement agreement during the agreement period (136 §)	5	45,5%
	k) I have not found that the procurement could be carried out without	1	9,1%

	organizing a competitive tendering		
	l) I do not know	2	18,2%
8. In which situations do you most often find that the contracting entity may not use direct procurement? (Select 1–5)	a) No suitable tenders were received (40.2.1 §)	0	0%
	b) There is a technical, artistic or exclusive reason for direct procurement (40.2.2 §)	7	0%
	c) The aim of the procurement is the creation or acquisition of a unique work of art or artistic performance (40.2.3 §)	1	9,1%
	d) Direct procurement is due to extreme urgency (40.2.4 §)	8	72,7%
	e) The goods to be procured are manufactured only for R&D purposes (40.2.5 §)	1	9,1%
	f) Direct procurement from the commodity market (40.2.6 §)	0	0%
	g) The goods would be procured under particularly advantageous conditions (40.2.7 §)	0	0%
	h) Direct procurement from a winner of a design contest (40.2.8 §)	1	9,1%
	i) I have not found that the contracting entity could not use direct procurement	2	18,2%
	j) I do not know	0	0%
9. In which situations do you most often find that the procurement cannot be carried out without organizing a competitive tendering? (Select 1–5)	a) The procurement is not made by a contracting entity (5 §)	0	0%
	b) The main subject of the hybrid agreement is not a procurement covered by the Procurement Act (7 §)	2	18,2%
	c) Procurement concerns		

	purchase or lease of land, existing buildings or other immovable property (9.1 §)	1	9,1%
	d) Procurement from an in-house entity (15 §)	3	27,3%
	e) Procurement from another contracting entity (16 §)	1	9,1%
	f) The estimated value of the procurement falls below the national threshold (25 §)	1	9,1%
	g) Procurement is made within a framework agreement (42-43 §)	0	0%
	h) Interim arrangement of a procurement for the duration of the appeal process (153 §)	0	0%
	i) Direct procurement in an additional order (41 §)	3	27,3%
	j) An amendment of a procurement agreement during the agreement period (136 §)	7	36,6%
	k) I have not found that a competitive tendering should be organised	0	0%
	l) I do not know	1	9,1%