CHAPTER 6

Parties to the framework agreements and organization hereof

1. Introduction

As mentioned in Chapter 5, Article 33(1) of Directive 2014/24/EU establishes that a framework agreement is an agreement between contracting authorities and suppliers. This means that framework agreements cannot be entered into between two private parties or two contracting authorities, i.e. there must always be at least one contracting authority and at least one private party.[1] The question is how this functions, and who these contracting authorities are in practice.

This question will be answered in the following where an examination will be made as to the parties of framework agreements and the organization hereof.

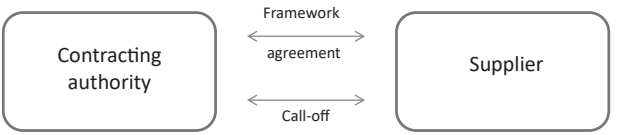
Thus, in Section 2 common public purchasing will be examined, followed by purchasing associations in Section 3. In Section 4, the occasional joint procurement is studied and finally, in Section 5, CPBs are scrutinized.

2. »Common« public purchasing

The first type of organization is rather straightforward and as the figure below suggests, it concerns a single contracting authority that establishes a framework agreement with one or more suppliers. The call-off is made between the same parties, where the contracting authority makes an order and pays for the good or service, which the supplier delivers.

1 Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 372 and 1171.

Figure 1 – Framework agreements by common public procurement



Source: author's own creation

Obviously, this situation is covered by Article 33(1) of Directive 2014/24/EU, but other than that there is no special provision covering this situation.

In practice, as mentioned in the introduction to this part, it seems that framework agreements entered into by single contracting authorities are quite rare as the preparation and execution of a framework agreement is costly and time consuming.

Rather, regional and local authorities can choose to aggregate their purchases to gain practical as well as financial benefits in another way. They can cooperate in order to establish a new joint legal entity as was the case in case C-360/96, *Arnhem/BFI*,[2] to manage their purchasing, which corresponds to a CPB, or they can form an association, which is not a legal entity.

3. Purchasing associations

As mentioned in Part I of this dissertation, contracting authorities consist of authorities, i.e. state, regional or local, bodies governed by public law or associations made up of one or more authorities or one or more bodies governed by public law. On this basis, obviously purchasing associations are covered by the Directive.

Municipalities, for example, are local authorities and they are by definition contracting authorities. When municipalities form an association, in some of the associations the municipalities take turns managing the agreements, while in others a number of employees from each municipality participate in the tender procedure,[3] for example as a joint purchasing team and/or a joint purchasing office.

2 Case C-360/96, *Gemeente Arnhem*, para 8.

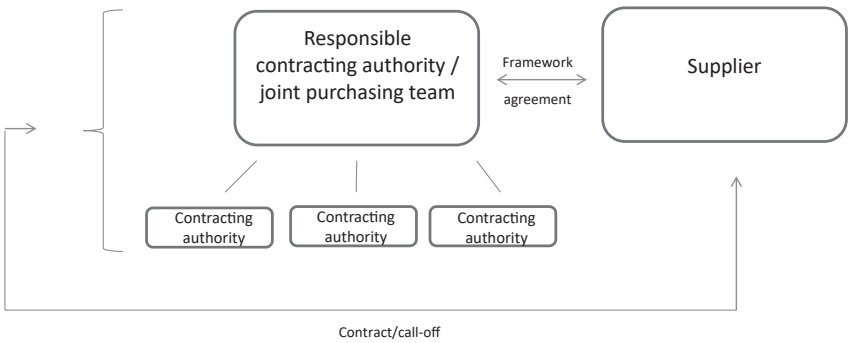
3 At least this applies in Denmark, see Rambøll: »*Bilagsrapport 1 – Analyse af de Kommunale Indkøbsfællesskaber – Casebeskrivelser*« (2009) at 3. The way it works is that the municipalities in advance, in a binding manner, declare to participate in a tender.

In purchasing associations, all contracting authorities (e.g. municipalities) are equal, meaning that no one has more (permanent) responsibility than others.

Purchasing associations are permanent in the sense that more municipalities have created an association and they are members until they withdraw. Depending on the size of the association, it carries on without the specific member.

Figure 2 below illustrates the organization of purchasing associations and who the parties are in the framework agreement and call-off, respectively.

Figure 2: Framework agreements by purchasing associations



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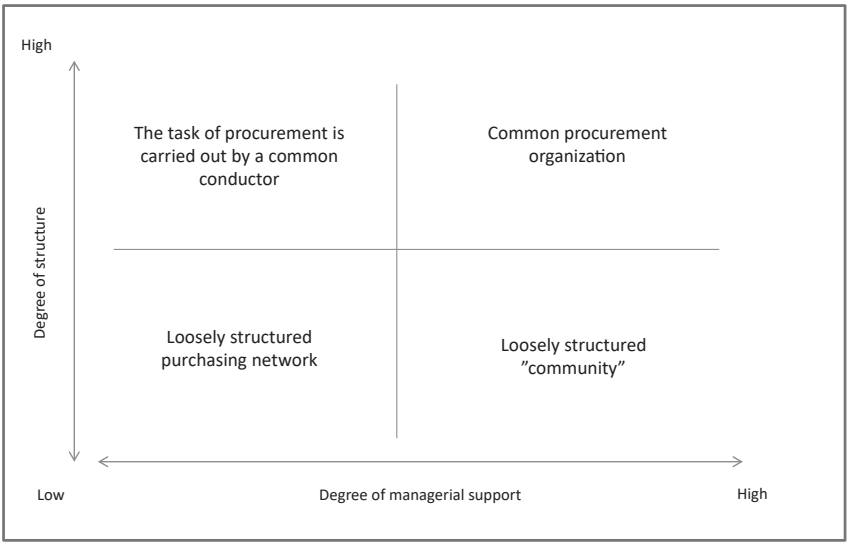
In this situation there are two distinct agreements: 1) the framework agreement between the responsible contracting authority and the supplier, and 2) the call-off between the individual contracting authorities (including the responsible contracting authority) and the supplier.

Associations can be organized according to various principles, and according to an analysis conducted by Danish Rambøll Management, two dimensions are used to differentiate the principles. On one side there is the degree of managerial/political support, and on the other side there is the degree of structure in the purchasing association.[4]

On this basis, individual (and presumably similar) contracts are conducted for each municipality.

4 Rambøll: »*Udviklingsmuligheder for de kommunale indkøbsfællesskaber – rapport*« (2009) at 13.

Figure 3 – Model of principles for organizing purchasing associations.



Source: Rambøll: »*Udviklingsmuligheder for de kommunale indkøbsfællesskaber – rapport*« (September 2009).

The conclusion is that purchasing associations with a high degree of managerial support have big impact in the municipalities, and it is easy to establish a common tender in that it is supported by the management. Similarly, where the purchasing associations have a high degree of structure, the association is more likely to have a common procurement plan, and so on.[5]

In Denmark there are 13 municipal purchasing associations[6] and when examining their organizations, it appears that the majority of them have a low degree of managerial support as well as a low degree of structure. This suggests that most of the associations in Denmark are »loosely structured purchasing networks«.

This means that participation and the level of activity in the associations first and foremost depends on what the specific employee/municipal representative deems appropriate and practical to contribute. Similarly, the

5 Rambøll: »*Udviklingsmuligheder for de kommunale indkøbsfællesskaber*« (September 2009) at 8.

6 Fællesindkøb Fyn, Fællesindkøb Nord, Fællesudbud Sjælland (FUS), Fællesindkøb Midt, Indkøbsfællesskab Nordsjælland (IN), Jysk Fællesindkøb, KomUdbud, Limfjord Vest, Spar 5, Sydjysk Kommuneindkøb, Sydjysk Udbuds Samarbejde, Vestegnens Indkøbsforum, Aalborg Modellen.

loose structure means that the municipalities have not in advance committed themselves substantially in relation to resources. Basically, the commitment covers the attendance in a number of meetings (exchange of experience), and the members of the association have expressed an interest in implementing an unspecified number of tenders along with the other members. The associations do not have shared resources, common tendering and procurement strategy, or a tendering plan as such.[7] Instead, the municipalities take turn in facilitating the tenders.

There are examples of the other principles in Denmark, though, where either the degree of structure is higher or where the degree of managerial support is higher – or both. This is for example the case where associations have a common tendering and procurement strategy, a joint purchasing team and/or a joint purchasing office.[8]

As per November 2017, the majority, 90 out of 98[9] of the Danish municipalities take part in a purchasing association of some kind. In 2009, Rambøll made an analysis of municipalities which do not take part in a purchasing association as to why they did not participate. Back then, the number of municipalities not members of a purchasing association neared 20, but it is assumed that the reasons are still valid today as several of the remaining eight municipalities did also not participate in any purchasing associations in 2009.[10]

Some of the municipalities not members of a purchasing association industriously use the agreements established by SKI, although there are great variations in the use of SKI's agreements across the municipalities.[11]

An association is a *cooperation* between municipalities, and hence it is not a legal entity. As a consequence, it is not a body governed by public law. This seems to apply to both loosely structured associations and the more structured ones. An argument can be made that a purchasing association legally is covered by Directive 2014/24/EU as the contracting authorities are individually

7 Rambøll: »*Udviklingsmuligheder for de kommunale indkøbsfællesskaber*« (2009) and Rambøll: »*Bilagsrapport 1 – Analyse af de Kommunale Indkøbsfællesskaber – Casebeskrivelser*« (2009).

8 This concerns for example Fællesindkøb Fyn and Aalborg Modellen.

9 IKA – foreningen for offentlige indkøbere – http://www.ika.dk/netvaerk/kommunale-indkoebsfaellesskaber/.
As per 2017 the 8 municipalities not members of a purchasing association are Assens, Lolland, Ringkøbing-Skjern, Ærø, Copenhagen, Dragør, Fanø and Sønderborg.

10 See IKA – foreningen for offentlige indkøbere. and KL – a Danish private interest and membership group for all 98 municipalities in Denmark.

11 Rambøll: »*Udviklingsmuligheder for de kommunale indkøbsfællesskaber – rapport*« (2009) at 31.

covered rather than being covered because they make up an association. Either way, purchasing associations are covered by Directive 2014/24/EU, cf. Article 2(1)(1) of Directive 2014/24/EU.[12]

In purchasing associations, each municipality is responsible for its own agreement/call-off,[13] which means that municipality A is not liable if municipality B violates his agreement/call-off.

4. Occasional joint procurement

Where purchasing associations are made on a »permanent« basis, certain other cooperations can be made on a temporary or an ad hoc basis. These are called occasional joint purchases and they are regulated in Article 38 of Directive 2014/24/EU. Hence, according to the provision, occasional joint purchases can be made in the way that »*two or more contracting authorities may agree to perform* certain specific procurements *jointly*«[14] (emphasis added). This means, for example, that two municipalities can undertake an entire procurement process or parts of it together for one specific agreement or contract.

In Recital 71, occasional joint procurement is defined as being systematic common purchasing and less institutionalized than for example CPBs. Furthermore, Recital 71 carries on stating that occasional joint procurement can take various forms which can range from coordinated procurement where common technical specifications for works, supplies or services are prepared and where each contracting authority conducts a separate procurement procedure, to procurements where the contracting authorities jointly conduct one procurement procedure – either by acting together or by entrusting one contracting authority with the management of the procurement procedure on behalf of all contracting authorities. Finally, mention is made of the allocation of responsibility between the participants.

Thus, if procurement has been conducted jointly by more contracting authorities – on behalf of and in the name of all participants – they are jointly responsible for fulfilling their obligations.[15] This is suggested to be particularly relevant with respect to dynamic purchasing systems and framework

12 See also Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 367-368.

13 Rambøll: »*Bilagsrapport 1 – Analyse Af De Kommunale Indkøbsfællesskaber – Casebeskrivelser*« (2009) at 7.

14 Article 74 of Directive 2014/24/EU. This provision further refers to Annex XIV of the said Directive.

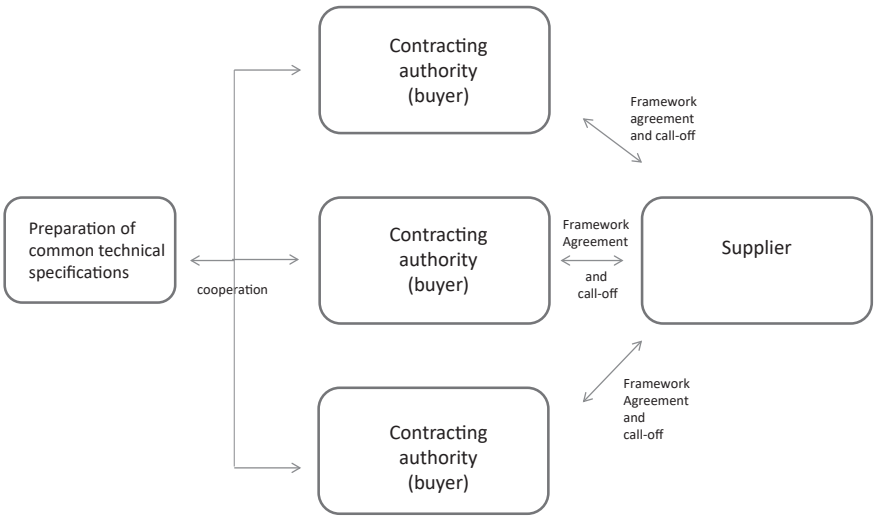
15 Article 38(1), second paragraph of Directive 2014/24/EU.

agreements.[16] Furthermore, if procurement is conducted jointly by more contracting authorities, but only managed by one of the contracting authorities, all members are still jointly responsible.

However, if only parts of the procurement have been carried out jointly, only these parts are subject to joint responsibility. Each participant is responsible for the parts that it carries out on its own, and they make all their own framework agreements.[17]

Illustratively, framework agreements by occasional joint procurement can look like the following. Figure 4 illustrates procurement through the preparation of common technical specifications for works, supplies or services that will be procured by a number of contracting authorities. Here, each contracting authority will conduct a separate procurement procedure based on the common specifications, whereas Figure 5 illustrates the situations where the contracting authorities concerned jointly conduct one procurement procedure either by acting together or by entrusting one contracting authority with the management of the procurement procedure on behalf of all contracting authorities.

Figure 4: Framework agreements by occasional joint procurement – separate procedures

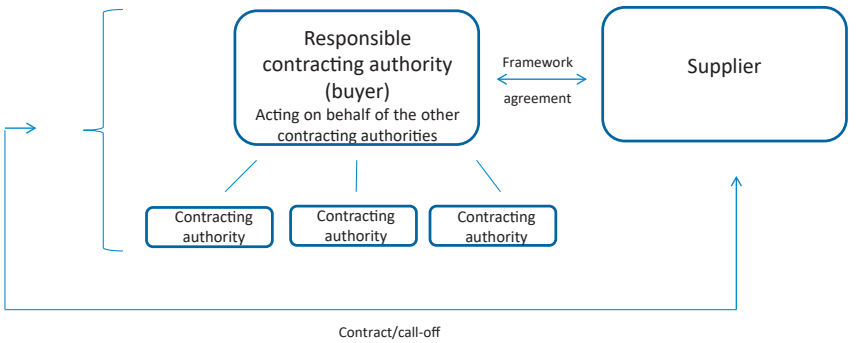


Source: Author's own creation

16 Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 376.

17 Article 38(1), third paragraph of Directive 2014/24/EU.

Figure 5: Framework agreements by occasional joint procurement – one procedure on behalf of others



Source: Author's own creation

In both situations – again – there are two distinct agreements: 1) the framework agreement between the responsible contracting authority, and 2) the call-off between the contracting authorities and the supplier.

In figure 4, the parties to the framework agreement and call-off are the same, whereas in Figure 5, the parties are not necessarily the same.

As with purchasing associations, all contracting authorities are »equal« in these setups as they are cooperations.

According to commentators, the fact that all participants are jointly responsible when only one contracting authority manages the procurement – possibly in its own name – warrants a few comments.[18]

The first comment concerns the situation where the tender is done in one contracting authority's name with another one using it, but the supplier does not know this. A question is thus raised as to whether it is »*a requirement for the joint liability for the name of the other participating authorities to be disclosed or is it simply an internal requirement (that is all participating authorities are aware of the procurement) irrespective of the supplier being informed*«?[19] As the commentator suggests – and this author concurs – there is

18 See the blog of Dr Pedro Telles, Senior Lecturer at the College of Law and Criminology at Swansea University, UK. Blog entry of April 20, 2015 concerning Regulation 38 – occasional joint procurement. https://pedro-telles.squarespace.com/?offset=1429692277625.

19 Ibid.

basis for a »pass-the-buck-game« between the contracting authorities if something goes wrong because no-one really knows whom to complain to or sue.[20]

The second comment concerns the choice of wording when choosing the term »obligation«. This is due to the fact that it can imply »*an extra-contractual nature in addition to a contractual one, ie they can also originate in tort*«.[21] This author, however, does not agree with that interpretation as Article 38 of Directive 2014/24/EU clearly states that it is »*obligations pursuant to this Directive*« that must be fulfilled, and hence this author has no objections to the use of word.

As indicated above, »occasional« translates into temporary or ad hoc. The question is what that means specifically – does it mean that occasional joint procurement can last for the duration of one contract or (framework) agreement only, or does it have a longer period of time? Directive 2014/24/EU is silent in both the Recitals and in the Articles, and hence an interpretation of the wording is necessary. According to the MacMillan Dictionary, »occasional« means »*happening sometimes, but not frequently or regularly*«. The term »ad hoc« is not used in the Directive but it is used industriously in the literature involving occasional joint purchases. »Ad hoc« is Latin for »for this«, suggesting that the two terms are conflicting in that the former suggests that the joint procurement can in fact take place more than once, i.e. for a duration longer than one agreement or contract, whereas the latter suggests that once the (framework) agreement has been honored, the cooperation seizes.

This author submits that the former interpretation must be the correct one as the Directive uses the word occasional and not ad hoc. Even if a contract or agreement lasts longer than one period, it is still a lot shorter and much less formal than purchasing associations.

Article 38 provides for occasional joint procurement within one Member States, but Article 39 extends this possibility to cover other Member States as well.[22]

20 Ibid.

21 Ibid.

22 Hence, Article 39(4) e.g. establishes that the contracting authorities must have a clear agreement in place which determines both »*a) the responsibilities of the parties and the relevant applicable national provisions, and (b) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts.*«

5. Central purchasing bodies

Of the massive value that framework agreements and other types of public purchases represent, more than 10% of all public purchases (this being through aggregated purchasing strategies and public contracts as such) were conducted with the help of CPBs in some Member States by 2012.[23]

As defined in Chapter 2, a CPB is a legal entity which, on a permanent basis, can act as a wholesaler or an intermediary. It has been argued by commentators, however, that there may be a third manner, namely »advisory CPBs«.[24]

This third manner is said to be a derivative or implicit function of the CPBs and it can be employed directly for the provision of ancillary purchasing activities. Ancillary purchasing activities consist of technical infrastructure enabling contracting authorities to award public contracts or to conclude framework agreements for works, supplies or services; advice on the conduct or design of public procurement procedures; and preparation and management of procurement procedures on behalf and for the account of the contracting authority concerned.[25] According to Recital 70 of Directive 2014/24/EU, ancillary purchasing activities must be provided in connection with the provision of central purchasing activities. This suggests that it does not make up an independent type of CPB, and for that reason this author does not acknowledge the »advisory CPB«.

5.1. CPB as wholesaler

As to the wholesaler manner, the CPB buys goods in the upstream market (from suppliers) and resells them at the downstream market (to public users/contracting authorities). Here, it is argued, the CPB assumes economic risk caused by the potential discrepancy between the volumes that they purchase

23 This was up from 3% in 2006, see Commission Staff Working Document – Annual Public Procurement Implementation Review 2012 (SWD(2012) 342 final) at 25-26. Generally concerning centralized purchasing systems, including CPBs, see OECD: »*Centralised Purchasing Systems in the European Union*«, SIGMA Papers, No. 47 (2011).

24 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 154-156.

25 Article 2(1)(15) of Directive 2014/24/EU.

and the volumes that they manage to resell to contracting authorities.[26] When reselling to the contracting authorities, the CPB acts in competition with private suppliers.[27]

Article 37 (2), first subparagraph regulates the wholesaler manner, which stipulates that a »*contracting authority fulfils its obligations pursuant to this Directive when it acquires supplies or services from a central purchasing body*« (emphasis added). It is worth noting that Article 37(2) only mentions *supplies* or *services* and not works and construction services. This means that a CPB cannot act as a wholesaler regarding these types. Not including works and construction services seems prudent as it would not be administrable in practice. For the same reason, the fact that Article 37(2) mentions services seems odd as it does not make any sense for a CPB to purchase and resell a service. An example could be to buy 100 hours of cleaning service and then resell them. That seems pointless.

The CPB acting as a wholesaler cannot employ framework agreements, which is the focus of this dissertation. The CPB as intermediate *can* employ framework agreements, for which reason the remainder of this chapter concerns the intermediate function of CPBs.

5.2. CPB as intermediate

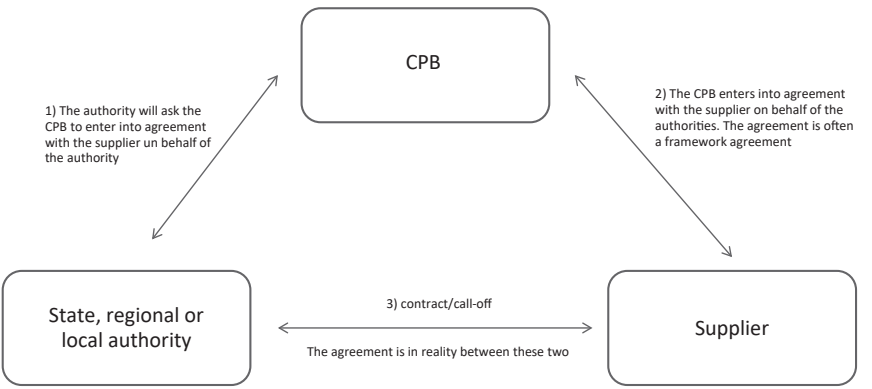
The intermediate manner is regulated by Article 37 (2) second subparagraph of Directive 2014/24/EU, and here the CPB acts as an intermediate or a middleman on behalf of the contracting authority. By placing the purchasing function with a central organization, there is great potential to save money and make the purchasing process more efficient.

The construction with a CPB inserted as a middleman makes up a complex contractual arrangement between at least three parties. When illustrated, the situation looks like this.

26 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 149 in fine.

27 Ibid at 152.

Figure 6 – CPB



Source: author's own creation

As can be seen, when a CPB is involved there are three agreements, two of which directly involve the CPB; 1) a service agreement with the contracting authorities (which is not compelled to be subject to the public procurement rules, as shall be seen below), and 2) a framework agreement with the suppliers. The third agreement is between the contracting authorities and the suppliers.

Thus, in this contractual arrangement, the contracting authority will ask the CPB to establish an agreement with a supplier on behalf of the contracting authority, and for this, the contracting authority usually pays an annual subscription fee (remuneration) to the CPB in order to be allowed to use the agreements.

Afterwards, the CPB enters into an agreement with the supplier on behalf of the contracting authority, and in return the supplier usually pays a percentage of the turnover regarding the specific agreement.[28] This covers the costs of providing and operating the agreement. It has been suggested that the payment from the suppliers to the CPB resembles kickback as the payment not necessarily matches the service provided. According to this author, however, as the payment concerns a percentage of the turnover regarding the *specific* agreement, it does match the service provided and the payment makes up some sort of 1:1 situation as payment takes place for services rendered. Thus, it is

28 At SKI this cost usually varies between 1 and 3%, see http://www.ski.dk/viden/sider/saadan-finansieres-rammeaftalerne.aspx.

simply remuneration. Furthermore, kickback is illegal which this remuneration is not. Here, it is just a form of payment.[29]

As can be seen, the CPB has two roles. It acts as a contracting party when establishing the framework agreement, but in relation to the call-off, the CPB has the role as an independent middleman.

This is not a cooperation between equal parties as with purchasing associations and joint occasional procurement. Rather, this setup is between different levels of contracting authorities making a »business deal«.[30]

The agreement is often drawn up as a framework agreement,[31] which »regulates« the subsequent call-off/contract between the contracting authority and the supplier. This is despite the fact that these two have not had any contact before an actual order is made.

The CPB only has limited interface with the competitive markets[32] as its only interaction with the market is when it enters into agreements with the suppliers on behalf of the contracting authorities.

Recital 70 and Article 37(4) first subparagraph of Directive 2014/24/EU assert that a contracting authority can award a CPB with a contract for the provision of centralized purchasing activities without applying the procedures provided for in Directive 2014/24/EU.[33] This means that as long as the CPB has followed the Directive's procedures when e.g. establishing a framework agreement, the contracting authority is free to use the agreement without making an individual tender first.[34] This is due to the fact that it is a public-

29 In agreement with this, see Graells A S & Anchustegui I H: *Revisiting the concept of undertaking from a public procurement law perspective – a discussion on EasyPay and Finance Engineering*, European Competition Law Review (2016) at 97.

30 This will be elaborated in this as well as in the forthcoming chapters.

31 But it does not by any means need to be.

32 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 149.

33 This is deduced conversely as the Recital 70 of Directive 2014/24/EU states that »*Public service contracts for the provision of ancillary purchasing activities should, when performed otherwise than by a central purchasing body in connection with its provision of central purchasing activities to the contracting authority concerned, be awarded in accordance with this Directive.*«

34 Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« at 536, Racca, G M: *Joint Procurement Challenges in the Future Implementation of the New Directives* in Lichére, F; Caranta, R and Treumer (eds): »Modernising Public Procurement: The New Directive« (DJØF Publishing, 2014) at 235 and Anchustegui, I H: *Centralising Public Procurement and Competitiveness in Directive 2014/24/EU*, European Law Reporter (2015) at 17-20.

public collaboration, which provides an exemption from the usual rules which require that the procurement law applies to agreements between contracting authorities.[35]

Moreover, the wording of Article 37(2) states that a »*... contracting authority fulfils its obligations pursuant to this Directive when it acquires supplies or services from a central purchasing body* (…).« According to commentators, this can be interpreted as meaning that when a contracting authority uses a framework agreement established by a CPB, it is considered to have complied with the rules in the directive although the CPB has not, provided that the contracting authority has followed the conditions set up in the framework agreement.[36] In contrast, if the contracting authority does not follow the conditions set up in the framework agreement, the call-off risks being deemed ineffective after all.[37]

Thus, the contracting authority is always responsible for fulfilling the obligations concerning »*the parts it conducts itself*«.[38] According to Article 37(2) of Directive 2014/24/EU this includes 1) when a contracting authority awards a contract under a DPS, which is operated by a CPB, 2) when a contracting authority conducts a mini competition under a framework agreement, which has been concluded by a CPB, or 3) when the contracting authority is to determine which of the suppliers party to the framework agreement shall perform a given task under a framework agreement that has been concluded by a CPB.

Regarding Article 37(2) subparagraph 2, a part which the contracting authority conducts itself could be introducing a new award criterion in the mini-competition which was not evident in the framework agreement.

35 Commission Staff Working Document concerning the application of EU public procurement law to relations between contracting authorities (public-public cooperation) – SEC (2011) 1169 final.

36 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 209.

This as opposed to the interpretation of Directive 2004/18/EC according to which a contracting authority would only have complied with the rules in the directive if the CPB had followed the rules without making mistakes, see Article 1(10) of Directive 2004/18/EC.

37 Ibid at 209.

38 Art 37(2) of Directive 2014/24/EU.

5.2.1. Body governed by public law

According to Article 2(1)(16) of Directive 2014/24/EU, CPBs must themselves be a contracting authority, i.e. a state, regional or local authority, a body governed by public law or an association formed by one or more of such authorities or one or more such bodies governed by public law.[39] Hence, a private undertaking cannot function as a CPB. Other than keeping matters within the public sector and hence not entrusting a private company with it, this means that, as a starting point, only the public procurement rules apply in the situation. However, this result may change as shall be seen below in Chapter 10.

As a CPB usually is neither a state, regional, nor local authority,[40] by process of elimination it must either be a body governed by public law or an association. When looking at the definition of an association above, it appears that a CPB is no such thing (unless it is both highly structured and has a high degree of managerial support), as an association is a cooperation between more contracting authorities with a more or less loose organization. A CPB is an established entity which often has its own legal personality.

Hence, a CPB must be a body governed by public law. However, in order for a CPB to be classified as a body governed by public law, the three conditions outlined in Section 5.4 of Chapter 2 must be met,[41] and according to case C-44/96, *Mannesmann*,[42] they are cumulative. Hence, the body must:

- be established for the specific purpose of meeting needs in the general interest;
- have legal personality; and
- be financed or supervised by the state, regional or local authorities, or by other bodies governed by public law; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law.[43]

In Recital 69 of Directive 2014/24/EU it is stated that CPBs, *inter alia*, are responsible for making acquisitions and awarding framework agreements for other contracting authorities, with or without remuneration. A CPB is defined

39 See more on this in Section 5.3.1 of this chapter.
40 An exception is for example the Danish CPB »Statens Indkøb«, which can be seen below in Section 5.3.1 of this chapter.
41 Article 2(1)(4) of Directive 2014/24/EU.
42 Case C-44/96, *Mannesmann*, para 21.
43 Whether the conditions are fulfilled for Danish CPBs is examined immediately below in Section 5.3.

as being a contracting authority that provides centralised purchasing activities and ancillary purchasing activities[44] where a centralized purchasing activity consists in concluding framework agreements for services, works and goods intended for contracting authorities, and acquisition of supplies and/or services intended for contracting authorities. An ancillary purchasing activity, on the other hand, consists of the provision of support to purchasing activities including advice and technical infrastructure etc.[45]

Article 37 of Directive 2014/24/EU has been expanded quite a bit compared to the regulation of CPBs in Directive 2004/18/EC.[46] According to the Commission, Directive 2014/24/EU makes it easier for contracting authorities to bundle their purchases by using joint procurement procedures or by purchasing through a CPB.[47] This can be done on a national or cross-border level.[48] Based on economic analyses and considerations, it has been argued, though, that »*centralisation of procurement activities creates significant risks of distortions of competition*«.[49]

Although with less intensity and warning, this is acknowledged in Recital 59 of Directive 2014/24/EU, which states that »… *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*«.

Member States can make recourse to CPBs mandatory, cf. Article 37(1).[50]

44 Article 2(1)(16) of Directive 2014/24/EU.

45 Ibid Articles 2(1)(14) and 2(1)(15).

46 See Directive 2004/18/EC Article 11 in this regard.

47 The European Commission: Public procurement reform – factsheet No. 3: simplifying the rules for contracting authorities (2014).

48 See Article 39 of Directive 2014/24/EU, which establishes that »*centralised purchasing activities by a central purchasing body located in another Member State shall be conducted in accordance with the national provisions of the Member State where the central purchasing body is located*«.

49 Graells A S: »*Public Procurement and the EU Competition Rules*« (2015) at 255.

50 Generally on mandatory recourse to CPBs, see Graells, A S and 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 150.

5.3. National CPBs

In the Member States CPBs are primarily created as publicly owned limited companies.[51] As to their financing, this varies from Member State to Member State but it has been suggested that the financing can be categorized in four ways: i) purely publicly funded by the central authorities, ii) funded by contracting authorities who pay subscription fees for using the services, iii) funded by suppliers who pay participation or call-off fees, or iv) a combination.[52]

The CPBs can be organized to conduct purchases of very specific items only, e.g. hospital supplies like the Norwegian »Helseforetakenes Innkjøpsservice«, or on a broader level to cover many – or perhaps most – fields for the public administration as a whole.

In Denmark, the two largest CPBs are »Statens Indkøb«[53] (SI) and »Staten og Kommunernes Indkøbsservice A/S« (SKI).[54] The vast majority (if not all) of their activities involve acting as intermediaries for the public administration as a whole.[55]

5.3.1. Statens Indkøb and SKI

SI is part of the Agency for Modernisation Ministry of Finance which means that it is a CPB within a public agency. Hence, it does not have legal personality.[56]

As a starting point, as it is neither a state, regional or local authority, an association *or* a body governed by public law (because of the lacking legal personality), it is not a contracting authority and with that not covered by Directive 2014/24/EU. However, in its capacity as being a legal »*part of a government department, but operationally separate*«,[57] the SI is a sort of right hand body

51 Anchustegui, I H: *Centralising Public Procurement and Competitiveness in Directive 2014/24/EU*, European Law Reporter (2015) at 26. There are exceptions, however, as shall be seen immediately below.

52 Anchustegui, I H: *Centralizing Public Procurement and Competitiveness in Directive 2014/24*, posted 22 Jul 2015 on ssrn.com at 3-4.

53 Statens Indkøb – the »Danish Central Procurement Programme« is a contracting authority acting as a central purchasing body for the central government.

54 As mentioned in Chapter 5 footnote 5, SKI is the »National Procurement Ltd. Denmark«.

55 From SKI's website http://www.ski.dk/Viden/Sider/Facts-about-SKI.aspx.

56 No information is available as to its financing but because it is a CPB within a public agency, it is assumed that it is financed by the central authorities.

57 Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 370.

and thus covered by Directive 2014/24/EU if the government department is.[58] In this case, the Agency for Modernisation is definitely covered by Directive 2014/24/EU, which is why the SI also is.[59]

The state entities are obliged to use the framework agreements established by SI,[60] thus making them mandatory framework agreements. If a state institution has a need to purchase a good or service not covered by SI, it can use a framework agreement established by SKI. In this situation, however, the state institution must document both its need and the fact that SI does not cover it.[61]

SKI, on the other hand, is founded as a publicly owned limited company, owned by the Danish State (55%) and by KL, which is an interest group for the Danish municipalities (45%).[62] Therefore it has legal personality and carries out self-standing activity, which means that it is not a right hand body for the contracting authorities.[63]

SKI's operations are subject to public control due to the fact that it is owned by the Danish State and municipalities, and with that, two of the three conditions for being a body governed by public law are met. SKI describes itself as being non-profit as any profit yield is used to develop better and more agreements.[64] The question is, however, if the first-mentioned condition necessary in order for the SKI to be a body governed by public law is met?

The first condition concerns whether SKI meets the needs of the general interest, and this is an area which could be subject to scrutiny. The case law regarding the issue »in the general interest« is rather unclear, among others because there is no established category of activities involving needs in the public interest.[65] Hence, in 1996 the European Commission started rethinking and reshaping the area of services of general interest (SGI). It started out with

58 Ibid at 372. Here, reference is made to case C-306/97, *Connemara* para 27 which argues that »*it was 'common ground' that the procuring entity, the Irish Forestry Commission did not award contracts on behalf of the State or regional or local authorities, implying that if it did so it would be covered by the directive*«. Furthermore, at page 374 it is submitted that CPBs have to comply with the Procurement Directive »*as if it were the contracting authority and not in its own capacity*«.

59 Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 370. See to this extent also case T138/15, *TenderNed*.

60 Danish circular letter No. 9112 of 20 March 2012 (procurement circular).

61 From the website of Statens Indkøb http://www.statensindkob.dk/Statens-Indkobsaftaler/Indberetning-af-indkob-paa-SKI-s-rammeaftaler.

62 From SKI's website http://www.ski.dk/Viden/Sider/Facts-about-SKI.aspx.

63 See more on this topic below in Chapter 10.

64 From SKI's website http://www.ski.dk/Viden/Sider/Facts-about-SKI.aspx.

65 Case C-360/96, *Gemeente Arnhem,* para 63.

two Communications in 1996 and 2000, respectively,[66] a report in 2001,[67] a Green Paper in 2003,[68] a White Paper in 2004,[69] and two further Communications in 2007 and 2011, respectively.[70]

In the 2003 Green Paper, the Commission stressed that SGIs »*play an increasing role. They are a part of the values shared by all European societies and form an essential element of the European model of society. Their role is essential for increasing quality of life for all citizens and for overcoming social exclusion and isolation. Given their weight in the economy and their importance for the production of other goods and services, the efficiency and quality of these services is a factor for competitiveness and greater cohesion, in particular in terms of attracting investment in less-favoured regions.*«[71] The White Paper carried on by stating that there was general agreement on the need to safeguard a durable and stable combination of public service and market mechanisms.[72]

In the 2011 communication on services of general interest it has been clarified that services of general interest are *»services that public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations (PSO). The term covers both economic activities … and non-economic services. The latter are not subject to specific EU legislation and are not covered by the internal market and competition rules of the Treaty. Some aspects of how these services are organised may be subject to other general Treaty rules, such as the principle of non-discrimination.*«[73]

In other words, SGI covers both *non-economic* services, i.e. services based on solidarity which only are subject to the general principles of the EU – non-discrimination, transparency, proportionality, and equal treatment – and

66 Communication on Services of General Interest in Europe – COM(2000) 580 final (OJ 1996 C 281).

67 Report to the Laeken European Council – Services of General Interest, COM(2001) 598.

68 Commission Green Paper on services of general interest, COM (2003) 270 final.

69 Commission White Paper on services of general interest – COM (2004) 0374 final.

70 Communication on a Quality Framework for Services of General Interest in Europe – COM (2011) 900 final. See also Fiedziuk, N: *Services of general economic interest and the Treaty of Lisbon: opening doors to a whole new approach or maintaining the »status quo«*, European Law Review (2011).

71 Commission Green Paper on services of general interest, COM (2003) 270 final, para 2.

72 Commission White Paper on services of general interest, COM (2004) 0374 final, para 1.

73 Communication on a Quality Framework for Services of General Interest I Europe, COM(2011) 900 final at 3.

economic activity, which is where the public service obligation is entrusted to a provider through exclusive rights etc.

As the purpose of the condition in *Mannesmann* is to determine if the body is established for the very purpose of meeting needs in the general interest[74] and not whether Article 106(2) TFEU is applicable,[75] it is not relevant to discuss services of general economic interest (SGEI).[76]

Hence, in order for the condition to be met, SKI must meet the needs in the general interest, i.e. based on solidarity, which entails that services are provided »*free of charge to its members on the basis of universal cover*«.[77] Further, universal cover or access is defined as »*the right of everyone to access certain services considered as essential [which] imposes obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price*«.[78]

A CPB does not fit into this description because the services that a CPB carries out are »internal« in the sense that they are usually aimed at another contracting authority. Hence, according to this author, a CPB cannot be defined as meeting the needs of the general interest and it is therefore *not* a body governed by public law.

Granted, it *can* be argued that SKI – or any CPB – is established for the purpose of meeting the needs of the general interest in that it sets up the agreements for which contracting authorities procure the goods and services *used* to meet the needs of the general interest. In that way contracting authorities save money, which in the end is good for society as such. However, this author suggests that SKI has no interaction with the general public and hence it does

74 Case C-44/96, *Mannesmann,* para 19.

75 See more on SGEI below in Chapters 8 and 10.

76 As shall be seen below in Section 6 of Chapter 10, SGEI is defined as »*economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention*«, cf. Commission Communication: A Quality Framework for Services of General Interest in Europe – COM(2011) 900 final, para 21.

77 Joined cases C-159/91 and C-160/91, *Poucet & Pistre*, para 39. See more on solidarity below in Chapter 8.

78 Commission White Paper on Services of General Interest, COM (2004) 374, para. 3.3.

not *in itself* as such meet the needs of the general interest[79] in that the activities are not of »*direct benefit to the public*«.[80]

Instead, because the suppliers pay 1-3% of the revenue of the specific agreement, *and* the contracting authorities who use the agreements then pay a subscription fee to use the agreements to SKI[81] (thus, in category iv regarding financing, see Section 5.3. of this chapter), it could be argued that it is in fact a commercial body having been placed in a »lucky position« where it does not have to work hard like private companies to receive work and earn money. Furthermore, the same job could have been performed by a private company.

Although, in this author's opinion, SKI does not fulfil the conditions established in *Mannesmann*, SKI *is* considered to be a body governed by public law and thus covered by the procurement rules. This, however, seems very strange and inappropriate.

6. Preliminary conclusions

To sum up this chapter, overall there are four ways in which contracting authorities can organize themselves when establishing framework agreements. This includes common public purchasing, purchasing associations, occasional joint procurement and central purchasing bodies.

Common public purchasing is rather straightforward as the contracting authority makes an order and pays for the good or service, which the supplier delivers.

Regarding purchasing associations, regional and local authorities can choose to aggregate their purchases to gain practical as well as financial benefits in another way. They can cooperate in order to establish a new joint legal entity, or they can form an association. The structure in an association can range from being loose to being »fixed« or »established«. Concerning the loose structures this means that the entities in advance have not committed themselves substantially relating to resources. Basically, the commitment cov-

79 Concluded conversely, as Arrowsmith S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 359 asserts that »*entitites providing services directly to the public have often been stated to meet the needs in the general interest*«.

80 Opinion of AG Léger in case C-44/96, *Mannesmann,* para 65.
See also Arrowsmith, S: »*The Law of the Public and Utilities Procurement: Regulation in the EU and UK*« (2014) at 357.

81 From SKI's website. Available at: http://www.ski.dk/viden/sider/saadan-finansieres-rammeaftalerne.aspx.

ers the attendance in a number of meetings. Regarding the more established structure, there is often a common tendering and procurement strategy, a joint purchasing team and/or a joint purchasing office.

Where purchasing associations are established on a »permanent« basis, certain other cooperations can be made on a temporary or on ad hoc basis. These are called occasional joint purchases. Occasional joint procurement is, as the name indicates, »*happening sometimes, but not frequently or regularly*«. Joint procurement can, however, take place more than once, i.e. for a duration longer than one agreement or contract.

Occasional joint procurement is defined as being systematic common purchasing and less institutionalized than for example CPBs.

Hence, CBPs make up a more complex contractual situation between at least three parties. Here, the contracting authority asks the CPB to enter into agreement with a supplier on behalf of the contracting authority, and for this the contracting authority usually pays an annual subscription fee (remuneration) to the CPB. The CPB then establishes an agreement with the supplier on behalf of the contracting authority, and in return the supplier usually pays a percentage of the turnover relating to the specific agreement.

In practice, framework agreements are used extensively by CPBs.

CPBs can operate in two different manners, either as a wholesaler »*by buying, stocking and reselling*« or as an intermediary »*by awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting authorities*«. There is no doubt that when reselling to the contracting authorities, the CPB acting as a wholesaler acts in competition with private suppliers. The picture is less clear when it comes to CPBs acting as intermediaries because there is only limited competition with the competitive markets.

»Statens Indkøb« (SI) and »SKI« are the two largest CPBs in Denmark.