https://doi.org/10.12697/JI.2025.34.04

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Disproportionate Restrictions on the Exercise of Discretion concerning Public Procurement Instruments under Estonian Legislation[*1]

Abstract. This article examines the restrictive boundaries of discretion imposed by Estonian public procurement law in comparison to EU directives, highlighting the contradictions, interpretative errors, and regulatory gaps that complicate and challenge the work of Estonian procurers. The topic is significant because public procurement constitutes a substantial share of public expenditure and serves as a key mechanism for ensuring efficiency, competition, and the coherent application of EU internal market rules. The main questions addressed include whether Estonian enforcement disproportionally restricts EU-provided discretion and whether those restrictions conflict with the directive's objectives. The study offers a critical assessment and proposes legislative guidelines. It concludes that current Estonian regulation and administrative interpretation often narrow the discretion intended by EU law, suggesting the need for legislative amendments or interpretative clarification to restore consistency and improve the effective use of procurement instruments.

Keywords: public procurement, EU public procurement law, framework agreement, dynamic purchasing system, discretion of the contracting authority

1. Introduction

This article examines the scope of the contracting authority's discretion under Estonian public procurement law in the case of using framework agreements (FA) and dynamic purchasing systems (DPS), with a particular focus on whether the restrictions imposed by the Estonian legislator are in harmony with the EU Public Procurement Directive[*2] (procurement directive) and the Utilities Procurement Directive[*3] and how potential conflicts between the related national practice and EU law should be addressed.

1 The research was funded by the Estonian Research Council (PRG 1449).

2 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

3 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance [2014] OJ L 94/243.

The public procurement instruments (PPI) introduced by Chapter 2 of the Procurement Directive are implemented in Estonia under the Public Procurement Act (PPA)[*4]: the FA (§ 29–31), the DPS (§ 32–35), the electronic auction (§ 36–38), and the electronic catalogue (§ 39–41). As the provisions discussed in this article are identical to the procurement directive governing the utilities sector, I will refer only to the Procurement Directive, but the conclusions apply to both the classical and utilities sector regulations.[*5]

An **FA** is a contract that establishes the terms and conditions governing the public contracts to be awarded under the FA during the term of validity of the FA (PPA § 4 (15)). A **DPS** is an electronic procedure for the award of public contracts, which qualified undertakings may join on an ongoing basis during the DPS's period of validity, and the contracting authority may enter into public contracts with the applicants who have joined pursuant to the procedure provided for by law (PPA § 32 (1)).

Those two PPIs were introduced into the procurement directives to ensure the efficient and transparent use of public funds, promote fair competition, and support broader EU policy goals such as innovation, sustainability, and market integration. In particular, the European Commission recommends using FAs and DPS in the defence sector as they allow defence authorities to react quickly to changing operational needs while maintaining legal and procedural efficiency. These PPIs support collaborative procurement and reduce administrative complexity, making defence readiness more agile and cost-effective.[*6] I focus in this article primarily on the DPS and FA as these instruments are more widely used. The e-catalogue and e-auction pursue the same objectives, but due to their nature, they are applicable in a more limited range of situations.

However, I submit that the above-mentioned purposes seem to be significantly diminished by the Estonian legislative choices, which limit the discretionary choices of authorities regarding PPIs more strictly than EU law. Examples of such regulatory contradictions include § 33 (1^1) of PPA, which obliges a contracting authority to publish the nature and estimated quantity of the envisaged purchases. It is similar to Art 34 (4) point b of the Procurement Directive, but the interpretations in Estonia differ from how this provision of the Directive is interpreted in other countries. In Estonia, it is officially interpreted in a way that obliges the contracting authority to publish a fixed technical description of the public procurement contracts. Additionally, there is a lot of confusion about the rules that apply to changing FAs. Limited discretion for Estonian contracting authorities undermines the beneficial effects intended by the Procurement Directive and reduces the overall effectiveness of procurement. In my view, Estonia's statistics show an underuse of PPIs; one of the reasons for this may be the regulatory and interpretative issues analysed in this article.[*7]

The article submits that to properly harmonise and more effectively apply EU public procurement law to FAs and DPSs, Estonian public procurement law either needs revision and amendments or the contracting authorities need soft law guidance to efficiently employ the PPIs. The article analyses the applicable legislation and current case law to answer the following research questions:

- The Estonian legislator has restricted the discretion of contracting authorities or interpretations that are just too narrow by the Ministry of Finance about the use of PPIs in the applicable provisions of the PPA. Are the restrictions and/or interpretations in harmony with the public procurement directives?
- How should conflicts between national procurement practices and EU directives be resolved? What role does the contracting authority's discretion play in addressing such inconsistencies?

To address these questions, the article first outlines the concept and limits of the contracting authority's discretion under Estonian and EU public procurement law. The following two chapters examine in more detail the scope of discretion arising from EU law with respect to each PPI (the FA and the DPS) and then analyse the shortcomings in Estonian legislation and practice that have limited their effective use. Finally, the article explores possible solutions for overcoming the identified regulatory and interpretative problems.

4 Riigihangete seadus: RT I, 01.07.2017, 1; RT I, 12.07.2025, 25.

5 In addition, both the PPA and the procurement directive have dealt with the possibilities of consolidating public procurements as central, joint, and cross-border procurements, respectively, in the same section and chapter as PPI. As these are not PPIs but methods, the methods mentioned in the article are not discussed alongside PPIs.

6 European Commission, *Defence Readiness Omnibus* (2025) <https://defence-industry-space.ec.europa.eu/eu-defence-industry/defence-readiness-omnibus_en> accessed on 16 July 2025.

7 Ministry of Finance Statistics <https://www.fin.ee/riigihanked-riigiabi-osalused/riigihanked/kasulik-teave-oigusaktid#riigihangete-valdkon--2> accessed on 16 July 2025.

Several interesting research directions fall outside the scope of this article due to space limitations, and I will address them in more detail in future scholarly work. The aim of this article is to identify the nature of the problem and find possible solutions, primarily in the initial stage of organising a procurement procedure, namely, in making the discretion-based decision in favour of a PPI vs a regular procurement contract. Naturally, the article also brings into focus future research avenues, including more detailed questions concerning the substantive definition of PPIs.

2. Discretionary power of a contracting authority and the general principles of public procurement law

The Procurement Directive and the PPA do not contain fully identical general principles. While the Estonian legislator has transposed all EU procurement principles, additional principles have been introduced that do not exist in EU law. These national principles are based on domestic policy objectives and operate alongside EU procurement principles, although legal scholarship suggests that in practice they function hierarchically beneath them.[*8]

EU public procurement law does not explicitly recognise discretion as an independent principle, as it is not a principle but rather a tool for applying principles. However, there is one general principle for which discretion forms a core component: the principle of proportionality. It is from this principle that the contracting authority's right and duty to make choices arises, and the exercise of those choices is, in substance, the exercise of discretion. The EU legislator has not regulated how discretion must be exercised under the procurement directives, and the European Court of Justice (ECJ) has clarified this progressively on a case-by-case basis.

In Estonia, the concept of discretion derives from administrative law. Since these are general rules governing the exercise of administrative discretion, they can be regarded as compatible with the proportionality principle under EU procurement law. The right of discretion is the power of an administrative authority to choose between legal consequences when enforcing a legal provision—the discretion to decide or to choose (§ 4(1) of the Administrative Procedure Act[*9]). In exercising discretion, an administrative authority decides which of the legally permitted options to apply in each situation. Before making a discretionary decision, the authority must first determine whether the legal prerequisites are met, define the content of any indeterminate legal concepts, and evaluate the relevant factual circumstances, which may involve extra-legal considerations. Only after these steps can the authority properly exercise its discretion to select the most appropriate solution based on the specifics of the case.[*10]

One of the aspects that must be followed when exercising discretion in a public procurement matter is the impact of the general principles of public procurement law. Art 18(1) of the Procurement Directive is perhaps the most important article of all as it reflects the procurement principles of equal treatment, transparency, and proportionality, which are also fundamental principles of EU primary law.[*11] The Estonian legislator has transposed the same principles into § 3 of the PPA but has supplemented them with an additional requirement that contracting authorities must use public funds economically and expediently, ensure the best price-to-quality ratio, and conduct procurement within a reasonable timeframe, reflecting national priorities alongside EU-level principles.

It is generally understood that when exercising the power of discretion in public procurement cases, a contracting authority is guided by the general principles of public procurement law.[*12] This ensures

8 Mari Ann Simovart and Mart Parind (eds), *Public Procurement Act. Commented edition* (Juura 2019), s 3, comments 5, 72.

9 Haldusmenetluse seadus: RT I 2001, 58, 354; RT I, 06.07.2023, 31.

10 Judgment of the Administrative Law Chamber of the Supreme Court 3-20-2474, 20 June 2022, para 17; Judgment of the Administrative Law Chamber of the Supreme Court 3-20-1198, 11 December 2020, para 12.

11 Carina Risvig Hamer and Marta Andhov in Albert Sanchez-Graells, Roberto Caranta (eds), *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar 2021), 18.01; Regarding general principles of EU law, see, for example, Takis Tridimas, *The General Principles of EU Law* (OUP 2006).

12 F.e ECJ case C-14/17 *VARSrl, Azienda Trasporti Milanesi SpA (ATM) v Iveco Orecchia SpA* ECLI:EU:C:2018:568, para 32.

the purposeful interpretation of norms[*13] or fills in any gaps in the regulation.[*14] Both EU and Estonian case law, along with general principles, impose clear limits on the discretion of contracting authorities.[*15] Thus, wherever a contracting authority needs to interpret a norm, overcome loopholes in the law, or make a discretionary decision, it must do so through the prism of the general principles.[*16] This includes any decisions regarding the use of a PPI. Accordingly, when applying the proportionality principle, Estonian contracting authorities must also follow the broader administrative law rules on discretion that apply in national law.

An example of discretion in the case of PPIs concerns the deadline for submission of tenders in a mini-competition under an FA. According to the law, there is no mandatory minimum time period for the submission of tenders in a mini-competition (§ 30(9)2) of the PPA), in contrast to the DPS, where the minimum time is 10 calendar days (§ 35(3) of the PPA). In setting a deadline in a mini-competition, the principle of proportionality restrains the contracting authority from abusing its discretion.[*17]

In the context of PPIs, such as FAs and DPSs, the scope of discretion granted to contracting authorities becomes particularly evident. Under an FA, the contracting authority enjoys a wide margin of discretion when designing both the structure of mini-competitions and the underlying contractual model, provided that the general principles of public procurement law are respected. Similarly, in the case of a DPS, the authority itself must develop and define most of the procedural rules, as the Procurement Directive does not prescribe the detailed operational framework. In both instruments, EU law intentionally leaves significant room for the authority to tailor the system to its practical needs.

This legislative design demonstrates that the EU legislator has sought to give contracting authorities a high degree of flexibility when using PPIs. Any limitations imposed on the exercise of that discretion must therefore derive not from rigid national prescriptiveness but from the fundamental principles of transparency, proportionality, and competition, and they should enhance, not undermine, the effectiveness of the instrument. In other words, restrictions should be justified only insofar as they protect the interests of tenderers and ensure fair competition, while still allowing contracting authorities maximum flexibility in organising procurement efficiently.

3. The role of PPIs in increasing the efficiency of public procurement

3.1. Efficiency

To be efficient, a public procurement procedure must follow the general principles, be purposeful, and use public resources expediently and economically. This allows the public sector to provide more services and boost the economy. The need to measure the efficiency of public procurements and their impact on the public sector in general is very closely related to promoting economic growth.

For example, the OECD highlights that both FAs and DPSs enhance procurement productivity by reducing duplication, enabling the aggregation of demand, and fostering innovation. The use of PPIs is one of the means to support broader policy goals, such as environmental sustainability and small and medium-sized enterprises' (SME) participation, by offering flexible yet transparent procurement mechanisms. A Finnish study confirms this, finding that FAs conduct public procurement efficiently and have a positive impact on the economy.[*18]

13 F.e ECJ case C-42/13 *Cartiera dell'Adda SpA v CEM Ambiente SpA* ECLI:EU:C:2014:2345, para 49.

14 Albert Sanches-Graells, *Competition and the Public Buyer Towards a More Competition-Oriented Procurement: The Principle of Competition Embedded in EC Public Procurement Directives* (University of Bristol 2009) 13.

15 Judgment of the Tallinn Administrative Court 3-13-1510, 5 August 2013, para 12; Judgment of the Tallinn Administrative Court 3-13-1752, 25 November 2013, para 6; ECJ case C-14/17 *VARSrl, Azienda Trasporti Milanesi SpA (ATM) v Iveco Orecchia SpA* ECLI:EU:C:2018:568, para 34.

16 Kadri Härginen, *Due Diligence Obligations of a Contracting Authority Under the EU Public Procurement Law* (PhD thesis, University of Tartu Press 2023) 40.

17 Mari Ann Simovart and Mart Parind (n 8), s 30, comment 29.

18 OECD, Productivity in Public Procurement. A Case Study of Finland: Measuring the Efficiency and Effectiveness of Public Procurement (2019) <https://www.oecd.org/en/topics/public-procurement.html> accessed on 16 July 2025.

The wish to improve efficiency is also evident from the Public Procurement Directive, which introduced simplification measures to help contracting authorities achieve the best possible procurement result with the least possible investment in terms of time and public money.[*19] PPIs are among such simplification measures.[*20] The EU legislator emphasises that these instruments increase competition and efficiency by saving time and money. The same is true for Estonian public procurements, as the Estonian legislator specifically highlights the need to procure economically and expediently (PPA § 3).

Past crises have shown the need for contracting authorities to be able to conduct quick public procurements. PPIs are designed to enable this legally and purposefully. A DPS can be crucial, as it was often used during the pandemic for efficient and flexible procurements to meet society's changing needs.[*21] Despite the war in Ukraine following the COVID-19 crisis, Estonia did not see a boom in defence procurements. Existing PPIs and contracts covered the increased needs.[*22] The statistics on the use of PPIs suggest the total opposite, as is explored in the next paragraph of this article, making it crucial to understand the reasons for the underutilisation of these PPIs.

3.2. Overview of statistics

In 2022, public procurements accounted for 39% of state budget expenditure and 15% of GDP.[*23] Therefore, as is widely known, public procurements serve as a powerful tool with a significant impact on the market and its players. Comparing the general numbers with the statistics on the use of FAs and DPS, however, the picture suggests significant potential.

Between 2020 and 2024, 43,405 public procurements were registered in Estonia, including small purchases valued at less than 30,000 euros. Of these, 33,747 aimed to award public contracts, 140 were design competitions, and 301 awarded concession contracts. Over 77.75% of procurements were for public contracts, showing a preference for regular procedures despite longer processing times.

Considering the overall numbers above, FA is a relatively widely used PPI in Estonia: they were used in a total of 9,001 public procurements in the period 2020–2024.[*24] So, approximately 20% of public procurements ended with an FA. If the statistics are narrowed for comparison purposes to the year 2020 only, the numbers in Estonia are 1,549 FAs out of 8,331 procurements (18.6%). In the EU, this was 45,051[*25] FAs during the same period out of 639,503 tenders noticed in TED (7%).[*26]

However, a DPS was set up only 216 times during the same reference period of 2020–2024, with only 22 new DPSs in 2020 (0.24%). In the EU, the number was even worse, with 893 DPSs in 2020 (0.14%).[*27] An e-catalogue was created in Estonia 22 times, and an e-auction was used three times.[*28]

Although the use of DPSs is quite low in both Estonia and the EU, when compared to FAs, there are no analyses in Estonia that would explore or explain why. More importantly, statistics on the creation of DPSs may also be misleading, as they could present the number of procurement contracts concluded on

19 450 SE, Seletuskiri riigihangete seaduse eelnõu juurde [Explanatory memorandum to the initiation of the Public Procurement Act], para 3.

20 Recital 68 of the procurement directive.

21 Ioan-Gabriel Popa and Marius Milandru, 'The Dynamic Purchasing System – a modern public procurement solution' (2023) XXIX (2) International Conference Knowledge-based organisation <https://www.researchgate.net/publication/372529159_The_Dynamic_Purchasing_System_-_A_Modern_Public_Procurement_Solution> accessed on 16 July 2025.

22 Mari Ann Simovart, Deividas Soloveičik, and Triin Väljaots, 'Trouble in the neighbourhood: defence procurement in Estonia and Lithuania in times of war in Ukraine' (2023) 62 PPLR 367–381.

23 Public Procurement Register <https://riigihanked.riik.ee/rhr-web/#/> accessed on 16 July 2025; Statistics Estonia's website <https://www.stat.ee/> accessed on 16 July 2025; Eurostat <https://ec.europa.eu/eurostat> accessed on 16 July 2025.

24 Ministry of Finance Statistics <https://www.fin.ee/riigihanked-riigiabi-osalused/riigihanked/kasulik-teave-oigusaktid#riigihangete-valdkon--2> accessed on 16 July 2025.

25 European Commission, *Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Dynamic purchasing systems – Use guidelines* (Publications Office of the European Union 2021) 21 <https://op.europa.eu/en/publication-detail/-/publication/9b5394f7-3219-11ec-bd8e-01aa75ed71a1/language-en> accessed on 16 July 2025.

26 Tenders Electronic Daily Statistics <https://ted.europa.eu/en/simap/statistics-on-ted-notices> accessed on 16 November 2025.

27 European Commission (n 25) 21.

28 The data of the e-auction have been identified using the search of the Public Procurement Register (n 23) accessed on 16 July 2025.

their basis and not indicate the individual DPSs created. Such information cannot be found based on public data across the EU. However, in Estonia, the number of contracts concluded through dynamic systems has remained at the same level, while in 2023, only 62 procurements were carried out under DPSs; in 2024, the number of procurements was 40.

The numbers are curious, though, as the nature of FAs and DPSs suggests greater use of DPSs. An FA is a closed system with fixed terms that cannot be altered substantially (§ 30(1) of the PPA). Tenderers cannot join during its validity. In contrast, a DPS allows more flexibility in specifying terms and permits tenderers to join at any time (§ 32 (3) of the PPA). This raises the question of why the more rigid FA is chosen over the DPS more often. This issue will be explored in relation to the contracting authority's discretion in procurement decisions. It is proposed that legal ambiguities may be a reason.

3.3. Different aspects of choosing between PPI and public procurement contracts

When presented with a need to conduct a public procurement, a contracting authority has the discretion to conduct a standard public procurement procedure or to choose any of the PPIs for awarding the public contract. Choosing between using a PPI or awarding a 'simple' public contract depends on the specific needs and strategic objectives of the contracting authority. Although the Procurement Directive applies uniformly across the EU, comparing practices reveals that different countries have varying interpretations and, consequently, different discretions regarding PPIs. Though, in EU countries, the impact of discretion has been studied mainly in the context of corruption.[*29]

If PPIs are underused despite easier processes offered by the Procurement Directive and the PPA, it may indicate that contracting authorities fail to exercise discretion properly under EU law. This means that PPIs make it possible to significantly accelerate the procurement process. Let us take a closer look at procurement statistics to understand how valuable time resources can be saved simply by using PPIs. Among EU countries, Estonia has the shortest time between the tender submission deadline and contract conclusion, at 53 days in open procurement procedures, while Greece has the longest at 246 days. The average time for procurement decisions across EU countries is approximately 117 days. With the DPS, Sweden records the shortest decision time at 48 days, while Cyprus has the longest at 135 days. The average time for a procurement decision is 83 days in this context.[*30]

Comparing deadlines for open procurement with those based on a PPI shows considerable time savings as well. For example, a cross-border procurement must be published at least 30 days (§ 93(1)4) of the PPA) before the deadline of the tenders. However, awarding a public contract under an FA does not require a minimum tender submission period, only a reasonable time (§ 30(9)2) of the PPA). In a DPS, the minimum deadline for tender submission is 10 days (§ 35(3) of the PPA). Therefore, based only on the procurement timeframe, large-scale acquisitions can be completed much faster with an FA or a DPS than through an open procurement procedure.

In today's legal space, a contracting authority may find itself using relatively less efficient public procurement opportunities due to the lack of legal certainty, which in turn has given rise to contradictory interpretations. This is supported by a study conducted in Sweden, which showed that contracting authorities chose not to use the DPS precisely because it is not clear how and for what purpose it should be used.[*31] This is supported by the fact that the more widely used means of public procurement—FAs—are regulated much more strictly in national law than in the Procurement Directive, while DPSs, as a little-used PPI, are regulated to a very limited extent. This suggests that the contracting authorities understand the function and regulation of FAs more.

29 Francesco Decarolis, Raymond Fisman, Paolo Pinotti, and Silvia Vannutelli, *Rules, discretion, and corruption in procurement: evidence from Italian Government contracting* (National Bureau of Economic Research, Cambridge 2023) <https://www.nber.org/system/files/working_papers/w28209/w28209.pdf> accessed on 16 July 2025.

30 European Commission, *Access to public procurement* <https://single-market-scoreboard.ec.europa.eu/business-framework-conditions/public-procurement_en> accessed on 16 July 2025.

31 Charlie Barron, *A Logistics Perspective on Dynamic Purchasing Systems – Investigating the Supplier Perspective* (Student thesis, Luleå tekniska universitet 2023) 38 <https://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1768373&dswid=-9149> accessed on 16 July 2025.

In Estonia, the situation is negatively impacted by the Ministry of Finance's (MoF) soft law interpretations and suggestions, which direct contracting authorities in a manner that leaves less discretion and creates more uncertainty in using PPIs, particularly DPSs. Paradoxically, for example, in the case of a DPS, it has happened that the legally greater margin of discretion has made contracting authorities much more cautious, and a more open system has been interpreted and treated as significantly more closed than an FA system. For example, I would like to quote again the MoF's interpretation, which states that in the case of a DPS, the technical specifications must be essentially unchanged from start to finish, but there is no such obligation in the case of an FA.[*32] This highlights a pattern in the MoF's interpretative practice: it initially adopts a very strict interpretation, which creates uncertainty for contracting authorities and ultimately discourages them from using the available instruments. This strictness often results from attempts to fill legislative gaps by relying on more rigid and narrowly regulated instruments. In this case, most notably, DPS-related gaps are addressed by applying rules designed for the significantly more closed and regulated framework agreement.

4. Restricted discretion under PPI regulation in Estonian law

4.1. Examples of limitations on discretion concerning DPS

At the level of the directive, the EU legislator has intentionally granted contracting authorities a high degree of flexibility and discretion in the implementation of a DPS. This is reflected, among other things, in the possibility to describe goods or services that will be purchased over a longer period only in broad terms at the outset, with the corresponding obligation to provide a sufficiently detailed specification at the time of the actual contract award so that participants in the DPS can understand what is being requested. The very nature of the DPS under EU law therefore presupposes wide discretion for the contracting authority to structure the system in a way that enables its long-term use and ensures continuous competition. At the same time, this approach does not create any transparency concerns because, first, the system remains open for its entire duration, meaning that new suppliers may join at any time, and second, later specification of requirements simply allows participating suppliers to assess whether they wish to submit an offer. Competition is not adversely affected as no operator is excluded.

A notice of DPS must include a description of the goods and services to be procured (§ 33(1^1) of the PPA). This looks like a logical requirement at first glance, but the precision required for this description is legally unclear. The MoF, as the public procurement advisory body, explains that the contract details should be clear enough to determine what products or services are included. Although, unlike an FA, a DPS allows economic operators to join at any time, the description must still enable them to assess whether their offers would be relevant.[*33]

However, the MoF changed direction at one point, finding that § 33(1^1) of the PPA brought the provisions of the PPA into conformity with the provisions of the directive; according to the wording that was previously in force, the contracting authority had to refer to the nature and quantity of the public contracts to be entered into on the basis of the DPS and the electronic connection to be used only in the proposal for submission of tenders, but according to Art 34(4)b of the Procurement Directive, this information should be disclosed upon the establishment of a DPS. The proposal for the submission of a request for participation must indicate the specific products and services and the quantity thereof to be purchased under the contract to be awarded, so the approximate provision of this information is no longer relevant in any way.[*34]

In short, in the opinion of the MoF, the obligation to describe "the general nature of the planned procurement contracts" is an obligation to fully and definitively provide the entire technical specification for the entire period of the DPS upon publication of the DPS.[*35] This, however, raises questions as to why

32 Ministry of Finance FAQ, question 5 <https://www.fin.ee/riigihanked-riigiabi-osalused/riigihanked/korduma-kippuvad-kusimused#dunaamiline-hankesus> accessed on 16 July 2025.

33 Ministry of Finance, Award of a public contract with several tenderers on the basis of a framework agreement (19.05.2022). Document in the author's possession.

34 See a similar position in the FAQ of the Ministry of Finance (n 32), question 3.

35 Ministry of Finance (n 33).

the legislature intended to provide for a prohibition on any amendment to the technical specifications in a DPS, while at the same time, it is permissible to specify it both in the case of an FA and in a restricted procurement procedure for a certain period. It is also in clear contradiction with the requirement that the DPS can be valid indefinitely and is intended to be valid for a rather long term.[*36]

Neither the procurement directive nor the PPA provide clear answers to the question of how detailed the technical specifications have to be when setting up the DPS.[*37] For example, C. Risvig Hamer found in her report that the advantage of a DPS is the opportunity to contribute to green procurements, namely because "the object of a public procurement can be specified for a specific contract, i.e. the technical conditions can also change, and thus innovative solutions can be acquired through a DPS".[*38] It can also be seen from the practice of the European Commission that, in their opinion, the advantage of using a DPS is the possibility of significantly specifying the scope of public procurement within the framework of a specific related procurement.[*39] The same can be found in the legal literature on the subject (albeit with reference to the UK): at the beginning of a DPS, it is only necessary to present the general nature of the future acquisitions and the procedure for the technical implementation of the DPS itself.[*40] Furthermore, legal scholars confirm that tender documents should be sufficiently informative to allow tenders to be submitted on transparent and equal terms. The necessary information can be published either in full in the tender documents or added in more detail in the call for tenders.[*41] More specifically, in the Estonian applicable law, Attorney-at-Law K. Matteus has pointed out that contracting authorities can still define technical specifications at a later stage in a related procurement.[*42]

Therefore, it is in line with the nature of a DPS and the intended effectiveness of this tool as a PPI that the contracting authority has a wide discretion and opportunity to tailor the DPS to its specific needs during the validity of the DPS and not just at the beginning. This suggests that technical specifications do not have to be finalised when a DPS is first published.

Regarding the Estonian regulation, it is also noted that § 35(2) of the PPA only refers to the evaluation criteria of tenders and does not mention technical specifications. This implies that the legislator only intended to grant the contracting authority the freedom to modify the initial evaluation criteria during the validity of the DPS, and not to alter any other aspects, including the technical specifications of the services or goods. As a result, the procurement directive may have been implemented or interpreted too narrowly in Estonian law. Legal scholars argue that § 35(2) of the PPA should thus be amended, since the current wording does not allow for a consistent interpretation with the Directive.[*43]

Another question is whether and how these discrepancies can be overcome in Estonian practice. I submit that the MoF's interpretation is too narrow, and the problem cannot be overcome by applying the conventional interpretation methods. This requires modification in the law because it is an obvious example of how a procurement directive confers a wider discretion, but national law, or at the very least, its interpretation, undermines its effectiveness.

Another example of how the MoF has created confusion with its narrow interpretation is that the DPS can only be used for simple things, services, and construction works. The position of the European Council unduly restricts the scope of Art 34(1) of the procurement directive. According to the procurement directive, a DPS is intended to be used in cases involving products in the public domain as they are offered on the market, so there is no indication of simplicity in the Procurement Directive. Thus, a DPS can be used to procure supplies, services, or works that are widely offered on the market, namely, supplies and services in

36 Mari Ann Simovart in Albert Sanchez-Graells and Roberto Caranta, *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar 2021) 34.12.

37 Kadri Matteus, 'Dünaamilise hankesüsteemi status quo' [Status quo of the Dynamic Purchasing System] (*Riigihanke blogi*, 19 March 2023) <https://riigihankeblogi.com/2023/03/19/dunaamilise-hankesusteemi-status-quo/> accessed on 16 July 2025.

38 Carina Risvig Hamer, *Dynamic Purchasing Systems* (Presentation Norhcon Nordic Public Procurement Forum 2023).

39 The European Commission published a press release on the launch of a dynamic purchasing system, which contained the following idea: "The precise scope, rules, estimated value and contract award of each competition will be set out in its respective tender specifications" <https://commission.europa.eu/news-and-media/news/commission-launches-new-flexible-dynamic-purchasing-system-network-and-telecommunication-services-2023-02-22_en> accessed on 16 July 2025.

40 Ama Eyo, 'Evidence on use of dynamic purchasing systems in the United Kingdom' (2017) 6 PPLR 237–248.

41 Mari Ann Simovart (n 36) 34.23.

42 Kadri Matteus (n 37).

43 Ibid.

the public domain. Legal scholars point out a very extensive list of all kinds of areas where a DPS has been used, a few examples of which are transport services, programming, consulting, catering, cleaning, and education.[*44] As this is not the wording of the PPA or the Directive, but the interpretation of the MoF, it would be sufficient to make amendments to the guidance materials and interpret the law in conformity with the Procurement Directive in the content of a public procurement instrument to harmonise the practice on the referred problem. The relevant proposal has also been officially submitted to the MoF, as it appears that the MoF has become confused about the nature of two different documents: the technical description of the public procurement and the description of the technical implementation of the DPS.[*45]

Regarding PPIs, the FA, as a more widely used means of public procurement instrument, is regulated much more strictly in national law than in the Procurement Directive, while the DPS, as a little-used public procurement instrument, is regulated to a limited extent. As an example, I would like to mention the position of MoF, where the gap in the issue of the estimated value of the DPS has been bridged with the regulation of the FA, but in this matter we are dealing with completely different instruments, whereas the DPS can also be indefinite, making the use of the regulation of the FA in this issue questionable.[*46] This has created a situation where the MoF has started to give substance to issues not regulated in the case of a DPS, with the regulation of the FA to overcome the legal gaps. It has also been found in the legal literature that due to the openness of the DPS, it works well even if the expected volume is not precisely defined.[*47] However, it is certainly not envisaged that the volume expected to be fulfilled as the basis for the termination of the DPS will be reached. If the legislator were to make such a national regulation, there would be a clear conflict with EU law and the nature of the DPS. Therefore, to bridge the legal gap, only a change in interpretation is necessary today.

4.2. Examples of limitations of discretion in the case of FA

Although it has been unequivocally found in the legal literature[*48] that Art 72 of the Procurement Directive and § 123 of the PPA are equally applicable to public contracts as well as FAs, the MoF has not agreed with such an interpretation, thereby restricting the contracting authority's discretion in amending FAs. Notwithstanding the ECJ's recent decisions concerning FA changes, in practice, the question of the permissibility of amending the FA within the meaning of Art 72 of the procurement directive remains unclear.

Legally, the question of amending a framework agreement can be approached in two ways. First, § 29(1) of the PPA provides that the rules applicable to public contracts also apply to FAs, unless stated otherwise. The PPA does not contain any provision excluding the application of contract amendment rules to FAs. Therefore, based on grammatical and systematic interpretation, FAs may be amended under § 123(1) of the PPA. Second, § 29(1) of the PPA may also be read in connection with the prohibition of substantial amendments, which is regulated in § 123(2) of the PPA. However, amendments permissible under § 123(1) do not necessarily constitute substantial amendments within the meaning of § 123(2).[*49] Based on the above, the PPA does not, in fact, contain a prohibition on amending FAs, meaning that any perceived restriction arises solely from a potentially incorrect interpretation.

The judgment of the ECJ in case C-23/20 *Simonsen & Weel* has raised the question of whether an FA can be amended only based on Art 72 (1)(a) of the Procurement Directive (same as § 123(1)7) of the PPA), which concerns not substantial modifications to contracts. This question arose from the fact that said judgment held that only insignificant amendments to the FA could be made.[*50] However, the MoF has found[*51] that

44 Mari Ann Simovart (n 36) 34.10.

45 Ministry of Finance. TGS Baltics, *Riigihangete lihtsustamine. Lõpparuanne* [Final report: simplification of public procurement] (2024) <https://www.fin.ee/sites/default/files/documents/2024-12/Riigihangete%20lihtsustamine.%20Lo%CC%83pparuanne%2016.12.2024%20final.pdf> accessed on 16 July 2025.

46 Ministry of Finance FAQ (n 32), question 5.

47 Mari Ann Simovart (n 36) 34.25.

48 Mari Ann Simovart and Mario Sõrm, '10 years of changing contracts: for better or for worse?' (2024) (3) Upphandlingsrättslig Tidskrift 2.2.

49 Mari Ann Simovart and Mart Parind (n 8) s 123, comment 54.

50 ECJ case C-23/20 *Simonsen & Weel A/S v Region Nordjylland and Region Syddanmark* ECLI:EU:C:2021:490.

51 Ministry of Finance FAQ, question 16 <https://www.fin.ee/riigihanked-riigiabi-osalused/riigihanked/korduma-kippuvad-kusimused#raamleping> accessed on 16 July 2025.

in the case of an FA, it is still possible to use all the possibilities of amending the contract provided for in § 123(1) of the PPA, adding to the presumptions set out therein that it is an insignificant amendment. At the same time, the ECJ has pointed out (paragraph 68) that the FA ends when the maximum volume is reached, as a result of which the MoF is of the opinion that the amendment of the monetary volume is, in any case, a significant change that cannot be made in the case of an FA. Therefore, the conclusion reached by the MoF cannot be fully accepted, e.g. the MoF agrees that both the Procurement Directive and the PPA allow *de minimis* changes. The fact that paragraph 70 of the judgment refers to the permissibility of non-substantial modifications does not mean that this corresponds solely to the amendments permitted under § 123(1)(7) of the PPA. As explained above, the Procurement Directive defines substantial modifications as those falling within the scope of Art 72(4), which are prohibited. However, not all amendments listed in Art 72(1) necessarily constitute substantial modifications within the meaning of Art 72(4). Accordingly, the *Simonsen & Weel* judgment can also be interpreted as confirming that the ECJ did not introduce a new rule but simply reaffirmed the existing regulatory structure of the Procurement Directive.

However, it is surprising here that Art 72(1) of the Procurement Directive clarifies that contracts and FAs may be amended without organising a new procurement procedure under this Procurement Directive in the following cases (a list of situations is added). Art 72(1)(a)–(e) has been transposed in the same way from § 123(1)2)–7) of the PPA. Thus, the MoF has started to interpret the practice of the ECJ in a way that does not coincide with the regulation of the Procurement Directive. In addition to the public contract, the Procurement Directive also expressly describes, in the case of an FA, a situation in which changes are possible without an assessment of additional significance. For example, in joint cases C-274/21 and C-275/21, the Court stated very clearly in paragraph 68 of its judgment that "Article 33(3) of Directive 2014/24 must be interpreted as meaning that the contracting authority may not rely on a framework agreement in which the maximum volume and/or value of the works, supplies or services provided for has already been reached, in order to award a new contract, unless the award of that contract does not entail a substantial amendment to the framework agreement in question as provided for in Art 72(1)(e) of that [D]irective". The referenced provision of the Procurement Directive corresponds to § 123 (1) 7) of the PPA, which is an exception to a non-significant amendment.

Proceeding from the above, the legal questions of whether and when the amendment of an FA is permissible, whether the amendment is permissible, and whether it is also legally possible to amend the maximum volume are still relevant solely due to the interpretations of the MoF, since (as noted at the beginning) legal scholarship makes it rather clear that, according to the Procurement Directive and the case law of the ECJ, FAs and public contracts are treated in the same manner with regard to modification. The Estonian legislation currently corresponds fully to the wording of the Procurement Directive, which suggests that the problem may lie at the level of the Procurement Directive and therefore cannot be resolved solely at the national level. This remains the case even though, for example, in the context of FAs, such clarification would be both relevant and helpful.

In addition to the issue of changing the FAs in practice, the FAs' Estonian regulation can also lead to ambiguity. The law does not clearly specify which contracting authorities are parties to the FA (§ 30(2) of the PPA). According to Art 33(2) of the Procurement Directive, only specified contracting authorities can award public contracts based on an FA. Hidden or misleading identification in procurement documents is impermissible.[*52] Therefore, § 30(2) of the PPA must align with the Procurement Directive, reflecting contracting authorities in the notice starting the public procurement.[*53] Currently, § 30(2) of the PPA regulates only that FAs may be used solely by contracting authorities that can be identified on the basis of the procurement documents, and only with the tenderers with whom the FA was concluded. Thus, the provision in the Procurement Directive referring specifically to the contract notice has been transposed in Estonian law in a broader manner, extending it to all procurement documents, even though, in practice, the contract notice is the only concrete document that serves this function.

All the above-mentioned ambiguities in interpretation, the incorrect harmonisation of the Procurement Directive into national law, and the general lack of understanding about the lawful use of PPIs have created a situation where contracting authorities do not even dare to use a DPS for fear of breaking unclear rules.[*54]

52 ECJ case C-216/17 *Autorità Garante della Concorrenza e del Mercato - Antitrust ja Coopservice Soc. coop. arl v Azienda Socio-Sanitaria Territoriale della Vallecamonica – Sebino (ASST)* ECLI:EU:C:2018:1034.

53 Mari Ann Simovart and Mart Parind (n 8) s 30, comment 8.

54 Ministry of Finance. TGS Baltics (n 45).

In my opinion, the legal clarity created in the use of PPIs has a concrete impact and importance in fulfilling the objectives of the EU public procurement law, which is why the legislator and the MoF must carefully consider all the proposals made and implement them as soon as possible.

4.3. The need for uniform interpretation and application of EU law

One of the main objectives of the PPA is to harmonise Estonian law with EU public procurement directives; however, in addition to the directives, EU primary law plays a key role in the interpretation and application of the Procurement Directive. When applying the PPA, the conformity of national and EU law must be checked.[*55] The Estonian Supreme Court[*56] has emphasised the importance of ensuring conformity between national law and EU law, including primary law, when interpreting and applying the PPA. This underscores the necessity of interpreting national law in harmony with EU law to avoid conflicts. Where direct effect provisions of EU law are at odds with national rules, the latter must be disapplied.[*57] For example, for this reason, the Administrative Law Chamber of the Supreme Court in case 3-3-1-49-12 has checked the conformity of the Estonian PPA with the relevant Procurement Directive and established that the PPA is in conformity with the Procurement Directive to the extent that it exempted the network operator from the obligation to organise a public procurement upon the purchase of heat in its entirety.[*58]

For the consistent application of EU law, national laws should not limit the discretion of contracting authorities unnecessarily. If there is a contradiction between texts, priority must be given to interpreting national law in line with EU directives to resolve conflicts.[*59] However, it is necessary to avoid the interpretation of national law *contra legem*;[*60] instead, a national rule that is contrary to the provision of direct effect of the EU must be disapplied.[*61] Thus, in the case of the above examples, the first thing is the desired consistent interpretation and only then can a proposal be made to amend the provisions of the law or, if necessary, not to apply them.

Recital 63 of the Procurement Directive calls for changes to DPS rules to maximise their benefits. If the Procurement Directive is misapplied or misinterpreted in national law, urgent amendments are required. Estonian law restricts DPS use, making it less efficient than an FA with multiple tenderers, which limits competition. Thus, the regulation's objectives are underused in Estonia.

In the strategic principles of public procurement, it has been pointed out that reliability is important in public procurements: "Through a legally certain and transparent procedure, we ensure the involvement of competition and credibility in the use of public instruments in order to achieve the best result." It has also been described that public procurements must be carried out reasonably, which in turn includes the components of 'efficiently organised' and 'economically' advantageous.[*62] Thus, a reliable and efficiently organised public procurement procedure as well as its economically advantageous result, i.e. achieving the goal with the best price-to-quality ratio, are strategically important. Where the legislation or the MoF's guidance is inconsistent, it contradicts the MoF's stated aim of ensuring a reliable procurement system. This reflects a clear internal inconsistency in the state's approach, and it would be reasonable to begin fulfilling the strategic objectives by reassessing how the law is interpreted in soft-law terms and what kind of practical guidance is being provided to contracting authorities.

55 Mari Ann Simovart and Mart Parind (n 8) s 1, comment 9.

56 Judgment of the Administrative Law Chamber of the Supreme Court 3-4-1-7-08, 8 June 2009.

57 GC case T-1/23 *Enmacc GmbH v European Commission* ECLI:EU:T:2023:506, para 122, 125 and the cases cited.

58 Regulation of the Administrative Law Chamber of the Supreme Court 3-3-1-49-12, 13 February 2013, para 13, 18–20.

59 ECJ case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153, para 26; ECJ case C-355/96 *Silhouette International Schmied GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH* ECLI:EU:C:1998:374, para 36; Judgment of the Administrative Law Chamber of the Supreme Court 3-3-1-85-07, 7 May 2008, para 38.

60 ECJ case C-579/15 *Daniel Adam Popławski v Openbaar Ministerie* ECLI:EU:C:2017:503, para 33.

61 Judgment of the Administrative Law Chamber of the Supreme Court 3-3-1-85-07, 7 May 2008, para 38; Judgment of the Administrative Law Chamber of the Supreme Court 5-19-29, 15 March 2022, para 41.

62 Ministry of Finance, Riigihangete läbiviimise strateegilised põhimõtted [Public procurement: strategic principles] (2023) 2 <https://fin.ee/sites/default/files/documents/2024-04/Riigihangete%20la%CC%88biviimise%20strateegilised%20po%CC%83himo%CC%83tted_2023.pdf> accessed on 16 July 2025.

5. Summary

The Estonian legislator has incorrectly implemented the provisions of the Public Procurement Directive regarding some requirements of FAs and DPSs by restricting the discretion of contracting authorities to conduct DPS documents in a flexible way and making changes to FAs. This issue has been further exacerbated by the MoF's overly restrictive interpretation, even in situations where the Directive has been correctly transposed but the underlying purpose of the provision has been lost in the process of interpretation.

Estonian law is misaligned with Art 34(6)(2) of the Procurement Directive, blocking contracting authorities from defining technical specifications at the contract award stage, against the Directive's intent. Similarly, § 34 (1) of the PPA is overly restrictive, reducing the procurement's flexibility. It is unclear under Estonian law what the consequences of fulfilling the expected financial volume of a DPS are. Moreover, MoF interpretations have led to restricted possibilities to change FAs, contrary to the Directive.

As a result of such legislative gaps and controversies, the PPA is not in harmony with the procurement directives and limits the effectiveness that the use of FAs and DPSs could otherwise have. Moreover, those restrictions conflict with the directives' objectives of flexibility, competition, and efficiency in procurement.

In the case of restrictions on discretion regarding FAs, it is possible to overcome the national-level problem through an interpretation in accordance with the Directive. In the case of DPSs, it is not clear whether it is possible to overcome the issues with correct interpretations alone. To ensure alignment with the Procurement Directive and its objectives, Estonia should amend its national legislation, clarify contracting authorities' discretion, and resolve existing contradictions. The current approach has created an unfavourable legal environment for using key PPIs effectively.

During the writing of this article, several clear problems emerged regarding the legal questions surrounding the substantive definition of a DPS, which I plan to examine in more detail going forward. For example, a substantially more in-depth line of enquiry arose concerning precisely what the description of the DPS must contain, considering that a DPS is, by nature, a continuous procurement procedure throughout its period of validity. A DPS does not conclude at a specific stage, unlike the analogous framework agreement regime. It is also necessary to analyse the boundaries and possibilities for defining the technical specification of a DPS, considering that the Procurement Directive and the PPA approach this requirement grammatically differently.

Furthermore, an additional question for future research concerns whether—given that the Procurement Directive allows for a more flexible substantive definition of a DPS but leaves the formulation of more detailed DHS regulation to the competence of member states—Estonia could legitimately implement the system in a stricter manner than the Procurement Directive requires, purportedly in the interests of enhancing competition among tenderers and ensuring transparency. Does the legislator in this context have an obligation to adopt a version that allows for broader discretion?

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