CHAPTER 5

# Framework agreements

## 1. Introduction

Article 33(1) of Directive 2014/24/EU defines a framework agreement as:

> »*an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged*«.

The provision specifically authorizes framework agreements and regulates their use. These agreements are used when contracting authorities have a repeated need for certain supplies, services or works.[1]

Framework agreements have a reputation of being efficient[2] and flexible for the contracting authority and they are argued to lower costs.[3] Due to this reputation, the use of framework agreements has increased rapidly since the introduction in 2004.

1 Framework agreements can be unsuitable in connection with the purchase of works because it is difficult for a supplier of works to adjust his capacity on a day-to-day basis like providers of supplies and services. Thus, in principle works are included, but in practice the application must be assumed to be limited.

2 Although there is also some who claim that framework agreements are inefficient, cf. Yukins, C: *Are IDIQs inefficient? Sharing lessons with European framework contracting*, Public Contract Law Journal (2008) at 546-548. A discussion of the efficiency of frameworks agreements can be found in Chapter 7.

3 Udbudsrådet: »*Analyse af bedste praksis for brug af rammeaftaler*« (2011) at 5. In this analysis made by The Danish Public Procurement Council it is stated that 9 of 10 of the screened products can be purchased at a lower price when using framework agreements compared to purchasing directly from the supplier.

In the EU as a whole, there has been an increase by an average of 18% per year since 2006.[4] Statistics show that in Denmark from 2004-2010, there has been an increase of 47%, from DKK 6,111 million to DKK 13,096 million,[5] corresponding to an average of 11% a year.[6] Compared to the average of 18% per year in the EU as a whole, the Danish increase is not so impressive, but perhaps it can be explained by the fact that Denmark has used framework agreements long before the EU rules on framework agreements became effective, and hence the increase is not as rapid as for those countries that have not previously made use of framework agreements. From 2011 and forward the number has decreased, and it is conceivable that this is due to an equalization of the use of framework agreements combined with a statistical uncertainty.

Denmark is placed at the top when it comes to using framework agreements; hence a third of all public contract award notices are announced as and conducted through framework agreements.[7]

Framework agreements thus play a major role in European economy, for which reason this chapter will go into detail with what framework agreements really are.

Hence, Section 2 of this dissertation accounts for the commencement of framework agreements and Section 3 carries on with an analysis of what framework agreements are, including an examination of single/multiple pro-

4 PwC, London Economics and Ecorys: *»Public procurement in Europe Cost and effectiveness, a study on procurement regulation*« (March 2011).

5 See Appendix 3. Appendix 3 shows SKI's turnover from framework agreements in Denmark 1994-2014 in current prices. SKI – »National Procurement Ltd. Denmark« – is the state and municipality procurement service, acting as a central purchasing body. As can be seen in Appendix 3, there has been a relatively steady use of framework agreements (in monetary terms) from 1996 to 2004 and after that it has increased. It must be noted that the appendix only shows the use of framework agreements in the context of SKI. Other organizations did and do also make use of framework agreements, and it is submitted that framework agreements also were used prior to 1994.

6 These numbers are from SKI. It is important to remember that other organizations also make use of framework agreements, which is why the numbers are subject to some uncertainty. However, they are definitely approximate.

7 PwC, London Economics and Ecorys: *»Public procurement in Europe Cost and effectiveness, a study on procurement regulation*« (March 2011) at 38.

That said, despite the fact that a third of all contracts are conducted through framework agreements, which evidently amounts to DKK 300 billion, the Danish Government is still not satisfied. They seek to centralize public purchases even further through framework agreements in order to save money, cf. Dørge, H: *Spildte penge*, Weekendavisen (9 June, 2017) at 6.

These are numbers from 2009. To compare, in the same year the average number in the remaining EU was 16%.

vider framework agreements respectively, what the rules entail as regards the time frame, the parties to the framework agreement, amendments to the agreements etc. The analysis is conducted from a procurement law perspective as framework agreements are a procurement phenomenon.

## 2. Development of framework agreements

In 2004, Directive 2004/18/EC[8] introduced explicit provisions on framework agreements for public works, supply and service contracts for the first time.[9] The concept, however, was already known in the utilities sector as Directive 90/531/EEC[10] and the later Directive 93/38/EEC[11] made use of framework agreements, and in practice also in the public sector.

Prior to 2004 there was much uncertainty over the legal position concerning framework agreements outside the utilities sector.[12] It was possible,

8 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134), Article 32.

9 Framework agreements were initially presented in a Communication from the Commission on Public Procurement in the European Union ((COM (98) 143 Final). This followed the 1996 Green Paper on public procurement in the European Union: Exploring the way forward (COM(96) 583). The Green Paper made no mention of framework agreements, and the Communication did not go much into detail.

10 Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297).

11 Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199).

12 Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 1103. In the book it is suggested that the uncertainties over the legality of frameworks were caused by the Commission itself, as it initially stated that framework agreements with more than one economic operator were not permitted and then later it changed its mind and accepted that these framework agreements were possible.

In a 1997 press release (European Commission: Press Release IP/97/1178 »*Public procurement: infringement proceedings against the United Kingdom, Austria, Germany and Portugal*«), the Commission denied the use of framework agreements as they are not authorized by the public procurement rules in the public service, supplies and works directives (Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, respectively). The Commission confirmed its stance in case C-84/03, *Commission v Spain* [2005] ECR.I-00139, stating in para 55 that »*Having set out the definition of the framework agreements, the Commission asserts that those agreements are not covered by Direc-*

however, to use framework agreements for public supply, service and works contracts where all substantial terms had been established in accordance with the Directive in force at the time,[13] and then all orders placed under this agreement were exempt from the Directive. This means that the problem occurred in situations where all terms had not yet been established. As there was no specific regulation, many Member States did not use framework agreements.[14] Nevertheless, some Member States such as the UK, France, Sweden,[15] and Denmark[16] did make use of a variety of framework arrangements. It has been argued,[17] probably righteously, that the lack of explicit rules has led to abuse and inappropriate use of framework agreements.

Along with dynamic purchasing systems, framework agreements make up techniques for aggregated purchasing, which contracting authorities can use in order to get the best value for money.[18] A purchasing aggregation technique or strategy is about pooling public purchasing market power when purchasing a service, work or supply in order to maximize profits. Hence, if used properly,

*tive 93/36*«. In a later press release (European Commission: Press Release IP/00/813 *»Public procurement: Commission refers United Kingdom to Court«*), the Commission indicated that »*if the terms of a framework agreement are sufficiently specific as to detail the key elements of any individual contracts to be awarded subsequently, and if these are set out in binding form, when those individual contracts are awarded it is not necessary to follow the detailed procedural requirements of the Directives. However, where the key terms and conditions of individual contracts are vague, or simply not specified at all, they must be advertised in the Official Journal and follow the detailed procedural requirements of the public procurement Directives.*« Hence, the Commission accepted the use of framework agreements.

13 When all terms are established, we are dealing with a »traditional public contract« and that can be concluded when the procedural provisions of the directive have been complied with. See European Commission: »*Explanatory Note – Framework agreements – Classic directive*« (2005) at 3.

14 Procurement Lawyers' Association: »*The use of framework agreements in public procurement*« (2012) at 3.

15 Ibid at 3.

16 See appendix 3.

17 Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 1103.

18 Graells, A S & Anchustegui, I H: *Impact of public procurement aggregation on competition. Risks, rationale and justification for the rules in Directive 2014/24* in Fernandez P V (ed): »Compra conjunta y demanda agregada en la contratación del sector público. Un análisis jurídico y económico« (2016) at 130. The term purchasing aggregation covers the situation where multiple purchasers come together in some sort of purchasing organization to purchase together and in that way increase their buying power. In this dissertation, the purchasers are public and come together – often in a CPB – to get better prices and terms.

aggregation techniques can help save money and achieve better terms and conditions in the agreement.[19] However, according to Directive 2014/24/EU, »*the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs*«.[20] As shall be seen in Chapters 6 and 10, framework agreements are used extensively by CPBs when establishing and mediating contracts between contracting authorities and suppliers.

Despite a rapid increase in the use of framework agreements since the introduction of the rules in 2004, Directive 2004/18/EC was criticized for being too insipid and vague concerning framework agreements. Hence, no one has really known in detail how to deal with these kinds of contracts.

In 2014 Directive 2014/24/EU commenced and overall the changes concerning framework agreements were minimal. The proposal to the Directive, COM (2011) 896 final,[21] in fact contained even less changes. On the road to Directive 2014/24/EU as it stands today the proposal was announced in the Parliament, debated in the Council, and a Committee report was tabled for plenary. The Committee report included a draft European Parliament legisla-

19 Recital 59 of Directive 2014/24/EU. See also Graells, A S & Anchustegui, I H: *Impact of public procurement aggregation on competition. Risks, rationale and justification for the rules in Directive 2014/24* in Fernandez P V (ed): »Compra conjunta y demanda agregada en la contratación del sector público. Un análisis jurídico y económico« (2016) at 134. In continuation hereof, according to Commission Staff Working Paper, Evaluation Report – Impact and Effectiveness of EU Public Procurement Legislation – SEC(2011) 853 final at 23-24 and Hamer, C R: *Chapter II: Techniques and instruments for electronic and aggregated procurement* in Steinicke M & Vesterdorf P L (eds): »Brussels Commentary on EU Procurement Law« (Nomos, 2015), a framework agreement is not an independent award procedure, but instead it is a tool or technique for aggregated purchasing. This dissertation only concerns framework agreements.

20 Recital 59 of Directive 2014/24/EU. SME is an abbreviation of »small and medium-sized enterprises« which, according to Article 2 of Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L124) are defined as 1) enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million, 2) an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million, and 3) an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

21 Proposal for a Directive of the European Parliament and of the Council on public procurement – COM(2011) 896 final – 2011/0438 (COD).

tive resolution,[22] which took into consideration the opinions of the European Economic and Social Committee,[23] Committee of the Regions[24] and several other committees.[25] Subsequently, the draft European Parliament legislative resolution was debated in Parliament and subject to a vote.[26] On February 11 2014, the Directive was adopted by the Council after Parliament's first reading.

The observation that the changes between Directive 2004/18/EC and Directive 2014/24/EU concerning framework agreements are minimal is supported by the fact that the 2011 Green Paper[27] makes no mention of framework agreements at all. In Recital 60 of Directive 2014/24/EU it is implied that the introduction of framework agreements has been a success, and thus the rules should remain largely unchanged. However, it is noted that certain aspects need to be clarified, which will be examined in depth below.[28]

The chapter will analyze framework agreements with the aim of answering the questions of what framework agreements are, and which problems they can pose.

22 Draft European Parliament Legislative Resolution – on the proposal for a directive of the European Parliament and of the Council on public procurement – (COM(2011)0896 – C7-0006/2012 – 2011/0438(COD)).

23 Opinion of the European Economic and Social Committee of 26 April 2012 on public procurement and concession contracts (OJ 2012 C 191).

24 Opinion of the Committee of the Regions of 9 October 2012 on public procurement package (OJ 2012 C 391).

25 Opinions of the Committee of International Trade, the Committee on Employment and Social Affairs, the Committee on the Environment, Public Health and Food Safety, the Committee on Industry, Research and Energy, the Committee on Transport and Tourism, the Committee on Regional Development, and the Committee on Legal Affairs (A7-0007/2013) of 11 January 2013 on the proposal for a directive of the European Parliament and of the Council on public procurement.

26 See the procedure file on COM (2011) 896 final – 2011/0438 (COD) – Proposal for a Directive of the European Parliament and of the Council on public procurement. Available at: http://eur-lex.europa.eu/procedure/EN/2011_438

27 Commission Green Paper on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market – COM(2011) 15 final.

28 This also appeared in a European Parliament resolution of 25 October 2011 on modernisation of public procurement (2011/2048(INI), which in para 30 called on the Commission »*to review the current approaches to the qualification of suppliers (particularly framework agreements, dynamic purchasing systems and the use of qualification systems by utilities procurers), so that any new approaches to qualification reduce costs and timescales, are attractive for both contracting authorities and economic operators and lead to the best possible outcomes*«.

## 3. What is a framework agreement?

Like with »regular« public contracts, framework agreements are covered by Directive 2014/24/EU when the maximum estimated value envisaged for the total term of the framework agreement exceeds the current threshold, cf. Articles 4 and 5(5) of Directive 2014/24/EU.[29]

Traditionally, framework agreements have been put out to tender in the same manner as any other works, supply and service contract, using open (Article 27) or restricted procedures (Article 28).[30] Whether the remaining procedures – competitive procedure with negotiation (Article 29), competitive dialogue (Article 30), innovation partnership (Article 31), and negotiated procedure without prior publication (Article 32) – will be used more in the future, remains to be seen.

According to the definition of a framework agreement in Article 33(1), a framework agreement establishes the terms under which the subsequent contracts (call-offs) can be awarded. As shall be seen in this and following chapters, it is important to remember the distinction between the framework agreement and the call-off, as the framework agreement *may* be entered into by other parties than the call-off.[31]

A framework agreement is similar to that of a sales contract except that the price or quantity is not fixed. As regards price and quantity, the wording of the definition of framework agreements in Article 33 (1) is worth dwelling upon; the phrase »*in particular*« suggests that quantity and price are not the only terms that can be established in a framework agreement,[32] and the phrase

29 As mentioned in Chapter 2, according to Article 1 of Regulation (EU) 2015/2170 of 24 November 2015 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts (OJ 2015 L 307), Article 4 of Directive 2014/24/EU is amended as of 1 January 2016 so that the threshold are as follows: a) EUR 5,225,000 for public works contracts, b) EUR 135,000 for public supply and service contracts awarded by central government authorities, and c) EUR 209,000 for public supply and service contracts awarded by sub-central contracting authorities. See also Albano G L & Nicholas, C: »*The Law and Economics of Framework Agreements*« (2016).

30 There are two levels of procedure; the first level of procedure is used for the establishment of the framework agreement, and the second level is for the subsequent award of the call-off.

31 This is the case when the CPB establishes the framework agreement.

32 Andrecka M: *Framework Agreements, EU Procurement Law and the Practice*, Upphandlingsrättslig Tidskrift (2015) at 129.

»*where appropriate*« suggests that the precise quantity need not necessarily be established in the framework's terms.[33]

Furthermore, the distinction between »*contract*« (in this connection a public contract) and »*framework agreement*« is notable as it makes some difference whether an agreement is subject to the general public contract rules or the rules on framework agreements, which will be examined further below.

In certain cases there may be doubt as to whether an agreement is a *contract* or a *framework agreement*.[34] This occurs in situations where the agreement contains elements of both types of agreements – for example the supply of a good and subsequent maintenance and spare parts for the good for a number of years to the extent that the buyers needs it. Seen in isolation, the former is a contract and the latter is a framework agreement. This is suggested to be a mixed agreement[35], which should not be divided but rather qualified according to the »part« of the agreement with the highest value. For example, if the purchasing price of the good is € 1 million and the value of the maintenance and spare parts is estimated to be € 3 million, then the entire agreement is a framework agreement – and vice versa.[36] It is submitted, however, that the qualification principle only appears in a previous Danish Executive Order on Implementation[37] – but it does not have legal basis neither in the procurement directives nor in the current Danish Public Procurement Act.[38] Yet, it is argued that the principle is assumed to be applicable,[39] although no legal basis for this contention is offered. It is merely added that the qualification principle is not alien to the Danish Public Procurement Act, because similar principles are used in connection with qualifying both »light« and standard services, cf. § 25(2) of the Act.[40]

33 Andrecka M: *Framework Agreements, EU Procurement Law and the Practice*, Upphandlingsrättslig Tidskrift (2015) at 129.

34 Hansen, R H & Rytter, N K H: »*De udbudsretlige rammer for offentlige kontrakters varighed* in Hagel-Sørensen, K: »Aktuel Udbudsret II« (2016) at 77-78.

35 Ibid at 78.

36 Ibid at 77-78.

37 Danish Executive Order No. 712 of 15 June 2011 (on the procedures for the award of public works contracts, public service contract and public supply contracts).

38 Act No. 1564 of 15 December 2015 – The Public Procurement Act. This Act revoked Executive Order No. 712 of 15 June 2011.

39 Hansen, R H & Rytter, N K H: *De udbudsretlige rammer for offentlige kontrakters varighed* in Hagel-Sørensen, K: »Aktuel Udbudsret II« (2016) at 78.

40 Ibid at 77-78.

The rules on framework agreements limit the time frame to four years, which is a limitation that does not apply to public contracts.[41] The Commission's 2005 Explanatory Note on framework agreements[42] complicates the distinction between contracts and framework agreements, as it makes a further distinction between »*framework contracts*« and »*framework agreements strictu sensu*«.[43] Hence, framework contracts are agreements that establish all the terms in a binding manner, whereas framework agreements strictu sensu are agreements that do not establish all terms or that do not establish all the terms in a binding manner. Binding, in this respect, does not mean that the buyer has a legal obligation to purchase, nor does it mean that the supplier has an obligation to deliver, but rather that once the contracting authority has made the decision to use the framework agreement, the conditions in it are definitive.[44]

Neither framework contracts nor framework agreements strictu sensu contain a legal obligation to purchase, which is exactly the pivotal component that distinguishes framework agreements from public contracts.[45] Therefore, Article 33 of Directive 2014/24/EU covers framework contracts *and* framework agreements – but not public contracts.

As both framework contracts and framework agreements strictu sensu are considered to be framework agreements *as such*, a distinction between the two is for explanatory purposes only. Hence, for good measure, in this chapter the proper denomination will be attached to the various types of frameworks.

### 3.1. Mandatory or voluntary

As can be deduced, by definition an agreement that obliges and binds both parties to an agreement cannot be a framework agreement, as this is a public contract. This is confirmed in literature where commentators agree that if both

41 Steinicke M & Groesmeyer L: »*EU's Udbudsdirektiver med Kommentarer*« (2008) at 247.
See more on the time frame below in Section 4.1. of this chapter.

42 The Commission's Explanatory Note on framework agreements at 3.

43 See also Albano, G L; Ballarin, A and Sparro, M: *Framework Agreements and Repeated Purchases: The Basic Economics and a Case Study on the Acquisition of IT Services*, Quaderni Consip (2010).

44 The Commission's Explanatory Note on framework agreements at 3. See also Albano, G L; Ballarin, A and Sparro, M: *Framework Agreements and Repeated Purchases: The Basic Economics and a Case Study on the Acquisition of IT Services*, Quaderni Consip (2010).

45 Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« at 1114.

sides to an agreement have binding expectations as to a minimum turnover, quantity etc., then it is a pure public contract and not a framework agreement.[46]

However, with single providers, the buyer and the supplier are often in practice bound to buy and supply (if a need arises) and such agreements are still considered to be framework agreements. This is due to the fact that with only one provider, the buyer has nowhere else to turn, unless it can find the good or service cheaper elsewhere.

Furthermore, agreements that impose an obligation on the supplier to deliver a work, supply or service but do not impose an obligation on the contracting authority to purchase such work, supply or service is recognized as a framework agreement covered by Article 33, see case C-300/07, *Hans & Christophorus Oymanns*.[47]

This *is* in fact in line with Directive 2014/24/EU as it does not prohibit framework agreements that oblige both parties, i.e. mandatory framework agreements. The key word here is *binding expectations*, because – as will be seen immediately below – the framework agreement only obliges both parties *if* a purchase is to be made. This means that if a purchase is to be made, both parties are bound by the agreement, but as there are no binding expectations, no harm is done if no need to make purchases arises.

The Directive does not address the obligations of the parties and whether the agreement is mandatory or not depends on the setup. The Directive only regulates *how* the framework agreement is set up and not the setup itself.

Opposite mandatory framework agreements there are voluntary framework agreements, i.e. framework agreements that do *not* oblige the parties to use it if a purchase is necessary. Directive 2014/24/EU does not prohibit contracting authorities from choosing to purchase goods, services or supplies covered by the framework agreement from other suppliers who are not parties to the agreement if the agreement does not provide value for money.[48] The

46 Binding expectations in the sense that the contract contains a pre-determined minimum quantity. Ibid at 1114 and Poulsen, S T; Jakobsen P S & Hjelmborg, S E: »*EU Public Procurement Law*« (2012) at 399

47 Case C-300/07, *Hans & Christophorus Oymanns*, paras 67-76. This case, however, focuses on the distinction between a concession and other arrangements in order to determine whether Directive 2004/18/EC regulated the procurement.

48 Recital 61 of Directive 2014/24/EU states that »*Contracting authorities should not be obliged pursuant to this Directive to procure works, supplies or services that are covered by a framework agreement, under that framework agreement*« indicating that the works, supplies or services covered by a given framework agreement do not have to be purchased under that specific framework agreement. They can be purchased elsewhere.

rationale behind this is the notion that a framework agreement is not a contract and hence, the parties are not tied to the agreement, see above. Although it does not appear from the wording of Directive 2014/24/EU or the Commission's Explanatory Note on framework agreements, it must be a matter of course that if the contracting authorities decide to buy outside the framework agreement a new tender must be put out *if* the thresholds have been exceeded. Otherwise the procurement obligation has not been fulfilled. If the thresholds have not been exceeded, the contracting authority can choose to purchase outside the framework agreement without putting out a new tender.

In Denmark, SKI has begun to set up mandatory framework agreements where the parties to the agreement are obliged to *use* the framework agreement *if* a purchase is to be made.[49] Currently, the SKI has 17 mandatory framework agreements.[50] Among others, one reason for establishing mandatory framework agreements is to secure the supply of a given work, supply or service. A clear disadvantage of mandatory framework agreements is that the parties are bound to the agreement even if a better deal surfaces.

As can be deduced from the aforementioned sections, with voluntary agreements the individual contracting authority can choose freely whether it wants to use the framework agreement, whereas with the mandatory framework agreements, the agreement must be used.[51]

In this author's view, when framework agreements are voluntary there is a great risk that they will never be used and both the contracting authority and the suppliers have wasted many resources. From a societal point of view, when framework agreements are not used they go from creating efficiency and flexibility to creating waste. Furthermore, that contracting authorities can choose to buy outside the framework agreement if it does not provide

See also Office of Government Commerce: »*Framework Agreements: OGC Guidance*« (September 2008) at 3; Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 1101-1105 and Andrecka M: *Framework Agreements, EU Procurement Law and the Practice*, Upphandlingsrättslig Tidskrift (2015) at 133.

49 Andrecka M: *Framework Agreements, EU Procurement Law and the Practice*, Upphandlingsrättslig Tidskrift (2015) at 141. These mandatory framework agreements could in fact be argued to be a public contract because they fulfil the definition in that both parties have an obligation. Once again, however, there are no binding expectations as to minimum quantity etc., as the framework agreement is only mandatory *if* a purchase is to be made.

50 As of September 2017. See SKI's website http://www.ski.dk/sider/aftaleliste.aspx.

51 Konkurrence- og Forbrugerstyrelsen: »*Effektivt offentligt indkøb – Konkurrenceanalyse 03/2010*« (September 2010) at 43. Konkurrence- og Forbrugerstyrelsen is the Danish Competition and Consumer Authority.

the expected value for money, again, creates waste, in this author's opinion. Clearly, from a socio-economic point of view, contracting authorities should not be obliged to place a less than profitable order from a given supplier if another supplier could do better, and therefore, being able to go outside the framework agreement is a clear advantage. But on the other hand, by letting contracting authorities set aside a framework agreement so easily the Directive loses its legitimacy. In this author's view this ought to be reevaluated, perhaps by requiring certain requirements to be met before the framework agreement could be set aside. The whole point of setting up framework agreements is that they usually provide lower prices than those which an individual contracting authority can negotiate. In practice, this author submits, buying outside framework agreements is very expensive and creates a waste of resources – and it is probably not very common.

Despite the discussion on mandatory contracts being framework agreements or not, as a main rule, if there is no obligation to purchase, framework contracts are covered by Article 33 as shall be seen in the following, even if they are named framework *contracts*.

### 3.2. Four types of framework agreements

When concluding a framework agreement, Article 33(1) of Directive 2014/24/EU states that the rules specified in the Directive regarding advertisement, publication, qualification and selection of suppliers and the subsequent award processes should be followed.

Thus, initially a contract notice must be published in the Official Journal of the European Union (S series). Failing to publish the notice in the Journal is a violation of Directive 2014/24/EU.[52] The contract notice must, *inter alia*, include the estimated total value of the contract and (as far as possible) the value and frequency of the contract. This is despite the fact that this may cause potential problems of collusion.[53]

Depending on the needs of the contracting authority there are different types of framework agreements that the contracting authorities can use. The basic distinction of the different types of framework agreements is between framework agreements concluded with a *single economic provider* and framework agreements concluded with *multiple economic providers*.

Hence, the four types of framework agreements consist in:

52 Case C-79/94, *Commission v Greece*, para 1.

53 When the supplier knows what the call-off is, i.e. the size etc., there is a basis for collusion.

1. Single provider framework agreement
2. Multiple provider framework agreement – direct award
3. Multiple provider framework agreement – mini-competition
4. Multiple provider framework agreement – hybrid

These four types of framework agreements will be examined below in Sections 3.2.1 and 3.2.2 of this chapter.

When a framework agreement is concluded, either with a single provider or multiple providers, the specific procedures laid out in Article 33 paragraph 3 and 4 must be complied with, and the conclusion of a framework agreement is a two-stage process[54] consisting of a first award phase and a second award phase.

First award phase

In the first award phase, the best bids are singled out and admitted to the framework agreement.[55] To do this, the award criteria outlined in Article 67 of Directive 2014/24/EU, the most economically advantageous tender (MEAT),[56] as well as the general rules of the Directive concerning *inter alia* choice of procedure etc. must be complied with. The MEAT is a superordinate for three types of award criteria and not an award criterion in itself. The three types of award criteria are 1) lowest price 2) cost-effectiveness, »*using*

54 The two-stage process applies to the most common procedures: open or restricted procedure. When using the competitive procedure with negotiation and the competitive dialogue there is a third phase, namely a phase of choosing whom to invite to tender in the first place.

55 A separate discussion of mini-competitions in this regard is provided in Section 3.2.2. of this chapter.

56 This requirement was set out explicitly in Article 32(2) of Directive 2004/18/EC. The requirement has not explicitly been passed on to Article 33 of Directive 2014/24/EU, but this author suggests that it still applies as the wording of the provision has been changed and hence the use of Article 67 (of Directive 2014/24/EU) is an implicit requirement in that Article 33(1) reads: »*Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.*« This is the opposite of the wording of Article 32(2) of Directive 2014/24/EU which reads: »*For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 53.*«

*a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68*«,[57] and 3) price-quality ratio.[58]

For framework agreements concluded using the *restricted procedure*, the *competitive procedure with negotiation*, the *competitive dialogue procedure* and the *innovation partnership* – i.e. all procedures except for the open procedure – there is a shortlisting/prequalification round.

In the shortlisting/prequalification round, any supplier may submit a request to participate in response to a call for competition. As such, *all* the candidates that satisfy objective selection criteria such as suitability to pursue the activity, economic and financial standing, and technical and profession ability[59] must be invited to submit a tender for the first award phase. However, according to Article 65 of Directive 2014/24/EU, contracting authorities can limit the number of candidates meeting the criteria that they will invite to tender. The minimum is five candidates for the restricted procedure, where in the competitive procedure with negotiation, in the competitive dialogue procedure and in the innovation partnership, the minimum number of candidates to be invited to tender is three, cf. Article 65(2). The maximum number must be indicated in the contract notice, and the bids submitted by the candidates invited to tender will be assessed according to one of the three MEAT criteria.

It can be debated whether five (or three) candidates are enough to ensure sufficient competition. In this author's opinion, inviting three or five candidates to compete *is* rather limiting depending on the number of candidates seeking pre-qualification. On the other hand, three or five candidates ought to be enough to ensure competition. In theory it only takes two to create competition.

As there is no prequalification in connection with the *open procedure*, tenders are submitted right away as a response to a call for competition. No one is invited so all interested parties can submit a tender. According to Article 27 of Directive 2014/24/EU, the tender must be accompanied by the information for qualitative selection that is requested by the contracting

57 Cf. Article 67(2) of Directive 2414/24/EU.

58 In Article 53 of Directive 2004/18/EC there was a choice between »the most economically advantageous tender« and »lowest price«. But, as mentioned, in the Public Procurement Directive there is only one option, namely »the most economically advantageous tender« which works as a superordinate for the three types of award criteria concerning suitability to pursue the activity, economic and financial standing, and technical and profession ability. Article 67(2) of Directive 2414/24/EU is examined more thoroughly below in this chapter, in Section 3.2.2.

59 Cf. Article 58 of Directive 2014/24/EU.

authority.[60] This is used to prune unfit tenderers. The number of fit tenderers may, however, turn out to be a great, so in order to limit the candidates and choose the best ones with 1) lowest price 2) best cost-effectiveness, or 3) best price-quality ratio, cf. Article 67 of Directive 2014/24/EU, it is important that the contract notice contains the maximum number of suppliers to participate in the framework agreement.[61]

The award criteria in Article 67 of Directive 2014/24/EU only apply to the first award phase,[62] and if the best price-quality ratio is chosen, the criteria, sub-criteria, weightings etc. to be used in the assessment of the bids must be published in the contract notice, cf Article 67(2) and (5) of Directive 2014/24/EU.[63]

In practice, framework agreements are primarily awarded using the restricted procedure. This is evident from a small survey conducted by this author of the framework agreements established by the Danish SKI, which shows that 25 of 42 agreements employ the restricted procedure. This is about 60% of the agreements. Seven agreements were awarded using the open procedure leaving ten agreements undetermined. With that, the number of framework agreements employing the restricted procedure may be much higher.[64]

Second award phase

The second award phase concerns the assessment of the tenders and the award of the contract to the specific tenderer. As shall be seen below, if a single economic provider is chosen, (s)he will receive an order, but if multiple eco-

60 Implicitly these are the objective requirements in Article 58 of Directive 2014/24/EU, i.e. suitability to pursue the activity, economic and financial standing, and technical and profession ability. These can also be considered minimum requirements, without which the contracting authority cannot reduce the number of tenderers, cf. Dethlefsen, P: *Kan rammeaftaler altid afløfte udbudspligten?* (14 July 2008).

61 Article 49 of Directive 2014/24/EU states that contract notices must be used as a means of calling for competition in respect of all procedures and refers to Annex V part C, stating: »*In the case of a framework agreement, indication of the planned duration of the framework agreement, stating, where appropriate, the reasons for any duration exceeding four years; as far as possible, indication of value or order of magnitude and frequency of contracts to be awarded, number and, where appropriate, proposed maximum number of economic operators to participate*« cf. para 10(a).

62 Although for mini-competition it may also apply in the second award phase, as shall be seen below in this chapter, Section 3.2.2.

63 See more on this in Section 3.2.2 below on mini-competitions.

64 Cf. the website of the Danish SKI, https://www.ski.dk/sider/aftaleliste.aspx. The small survey was conducted in September 2017, using the agreements available at the time.

nomic providers are chosen, a choice is made between them in this second phase. In the second award phase, the award of call-offs should comply with the specific rules in Article 33 of Directive 2014/24/EU.[65]

Directive 2014/24/EU contains no requirements for the contracting authority to use the same award criteria in the first and the second award phase, respectively. However, the obvious starting point is that the award criteria are identical in the framework agreement and the call-off, but there is scope for variation, for example in cases of emergency etc.[66] This is particularly relevant in connection with mini-competitions. The application of different award criteria, however, must be transparent and the variations must be clear in the contract notice and in the framework agreement ifself.[67]

It is important to remember that the award criteria in the first phase must cover a framework agreement with several lots, which each have different award criteria in the second award phase.

### *3.2.1. Single provider framework agreements*

According to Article 33(3) first subparagraph, call-offs based on a framework agreement which is concluded with a single provider (i.e. supplier) shall be awarded within the limits of the terms laid down in the framework agreement (direct award). This means that the specific criteria for allocating and awarding the contract are established. When all the terms are established, it is in fact a framework contract, as mentioned above. When a purchase is made, it is a pure order awarded on the terms of the agreement and there is no duty to retender for the subsequent call-off.

If the call for competition, however, does not specify all the terms precisely enough, the contracting authority has the possibility of consulting the supplier in writing to supplement the tender, hence making it a framework agreement strictu sensu, cf. second subparagraph of Article 33(3). In this case adjustments or supplements can be made on the initiative of the contracting authority, although this is limited by Article 72.[68] As with the first subpara-

65 Graells, A S: »*Public Procurement and the EU Competition Rules*« (2015) at 356.

66 In Denmark, however, the CBPP in case *Abena A/S og VTK A/S v København Universitet*, ruling of 13 July 2010, has decided that replacing a criterion in the framework agreement with another in the call-off is not allowed.

67 Konkurrence- og Forbrugerstyrelsen: »*Sortimentsudbud gennem brug af rammeaftaler – vejledning*« (2014) at 8. This is a report from the Danish Competition and Consumer Authority.

68 See Section 4.3 of this chapter.

graph, the call-off is awarded within the limits of the terms laid down in the framework agreement.[69]

With a single supplier, the first and the second award phases coincide because the competition is held and finished right away. Further action only concerns the issuance of purchase orders.

Single-provider framework agreements are in practice not very different from »regular contracts« as both the buyer and the supplier often are bound to buy and supply. Hence, it is suggested that in principle there is no reason why they are regulated as framework agreements. Most problems are caused by multi-provider framework agreements.

### *3.2.2. Multi-provider framework agreements*

Framework agreements concluded with multiple providers are regulated in Article 33 (4) with three methods as to the performance: direct award (litra a), mini-competition (litra c), and a »hybrid« (litra b).[70]

Today, with multi-provider framework agreements there is no requirement as to minimum number of participants. In the 2004 Directive, on the other hand, only one or at least three participants were required. It is reasonable to ask why. Why should it be allowed to have one participant but not two, which is more competitive? The answer to this question must be that it was just illogical and there was no reason for this, which is why the requirement has now been removed.[71]

Direct award

Call-offs based on direct award are awarded on the terms and conditions of the framework agreement, without reopening competition, meaning that all the terms have been established. Hence, it is by definition a framework contract. As there are multiple suppliers, the contracting authority must set out all the terms governing the provision of the services, supplies and works concerned

69 The Commission's Explanatory Note on framework agreements at 6-7.

70 The performance option »mini-competition« has been included in the directive (Recital 61 of Directive 2014/24/EU), which is a novelty compared to Recital 11 of Directive 2004/18/EC. The performance option »direct award« is not mentioned explicitly, but Recital 61 of Directive 2014/24/EU explains it more thoroughly than Recital 11 of Directive 2004/18/EC did.

71 Albert Sanchez Graells is of the opposite opinion and he continues to work with the assumption that at least three participants are required without explaining why. He asserts that »*in my opinion and to avoid uncertainty, the express requirement of art 32(4) Dir 2004/18 that the minimum number was three should have been kept in art 33(4) Dir 2014/14*«, see Graells, A S: »*Public Procurement and the EU Competition Rules*« (2015) at 356.

and the objective conditions for determining which of the suppliers shall perform them. Offhand, because the way to prioritize the bids is determined in the framework agreement and the actual competition thus takes place right away, this procedure bears resemblance to the single-provider framework agreements where the first and the second award phases coincide. But as opposed to the single-provider framework agreement, there are in fact two separate phases here, although the second phase is said to be uncompetitive.[72] In practice, the competition is concentrated in the first phase, and in the second phase the specific contracts are awarded. Hence, the second phase merely concerns the issuance of purchase orders.

When a call-off is made based on direct award, the supplier is selected for each specific purchase. This means that for every purchase an evaluation is made. This is opposed to the single-provider framework agreement where it is the same supplier for each purchase and no new evaluation for each purchase is necessary.

The key word in connection with direct award is the »objective conditions« because what does that entail?

Clearly, it must mean that the contracting authority cannot randomly choose which suppliers are to perform the task, but the relevant articles are silent. Recital 61 of Directive 2014/24/EU addresses the issue and states that »*the objective conditions for determining which of the economic operators party to the framework agreement should perform a given task, such as supplies or services intended for use by natural persons, may, in the context of framework agreements setting out all the terms, include the needs or the choice of the natural persons concerned*«.[73] This, however, is not very clarifying.

The Commission's Explanatory Note[74] as well as certain commentators[75] suggest a model to award call-offs objectively which is called the »cascade model«.[76] With this model, the contracting authority will send a request for services to the »highest ranking« supplier, and if that one cannot deliver or can only deliver up to a certain limit, the contracting authority will ask the second best and so on.

The cascade model corresponds, to a large extent, to only having a single supplier, but it has the advantage that in case the highest ranking supplier can-

72 Graells, A S: »*Public Procurement and the EU Competition Rules*« (2015) at 356.
73 Recital 61 of Directive 2014/24/EU.
74 The Commission's Explanatory Note on framework agreements at 8.
75 E.g. Hamer, C R: *Regular purchases and aggregated procurement: the changes in the new Public Procurement Directive regarding framework agreements, dynamic purchasing systems and central purchasing bodies*, PPLR (2014) at 201-210.
76 Perhaps another name could be »ranking model«.

not deliver, the contracting authority can ask the second best to deliver and so on. This meets the security of supply.[77] The cascade model is often combined with a limit to how much each supplier may deliver, the advantage being that the orders are allocated through a predetermined basis of allocation, thereby creating a greater degree of certainty that the suppliers admitted to the framework also get to deliver. This increased level of security for the suppliers may create better prices within the framework, which could compensate for the disadvantage of not always being able to buy from the operator that provides the best value for money.[78]

Some commentators submit that the cascade model contradicts the actual purpose of a framework agreement because to say that a supplier for some reason cannot deliver suggests that it has a possibility of not fulfilling its obligations.[79] This is, according to the commentators, not an option as a framework agreement is a public *contract* and hence a legally binding document – at least for the suppliers.[80] No explicit opinion is offered as to whether the call-off, which is in fact the agreement that the cascade model concerns, is a public contract or not. It is stated that »*although it supposes a subsequent contract, a framework agreement is legally speaking a contract ...*«,[81] for which reason, implicitly, this could be interpreted as meaning that the call-off is also a public contract. If this is correct, it may be true that the cascade model is inapplicable.

As mentioned above, the Explanatory Note states that framework agreements sometimes are public contracts in themselves, and thus the call-offs are *not* contracts. If that is correct, the cascade model is in fact usable.

Yet other commentators assert that framework agreements are not public contracts in themselves, but the call-offs are always public contracts.[82]

This author agrees with this last assertion, namely that a framework agreement is not a contract but a call-off *is.* Here, it is important to remember the difference between a framework agreement and the call-off; the framework agreement sets the frame for an agreement, for which reason it is not a con-

77 Konkurrence- og Forbrugerstyrelsen: »*Sortimentsudbud gennem brug af rammeaftaler – vejledning*« (2014) at 8-9.

78 Ibid at 8-9.

79 Lichère F & Richetto S: *Framework Agreements, Dynamic Purchasing systems and Public E-Procurement* in Lichère F et al (ed): »Modernising Public Procurement. The new Directive« (2014) at 217.

80 Ibid at 217.

81 Ibid at 217.

82 Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 1115 and Nicholas, C: *Framework agreements and the UNCITRAL model law on procurement*, PPLR (2008) at NA223.

tract, whereas the call-off *is* the contract where a specific purchase is agreed. In continuation hereof, it is suggested that a way to view this issue is to consider a framework agreement as a process that leads to the award of a public contract (call-off).[83] This is due to the fact that with a framework agreement no service, supply or work has been contracted. Thus, the cascade model may not be applicable.

Other methods, which have been suggested and in practice are widely used, include the usage of an alphabetical rotation, a random process, a swiveling process (each supplier is given a number, and when the contracting authority needs to make use of the framework agreement, it will call number one, then two, etc.),[84] percentage allocation or »cab-rank« rotation (rotation between suppliers where the winner accepts any given order).[85] According to the Commission's Explanatory Note,[86] the second phase award criteria were not explicitly regulated in Directive 2004/18/EC, but instead the basic principles of Article 2 (now Article 18 in Directive 2014/24/EU), principles of equality, non-discrimination and transparency, should be complied with. The methods are all non-discriminatory and they comply with the objectivity test, however, it is argued that there is a risk that they distort competition as they are pro-collusive.[87] Furthermore, the methods are non-transparent and hence they do not enable the contracting authorities to identify the tender which

83 Andrecka M: *Framework Agreements: Transparency in the Call-off Award Process*, EPPPL (2015) at 247.

84 Lichère F & Richetto S: *Framework Agreements, Dynamic Purchasing systems and Public E-Procurement* in Lichère F et al (ed): »Modernising Public Procurement. The new Directive« (2014) at 217 and Arden P: *Legal regulation of multi-provider framework agreements and the potential for bid rigging: a perspective from the UK local government construction sector*, PPLR (2013) at 173.

85 Procurement Lawyers' Association: »*The use of framework agreements in public procurement*« (2012) at 35.

86 The Commission's Explanatory Note on framework agreements at 8.

87 Andrecka M: *Framework Agreements: Transparency in the Call-off Award Process*, 10(4) EPPPL (2015) at 21.

Andrecka sees that the processes are pro-collusive, whereas this author suggests that, because the competition is concentrated in the first phase, and specific contracts are awarded in the second phase, there can be two sides to this. It is evident that when making a bid, a cartel or a bidding ring can collude and coordinate which economic operators are accepted within the framework agreement, but when the bids are prioritized by means of rotation processes, it is difficult for a cartel or bidding ring to control who gets the contract. Therefore, according to this author, saying that these rotation processes overall are pro-collusive is too simple. Because in a way they are and in a way they are not. With the cascade model it is another story, though, as the cartel or bidding ring here can »gear« their bids to a specific place in the sequence.

provides them with the best value for money, which is a requirement of the Directive.[88] In order to use the methods in practice, it must be assumed that there are objective considerations to justify the derogation from the requirement to select the tender which provides them with the best value for money. Objective considerations include considerations regarding small- and medium sized enterprises (SMEs) and the need to uphold a sustainable competition on the market.[89] Currently, there is no case law to either confirm or deny any of these award methods, and for the reasons just mentioned it is likely that most of the methods would not hold up in court.[90]

It seems that the Commission's Explanatory Note may have acknowledged the concerns of using the methods, as the Explanatory Note makes no mention of any of the methods except the cascade method – although, in this author's opinion, this is also problematic as the call-off is a contract. This author agrees that the cascade model suggests that a supplier has a possibility of not fulfilling its obligations – which it does not.

That said, the reason why the Explanatory Note makes no mention of any of the methods except the cascade method may also be because the models have developed over time and thus the remaining models have not been properly known at the time of issuing the Explanatory Note. Regardless, only the Explanatory Note – and not the directives – mentions the methods, for which reason it is unclear which, if any, of the methods are in fact permitted.[91]

Mini-competition

Framework agreements concluded with multiple suppliers where not all the terms have been established must, according to litra c, be awarded through the reopening of competition amongst the suppliers parties to the framework

88 Andrecka M: *Framework Agreements: Transparency in the Call-off Award Process*, EPPPL (2015) at 18 has a discussion on this, but agrees that for the »direct award« the general principles apply. According to Procurement Lawyers' Association: »*The use of framework agreements in public procurement*« (2012) at 35-36, there is no case law establishing whether Article 67 of Directive 2014/24/EU concerning the most economically advantageous tender is applicable to the direct award, but it is assumed that the principle is consistent with the general principles. As all the terms concerning the priority of the bids have been established in connection with the direct award, Article 67 is not relevant.

89 Konkurrence- og Forbrugerstyrelsen: »*Sortimentsudbud gennem brug af rammeaftaler – vejledning*« (2014) at 9 footnote 7.

90 Andrecka M: *Framework Agreements, EU Procurement Law and the Practice*, Upphandlingsrättslig Tidskrift (2015) at 147.

91 See also Albano G L & Nicholas, C: »*The Law and Economics of Framework Agreements*« (2016) at 201.

agreement.[92] This means that only parties to the framework agreement can participate in the mini-competition as it would otherwise be too difficult for the suppliers to calculate a specific tender. The award of framework agreements concluded with multiple suppliers where not all terms have been established are more clearly divided into two phases: a first award phase where all suppliers capable of performing the contract are selected, cf. Section 3.2., and a second award phase – the call-off phase – where the contracting authority, after the mini-competition, awards the call-off to the supplier with the best compliant tender.[93]

Framework agreements where not all terms have been established are by definition incomplete and hence they are categorized as framework agreements strictu sensu.

The reopening of competition means that the supplier submits its final tender only during the mini-competition. At this time, all terms are established and the call-off is awarded to the supplier who has made the best tender on the basis of MEAT, this being e.g. price, quality, organization, and after-sales service, cf. Article 67 of Directive 2014/24/EU.

Using Article 67 and the MEAT runs contrary to the assertion made above that it only applies in the first award phase; however, because the parties to the framework agreement in a mini-competition compete with each other until a »winner« has been found (ongoing competition), it has been suggested – seemingly rightfully – that Article 67 of Directive 2014/24/EU *is* applicable to the second award phase for mini-competitions.[94] This is despite the fact that the Commission has not addressed the issue of award criteria in connection with mini-competitions.

When one of the categories of MEAT is used, other factors than just price may be of importance, and the bid that fulfils all criteria in the best manner is awarded the contract. In order to use a criterion it must be linked to the subject-matter of the contract, it must not confer unrestricted freedom of choice on the contracting authority,[95] it must be specified in the contract notice, and

92 See more on »parties« in Section 4.2 of this chapter.

93 Arrowsmith, S: *»The Law of the Public and Utilities Procurement: Regulation in the EU and UK«* (2014) at 1107.

94 Andrecka M: *Framework Agreements: Transparency in the Call-off Award Process*, EPPPL (2015) at 18.

95 The issue of unrestricted freedom to choose has been dealt with in two relatively recent rulings by the Danish CBPP. The first case is *Konica Minolta Business Solutions Denmark A/S v Erhvervsskolen Nordsjælland* – ruling of 5 December 2011. The case concerned a framework agreement established by SKI, which included a provision that the contracting authority could freely choose whether it wanted to make use of

it must comply with the basic principles within EU law.[96] Furthermore, the contract notice must state how the criteria and possible sub criteria should be weighted, cf. Article 67(5) of Directive 2014/24/EU. Thus, the main rule is that »*a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderers' attention*«.[97] Furthermore, the contracting authorities cannot replace a sub criterion with another that has already been established in the framework agreement.[98] The weighting of the criteria increases transparency, and the contracting authority can choose to weigh them percentage-wise or within a range.[99] When weighting the award criteria percentage-wise, it could look like this: price 50%, delivery time 30%, and quality 20%. Where, for objective reasons, a weighting is not possible, an exception can be made, and then the contracting authority must indicate the criteria in decreasing order of importance, cf. Article 67(5) third subparagraph. Moreover, the contracting authority must be able to give reasons for this. This is often necessary and allowed in mini-competitions because the specific projects seldom are known when the contract notice is made.[100]

In Denmark, the application of Article 67(5) of Directive 2014/24/EU to mini-competitions has been established in a Danish ruling by the CBPP.[101]

direct award or mini-competition. Among others, the Complaints Board ruled that the contract violated Article 32(4) (of Directive 2004/18/EC/) because when a contract is awarded based on a framework agreement with multiple suppliers, a choice must be made beforehand as to whether it will be awarded using direct award or mini-competition; so either the terms are established, or they are not. It cannot be ruled out that a contract can include both direct award and mini-competition, however, it must be expected that it is clearly and objectively stated whether it is one or the other and when. In the case, the framework agreement does establish when direct award and mini-competition 'shall' be used, respectively. However, as it is often merely the needs of the customer that determines the procedure to employ, it is more or less at the discretion of the contracting authority to decide. This has in fact been taken into consideration in Directive 2014/24/EU as there is now a specific provision on this in Article 33(4) litra b. In CBPP ruling, *Ricoh Danmark v Erhvervsskolen Nordsjælland*, ruling of 6 February 2012, the result was the same as reference was made to the Konica Minolta ruling.

96 Article 67(3) and 67(4) of Directive 2014/24/EU.

97 Case C532/06, *Lianakis*, para 38,

98 Ruling from the Danish CBPP, *Abena A/S and VTK A/S v Københavns Universitet*, ruling of 13 July 2013.

99 Jessen, P W et al: »*Regulating Competition in the EU*« (2016) at 578.

100 CBPP ruling: *Duba-B8 A/S v Region Hovedstaden,* ruling of 24 October 2013.

101 Ibid. In this case, the defendant argued that Article 53 of Directive 2004/18/EC does not apply to framework agreements because Article 53 only concerns public contracts,

In this case, based on the 2004 Directive, the CBPP found that Article 53(2) of Directive 2004/18/EC and weightings applies to mini-competitions because the common denominators between Articles 32 of Directive 2004/18/EC, which applies to the »award of contract«, and 53, which concerns the »award of public contract«, are »award« and »contract«. This is confirmed when taking due account of the purpose of Article 53 (transparency).

As emphasized in Chapter 2, the value of the practice from the CBPP is rather limited as a legal source because neither other Member States nor the EU courts are bound to follow the rulings. That said, due to the implementation of Directive 2014/24/EU in the Danish Public Procurement Act,[102] the rulings of the CBPP reflect the »EU way«, for which reason they can be considered indicative.

The range of the services, supplies or works covered by the framework agreement usually has different weights, as price may be the dominant criterion when purchasing pencils, whereas quality and other specifications may be more important when purchasing computers. This is called the »price-quality ratio« which Article 67 aims at improving.[103]

The mini-competition must result in a call-off and not just a »framework agreement in a framework agreement«.[104]

The mini-competition must be based on the same terms as those provided in the framework agreement, meaning that there can be no substantial changes.[105] Where necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the contract notice as a matter of refining or supplementing the basic terms, must be applied in accordance with the procedure stated in Article 33(5)(a-d).[106]

which a framework agreement is not. Because it is two different situations, the defendant argued, there is no requirement to weigh the criteria in mini-competitions. See also a discussion on this in Andrecka M: *Framework Agreements: Transparency in the Call-off Award Process*, EPPPL (2015) at 18.

102 Act No. 1564 of 15 December 2015 – The Danish Public Procurement Act.

103 Recital 89 of Directive 2014/24/EU.

104 Konkurrence- og Forbrugerstyrelsen: »*Vejledende udtalelse: Anvendelse af rammeaftaler*« (2009). The statement was also made clear in a ruling from the Danish CBPP, *Atea A/S v Ballerup Kommune*, ruling of 27 April 2011. In this case two contracts were awarded in a mini-competition and the CBPP asserted that a mini-competition should result in a specific contract and not just lead to a »*framework agreement in a framework agreement*«.

105 Case C454/06, *Pressetext Nachrichtenagentur*. See more on substantial changes below in Section 4.3 of this chapter.

106 Article 33(5) of Directive 2014/24/EU.

When a call-off is made, the procedure stipulates that the contracting authorities must consult in writing the suppliers objectively capable of performing the contract, fix a time limit for the suppliers to submit the written tenders, and finally, the supplier who has submitted the best tender based on the award criteria set out in the contract notice for the framework agreement must be awarded the contract. As mentioned, the award criteria used are the MEAT.

This indicates that all capable suppliers on the framework agreement should be informed before a mini-competition takes place. Nevertheless, as a framework agreement may cover a large number of different services or supplies there is a modification to that rule, namely that contracting authorities are not obligated to invite all suppliers capable of performing the contract to compete in the mini-competition. Only those suppliers in the framework agreement who have made a bid for the specific items being purchased need to be invited,[107] and therefore there is no obligation for the contracting authorities to consult capable suppliers parties to the agreement that provide pencils and rulers if the purchase solely concerns paper. Hence, forthcoming mini-competitions are not published to the world.[108]

It is also possible to divide the framework agreement into categories or lots, each covering different services, supplies or works. In this case the contracting authorities only have to consult the suppliers in the categories which cover the required services, supplies or works.[109] Moreover contracting authorities are not obliged to send a notice of the results for each contract based on that agreement.[110]

Another question is whether the contracting authorities should limit the number of tenderers in the first award phase, or whether they should include all suppliers capable of performing the contract in the mini-competition. Commentators suggest that »*the essence of a framework agreement is that as much of the competition as possible is completed at the first stage*«,[111] except in markets where an early selection randomly restricts competition,[112] indicating that the contracting authority at an early stage can exclude a number of capable

107 Office of Government Commerce: »*OGC Guidance on Framework Agreements*« (2008) at 9.

108 Andrecka M: *Framework Agreements: Transparency in the Call-off Award Process*, EPPPL (2015).

109 Ibid at 9.

110 Article 50(2) of Directive 2014/24/EU.

111 Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 1115.

112 Ibid at 1115, according to which this could be in *»markets with volatile prices where prices is a key award criterion, but prices need to be reset for every order«*.

suppliers. On the other hand, it is submitted that because a mini-competition is a continuous process where the competition is open until a call-off has been awarded, it increases the competition between the suppliers,[113] which ultimately will lead to lower costs for the contracting authorities. The more participants, the more competition, and this suggests that as much of the competition as possible should be completed at the final stage.

For this reason and because the complications and costs of using mini-competitions have declined, mini-competitions are popular amongst policymakers in the USA. It is submitted that, for the reasons just provided, European policymakers may want to emphasize mini-competition in the future,[114] although for now the issue of whether contracting authorities should limit the number of tenderers in the first award phase or include all capable suppliers in the mini-competition is unclear.

From an economical point of view the issue of the number of suppliers that are to be admitted to the framework agreement is a trade-off between efficiency and competition.[115] It is argued that if the first award phase is concluded with only a few suppliers, then the competition in this phase is extensive, as all suppliers fight for one of the few desired spots. This leads to lower prices, which is positive. In the second phase, on the other hand, there is a risk that none of the suppliers wish to conclude a call-off, and as there are so few suppliers on the whole, there is a risk that some contracting authorities will not get served, which is very inefficient. The situation is the opposite when the first award phase is concluded with many suppliers. Here, because there are many spots open, the operators do not need to compete too hard to be admitted to the framework agreement, and therefore the competition is rather soft. This leads to higher prices. A higher number of suppliers in the second phase, on the other hand, enhances efficiency, as more end users are likely to be served. Because there are many suppliers, the risk that no one is interested in entering a contract in phase two is significantly reduced. So, as can be seen, when competition is increased, there is a risk of less efficiency and vice versa.[116]

What is worth dwelling upon is the terminology. Within procurement literature the term »compliant tender« is often used concerning the first award phase. Article 33(5)(a) of Directive 2014/24/EU, however, uses the term »capa-

113 Yukins, C: *Are IDIQs inefficient? Sharing lessons with European framework contracting*, Public Contract Law Journal (2007-2008) at 562.

114 Ibid at 562.

115 Albano, G L & Sparro, M: *A simple model of framework agreements: competition and efficieny*, Journal of public Procurement (2008) at 357-359.

116 Ibid at 357-359.

ble economic operator« instead. This can cause some confusion as the former refers to the tender, whereas the latter refers to the supplier, i.e. a legal entity. A tender is compliant when it meets the requirement in the contract notice and contains no reservations, whereas a supplier is capable when he can deliver the call-off under the framework agreement.

So, is a capable supplier the same as a compliant tender? In this author's opinion, the answer would offhand be no, as a supplier could in fact be *capable* of performing a contract without the tender being *compliant*, but in reality the answer is yes. The way to view this – in this author's view – is that in the first award phase the »capability test« concerns fulfilling the fixed minimum requirements set up in the contract notice. The minimum requirements involve, *inter alia*, the financial standing and technical ability of the suppliers, cf. Article 58. When all minimum requirements are complied with, the economic operator is capable, but the tender is also said to be compliant.

Hybrid

With Directive 2014/24/EU a novelty has been introduced in Article 33(4)(b): a »hybrid«. Article 33(4)(b) recognizes that where a framework agreement with multiple providers establishes all the terms, there may be a need to include both types of award methods, meaning that a part of the framework agreement will be awarded directly and the other part will be awarded through the use of mini-competition.[117] According to recital 61, this provides additional flexibility.

The choice between awarding on the terms of the agreement and mini-competition must be based on objective criteria, which are to be set out in the contract notice. For instance, such criteria could relate to the »*quantity, value or characteristics of the works, supplies or services concerned, including the need for a higher degree of service or an increased security level, or to developments in price levels compared to a predetermined price index*«.[118] As can be seen, the criteria are defined very broadly.

In practice this means that contracting authorities do not have to decide beforehand whether they want to use one or the other method, they just have to be clear in the contract notice what the objective criteria for the choice between the two methods are. With this new possibility the contracting authorities have been given more freedom and flexibility to choose at a later stage if all terms

117 Andrecka M: *Framework Agreements, EU Procurement Law and the Practice*, Upphandlingsrättslig Tidskrift (2015) at 132.

118 Recital 61 of Directive 2014/24/EU.

have been established. The contract notice must also specify which terms may be subject to the reopening of competition.

When the contracting authorities in connection with litra b decide to award a call-off on the basis of a mini-competition, the aforementioned procedure rules in Article 33(5) must be complied with.

It is suggested that single provider frameworks are used *less* commonly than multiple provider frameworks. This is because with single provider frameworks, contracting authorities do not have another option, should the market have changed and the selected supplier no longer is the best. With multiple providers the best supplier at a given time can be chosen.[119]

As can be seen, the above mentioned types of framework agreements are quite different. However, they are all subject to the same rules, i.e. the remaining provisions of Article 33 – paragraphs 1 and 2 – and Directive 2014/24/EU in general.

### *3.2.3. Considerations regarding the types of framework agreements*

Above the various types of framework agreements have been examined and they give rise to some considerations. The considerations primarily concern the direct award.

When all terms have been established it should be relatively uncomplicated to award a call-off directly. The question remains, however, what happens if the contract notice states that the call-off will be awarded directly, but this is not possible because all terms have *not*, in fact, been established? Should the tender be cancelled, or is there another solution?

If all terms have not been established after all, one of the most significant circumstances which can (or must) lead to cancellation of the tender is errors in the procurement process. This has become evident in a ruling from the Danish *CBPP* concerning *Esbjerg Oilfield Services v Svendborg Municipality*.[120] This case concerned the purchase of a car- and passenger ferry between three destinations. While the shipyard companies were calculating their prices, the municipality changed some of the technical specifications of the ferry[121] and subsequently the municipality asked the companies to calculate the price difference. Following the changes, the municipality received complaints regarding the procurement procedure as substantial changes were made but

119 Andrecka M: *Framework Agreements, EU Procurement Law and the Practice*, Upphandlingsrättslig Tidskrift (2015) at 132.

120 CBPP ruling: *Esbjerg Oilfield Services A/S v Svendborg Kommune*, ruling of April 2 1996.

121 See more on substantial changes in Section 4.3 of this chapter.

also because the submitted prices were made available to all tenderers, and the municipality decided to cancel the tender. The decision to cancel resulted in complaints to the Danish CBPP, which in short ruled that when a tender is subject to substantial errors, cancellation is the correct course of action.

On the other hand, the general rule established in *Marius Hansen A/S v the Ministry of Research*[122] is that the party who has prepared the inadequately designed material is liable, and therefore it should not be to the disadvantage of the supplier if, because of the inadequately designed material, he establishes his own assumptions. What can be discussed then is whether missing terms in an award procedure where all the terms and conditions are supposed to have been established are a substantial error or an inadequately designed procurement document. This author speaks in favor of deeming it an inadequately designed procurement document, because with the substantial error, the subject is for example a change in the tender, whereas here something is missing. Therefore, the contracting authority carries the burden for the mistake and at first glance it would appear that the suppliers should be allowed to make their own assumptions. However, the principle of equality must be complied with and because, say, five different offers with different assumptions cannot be compared and treated equally, the contract could or should be subject to cancellation after all. So, regardless of the approach taken, the end result is the same.

But is a cancellation acceptable, or could another legal basis such as Article 67 of Directive 2014/24/EU be used to solve the situation? Or could the creation of a mini-competition where the established terms are fixed and the missing terms are made subject to competition be a solution instead? And is there a minimum limit as to when this is acceptable or not?

As regards the first issue, Article 67 of Directive 2014/24/EU, this provision sets out the rules regarding the award criteria and subparagraph 5 provides for assignment of relative weighting to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone. Assigning relative weightings does not provide any answer to the problem, because as mentioned earlier, the weights can only be used on terms that are established. If a term is missing, there is nothing to weight.

However, focusing on price alone could in principle be a solution but because the various tenders have not primarily focused on the price and because this is not what the suppliers have shown interest in, this is not in accordance

122 CBPP ruling: *Marius Hansen A/S v Forskningsministeriet*, ruling of 23 November 1998.

with the original contract notice, which is a requirement.[123] Complying with the principle of equality in this situation would be very difficult because some suppliers may have focused more on price than others which creates uneven competition.

The Danish CBPP has heard a few cases on similar issues. The cases do not concern missing terms, which is why they are not spot on, but because the cases concern the situation where the award criteria are supposed to be the MEAT, but in reality focus is only on price, this author submits that they can be used as guidance.

One of the cases took place in 2002 and concerned *ISS Danmark A/S against H:S Rigshospitalet*.[124] In the case ISS claimed that Rigshospitalet had infringed Article 36 of the Service Directive 92/50/EEC[125] in that they had constructed the priority of the sub criteria and the evaluation model in a way that was not suited to identify the most economically advantageous tender but only the lowest price. In its ruling, the CBPP sustained the claim by ISS because the weightings of the other criteria were so low that they could not »overrule« the price.[126]

Another more recent case is from 2015 and it concerned *Svend Pedersen A/S v Favrskov Municipality*.[127] This case is decided on the basis of § 8 of the Danish Consolidated Act on Tender Procedures for Public Work Contracts [128] and in the case Svend Pedersen A/S claimed that the award criterion employed by the municipality (MEAT), was unfit as award criterion as the general conditions in the procurement document were highly detailed and described very precisely. In practice the only competitive parameter was price. Svend Pedersen A/S claimed that the tender should be annulled as it infringed § 8, and the CBPP sustained this.

From case law it is evident that only looking at price when the contract notice states otherwise is an infringement of the law. This goes to show that

123 Jessen, P W et al: »*Regulating Competition in the EU*« (2016) at 570-571.

124 CBPP ruling: *ISS Dansk A&S v H:S Rigshospitalet*, ruling of 2 April 2002.

125 Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public services contracts (OJ 1992 L 209).

126 However, the CBPP stated that the infringement was only of a formal nature and not an expression of disregard for the principle of equality because the prioritization and evaluation model was mentioned in the contract notice. That ISS did not ask for the appendix was their own fault as it was emphasized in the procurement document. Therefore the contract was not annulled.

127 CBPP ruling: *Svend Pedersen A/S v Favrskov Kommune*, ruling of 25 June 2015.

128 Consolidation Act No 1410 of 7 December 2007.

Article 67 of Directive 2014/24/EU is not an applicable solution in case of missing terms.

The question is then whether it is possible to transform the tender (or at least part of it) into a mini-competition? Under normal circumstances, this author submits that a transformation of the tender into a mini-competition is precluded because, again, it is not a mini-competition that the suppliers have shown interest in, and if the tender is transformed, it will not be in accordance with the original contract notice, which is a requirement. Furthermore, it could be argued that if a mini-competition is completed although the contract notice states that the call-off should be awarded directly, the procurement obligation has not been fulfilled. This is because the rules that have been drawn up have not been observed and then the contract is subject to being declared ineffective.[129] But because it should not be a disadvantage of the supplier if, because of the inadequately designed material, the supplier establishes his own assumptions, this could in fact be an acceptable solution after all. Furthermore, if the only items made subject to competition were the missing terms while the established terms remain fixed, this could secure competition because only the specific areas in which the contracting authorities had failed were completed.

There is no law or literature on this issue and hence there are no interpretations as to whether such a solution is acceptable or not. In this author's opinion, making the missing terms subject to competition is an acceptable solution because the alternative is a cancellation of the tender which is a waste of many resources already spent.

## 4. Contents of the rules

The rules that apply to all types of framework agreements include a pre-set maximum time frame, availability for original parties only, and a prohibition against substantial amendments. Furthermore, there are rules about the minimum requirements in the contract notices.

### 4.1. Time frame

As mentioned above, the rules on framework agreements limit the time frame to four years. This is a maximum including any extensions, which is why it is allowed to extend a framework agreement for 2 x 12 months if the framework

129 See more on ineffectiveness below in Section 4.4 of this chapter.

agreement only has a duration of two years,[130] whereas if the duration of the framework is three years, only one extension of 12 months is possible.[131]

In 2013, in a report on »The Proposal for a Directive of the European Parliament and of the Council on public procurement«[132] the European Parliament proposed to extend the time limit to five years with the possibility of a longer duration in cases where:

»*a) the subject of the framework agreement concerns works or services that will take longer than five years to carry out; or (b) economic operators need to make investments for which the amortisation period is longer than five years or which are linked to maintenance, the recruitment of suitable staff to perform the contract or the training of staff to perform the contract.*«[133]

This is opposite to the text proposed by the Commission stating that the time limit should not exceed four years, save in »*exceptional cases duly justified, in particular by the subject of the framework agreement*«.[134]

As can be deduced, the Parliament's proposal was rejected as the Commission's proposal was included in Directive 2014/24/EU's final version. However, perhaps as a compromise, a clarification of what can be considered an exceptional case duly justified is included in Recital 62,[135] and the examples given correspond to a great extent to the Parliament's proposal.

It is suggested that the nature of »the subject of the framework agreement« may mean that the wanted outcomes of the framework agreement, for example savings, will only be achievable if the duration of the framework agreement is longer than four years. This, for example, could be in situations where substantial investments are made upfront, and where it may take considerable time to recover the investment.[136] It is argued that without the possibility of prolonging the framework agreement beyond four years, the suppliers might

130 CBPP ruling: *Kids Leg og Lær A/S v K 17 Indkøbsfællesskabet for kommunerne i Region Sjælland*, ruling of 10 January 2011 from the CBPP.

131 CBPP ruling: *UAB Baltic Orthoservice v Ringsted Kommune*, ruling of 19 December 2008.

132 Draft European Parliament Legislative Resolution on the proposal for a directive of the European Parliament and of the Council on public procurement (COM(2011) 896 –C7-0006/2012 –2011/0438(COD)), amendment 135.

133 Ibid.

134 Ibid.

135 Directive 2014/24/EU.

136 Procurement Lawyers' Association: »*The use of framework agreements in public procurement*« (2012) at 23. See also Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 1175-1176.

be disinclined to make as innovative bids as had the framework agreement had a longer duration.[137]

Furthermore, prolonging a framework agreement may be considered anti-competitive.[138]

Because the Parliament traditionally has been »SME-friendly«, it is surprising that the Parliament has proposed a lengthier time limit.[139]

Regarding the duration of the call-off, the articles of Directive 2014/24/EU are silent. Recital 62, however, states that »*the duration of the individual contracts based on a framework agreement does not need to coincide with the duration of that framework agreement, but might, as appropriate, be shorter or longer*.« This means that there is no exact limit on the length of the call-off as long as it has been awarded within the time limit of the framework agreement. In the Commission's Explanatory Note on framework agreements, it is stated that »*The duration of a framework agreement is limited to 4 years, which is also the case for the contracts based on the framework agreements*.«[140] This is due to the fact that call-offs are awarded »within the limits« of the terms laid down. Based on wording of Recital 62 as mentioned above, the contention of the Explanatory Note can no longer be the case. For call-offs, Directive 2014/24/EU must be interpreted in the way that it allows for a longer duration than four years.

In practice it is possible to award a call-off few weeks before the expiry of the framework agreement even though the actual contract will be performed only after the expiry of the framework agreement. The Commission has acknowledged that a contract will »*be rendered during the year after expiration of the agreement*«.[141] It is submitted, nevertheless, that it is unlikely that an extension beyond one year after the expiration of the framework agreement would be permitted,[142] as a further extension will entail too long a period without competition. The legal basis for such an interpretation is, however,

137 Procurement Lawyers' Association: »*The use of framework agreements in public procurement*« (2012) at 23.

138 See more on this in Chapter 12. See also Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 1176.

139 Hamer, CR: *Regular purchases and aggregated procurement: the changes in the new Public Procurement Directive regarding framework agreements, dynamic purchasing systems and central purchasing bodies*, PPLR (2014) at footnote 10.
See more on SMEs in Chapter 7.

140 The Commission's Explanatory Note on framework agreement at 5 and footnote 16.

141 Ibid at 5 footnote 16.

142 Lichère F & Richetto S: *Framework Agreements, Dynamic Purchasing systems and Public E-Procurement* in Lichère F et al (ed): »Modernising Public Procurement. The new Directive« (2014) at 219.

missing,[143] and according to Directive 2014/24/EU, it should in fact »*be allowed to set the length of individual contracts based on a framework agreement taking account of factors such as the time needed for their performance, where maintenance of equipment with an expected useful life of more than four years is included or where extensive training of staff to perform the contract is needed.*«

Further, it is argued that the maturity of a work, service or supply should help decide the length of a call-off.[144] If the call-off concerns a new and innovative work, service or supply, this speaks in favor of a short period of time, as recently emerged businesses might otherwise be excluded. Conversely, mature services, supplies or works can handle a longer period of time,[145] presumably because in these markets the suppliers are more established. Further, issues such as the number of suppliers admitted to the framework and the value of the call-off ought to be indicative as to the length of the call-off period.[146]

But why has the Commission and the Parliament come up with a time frame of four and five years, respectively? Why not just let the parties to a framework agreement work out a time frame on their own? These questions can be answered with one word: competition.[147]

As to the question of why the time frame is set at exactly four years and not, say, two, five or seven years (as is the time frame for defense and security contracts[148]), there is no »official« explanation. However, the answer must be found partly in the balancing act between making the framework agreement financially worthwhile for the parties to participate in and not closing the market for competition for too long, and partly in the balancing act between the level of transparency and the risk of collusion.[149] When the time limit set is two years, it may not be financially possible for the supplier to recover a given investment or it may not be sensible to engage in an agreement that can only provide a yield for a short period of time. On the other hand, setting a time limit that is much longer can also prove dangerous to the market, as stated above.

143 Ibid at 219. See more on this in Chapter 12.
144 Graells, A S: »*Public Procurement and the EU Competition Rules*« (2015) at 359.
145 Ibid at 359.
146 Ibid at 359.
147 See more on this in Chapter 11.
148 See Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216) para 29(2).
149 This issue will be discussed below in Chapters 11-13.

Therefore, another solution than a four-year time limit could include two separate time limits. The first with a two-year limit for projects not requiring substantial upfront investments, and hence not closing the markets for competition for very long, and the second with a five- or six- or seven-year time limit for projects requiring substantial upfront investments. In this case, obviously, there will be problems in regard to competition and the market as a whole, however, for projects that are extensive in terms of size and economy, it may prove to be acceptable as there will only be very few suppliers that are able to participate and therefore there will only be few »losers«.

However, if the large contract was divided into lots, there would be many participants and thus it would be easy to think that there would only be few losers. But as a division into lots attracts many small- and medium-sized enterprises, which make up a large percentage of all companies, there would be many companies that were excluded for a long period of time, and regardless of the number, there *will* be losers, which is what public procurement aims to avoid.

For these reasons a single time limit of four years seems to be a sensible compromise between the two sides, as other limits would be difficult in practice to administer, and the consequences are undesirable.

### 4.2. Original parties

Another rule that applies to all the types of framework agreements – and this is a novelty in Directive 2014/24/EU – is the explicity of »parties« in Article 33(2) subparagraph 2 and Recital 60. Here, it is clearly stated that in order for contracting authorities to take part in a framework agreement they must be identifiable, either »*by name or by other means, such as a reference to a given category of contracting authorities within a clearly delimited geographical area ...*«.[150] Moreover, suppliers who have not been original parties to the framework agreement before it was concluded cannot enter either.[151] This means that it is a closed system and once a framework agreement is in place, no one can enter it for its duration.[152] As mentioned, Article 72(1)(d)(ii) makes an exception to this closed system, because in case of e.g. restructuring and insolvency, a new supplier can replace the original supplier. This, however,

150 Recital 60 of Directive 2014/24/EU.

151 This is required by the transparency principle.

152 Lichère F & Richetto S: *Framework Agreements, Dynamic Purchasing systems and Public E-Procurement* in Lichère F et al (ed): »Modernising Public Procurement. The new Directive« (2014) at 215.

seems more like a simple substitution of a supplier, which is a necessity, rather than a softening of the rules.[153] Suppliers acting in a consortium are parties.

The Danish CBPP has heard a few cases on the issue of parties before the commencement of the 2014 Directive, and among others, it has established that all members of a purchasing association are considered parties although they have not actively joined the framework agreement.[154] This means that both those who actively have joined and those who have the possibility of joining are parties as long as they are members of the purchasing association.[155] The same must apply to central purchasing bodies. However, if members actively have rejected to be part of the framework agreement, they are not a party.[156] A statement that »all Danish municipalities and regions« are parties is sufficient to identify the parties.[157]

The CBPP has further established that a supplier who *is* a party to a framework agreement but who has not made a bid for a given good or service, is not a supplier for that good or service and hence the contract cannot be awarded to this supplier.[158]

When a framework agreement has been awarded to one or more suppliers, the subsequent purchases need not be put out to tender, even when they exceed the threshold. It can be said that the procurement obligation has been fulfilled.

### 4.3. Substantial amendments and modifications

Furthermore, according to Article 33(2) subparagraph 2 of Directive 2014/24/EU it appears that the terms of a call-off based on a framework agreement

153 Ibid at 215.

154 A purchasing association is a cooperative arrangement, often among businesses, to agree to aggregate demand to get lower prices from selected suppliers.

155 CBPP ruling: *KIDS Leg og Lær A/S v K 17 Indkøbsfællesskabet for kommunerne i Region Sjælland*, ruling of 10 January 2011. This ruling goes against a guiding statement made by The Danish Competition Authority in which it states: »*Efter styrelsens opfattelse er forskel på at tilslutte dig en indkøbscentral og at være »part« på de rammeaftaler, som indkøbscentralen indgår. Ordregivende myndigheder opnår som udgangspunkt ikke automatisk adgang til at trække på rammeaftalerne ved at tilslutte sig indkøbscentralen som abonnent.*« (This author's translation: There is a difference between joining a central purchasing body and being a party to the framework agreements entered into by the central purchasing body. When joining a central purchasing body, the economic operators do not automatically gain access to drawing on the framework agreement.) See Konkurrence- og Forbrugerstyrelsen: »*Vejledende udtalelse – Anvendelsen af rammeaftaler*« (28 October 2009).

156 CBPP ruling: *UV Data A/S v Københavns Kommune*, ruling of 25 September 2012.

157 CBPP ruling: *TDC A/S v Økonomistyrelsen*, ruling of 26 September 2011.

158 CBPP ruling: *Abena A/S and VTK A/S v København Universitet*, ruling of 13 July 2010.

cannot be substantially amended afterwards.[159] This applies to all types of frameworks but especially to the *framework contracts*, as the terms here have been fully established.[160]

Thus, changes or amendments which, if included in the contract notice, »*would have made it possible for tenderers to submit a substantially different tender*«[161] are prohibited.

But what does »substantial amendment« entail? According to case law, amendments constitute a new award of a contract »*when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract*«.[162] This premise has been passed on to Article 72(4) of Directive 2014/24/EU. This provision specifies that a modification is substantial when it has admitted other candidates than those originally selected,[163] when it changes the economic balance of the framework agreement,[164] when it extends the scope of the framework agreement,[165] and finally, where a tenderer is replaced because of e.g. restructuring and insolvency.[166] But what about the subject matter?

In practice there are many uncertainties as to how detailed the subject matter must be described, and whether substitution of services or products is allowed. In connection with framework agreements this is very important because all terms have been established when the framework agreement has been concluded. As to how detailed the description of the subject matter must be, the problem often occurs in situations where there is a large product portfolio.[167] The portfolio could include 5,000 types of personal care products and in this situation it seems sufficient to make a very broad description like »an assortment of personal care products that fulfil the needs« as it would otherwise be chaotic.[168] In Directive 2014/24/EU there is nothing to prohibit such practice. This can have a big impact on future framework agreements as this makes it possible to substitute a product with a similar product as a

159 Article 33(2) subparagraph 2 of Directive 2014/24/EU.
160 Hence, mini-competitions can be revised to some degree.
161 Case C-496/99 P, *Commission v CAS Succhi di Frutta*, para 116.
162 Case C454/06. *Pressetext Nachrichtenagentur*, para 34.
163 Article 72(4)(a) of Directive 2014/24/EU.
164 Ibid Article 72(4)(b).
165 Ibid Article 72(4)(c).
166 Ibid Article 72(4)(d).
167 Andrecka M: *Framework Agreements, EU Procurement Law and the Practice*, Upphandlingsrättslig Tidskrift (2015) at 143.
168 Ibid at 143.

result of newer technology.[169] Further, new products to the market[170] may also be accepted in a framework agreement if a »*clear, precise and unequivocal review clause*«[171] is written into the contract.

Article 72(1) of Directive 2014/24/EU defines positively that a framework agreement *can* be modified or amended without constituting a new award of a contract in certain situations. This involves situations where the modifications have been evident in the initial contract notice but do not change the overall nature of the framework agreement,[172] where additional services, supplies or works have become necessary and a change of contractor either would cause undue inconvenience or even be impossible because of technical or economic reasons,[173] or where a modification was unforeseeable for the contracting authority, does not change the overall nature of the framework agreement, *and* the price increase does not exceed 50% of the value of the initial framework agreement.[174] Finally, in case of e.g. restructuring and insolvency a new supplier can replace the original supplier as long as the value of the modification is not substantial.[175]

Furthermore, Article 72(2) introduces a sort of de minimis rule[176] which makes it possible to make changes in a framework agreement if the value of the amendment can be expressed in monetary terms, and this is below the threshold in the directive *and* below 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts.

### 4.4. Standstill period

In 2007 the Remedies Directive 2007/66/EC[177] was introduced as a means to improve the efficiency of review procedures concerning the award of public

169 Hamer C R: *Regular purchases and aggregated procurement: the changes in the new Public Procurement Directive regarding framework agreements, dynamic purchasing systems and central purchasing bodies*, PPLR (2014) at 201-210.

170 This may either be the upgraded but otherwise same product or a whole new product.

171 Andrecka M: *Framework Agreements, EU Procurement Law and the Practice*, Upphandlingsrättslig Tidskrift (2015) at 144.

172 Article 72(1)(a) of Directive 2014/24/EU.

173 Ibid Article 72(1)(b).

174 Ibid Article 72(1)(c).

175 Ibid Article 72(1)(d) and (e).

176 Hamer C R: *Regular purchases and aggregated procurement: the changes in the new Public Procurement Directive regarding framework agreements, dynamic purchasing systems and central purchasing bodies*, PPLR (2014) at 201-210.

177 Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to

contracts. The Remedies Directive amended Council Directives 89/665/EEC[178] and 92/13/EEC.[179]

*Inter alia*, the Remedies Directive contains rules on a mandatory standstill period and derogations from it,[180] and on ineffectiveness,[181] which are relevant for framework agreements.

A standstill period is a mandatory break inserted between the notification of the award of the framework agreement and the signing of it. The standstill period is to ensure that »*a body of first instance, which is independent of the contracting authority*«,[182] has sufficient time to perform an effective review of the contract award decisions made by the contracting authorities in case any of the suppliers complain. If electronic means or fax are used, a contract may not be concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned. If other means of communication are used, for example regular letters, a contract may not be concluded before the expiry of a period of at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned.[183]

For framework agreements, the award of the framework agreement is covered by Article 2a but the contracts placed under it, i.e. the call-offs, are not subject to a standstill period. This means that in the first award phase contracting authorities and the participants to the framework agreements must observe the standstill period for 10 to 15 days after having notified the candidates but in the second award phase there is no such requirement.

improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335).

178 Council Directives 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395).

179 Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76).

180 Article 2a and 2b of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335) (Remedies Directive).

181 Article 2d of Directive 2007/66/EC.

182 Article 1(3) Directive 2007/66/EC. In Denmark this body is the CBPP.

183 Ibid Article 2a.

However, according to the Remedies Directive's Article 2b(c), if there is an infringement of Article 33(5) of Directive 2014/24/EU (the procedures) or if the contract value is estimated to be equal to or to exceed the thresholds set out in Article 4 of Directive 2014/24/EU, the contract must be deemed ineffective in accordance with Articles 2d and 2f of the Remedies Directive. Furthermore, if a framework agreement is signed during the standstill period, it can also be deemed ineffective.

If a complaint is filed with the body of first instance during the standstill period, the complaint has a delaying effect until a decision has been made as to whether the complaint should have a delaying effect until the final decision is available. When a contract is deemed ineffective it entails a compulsory annulment of the contracts as specified in the Remedies Directive's Article 2(1)(b).

The Remedies Directive was implemented into Danish law through Act No. 492 of 12 May 2010 regarding the enforcement of procurement rules etc.[184] The mandatory standstill period had already been introduced into Danish law in 2006 based on case law by the CJEU[185] so it was not a new phenomenon. The standstill period and the derived effects only apply to framework agreements covered by EU law and not agreements covered by national law.

## 5. Preliminary conclusions

Framework agreements are agreements between one or more contracting authorities and one or more suppliers which establish the terms according to which subsequent contracts (call-offs) can be awarded during a given period of maximum four years. Framework agreements are used when contracting authorities have a repeated need for certain supplies, services or works.

The use of framework agreements has increased rapidly since the introduction in Directive 2004/18/EC in 2004. Between 2004 and 2010, the use of framework agreements has increased by 47% in Denmark, an increase from DKK 6,111 million to DKK 13,096 million. That is an average of 11% a year, which actually is not so impressive as there has been an increase at an average of 18% per year since 2006 in the EU as a whole. That said, the amount of money spent on framework agreements is huge.

184 Danish Act No. 492 of 12 May 2010 regarding the enforcement of procurement rules etc.

185 Konkurrencestyrelsen (now Konkurrence- og Forbrugerstyrelsen): »*Vejledning om reglerne for samtidig underretning og standstill-periode*« (2006) at 2.

A framework agreement is similar to that of a sales contract, except that the price or quantity is not fixed. Moreover, it has a fixed duration which a regular sales contract does not as it is a »one-time deal«.

As a main rule, framework agreements are not mandatory, meaning that a contracting authority has no obligation to use the framework agreement, should a purchase for some reason become unnecessary. If the good, work or service can be found cheaper elsewhere, the contracting authority can purchase it from that supplier. That said, in Denmark the SKI has begun to set up mandatory framework agreements where the parties to the agreement are obliged to use the framework agreement if a purchase is to be made – although this in fact could be argued to be a public contract because the agreement satisfy the definition in that both parties have an obligation. Currently, the SKI has 17 mandatory framework agreements.

According to Article 33(1) of Directive 2014/24/EU, the rules specified in the Directive regarding advertisement, publication, qualification and selection of suppliers and the subsequent award processes should be followed. Depending on the needs of the contracting authority there are different types of framework agreements that the contracting authorities can use. The basic distinction of the different types of framework agreements is between framework agreements concluded with a *single economic provider* and framework agreements concluded with *multiple economic providers*.

The single economic provider framework agreement is an agreement which is concluded with a single supplier and shall be awarded within the limits of the terms laid down in the framework agreement (direct award). This means that the specific criteria for allocating and awarding the contract are established. Framework agreements concluded with multiple suppliers are regulated in Article 33 (4) with three methods as to the performance: direct award (litra a), mini competition (litra c), and a »hybrid« (litra b).

According to the rules on framework agreements, there is a limit to the time frame of four years. This is a maximum including any extensions except in exceptional cases which are duly justified. The call-off, on the other hand, can be both shorter and longer than four years. It is submitted, nevertheless, that it is *unlikely* that an extension beyond one year after the expiration of the framework agreement would be permitted, as a further extension will entail too long a period without competition. Furthermore, only the original parties to the framework agreement can participate, meaning that it is a closed system and once a framework agreement is in place, no one can enter it for its duration. Once established, the terms of a call-off based on a framework agreement cannot be substantially amended afterwards. Article 72 of Directive 2014/24 clarifies when an amendment is »substantial«.

Finally, in 2007 the Remedies Directive 2007/66/EC was introduced as a means to improve the efficiency of review procedures concerning the award of public contracts. *Inter alia*, the Remedies Directive contains rules on a mandatory standstill period and derogations from it, and on ineffectiveness, which are relevant for framework agreements. A standstill period is a mandatory break inserted between the notification of the award of the framework agreement and the signing of it to ensure that »*a body of first instance, which is independent of the contracting authority*«, has sufficient time to perform an effective review of the contract award decisions made by the contracting authorities.

Overall, the procurement rules on framework agreements are assessed to be adequate and appropriate. That said, there are a few uncertainties and inexpediencies, e.g. that voluntary framework agreements potentially create a massive waste of resources when they are not used. This is a real risk as contracting authorities can set aside a framework agreement if better terms are found elsewhere.