

**DEALING WITH LEGAL LOOPHOLES AND UNCERTAINTIES  
WITHIN EU PUBLIC PROCUREMENT LAW  
REGARDING FRAMEWORK AGREEMENTS**

Marta Andrecka\*

**ABSTRACT.** Provision on framework agreements has been introduced into European Union (EU) Law in 2004. Since then framework agreements have gained popularity and importance on the European Union (EU) public tender market. Nevertheless, the use of frameworks poses significant legal challenges necessitating the clarification of the governing rules and the introduction of further guidelines. Unfortunately, clarifications were not fully provided in the new Directive 2014/24/EU. This article is a study of legal loopholes and uncertainties that occur during public procurement of framework agreements as a result of current EU rules and national practices in Denmark and the United Kingdom. The article highlights the need for clarification of the existing rules and introduction of transparency to the subsequent call-off stage of framework agreements. To achieve study aims, three methods were applied: a doctrinal analysis, a small scale comparative law research and field research based on qualitative research by the means of semi-structured interviews.

**INTRODUCTION**

A framework agreement in the context of EU public procurement law means 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 difference between a public contract and framework agreement is that a framework is an agreement with supplier or suppliers to establish

---

\* *Marta Andrecka, Ph.D., is an Assistant Professor, Centre for Enterprise Liability, Faculty of Law, University of Copenhagen, Denmark. Her research interest is in EU public procurement.*

terms governing contracts that may be awarded during the life of the agreement. In other words, a framework agreement sets out the overarching terms and conditions for making specific purchases (call-offs).

Provisions on framework agreements were introduced to EU public procurement law for the first time in 2004. Since that time they became well established and a key element of public sector procurement in several countries including the UK, Denmark, France and Sweden.

In the UK central government spends over 10 billion pounds via framework agreements, while a third of public procurement in Denmark is concluded through framework agreements. Frameworks are very convenient; they allow contracting authorities to avoid lengthy EU procurement processes each time they want to place an order. Also, they can bring commercial benefits by aggregating buying power and help manage risk by a multitude of suppliers. At the same time, framework agreements have been criticized as a procurement technique which has the potential to be pro-collusive (bid-rigging), close the market to the competition, limit access of small and medium enterprises (SMEs) to public tenders, and is used for administrative simplicity over efficiency or being the best possible solution for achieving value for money (Sanchez Graells, 2015; Arden, 2013). Despite framework agreements becoming more popular than ever, there are still relatively few legal studies carried out on this topic and even fewer sources regarding case law on resulting issues. Because of this, the author opted to conduct interviews with relevant stakeholders to discover how framework agreements are implemented in practice and what challenges and legal uncertainties they pose.

Following a brief conceptual framework, the research methodology is described. Then presented is the analysis of the findings. The article is concluded with a synthesis of findings and recommendation for further legal development.

### **CONCEPTUAL FRAMEWORK**

Research was carried out between 2013 and 2015. During that time Public Sector Directive 2004/18/EC was in power, though the new proposal for the revision of it had been already published,

and in 2014 the new Public Sector Directive 2014/24/EU was introduced. This provided an interesting benchmark for the study as it allowed identification of existing legal challenges and uncertainties in the way that the law was originally designed and practiced. But also this time frame allowed a preliminary assessment of the newly introduced provisions and, particularly, whether they provide necessary clarifications of the law.

When it came to the revision of the Public Sector Directive, the European Commission's intention was for framework agreements' provisions to stay largely unchanged, as they had been widely used and were considered an efficient procurement technique throughout Europe. That is why the majority of the proposed amendments were fairly subtle and aimed to clarify the current state of law, rather than change the law in a substantial manner (Andrecka, 2016).

In the new Public Sector Directive 2014/24/EU framework agreements are regulated in Article 33. The latter states that a contracting authority may use framework agreements to award numerous contracts over a longer period of time, either to a single supplier or to several suppliers who have been enrolled in the framework. They may be established by single or several contracting authorities, with public consortia becoming the leading creators of framework agreements on behalf of others. Where a framework agreement is concluded with more than one supplier (multi-supplier framework), contracts may be awarded by: a) direct award of call-offs, following the terms and conditions of the framework agreement without reopening competition, where all the terms and conditions for awarding the call-offs are set, or by (b) mini-competitions, where the framework agreement sets out the terms and conditions for reopening of competition amongst the providers of the framework agreement for the award of call-offs.

As a general rule, framework agreements should not last longer than four years in the public sector, or no longer than eight years in the utilities sector. Nonetheless, in exceptional cases when duly justified, in particular by the subject of the framework agreements, their duration may be longer than the mentioned limits. A justified reason for an extended duration of framework agreements may be situations in which an extended duration is necessary for the supplier to recover the investment costs. These could include cost

invested to start the project, such as investment in the establishment of an infrastructure, purchasing of specific machines or tools, etc.

### **METHODOLOGY**

To achieve study aims three methods were applied: a desk study, research of small-scale comparative law and field research based on qualitative research by the means of semi-structured interviews. The combination of these three methods resulted in a critical and comprehensive analysis of the research questions posed, not only from a purely theoretical perspective, but also a practical one.

#### **Desk Study**

A desk study was carried out by using the doctrinal legal method to analyze which law is to be applied when establishing framework agreements and awarding the subsequent call-offs. This was determined by interpreting legal sources. Thus, the EU's primary and secondary legal sources were analyzed on the basis of legal texts and existing literature, as well as practice from Denmark, and the United Kingdom (Banakar & Travers, 2005). The legal sources studied were identified and collected on the basis of their relevance and potential to answer the posed research questions. The aim of doctrinal analysis was to systematize, analyze and synthesize the legal sources with the aim of determining current law and its implication for analyzed matter.

#### **Comparative Law**

To gain an overall perspective of different legal systems and their interrelations, it was not possible to simply look at the wording of the various provisions, especially if the purpose of the project was to examine provisions and practices from different legal systems (Bogdan, 1994). To do so, an analysis of the reasons and aims, values and efficiency of the legal regimes was necessary (Cryer, Hervey, Sokhi-Bulley, & Bohm, 2011). Such an approach increased the knowledge of law and the understanding of law in the context, as well as demonstrated not only formal, similarities and differences but also the similarities and differences in the objectives and values underlying different legal systems.

'Research of small-scale comparative law' was undertaken, *i.e.* a problem-based method used to compare specific legal problems and rules used to solve particular problems. Using this method helped limit the field of research and keep framework agreements as the focus of the project (Zweigert, & Kötz, 1998).

As the project is set in the EU law framework, it was only natural to compare countries which are part of the EU. The number of 28 Member States was limited to legal systems which are 'heavy users' of framework agreements. Further criteria of selection included access to data and a possibility to present radically different approaches towards framework agreements across the EU. On this basis, two Member States were chosen: Denmark, which is a civil law country and part of the Nordic Legal Family, and the United Kingdom, a common law country which is part of the Anglo-American Legal Family (Lomio, Spang-Hanssen, & Wilson, 2011). Additionally, both countries have different legal traditions and different interpretations of EU law. While the United Kingdom traditionally represents a more flexible approach, Denmark's interpretation is usually stricter. The legal interpretation of provisions will vary in diverse legal systems. Thus, the research recognized that different legal sources had to be considered and different legal methods of interpretation had to be used.

### **Interviews**

The third method applied is understood as 'field research' based on qualitative research by the means of semi-structured interviews (Kvale & Brinkmann, 2008). Applying this method provided a vital insight into the law in context. Furthermore, it offered an understanding of how the law works in the real world. For this reason, the empirical research focused on understanding how framework agreements are being designed and used in practice and what real life problems are posed by them while awarding the call-offs.

Semi-structured interviews are a preferable method for the collection of rich empirical data that can be processed to answer the research questions. The content of the interviews was influenced by the findings of the dogmatic analysis. Thus the interviewees were asked about identified legal loopholes, challenges and

uncertainties, whether there were issues occurring in practice, and how they are dealt with.

The purpose of the empirical studies was to supplement the core research that was done in the form of a legal dogmatic method. Sampling of interviewees was done on the basis of selection criteria regarding their experience with framework agreements. The sample size consisted of 31 Danish and 31 British actors involved in the various aspects of framework agreements:

- 15 layers in Denmark and 15 in the United Kingdom from the top of the Legal 500 public procurement index in both countries
- 16 purchasing organizations, such as central purchasing bodies and cooperative purchasing partnerships (8 from the United Kingdom and 8 from Denmark)
- 16 Public authorities in government departments and municipalities of different procurement capacities: heavy users of framework agreements and smaller actors (8 from the United Kingdom and 8 from Denmark).

### **Interviews Design**

The questionnaire which constituted a foundation for the interviews was constructed on basis of both desk research and a sample of 10 explorative interviews with experts in the field. The latter included: leading lawyers, academics in the field of public procurement as well as representatives of contracting authorities and suppliers involved in public tenders of framework agreement. The reason behind carrying out sample of interviews was to specify the questions that would be the basis for the semi structured interviews. On that foundation, a set of questions developed which focused primarily on the multi-supplier type of framework agreement, as this type has been identified as the one posing the most challenges (See Appendix A).

### **Data Collection Process**

The stakeholders were first contacted by e-mail, and then a meeting or a phone call conversation was scheduled, where the interview was conducted. Before each interview, the informed consent form was signed by both the interviewer and the interviewee. The form stated how data will be protected and

addressed issues of the anonymity of the interviewees and the confidentiality of certain information provided.

### **Dissemination and Response Rate**

Several different channels were used to reach relevant procurement specialists. Primarily, the author participated in several international procurement conferences where she presented the preliminary issues identified in the research. During these events the author established contacts with relevant stakeholders or she has been connected by the conference participants with relevant stakeholders. Other channels included using collected mailing list and professional networks. Invitations for the interviews were distributed through those channels over the period of several months reaching a total response rate of 62 responses. Revision and cleaning of the collected data brought the number of responses down to 55, as interviewees who did not fit the description of relevant stakeholders were removed. The removed interviews represented, for example, suppliers, contracting authorities, lawyers working in other Member States than Denmark or the United Kingdom, or they were working in private procurement, or it was not possible to find its comparative counterpart in other Member State (Denmark or United Kingdom).

## **ANALYSIS OF FINDINGS**

The results show that there is a certain level of lack of transparency in framework agreements. Also, the complexity of designing multi-supplier framework agreements and carrying out a call-off award process often poses legal uncertainties and challenges.

### **Multi-Supplier vs Single-Supplier Frameworks**

In regards to the question of which types of framework agreements are being used more, single or multi-supplier ones, it could be observed that in both Member States respondents who represented the biggest public buyers in a country (central purchasing bodies, purchasing consortia) indicated that a majority of their framework agreements are multi-supplier ones.

However, at the same time a distinct difference between a majority of respondents from the United Kingdom and Denmark could be witnessed. While all the respondents stressed that it depends from the subject matter of the contract what type of framework is used, in the UK majority answered that multi-supplier framework agreements are used more often (between 75-90% of time). That is due to the fact that the respondents believe multi-supplier frameworks uphold competitive tension and therefore allow achievement of the best possible value for money as well as introduce security of supplies.

An opposite standpoint may be noticed in answers from Danish respondents, which reported that single supplier frameworks are in general used more often. Due to the fact that public procurement is often decentralized and consequently spread out through several departments in one organization single supplier frameworks are believed to be more manageable.

It was argued that single supplier frameworks are easier to handle; allow better offers due to exclusivity arrangement with the supplier; cost less in administration and allow for better oversight and control of framework agreements. Also, multi-supplier frameworks in Denmark are used but less often and it depends on the market and buyers' behavior if they will be a chosen as a procurement tool. Multi-supplier frameworks are particularly relevant when security of supply is needed, for example, when tendering frameworks for medicines and other supplies for hospitals. When it comes to different types of multi-supplier framework agreements, a majority of Danish respondents agreed that direct award in which offers are ranked are preferred over mini-competition. The latter are perceived as costly and too complex for end users (contracting authority) to handle.

In regards to question two—that is, whether one of the framework agreements is more appropriate for particular contracts (works/services/supply) or sectors (consulting/ construction/ cleaning/ transport)—respondents' answers differed substantially. However, several interviewees from both Member States agreed that multi-supplier framework agreements were particularly appropriate for sectors where security of supply is crucial, so often for supplies of tools and medicines to hospitals. Others underlined that it depends from who is setting up framework agreements, as

there will be many different political reasons as well as competition reasons considered. It was argued by one respondent from the United Kingdom that multi-supplier framework agreements are particularly good for projects where a lot of capacity is needed at the same time. For example, in the case of the university sector for certain tasks such as furniture or audio-visual installation projects which are done when there are no students and staff is on holidays over the summer time.

From the responses of all of interviewees in both the UK and Denmark, it can be concluded that there are a number of factors which determine which type of framework agreement is most appropriate for a specific contract. Given that single supplier frameworks eliminate competition for the duration of the framework, they are best suited to requirements that are either fixed in specification or can be defined using a schedule of rates where the buyer determines quantities required. Clearly, it is also necessary that the volumes are well within the capabilities of a single supplier. They are more suited to supply and service provision but can be used in other works, particularly for minor works and repetitive maintenance operations under a schedule of rates.

Multi-supplier frameworks are particularly suitable where capacity is an issue or the final specification is yet to be determined. They retain the element of competition that is necessary where the supplier and not the buyer determines the specification against the buyer's requirement.

Multi-supplier framework agreements with mini-competition are used for various services/supplies and works some of the examples mentioned by the respondents included: drivers training, consultancy services, personnel provision, minor building works, print services, supply of specialist vehicles, supply of wheeled bins, supply of emergency response equipment.

### **Mini-Competitions: Uncertainties and Challenges**

Multi-supplier framework agreements with mini-competition have been identified as the most complex and challenging type of contract award under frameworks. All respondents agreed that mini-competition pose most challenges and complications in the procurement process.

In Denmark it was underlined that a vast challenge for smaller contracting authorities is how to manage big multi-supplier framework agreements on a daily basis. Some respondents underlined that buying is often done not by procurement professionals but by teachers, secretaries, doctors, etc. who are not professional enough to handle complicated tendering.

From these reasons, single provider frameworks are preferred. Even if multi-supplier ones are used, a direct award of call-offs would be applied rather than a mini-competition. Some respondents believe that centralization of procurement could be helpful in this regard. Representatives of institutions in Denmark that use multi-supplier framework agreements indicated that another challenge is to decide the awarding criteria at the top level of the framework agreement in such a way for them to be still valid throughout whole life time of the framework agreement term.

In other words, it is challenging for the award criteria to be still appropriate at the stage of placing an order (call-off). That is due to the fact that according to provisions the award criteria for call-offs shall be established in framework documentation already at the stage of setting up a framework. Also, challenging is defining the scope/specification in a sufficient manner to ensure comparative quotations.

In the United Kingdom it was reported that it can occasionally be a challenge to maintain participant interest during the lifetime of a framework agreement, particularly if they have repeatedly lost mini-competitions under the framework. Another issue is seen in the fact that in some categories, such as transport, at times there are limited supply side capacities to the market. Consequently, keeping bidders' interest is crucial. Also, a common complaint was expressed that members of a framework agreement may become non-responsive or want to introduce changes in pricing which cause many challenges.

Finally, problems arise in getting the division into lots correctly and establishing realistic forecast of likely framework throughput poses some challenges, especially where frameworks are established for a number of potential users.

### **Award Criteria in Framework Agreements**

It was expressed by a majority of respondents in both countries that the main award criteria used for establishing framework agreements is the most economically advantageous tender and less often the criterion of the lowest price (award criteria regulated in Article 67 of the Public Sector Directive 20014/24/EU). Which one of these criteria is used largely depends upon the subject matter of the contract. A couple of respondents from the United Kingdom believe that the lowest price is appropriate only for a true commodity where there is no difference in specification or service. In a majority of interviewees' views, it is advisable to always look at the pricing element at the initial framework agreement contract stage. However, one interviewer from Denmark reported that at times particularly in the context of information and communications technology (ICT) procurement quality will be the only criterion considered at the stage of establishing framework agreement. That is due to the fact that the availability of boutique designed services is the most important element and the price will be considered at the call-off stage. In cases where framework agreements are concluded with a single supplier, it was stressed by several British respondents that it is crucial to also look into future pricing schemes under framework agreements. The contracting authority should always reserve the right to go outside of the framework agreement to purchase any individual requirement, which is allowed on the basis of Recital 61 of Directive 2014/24/EU. Alternatively, the contracting authority may introduce a term in which it has a right to benchmark framework pricing against market prices with the obligation of the single supplier to match the market prices or offer a set discount against them (Semple, 2015).

When it comes to the awarding criteria used for the subsequent award of a contract under framework agreement (call-offs), in Denmark a majority of respondents referred to the lowest price. Very close by the next criterion mentioned was most economically advantageous tender.

At the same time several of the respondents in Denmark interestingly also referred to other types of award criteria only limited by the general principles of EU procurement law such as non-discrimination, transparency and equality. Therefore, such an award criterion as delivery schedule or preferential user choice are

applied. An example was given in cases of surgical equipment where a framework agreement is established on the basis of a most economically advantageous tender, and the subsequent call-off contract is awarded on the basis of 'medical decision' of a doctor/personal preference. Such awarding criteria pose certain skepticism as usage of such 'objective conditions' is not enabling a contracting authority to properly choose the best tender and achieve the best value for money. In addition, it introduces inconsistency in the interpretation of the award criteria applicable for works/supplies/services covered by Directive 2014/24/EU. Nevertheless, in the context of multi-supplier framework agreements with a direct award it seems that such an approach has been adopted in the new Public Sector Directive 2014/24/EU.

In this regard, Article 33(4)(a) and (b), where applicable, should be read in conjunction with recital 61 expressly stating that the objective conditions for determining which of the suppliers' a n 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* (emphasis added). Therefore, it seems that if the end user of the framework agreement will be a natural person, he or she may be given a chance to choose by his/her preference. This is a newly introduced provision to Directive 2014/24/EU; the outcome of which may cause an increased number of legal challenges.

It is necessary here to consider whether the '*intended for use by natural persons*' refers to end-user who is a third party outside of a procurement relationship; thus for example disabled citizen who chooses transport service supplier in accordance with his/her preferences; or end-user of framework agreement meaning a public servant who is employee of the contracting authority, for example a doctor at the public hospital choosing surgical tools or medicines that he wants to use in his work. This matter is important as if the end user is part of contracting authority aka part of the procurement agreement than he may have influence on who in the end is a winner of a competition. In such a case there is a risk of corruption and preferential practices in the procurement of framework agreements.

In the United Kingdom, the responses indicated a combination of a most economically advantageous tender and a lowest price as the award criteria in framework agreements.

### **Various Methods of Awarding Call-off Contracts**

On the basis of literature review it was established that methods such as percentage allocation, random allocation, rotation or cab-rank (ranking) are used for award of call-offs in framework agreements (Lichère & Richetto, 2014). However, when asked all interviews unanimously agreed that they do not use random allocation of contracts.

Several interviewees from the United Kingdom indicated that percentage allocation is only used where the split is capable of being managed centrally, often adjusted throughout framework period based upon performance, i.e. 60/40 split between two organizations which is reviewed annually against set performance objectives. This maintains a level of competition.

All interviews from Denmark agreed that they do not use rotation of bidders. Five of the interviewees from United Kingdom acknowledged that rotation was a practice used in the past in the construction sector. However, this practice was questioned as being pro collusive and consequently dropped by the contracting authorities. Some interviewed actors from both Denmark and the United Kingdom confirmed that geographical allocation of contracts is used. In other words, contracts are divided into lots on geographical basis and awarded to SMEs. That way competitive market is upheld and governmental policies of SMEs inclusion in governmental contracts are fulfilled.

There were also several answers (12 in total) from both countries that indicated that they would not use any of the before mentioned methods (except cab rank/cascade) but solely the award criteria following from the directive that is the most economically advantageous tender and lowest price. In view of these responses, cab rank/cascade method could be used as an award method as it is still based on choosing the best offer from the submitted bids in regards to achieving value for money.

### Transparency Principle and Framework Agreements

In both Member States, according to a majority of respondents contracting authorities promote an open, transparent approach to the information included within the invitation to tender documentation to ensure that transparency has been achieved in the procurement process. This means that suppliers are aware at the point of tendering exactly how call-offs will be awarded, as adequate guidance and templates are included in the procurement documentation.

In the context of single supplier frameworks, some level of transparency is ensured through the fact that in the process of establishing framework agreements, the supplier who will deliver all the call-offs in the future is already identified. As Directive 2014/24/EU requires that the framework award notice is published, that information is public. The challenge occurs in regards to the fact that the lack of transparency exists after the establishment of the framework. It seems impossible to know whether the prescribed procurement rules are being complied with or not.

The situation is even more challenging in the context of multi-supplier framework agreements with mini-competition, as the rules state that *'for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract.'* (Article 33(5) of the Public Sector Directive 2014/24/EU).

Therefore, there is uncertainty if the process is transparent. Are all the pre-qualified members of the framework agreement invited to the mini-competition?

To this question several British respondents answered that all who pass mandatory selection criteria and meet minimum standards in accordance with implemented Transparency Code 2014 – Lord Young reforms are invited. Some also invoke voluntary stand still and write to all unsuccessful participants in the mini-competition. In general, in the United Kingdom the respondents believe that it is not necessary to invite/inform about a mini-competition all members of the framework agreement but solely those that are capable of delivering the contract.

In regards to informing all members of framework agreement about mini-competition, a majority of respondents believe it is not

necessary from the stand point of legality but it is relevant from the perspective of contract management. Buyers should want to keep the bidders all interested in the framework agreement so they will compete when invited. That way, the buyer will receive most bids and, consequently, will have a chance to get the best offers and achieve value for money.

This is, of course, a perspective of the public sector who organizes the procurements. The standpoint of legality in this context of private contractors participating in public tenders differs as the question of upholding of the transparency principle in these proceedings is questioned. Also, in the author's view there is substantial lack of transparency at the stage of the call-off award, particularly when dealing with multi-supplier framework agreements and mini-competitions (Andrecka, 2015a).

In Denmark - as the legislation states that every capable supplier should be invited making an assumption that a provider which has won a place on a framework is 'not a capable supplier' is risking a challenge according to one of the respondents. Therefore, it is better to invite all members to the mini-competition and let suppliers de-select themselves. In other words, give the members the chance to compete and at the same time provide them with freedom to make a choice if they wish to compete or not. It was noted that in both countries bidders at times include geographical opting out clauses in which they inform in which regions they are not interested. For example, a small SME in northern parts of country is not interested in providing transport services in the southern part of a country. Consequently, even if they could be capable (or not) they would not be interested in competition in the mini-competition.

Some respondents in both the United Kingdom and in Denmark expresses that they will inform all members of framework agreements about the mini competition to enhance transparency. Also, it was reported that the move towards e- procurement and e-communication changes the situations of information flow regarding notices about both mini-competition and also the award of call-off award, as the programs and software automatically generates this information to all members of framework agreement.

### **Amendments of Framework Agreement**

Introduction of changes to the established framework agreement at the stage of placing an order is a problem in all types of framework agreements. A majority of respondents in both jurisdictions emphasized that it is challenging if the market situation changes between the time of setting up a framework and placing an order. There is a general fear or risk of a challenge against the contracting authority for changing any aspects of the general terms and conditions set out in the framework agreements.

If the contracting authority introduces too many changes it may expose itself to a legal challenge. Usually such a challenge would be started by a competitor of the current contract supplier claiming that due to the extensive contract modification actually a new contract has been awarded directly to current supplier. The latter would occur in violation of Public procurement law as new tender would be not opened. The consequence of that challenge could be severe including damages, contract termination or contract ineffectiveness.

Therefore, respondents emphasized that risk assessment is crucial when introducing amendments to framework agreements and call-offs. A good example of how to handle potential need for amendments in framework agreement is to instead of describing specifically award criteria's weight to provide description of award criteria and range of their weight, while at the same time reserving the right to change the percentage of weighting in award criteria at the stage of the call-off.

Several responders stressed that a mini-competition shall be a subset of the framework agreement; consequently, the more deviation from the original criteria and other terms and conditions at the call-off stage, the more risk of legal challenge will be attracted.

The unanswered question until recently has been how much change can be introduced to an already established framework agreement. All the respondents in both Denmark and in the United Kingdom positively welcome, in this regard, Article 72 of the Public Sector Directive 2014/24/EU that in detail regulates what changes may be introduced and when.

Modifications are possible but within strict boundaries and only in the specified situations. There are five main avenues to change a framework agreement: a) if it had been forecast all along

in clear and precise terms; b) for additional *necessary* works, supplies or services under certain circumstances (including a maximum expenditure increase of 50%); c) due to unforeseen circumstances (without changing contract nature or going over the 50% value threshold); d) supplier succession; e) alterations are not substantial, irrespective of value; f) alterations have a value under the thresholds, stay within 10% (services and supplies) or 15% (works) and do not change the "overall nature" of the framework agreement.

### **Innovation and Framework Agreement**

One of the goals of the EU Procurement Directives modernization was to make public procurement more strategic and to spur innovation. Many respondents underlined that framework agreements established by a coalition of contracting authorities or by central purchasing bodies will have larger capacity than a framework agreement concluded by a single contracting authority. Centralized framework agreements will usually include a larger basket of products understood as a larger quantity and variety of products. Moreover, there will be more users involved in such as there will be more than one addressee of the framework agreement, and the value of it will be high. Furthermore, there will be usually a greater level of professionalism in carrying out the procurement. As one of the Danish interviewees emphasized these factors promote innovation and sustainable solutions in central framework agreements. Several respondents underlined that in framework agreements with a large volume and value of the contract, the suppliers will be more willing to invest in new, innovative solutions, as the potential profits will be larger (Andrecka, 2015b).

British respondents stated in several interviews that the problem exists of using public procurement to address several horizontal policies such as innovation and promotion of SMEs participation in the public tenders. This poses a challenge as deliverables for these policies may pull towards different directions. On the one hand, quite often large centralized framework agreements will limit the accessibility to the framework agreements for SMEs, as the latter will often lack in capacity to compete for participation in such large framework agreements (Risvig-Hammer,

2012). On the other hand, it is often argued that most innovations originate from SMEs, and thus it could be said that central framework agreements may potentially hinder the introduction of new innovative and sustainable solutions to the public markets (Cepilovs, 2012; Schumpeter, 2008).

Finally, respondents from both Member States agreed to the common challenge in regards to framework agreements and introduction of innovation to public procurement. Namely, the fact that in framework agreements contracting authorities lock themselves out from new technologies occurring on the market, as according to EU procurement rules a framework agreement is a closed agreement to which new suppliers do not have access. Therefore, if we conclude a framework agreement with four members in an innovative sector where changes happen very dynamically, it is quite common that the operator who offers the best technology at the moment of concluding a framework agreement may not be a technological leader in a year or two, when the call-off will be awarded. Consequently, the current leader may be outside of a framework agreement.

### **United Kingdom and Unused Framework Agreements**

In the UK context a majority of interviewees underlined the problem of many framework agreements being established, however never being used. There are a number of reasons that interviewees mentioned why that may be the case. Firstly, wider political motives may cause local authorities and other public bodies to widen the scope and, thus, potential suppliers of framework agreements so that they can claim to be collaborative and 'tick the box' in meeting government expectations. Secondly, some respondents in the United Kingdom referred to institutional pride factor—for example, contracting authorities may compete with one another or there may be tensions between local and central governments. The third reason is the factor of awareness. The end user is unaware of the existence of the framework, as often they are not publicized very well. Fourthly, there is insufficient research into the requirements of users. Sometimes the framework initiator is too remote from the end user (particularly in the cases of central purchasing and consortia purchasing where these institutions act as agents for contracting authorities) or does not seek estimates, commitments or plans of the user community leading to

frameworks being created without any real need. The fifth reason is the choice of frameworks. The end user has access to a number of frameworks and an alternative framework offers better value for money. Sixthly, the end user decides to tender the requirement rather than use the framework. Seventhly, self-preservation-buyers want to create work for themselves. Eighthly, prices on frameworks can be far more expensive than if you conduct your own procurement exercise. Finally, it has been reported that often at the same time there are several overlapping and duplicating framework agreements in place. To solve this issue, a more collaborative and proactive approach toward establishment of framework agreements is advised. Institutions which establish framework agreements shall closely collaborate with prospectus contracting authorities' end users to establish the most relevant frameworks, fitting the needs of its users. From an efficiency stand point, British interviewees stressed that users should be contacted beforehand to indicate if they would use the framework agreement should one be established.

### CONCLUSIONS

The analysis of dealing with legal loopholes and uncertainties within public procurement law regarding framework agreements proved that the lack of transparency in framework agreements is still an ongoing issue. It could be argued that transparency is provided, but only at the 'pre-award' stage which is the establishment of a framework agreement. Unfortunately, with the introduction of the new Directive 2014/24/EU, the legislators missed the opportunity to clarify uncertainties regarding transparency, particularly at the award stage of call-offs. This issue interestingly enough may be solved in the future as a side effect of the compulsory move to electronic procurement.

According to collected data, electronic software automatically distributes relevant information among members of a framework agreement. Several positive clarifications of the new regulation shall be accounted as positive ones, primarily the introduction of rules regarding modification of already established framework agreements, as according to conducted interviews this constitutes a large challenge for procurement professionals.

One of the interviewees compared framework agreements to ready-meals; they may not always deliver the lowest price or

highest quality, but they can deliver solutions to needs at short notice quite easily. Such an analogy is not satisfactory as it is an oversimplification. Therefore, the author hopes that presented good practices and suggestions in this article will be helpful for practitioners.

#### ACKNOWLEDGEMENTS

The author acknowledges and thanks the support of the Carlsberg foundation, in the conclusion of this research. Also, the author wishes to thank all the interviewees for their contribution to the study.

#### REFERENCES

- Andrecka, M. (Forthcoming). "Clarification or Missed Opportunity? The Provisions on Framework Agreements in the 2014 Directive." In G. Skovgaard Ølykke, & A. Sanchez-Graells (Eds.), *Reformation or Deformation? – Who Played the Negotiating Game Better in the 2014 Reform of the EU Public Procurement Rules: the CJEU as Umpire*. (Chapter 9). Cheltenham, United Kingdom: Edward Elgar.
- Andrecka, M. (2015a). "Framework Agreements: Transparency in the Call-off Award Process." *European Procurement & Public Private Partnership Law Review*, 10 (4): 227-230.
- Andrecka, M. (2015b). "Framework Agreements, EU Procurement Law and the Practice." *Upphandlingsrättslig Tidskrifts*, 2: 127-149.
- Andrecka, M. (2015). "Sustainable Public Procurement under Framework Agreements." In B. Sjøfjell, & A. Wiesbrock (Eds.), *Sustainable Public Procurement under EU Law - New Perspectives on the State as Stakeholder* (pp. 138-159). Cambridge, UL: Cambridge University Press.
- Arden, P. (2013). "Legal Regulation of Multi-Provider Framework Agreements and the Potential for Bid Rigging: A Perspective from the UK Local Government Construction Sector." *Public Procurement Law Review*, 5: 165-182.

- Arrowsmith, S. (2014). *The Law of Public and Utilities Procurement Regulation in the EU and UK*. London, United Kingdom: Sweet & Maxwell.
- Banakar, R., & Travers, M. (2005). "Law Sociology and Method" in R. Banakar, & M. Travers (Eds.), *Theory and Method in Socio-Legal Research* (pp.7-18.). Oxford, United Kingdom: Hart
- Bogdan, M. (1994). *Comparative Law*. Stockholm, Sweden: Kluwer Norstedts Juridik Tango.
- Cepilovs, A. (2012). *Public Procurement of Innovation and Small and Medium-Sized Enterprises*. (Semester Project, Aalborg University) (pp. 3-5). [Online]. Available at [www.academia.edu/1649133/public\\_procurement\\_of\\_innovation\\_and\\_SMEs](http://www.academia.edu/1649133/public_procurement_of_innovation_and_SMEs). [Retrieved May 16, 2016].
- Cryer, R., Hervey, T., Sokhi-Bulley, B., & Bohm, A. (2011). *Research Methodologies in EU and International Law*. Oxford, United Kingdom: Hart.
- European Commission (2011). *Proposal for a Directive of the European Parliament and of the Council on Public Procurement* (COM 896 final). Brussels, Belgium; Author.
- European Parliament and of the Council (2014). *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 L 34/114). Brussels, Belgium: Author.
- European Parliament and of the Council (2014). *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 On Public Procurement and Repealing Directive 2004/18/EC* (OJ L 94/65 Brussels, Belgium: Author.
- European Commission (2005). "Framework Agreements Classic Directive" (Explanatory Note CC2005/03\_rev/ of 14.7.2005) Brussels, Belgium: Author.
- Kvale, S., & Brinkmann, S. (2008). *Interviews: Learning the Craft of Qualitative Research Interviewing*, Thousand Oaks, CA: Sage Publications Incorporated.
- Lichère, F., & Richetto, S. (2014). "Framework Agreements, Dynamic Purchasing Systems and Public E-procurement." In F.Lichère

- R. Caranta & S. Treumer (Eds.), *Modernising Public Procurement: The New Directive* (pp. 186-190). Copenhagen, Denmark: DJØF.
- Lomio, J. P., Spanganssen, H., & Wilson, G. D. (2011). "Comparative Law Methods." In J. P. Lomio, H. S. Spang-Hanssen & G. D. Wilson (Eds.), *Legal Research. Methods in a Modern World: A Coursebook* (pp. 2-30). Copenhagen, Denmark: DJØF.
- Risvig-Hammer, C. (2012). "Regular Purchases and Aggregated Procurement: The Changes in the New Public Procurement Directive Regarding Framework Agreements, Dynamic Purchasing Systems and Central Purchasing Bodies." *Public Procurement Law Review*, 4: 201-210.
- Sanchez Graells, A. (2015). *Public Procurement and the EU Competition Rules*. Oxford, United Kingdom: Hart Publishing.
- Schumpeter, J.A. (2008). *The Theory of Economic Development: An Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle*. Cambridge, MA: Harvard University Press.
- Semple, A. (2015). *A Practical Guide to Public Procurement*. Oxford, United Kingdom: Oxford University Press.
- Zweigert, K., & Kötz, H. (1998). *An Introduction to Comparative Law*. Oxford, United Kingdom: Oxford University Press.

## APPENDIX A

### Questionnaire

1. Which type of framework agreements are you using more: single or multi-supplier?
  - a. If possible could you provide the percentage or other indicator?
2. Do you find one of the types of framework agreements more appropriate for particular contracts (works/services/supply) or sector (consulting/ construction/ cleaning/ transport)?
3. Could you provide examples of multi-supplier frameworks with mini-competition?
  - a. For what services/supply/works you use them the most?
  - b. If possible could you provide an example of documentation for such a framework (technical specification, public notice, selection / award criteria etc.).

- c. Any particular uncertainties you meet when dealing with multi-supplier framework agreements with mini- competition?
  - d. What (if anything) is a challenge?
- 4. What type of awarding criteria do you use for the establishment of framework agreements?
- 5. What type of awarding criteria do you use for the subsequent award of a contract under framework agreement (call-offs).
  - a. At the mini-competition stage do you use methods such as percentage allocation, cab-rank, random allocation or rotation?
- 6. How do you ensure transparency in framework agreements?
- 7. When preparing a mini-competition, do you always contact all members of particular framework agreement or only these which are capable to deliver the contract?
  - a. If the latter do you inform other members of framework agreement about the fact that a mini-competition will be held?
- 8. Did you encounter problems/practical challenges when introducing changes/amendments to terms and conditions of an established framework agreement? (Meaning, how do you proceed if you realize some changes are necessary when the time for a mini-competition comes? e.g. award criteria/sub-criteria need to be amended).
- 9. What is your opinion in regards to framework agreements and innovation?
- 10. Any additional comments/suggestions/ considerations?