NON-TRADITIONAL REGULAR PURCHASING ARRANGEMENTS

IN PUBLIC PROCUREMENT

- A doctrinal and comparative analysis of regulation and implementation systems -

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PhD Thesis submitted to the University of Nottingham
For the degree of PhD in Law

March 2018

ABSTRACT

This research analyses, by using legal doctrinal and comparative methods, non-traditional regular purchasing arrangements (NTRPA) in seven public procurement systems carefully selected to ensure a wide coverage: the UNCITRAL Model Law on Public Procurement (2011), the World Bank, the US federal procurement system, the EU system and three EU Member States: UK, Romania and France.

We define NTRPA as arrangements designed to meet on-going, recurrent or indefinite requirements for a long-term period through purchasing from the free market, and where the parties, at the initiative of the purchaser, go through a number of procedural stages (for example, 'suitability') and/or establish some contractual terms, but not all, in advance of the moment when an actual need for specific items arises, followed by placement of subsequent contracts or orders whenever the actual needs for items arise, based on the procedural stages conducted in advance, or based on the terms agreed beforehand.

Such arrangements include, for example, framework agreements, dynamic purchasing systems and qualification systems (in the EU), and indefinite delivery contracts and multiple-award schedules (in the US). The varied terminology reflects the even wider variety of the arrangements themselves and of the approaches that legal instruments take in regulating them.

The research examines how NTRPA are regulated in selected procurement systems, why they are regulated as they are, and assesses considerations that tend to promote or detract from fulfilment of certain objectives of the regulation of NTRPA. A common structure related to the 'core' elements of the underlying commercial process of such 'transactions' is used both for the examination of individual arrangements in each system *and* for wider comparative perspectives amongst them.

By 'de-constructing' NTRPA as currently regulated into basic elements by reference to the 'core' commercial purchasing process, a corpus of guidance and a perspective are 're-constructed' regarding: (i) relevant landmarks for regulating NTRPA by reference to the particular objectives envisaged by individual procurement systems; and (ii) relevant landmarks for interpretation by practitioners, particularly from a teleological point of view, in areas where existing legislation or regulations applicable to their procurement systems are silent, inconsistent or unclear.

'Relevant landmarks' refer to aspects worth being considered in a wide context by policy makers, legislators or practitioners when introducing or reviewing public procurement regulation regarding NTRPA, or when actually implementing such arrangements. These landmarks do not refer to (and do not imply) a 'single recipe' for non-traditional regular purchases, but to an 'orientation guide' to quite complex a phenomenon.

Acknowledgements

I express my gratitude to Professor Sue Arrowsmith for the highly professional academic guidance and support, as well as encouragement and understanding throughout the research period.

Similarly, I wish to extend my many thanks to the University of Nottingham and the Public Procurement Research Group (and PPRG) within the School of Law for the financial support provided for this research.

I also thank all at PPRG for the intellectually stimulating, enthusiastic and welcoming atmosphere that has surrounded me at all times.

Lastly, but not least, I cannot overemphasise the huge support that I received in various ways from my mother, relatives and friends – my heartfelt thanks go to you all.

Without any of the above, this thesis could not have seen the light.

To Magda, Șerban C., Radu, Christiane, John, Peter, Anca and Nicu

I hereby declare that this thesis is the result of the author's own work:

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This thesis has 99984 words.

I have made every effort to ensure that the thesis is up to date as at 10 December 2017.

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CHAPTER I

INTRODUCTION

A. Background

In the new millennium the regulation of what we call hereinafter "non-traditional regular purchasing arrangements" (or "NTRPA") has received increasing attention, with a view to enhancing efficiency and effectiveness in public procurement. This can be seen in particular at the level of the EU, including Member States, and UNCITRAL, as well as in the World Bank regulations. This thesis seeks to identify the main elements of the phenomenon of non-traditional regular purchasing arrangements and to assess the manner in which a number of systems (acting in various social and cultural situations) respond in their procurement regulation to the actual and system-specific objectives of such arrangements.

We define non-traditional regular purchasing arrangements in public procurement as those arrangements designed and/or implemented to meet on-going, recurrent or indefinite requirements for a long-term period through purchasing such items from the free market, and where the parties, at the initiative of the purchaser, seek to go through a number of procedural stages (for example, 'suitability') and/or to establish a number of contractual terms, but not all, in advance of the moment when an actual need for specific items arises, followed by placement of subsequent contracts or orders (also referred

to as call-offs) whenever the actual needs for items arise, based on the procedural stages conducted in advance, or based on the terms agreed beforehand.

The objective of the research, based on the analysis and assessment of specific public procurement systems is to "de-construct" non-traditional regular purchasing arrangements as currently regulated into basic elements by reference to the "core" commercial purchasing process and then to re-construct a corpus of guidance and a perspective regarding: (i) relevant landmarks for regulating NTRPA by reference to the particular objectives envisaged by individual procurement systems; and (ii) relevant landmarks for interpretation by practitioners, particularly from a teleological point of view, in areas where existing legislation or regulations applicable to their procurement systems are silent, inconsistent or unclear.

For the purposes of this research, 'relevant landmarks' refer to aspects worth being considered in a wide context by policy makers, legislators or practitioners when introducing or reviewing public procurement regulation regarding NTRPA, or when actually implementing such arrangements. These landmarks do not refer to (and do not imply) a "single recipe" for non-traditional regular purchases, which is most likely unachievable, but to an "orientation guide" to quite complex a phenomenon, to experiences of various systems, and to how such experiences may, should, or should not be used in particular circumstances of a given system, or by reference to certain objectives of a certain system.

The following sections of this introductory chapter describe how the research outcomes have been achieved and presented. Thus, Section B expands and discusses the definition of the phenomenon examined emphasising its features, implications and importance for academia and practitioners.

Section C looks at the methodology used in order to achieve accurate, relevant and reliable research outcomes. The appropriateness and limitations of the doctrinal legal research method for the subject of this research are discussed, as well as the particular features of the comparative method as applied to this research.

In Section D we explain the selection of the procurement systems researched, and why the selection offers a wide coverage of the current trends related to NTRPA. Section E explains how the thesis is organised and presented. Finally, Section F addresses potential limitations of the research, and describes the original contribution of the research.

B. Brief Discussion of Non-Traditional Regular Purchasing Arrangements in Public Procurement

It follows from the definition at Section A above that non-traditional regular purchasing methods in public procurement cover a wide range of arrangements whose main features are:

(i) they regard on-going, recurrent, or indefinite needs of a purchaser for a period of time, and not one-off needs;

(ii) the procurement / contracting process is initiated before a specific need becomes actual for the purchaser and/or specifiable in all respects.

Thus, the range of NTRPA includes: arrangements where before actual and/or fully specifiable needs arise suppliers only express an interest to supply, possibly by employing a very brief 'suitability' assessment, arrangements where a full 'suitability' assessment is conducted before the above needs arise, and arrangements where some or most, but not all, contractual elements and terms for the future purchases are agreed before an actual need arises. Within these landmarks, the possible arrangements outline the nuances of the phenomenon currently investigated[1].

The research covers urgent procurement, so far as potentially recurrent, on-going or indefinite needs are estimated to some extent on the basis of the assumption that urgent situations (disasters) are inevitable and that the type of items needed to deal with such events can broadly be identified in advance[2]. If the purchaser initiates the procurement / contracting process in advance of such events, contemplating to place subsequent contracts or orders when actually needed, then such arrangement falls under our definition of NTRPA.

Some further features of NTRPA emerge from the definition of the phenomenon. First, they involve aggregation of requirements usually into a

[1] S. Arrowsmith, "Framework Purchasing and Qualification Lists under the European Procurement Directives: Part I" (1999) 3 *PPLR* 115, at p.116. The idea of nuances or shades of the phenomenon of NTRPA was emphasised by Professor Sue Arrowsmith in academic discussions with the author.

[2] J.I. Schwartz, "Katrina's lessons for ongoing US procurement reform efforts" (2006) 15 (6) *PPLR* 362.

single procurement exercise resulting into a number of subsequent orders or contracts. NTRPA are distinct from 'traditional' procurement methods by lots, but it is possible to conduct NTRPA divided into lots[3]. Procurement by lots brings under a single procurement exercise items that may be different in nature or not offered (at best terms) by a single supplier, though the items could be somehow 'linked' or serve the same need of the purchaser. It gives the option for suppliers to submit for one or more lots, and the purchaser to admit applications or award different lots to different contractors in accordance with the interests, capability and best terms offered by suppliers for each individual lot, or a combination of lots[4]. In contrast, NTRPA involve the initiation of the procurement process for expected recurrent, on-going or indefinite needs, before such needs materialise.

Second, the subject-matter of procurement under NTRPA tends to consist of rather standard items where the arrangement establishes terms for future purchases (hereinafter referred to as 'framework arrangement'), and may range to quite complex items where the arrangement does not establish terms (referred below as 'supplier list'). The more complex an item is, the more difficult it could be to establish terms or go through a significant part of the procurement process before the need becomes actual and fully specifiable.

Reasons why NTRPA may be worth using, despite being rather complex arrangements, include: ensuring security and flexibility of supply

[3] For example, the framework agreements divided into lots under the public procurement system for EU's external aid programmes.
[4] Depending on the rules applicable to that exercise.

over a period of time at short notices, particularly where the arrangement provides for a commitment of the supplier(s) on the arrangement to supply[5]; and the objective impossibility (or inadequacy) of establishing all terms of, or best terms for, the requirements well in advance of the actual supply.

Sometimes there may be an overlap among reasons and potential benefits from using NTRPA. Thus, a purchaser may proceed to such arrangement in view of ensuring security or flexibility of supply. But he may also pursue economies of scale that could result from aggregation of demand. Suppliers may be able to offer better terms in light of an expected large volume of sales, and even more so where the purchaser commits to demand certain quantities. On the other hand, an overall reduction of the administrative burden, including transaction costs, could be achieved since the arrangement eliminates the need for a repeat of a 'full' procurement procedure for every need that materialises during its term.

However, depending on how they are regulated or implemented, NTRPA may also present challenges or risks. Because such arrangements are rather complex, usually involving two distinct procedural phases, there will be a need for experienced procurement personnel to understand the arrangement and ensure consistency of approach throughout the entire process. This may not be easily achieved, for example, in the case of multi-purchaser multi-supplier framework arrangements where an institution establishes the arrangement but other institutions place orders under it

[5] See S. Arrowsmith and C. Nicholas "Regulating Framework Agreements under the UNCITRAL Model Law on Procurement", Ch.2 in S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century*, West 2009, at pp.102-104.

completing (or even amending) specifications for the items and establishing the reminder of the terms[6].

Similarly, because NTRPA are longer term arrangements, their success depends on market dynamics over that period and market awareness is essential. It is important to 'design' arrangements that continue to be relevant for every order during their term, while at the same time avoiding situations where the purchaser remains stuck with terms that no longer reflect the general market. Thus, NTRPA require an increased planning effort.

On the other hand, NTRPA may pose a risk to competition[7]. This could affect the arrangement itself, in particular where additional suppliers cannot join after its establishment[8] or where the second stage is not properly regulated or monitored. The risk could also affect the relevant market where the NTRPA 'closes' a significant part thereof only for some suppliers active on that market. A risk of corruption could also affect large arrangements in view of the potential volume of sales.

It is also possible that some NTRPA are not attractive to procurement 'players', for example where procedural requirements are too burdensome,

[6] A specific experience is found in the US federal procurement system. The US Government Accountability Office found that in certain multi-purchaser, multi-supplier framework arrangements (or multi-agency indefinite delivery / indefinite quantity contracts) the institution placing orders exceeded significantly the scope of the underlying arrangements. B.N. Bleicher, W.I. Dunn, D.I. Gordon and J.L. Kang, "Accountability in Indefinite-Delivery / Indefinite Quantity Contracting: The Multifaceted Work of the U.S. Government Accountability Office", (2008) 37 (3) *Public Contract Law Journal* 407.

[7] See e.g. P. Trepte, *Public Procurement in the EU – A Practitioner's Guide (Second Edition)* (OUP, 2007) p.212; P. Arden, "Legal regulation of multi-provider framework agreements and the potential for bid rigging: a perspective from the UK local government construction sector" (2013) 5 *PPLR* 165.

[8] Referred to as 'closed arrangement'.

such as those that had been provided for the second stage of a dynamic purchasing system under the 2004 EU Public Sector and Utilities Directives[9]. These defeated the efficiency expected of the arrangement.

The above challenges regarding NTRPA illustrate how important the legal regulation of such arrangements is for their success (or otherwise), particularly due to the impact that legal regulation has on behaviours of the persons to whom it applies[10].

Generally, there is consensus that public procurement needs to be regulated[11]. The main question that emerges is how best to regulate public procurement such as to guide procurement activity towards wider objectives of a specific procurement system[12] and encourage an appropriate use of certain purchasing 'techniques'. At the same time regulation should consider the market rules and influences that are inherent to the underlying "core" commercial process of purchasing items from a free market. This approach has been applied to NTRPA in public procurement for the purposes of this research.

[9] Rules concerning dynamic purchasing systems were changed in the 2014 EU directives. See EU Chapter.

[10] N. Popa, *Teoria generala a dreptului (General Theory of Law),* (Bucharest, Romania: All Beck, 2002), p.134.

[11] See general literature on public procurement regulation, e.g. P. Trepte, *Regulating Public Procurement - Understanding the Ends and Means of Public Procurement Legislation* (OUP, 2004). Also, S. Filipon, *A Review of European Union's Public Procurement Procedures in External Environments*, MSc Dissertation, University of Strathclyde, UK, 2006.

[12] For example, efficiency, or transparency, or promotion of international trade, etc.

C. Methodology

The word "method" comes from the Greek word "methodos" which means way, road, but also the fashion in which something is presented[13]. As discovery of scientific knowledge involves a permanent activity of gradual approximation and the progressive effort[14] of a number of scholars and practitioners, this section describes the author's 'road' towards achieving the research outcomes as well as the stages of this 'trip'.

In essence, this research is mainly doctrinal and comparative, with some particular features as described below. It looked at arrangements that fall under the definition of NTRPA stated at Section A, as existing in public procurement legislation/regulation of a number of selected national and international public procurement systems.

A first step of the research was to identify, and then to describe and analyse these arrangements. This was done in the relevant procurement context of each system examined (taking into account historical, institutional and legal aspects). At this stage the doctrinal[15] interpretive methods were used. For each individual system, the relevant legislation, regulations and case-law (i.e. primary sources) were reviewed by employing methods such as grammatical interpretation, systemic interpretation, logical interpretation, historical and teleological interpretation. The outcomes of this exercise were

[13] Popa, n.10 p.16.
[14] L-J. Constantinesco, *Tratat de Drept Comparat (Comparative Law Treatise)* Volume 1 (Bucharest, Romania: All, 1997), Foreword p.XXI.
[15] P. Bartlett, T. Hervey, and E. Hasson, *Legal Research Methods 2008-09*, University of Nottingham, School of Law, pp.10-11.

placed into perspective and checked for accuracy by contrasting them with findings from literature relevant to each individual procurement system investigated (secondary sources).

Thus, literature review included two main layers of literature (sources), for each system. We defined primary sources as the official regulatory instruments (or preparatory materials for them) and relevant case-law. We defined secondary sources as academic or specialised literature relating to the subject investigated, that may include specialised textbooks, articles, or reports.

The next stage of the research involved the comparative method[16]. This was used to compare the legal norms/regulations across the public procurement systems under investigation concerning NTRPA[17]. The objective was to identify and explain similarities and differences between them with a view to draw, where appropriate, on elements of commonality in regulating and interpreting provisions regarding NTRPA.

A challenge in the application of the comparative method to this research arose from the wide variety of the legal and procurement systems examined, each having its own objectives, features, cultural or administrative backgrounds, etc. Another potential risk of comparative research is for outcomes to remain somehow: (i) superficial, simply describing in parallel the various case studies and outlining randomly some connections between their

[16] See Constantinesco, n.14 pp.230-231.

[17] However, some intra-system comparisons, among the various arrangements in a given system were also made.

various elements; or (ii) irrelevant, i.e. operating "micro-comparisons"[18] between various elements of the case studies taken in isolation likely to result in accurate but fragmented data unable to offer the insights and the depth of knowledge required to draw guidance for legislators and practitioners. Below we explain how we used the comparative method as a tool for legislative policy, and as a means to understand areas where the various procurement systems might benefit from sharing their experiences, and to understand current trends relevant to NTRPA.

As emphasised in the literature, the "tertius comparationis" or the comparability rule is of the essence for comparative research. In other words, "only comparable things can be compared but only the comparison itself will in the end indicate whether the things were comparable"[19]. The comparability rule clearly indicates that, in order for the comparison to generate valuable knowledge, it has to compare elements with a certain degree of commonality.

While, as indicated above, there is a wide range and variety of NTRPA in the systems we examined, all have in common: the commercial process of ensuring supply over a period of time, where the procurement process is started before an actual and/or fully specifiable need arises, through establishing a NTRPA within which contracts or orders are then placed when the need becomes actual. So, the comparative element of the research concerns the fashion in which regulation in various systems relates to this commercial process of dealing with uncertain or indefinite needs for a longer

[18] Constantinesco, n.14, p.228.
[19] Ibid, p.XII.

term period. It can be noticed, that the "tertius comparationis" rule is observed.

To handle scientifically the wide variety of arrangements researched a structure for analysis and presentation of all case studies was initially developed, and then adjusted as the research progressed, in light of additional or missing elements in each case study. During the first stage of the research, the structure guided the investigation and presentation of each individual case study (and arrangement) and at a later stage it drove the full analysis exercise.

In order to ensure relevance of the comparative exercise and of its outcomes at a procurement policy level, the case studies were carefully selected, considering aspects like the size of the public procurement market, the influence on other procurement systems, or the links between them[20]. Where appropriate the elements compared were regarded within the wider context[21] they emerged from and by employing a historical / teleological perspective[22].

Qualitative or quantitative empirical evidence that already exists was used as appropriate. This refers to data collected by public institutions or academics regarding the effects or influence of the regulation of particular NTRPA on the procurement practice and on the fulfilment of wider policy goals.

[20] See Section D below.
[21] Administrative, economic, social, political, cultural, etc.
[22] Popa, n.10, pp.22-24.

The author's experience in the area of public procurement has been (rarely) used and only subject to a prior "objectivity test", by triangulating the relevant experience with other resources. Ethics in research have been strictly observed, including the principles of confidentiality and objectivity.

D. The Selection of Public Procurement Systems

Nowadays public procurement is rather heavily regulated, particularly as regards the 'tendering' stage. Public procurement may be regulated at national level or at international level and these systems have their own objectives underlying such regulation.

For the purposes of this research the author sought to analyse a number of different systems such that the various NTRPA within each of them can be placed into a perspective that may reveal a variety of angles. The sample is carefully selected bearing in mind the size of the public procurement markets in question, their experiences and characteristics and/or their actual or potential influence on other procurement systems.

The EU public procurement system, regulated by the relevant EU directives[23], seeks to open national procurement markets to suppliers from other Member States, in line with the economic integration envisaged by the EU Treaties and is less interested in providing for detailed rules or guidance on how purchasers achieve efficiency in procurement[24]. The EU public procurement system was selected in the light of the sheer volume of public

[23] The most recent reform resulted in certain new directives being adopted in 2014.
[24] See e.g. Trepte, n.11, pp.42&342-367.

procurement conducted within this large market, as well as of its direct influence on its (currently) 28 national public procurement systems of the Member States. Further reasons for selecting this system were: (i) the availability of the primary and secondary literature in the English or French languages (that the author knows); and (ii) a degree of familiarity of the author with this system.

Among the national procurement systems of EU Member States, this research dealt with France, Romania and the UK to provide for a range of experiences and legal traditions[25]. France and the UK are older Member States experienced in public procurement although their practice and traditions differ, France having a Napoleonic (civil law) legal system, the UK having a common law system. France has a tradition of issuing detailed legally binding regulations[26], and a rather prescriptive approach to regulating procurement. As a legal/procurement system, it influenced other civil law states in its approach to the subject and has a direct impact in France's overseas territories.

In the UK the conduct of public procurement has traditionally been to a high degree left on the discretion of purchasers and procurement officers[27]. Emphasis is placed on their professional expertise and ability to make sound procurement decisions for each individual need they have to meet via

[25] The selection was also influenced by the author's knowledge of the relevant languages.
[26] For example, in the form of Decrees or Ordinances (or Codes).
[27] See e.g. S. Arrowsmith, "Framework Agreements in the EC and UK", Ch.3 in S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Public Procurement: Procurement Regulation for the 21st Century* (Thomson Reuters/West, 2009) pp.141-144.

purchasing. When transposing the EU procurement directives, the UK merely passed on the options provided by the directives to the Member States, further onto purchasers. The UK has a very extensive historical experience with framework arrangements and was one of the main drivers for ensuring they were appropriately addressed in the EU directives. The UK system presents an interesting balance between rigidity and flexibility in the regulation of public procurement. During the course of this research, the UK voted to leave the EU but this does not affect the research or its outcomes.

Romania is a new member state of the EU and a former centralised economy until 1989. Therefore, its procurement experience – in the sense of public institutions purchasing from the free market – is limited. It is important to include Romania's perspective since it applies to a number of former socialist countries, for which public procurement in this sense represents a new approach. The first piece of coherent public procurement legislation was dated 2001. Consistent with commitments related to EU integration, new legislation was enacted in the summer of 2006 transposing the relevant EU instruments into domestic law. However, the domestic procurement legislation suffered numerous changes in the following years, until it was completely revised in 2016 in light of the 2014 directives. Public procurement policy seems to have missed coherence and a longer-term strategy.

The author is of Romanian nationality and practiced the legal/procurement profession in Romania[28], so a degree of familiarity with this system, was a further reason for selecting this system.

On the other hand, the US federal procurement system could not be absent from this research, since it offers extensive experience with regular purchases, particularly in complex multi-purchaser/multi-supplier arrangements. This procurement system focuses on efficiency and speed of supply, at the cost of 'contestability' in some cases (such as the ordering stage of some indefinite delivery contracts). This is in line with the US Government objectives and a tendency towards more business-like procurement.

As the literature emphasised[29], it is probably impossible to accommodate all desiderates of public procurement like efficiency, value for money, transparency, competition, integrity, etc., and some will have to be traded-off against others. The US appears to have made its choices although, after 2008, there has been some preoccupation for enhanced competition[30], transparency and wider contestability at ordering stage.

The volume of the US public procurement market, its influence on certain international instruments, such as the Government Procurement Agreement (GPA) of the World Trade Organisation (WTO) or the UNCITRAL

[28] And in international context.

[29] S.L. Schooner, "Desiderata: Objectives for a System of Government Contract Law" (2002) 11 *PPLR* 103.

[30] See e.g. D.I. Gordon and G.M. Racca, "Integrity challenges in the EU and U.S. procurement systems", Ch.1, Part II in G.M. Racca and Christopher R. Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts – Balancing Corruption Concerns in Public Procurement Internationally* (Bruxelles: Bruylant, 2014) 117-145, at p.138.

Model Law on Public Procurement, and the availability of literature in the English language are further reasons for selecting this system.

The World Bank procurement system is an international procurement system employed by an international development loan provider, mainly applicable for borrowing institutions. It is of particular relevance to this research since it is: (i) applied in, and has influenced the procurement systems of a large number of various countries; (ii) used as an example for other development banks; (iii) providing for the perspective of an international loan organisation. The procurement regulations[31] are intended to ensure success of the projects financed through such loans (unless the Bank agrees that an alternative procurement regime can be applied to a project). Availability of the relevant literature in the English language and a degree of familiarity of the author with this system are further reasons for selecting it.

Finally, the activity of the Working Group for revision of the UNCITRAL Model Law on Public Procurement was of great interest for this research, as is the revised (2011) Model Law itself and its attending guidance. The scope of the UNCITRAL is to promote international trade through harmonisation of international trade law, and the Model Law seeks to provide guidance to States in drafting or updating their own national public procurement legal systems. These international instruments are particularly relevant since they are based on wide input from many states and are intended to provide guidance for legislators in varied contexts.

[31] Since July 2016: "The World Bank Procurement Regulations for IPF Borrowers".

One of the novelties of the 2011 Model Law was the introduction of certain types of NTRPA and thus our interest has been twofold in: (i) the actual content of the provisions regarding regular purchases; and (ii) the legal technique employed for expressing the agreed norms in a "legal language" of a very general level, as required by such an international model law.

The influence and further potential influence of the UNCITRAL model law on a large number of systems and availability of relevant literature in English are further reasons for selecting this procurement system.

E. Organisation and Presentation of the Thesis

The following three chapters present the research findings concerning relevant 'procurement contexts' of, and NTRPA in: the 2011 UNCITRAL Model Law on Public Procurement and its attending guidance documents (Chapter II), the IBRD procurement regulations (Chapter III) and the US federal procurement system (Chapter IV).

The EU procurement system is presented in Chapter V. This chapter addresses NTRPA as regulated in the EU procurement directives, and includes specific domestic approaches and experiences of the EU Member States examined (UK, Romania and France) that are significant in the wider context of this research. Such domestic approaches are included at appropriate places as sub-sections to Chapter V.

This presentation method for the EU procurement system was preferred considering the overwhelming data that resulted from the research,

in order to avoid inherent repetitions from using the same presentation structure for each Member State examined (given the commonalities in EU law)[32]. Thus, the presentation of the EU part of the research is more integrated. Also, notably, this presentation method helped comply with the word count requirement.

Chapter VI comprises the overall analysis with comparative perspectives, and conclusions are in Chapter VII.

F. Addressing Potential Limitations of the Research and Original Contribution

One of the questions that could arise concerns the extent to which it is possible to generalise and theorise on the basis of the results from the analysis of seven public procurement systems? Firstly, as already stated, the objective of this research is to provide neither general procurement regulation, nor general interpretation recipes, but only landmarks, guidance, and a research model for such activities.

The author recognises that there may be issues, practical or regulatory possibilities that are not covered by the research. However, the successive steps of the methodology used led to scientific validation, or otherwise, of the various research outcomes. Also, the scope of selected case studies, as explained in Section D, is intended to be sufficient to ensure that potential

[32] The original draft of the thesis included such individual chapters for the UK, Romania and France.

limitations of the coverage of the research are kept to a minimum and that the research is of quite wide value.

Indeed, the objective of the research went further than simply describing what the individual arrangements reviewed consist of, why they are regulated as they are in the various systems, and comparing them. By drawing on the resources, the methodological approaches discussed above and the features of the selected public procurement systems, the final objectives of the research were: (i) to identify and assess considerations in each procurement system investigated that tend to promote or detract from fulfilment of certain objectives of the regulation of NTRPA; and (ii) to provide a rather general, as appropriate and scientifically justified, 'corpus' of guidance in connection with NTRPA.

It is reminded that this 'guidance' is not regarded as an "ideal" or "unique solution" for the subject. It seeks to provide orientation as to relevant aspects that legislators may like to consider when enacting or updating regulatory instruments in respect of NTRPA with a view to achieving certain policy objectives. For practitioners it seeks to provide orientation in interpreting applicable regulatory instruments or in identifying practical courses of action in areas where the regulation is silent or inconsistent.

This 'corpus of guidance' brings an original academic contribution to what currently seems to be rather fragmented an area of legal research, by bringing together, organising, filtering and processing relevant knowledge that 'floats' (sometimes unarticulated) in various contexts. Such a rather general 'corpus of guidance' to the subject-matter also provides a research model for

use in further research, albeit one that can be further enhanced and refined if additional perspectives are revealed by future research.

Inevitably, any research has its own limitations and constraints, the main ‘suspects’ being time and other resources. Thus, potential developments of the current research or related research potentially arising from it are addressed in Chapter VII.

CHAPTER II

NON-TRADITIONAL REGULAR PURCHASING ARRANGEMENTS UNDER THE UNCITRAL SYSTEM

A. Procurement Context

A.1 UNCITRAL – Institutional Considerations and Its Work

"UNCITRAL" stands for the United Nations Commission for International Trade Law. As the name suggests, UNCITRAL is a body of the United Nations (UN) system dealing with international trade law. UNCITRAL's web site[1] describes the organisation as being "the core legal body of the United Nations system in the field of international trade law".

UNCITRAL was set up in 1966 via Resolution No.2205 of the UN General Assembly. The Resolution provides that UNCITRAL's mandate is to promote a "progressive harmonization and unification" of international trade law, in a structured, coherent, and organised fashion, as well as to coordinate the activity of other organisations acting in the area of international trade law by promoting cooperation among them. It also notes that harmonisation plays an important role in the development of international trade.

UNCITRAL's methods and work are highly participative and consensual[2]. Wide representation and the consensual approach enable

[1] www.uncitral.org

[2] S. Arrowsmith and C. Nicholas "The UNCITRAL Model Law on Procurement: Past, Present, and Future", Ch.1 in S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century*, West 2009, pp.5-6. See also C. Nicholas, "UNCITRAL and the Internationalization of Government

UNCITRAL's instruments to be based on a broad range of experiences and to present a high degree of acceptability and implementation among member States[3].

Sixty States are currently part of UNCITRAL. They are elected by the General Assembly for six years according to an algorithm aimed to ensure a wide representation of geographical areas, trade and legal traditions.

There are three levels of UNCITRAL's work: UNCITRAL (also referred to as the Commission), working groups, and secretariat[4]. The Commission convenes at annual sessions covering a number of subjects, such as: finalisation and adoption of draft texts prepared by working groups (e.g., Model Laws or Guides to Enactment), selection of topics for future work, and monitoring developments of the case-law concerning UNCITRAL text systems[5]. Decisions are taken (by Member States of the Commission) by consensus rather than vote[6], in order to facilitate general acceptance, to the extent possible, of a final text[7]. Only where consensus is not achieved "decisions are to be taken by voting"[8].

Procurement Regulation" in A.C. Georgopulos, B. Hoekan and P.C. Mavroidis (eds), *The Internationaliztion of Govenrent Procurement Reguation* (OUP, 2017) (electronic book).

[3] Arrowsmith and Nicholas, n.2.

[4] For details, see Guide to UNCITRAL (www.uncitral.org), pp.5-10.

[5] This system is called CLOUT and can be found on the Internet via www.uncitral.org; however, it does not appear to include case-law relating to the Model Law on Public Procurement.

[6] N.4, p.6.

[7] Such acceptance was described in literature as meaning that a final text "is relevant to States with different legal systems and levels of economic and social development" (Arrowsmith and Nicholas, n.2, p.6).

[8] N.4, p.6.

Usually Working Groups meet in sessions once or twice annually, and report their progress to the Commission. Working Groups include all member States of UNCITRAL, and delegations of States normally include Government officials, academics, experts, and lawyers specialising in the subject matter of that Working Group[9].

Working Groups are assigned substantive preparatory work by the Commission on subjects considered of particular importance for the development of international trade through harmonisation or unification of international trade law. Between 2004 and 2012 a Working Group dealt with the revision of the Model Law on Public Procurement.

The techniques used by UNCITRAL for modernisation, harmonisation and unification of international trade law include legislative techniques, contractual techniques, and explanatory techniques. Only some of the legislative techniques are relevant for the subject of this research, and, in particular model laws.

"A model law is a legislative text that is recommended to States for enactment as part of their national law"[10]. The main advantage it provides for is flexibility while simultaneously creating premises for a good level of legal harmonisation. Enacting States have the option to make adjustments to the text of the Model Law, or to take over only certain provisions. However, States are generally encouraged by UNCITRAL to make as few changes as practicable when transposing model laws into their national law.

[9] Ibid, p.8.
[10] Ibid, p.14. For details on model laws, pp.14-16.

More recently, model laws are usually accompanied by guides to enactment explaining the background of the model law. Guides to enactment also address potential consequences of using various options provided for by a model law, or deviations from the provisions of a model law.

A.2 The UNCITRAL Model Law on Public Procurement – Approach, Evolution, Relevance

The fact that UNCITRAL addresses international harmonisation of public procurement legislation via a model law technique gives a clear indication of its approach to the subject. The main reason for this is that, as observed in the relevant literature[11], there can be no universal "recipe" for public procurement, as solutions will depend on many factors, such as policy objectives, legal and administrative traditions, structure of the market, capacity of public institutions and procurement staff, the corruption and anti-corruption "culture".

Flexibility is needed in approaching public procurement at an international level if states are to harmonise further their procurement rules, by allowing them to adjust their public procurement 'solutions' to the local circumstances, traditions, and policy.

Even with flexibility in place, as catered for by a Model Law that provides options and allows for adjustments – the 'universality' claimed in the Guide to Enactment[12] appears to be an over-statement to some extent. In particular, addressing both developing and developed procurement systems

[11] See P. Trepte, *Regulating Public Procurement* (OUP, 2004) p.7.
[12] Preface, p.iii.

appears problematic in some respects. An example concerns the decision not to recognise and regulate supplier lists, in light of potential discrimination and despite potential advantages[13,14].

Nevertheless, there appears to be sufficient coherence of public procurement issues at an international level enabling legislation harmonisation in the public procurement area to be conducted, to a significant degree, through the rather structured method of a model law. That coherence relates to objectives and principles that are shared by most procurement systems[15]. The Model Law provides the "essential principles and procedures"[16] needed to pursue shared objectives, whilst considering the core commercial process of buying items from the free market. At the same time, it seeks to afford the flexibility needed by individual systems for various objectives pursued and to accommodate other local circumstances[17].

In a way, *mutatis mutandis*, and noting that different contexts and objectives apply to UNCITRAL's work on the one hand, and to the EU, or WTO's GPA work in the area of public procurement, on the other hand, a certain degree of similarity in approach has been taken by the three (international) organisations. The EU's main concern is to remove barriers to intra-EU trade, similarly as the WTO's GPA concern is to remove barriers in international trade. In contrast, UNCITRAL's main concern is to facilitate

[13] For potential use of flexibility for achieving a wider influence of the Model Law, S. Arrowsmith, "Public Procurement: an Appraisal of the UNCITRAL Model Law as a Global Standard" (2004) 53 *International and Comparative Law Quarterly* 17.
[14] See also Section B.5 below.
[15] Arrowsmith, n.13, pp.18-19.
[16] Guide to Enactment, n.12.
[17] See Trepte, n.11, p.8.

harmonisation (and improvement) of public procurement law internationally. But irrespective of the angles that the three international organisations approach the subject of public procurement, it is worth noting that all of them provide (member) states with some degree of flexibility in harmonisation of national public procurement legislation. Within the spectrum of harmonisation methods, UNCITRAL Model Law rests between conventions and other more 'informal' and less systemic approaches, such as guidance or model provisions.

The preoccupation for public procurement in the context of international trade development is not surprising given the sheer volume of public procurement markets. According to reports, they account to around 14% of GDP on average, or up to 50% of the total government spending in some countries[18], including large projects of public interest in vital sectors such as health, education or infrastructure.

The first UNCITRAL Model Law on the subject dates since 1993 when the Commission adopted a Model Law for Goods and Construction. The 1993 Model Law did not cover procurement of services, but it was supplemented by the adoption in 1994 of a Model Law for Goods, Construction and Services, also accompanied by a guide to enactment. Influence of that Model Law was "considerable" in developing countries, though apparently this was not the case in "developed countries with established systems"[19]. Thirty countries are

[18] World Bank, *Benchmarking Public Procurement*, the 2016 and 2017 editions, available via http://bpp.worldbank.org. See also http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html

[19] Arrowsmith, n.13, pp.20-21.

reported to have included in their national legislations procurement laws or regulations based on the 1994 UNCITRAL Model Law[20].

The review of the 1994 Model Law was initiated in 2004. The new Model Law was adopted at the 44th UNCITRAL session in July 2011, and the Guide to Enactment one year later, in June 2012. Additional guidance for enacting states concerns "procurement regulations" (instruments used to detail and support implementation of a main 'procurement law'). Main additions brought by the 2011 Model Law, versus 1994 Model Law, besides "introduction of a 'toolbox approach' to the choice and use of procurement methods"[21], regard three areas: use of electronic means in public procurement, electronic reverse auctions, and framework agreements. Regarding frameworks, it was decided that the introduction of rules was necessary in light of the potential benefits of such arrangements, to encourage and control their appropriate use[22].

Alongside the three 'new' subjects, many other changes were made to strengthen, improve and streamline the Model Law. Thus, an area that received particular attention concerns remedies and enforcement, which was significantly strengthened, in light of the United Nations Conventions against Corruption[23].

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[20] www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure/1994Model_status.html

[21] C. Nicholas, "The 2011 UNCIRAL Model Law on Public Procurement" (2012) 3 *PPLR* NA111-123.

[22] Arrowsmith and Nicholas, n.2, pp.54-60.

[23] Ibid, pp.70-79; and Nicholas, "Reform of the UNCITRAL Model Law on Procurement" (2010), EBRD Law in Transition http://www.ebrd.co/downloads/research/news/lit102.pdf.

The 2011 Model Law maintains or even extends flexibility in some respects. The fact that the provisions on 'challenge proceedings' are not contemplated as optional does not contradict this statement. Flexibility needs to be balanced with principles of sound procurement. If flexibility in approach should mean, for example, that value for money can be compromised, or transparency or competition requirements eluded (without proper and objective justification), then the whole construction of a model law (and any national system based on it) would basically be invalidated.

The Guide to Enactment clearly advises that the main principles of the Model Law, and their procedural safeguards, should not be changed in the national legislation transposing the 2011 Model Law[24]. It is this fine line between flexibility in approach and clear procedural safeguards for the main procurement principles and processes that ensures success of model laws. A measure of success of UNCITRAL's Model Law(s) on Public Procurement is that leading international or regional organisations use it "as a benchmark for public procurement law in countries of their operation"[25]. Over twenty States are currently reported to have used the 2011 Model Law in reforming their procurement systems[26]. While these tend to be transition economies it is rather early to assess impact; an important aspect, though difficult to appreciate, is the influence the Model Law has on interpretation and implementation of legal instruments in systems outside the traditional 'remit'

[24] Pp.14-15 (mainly point 51).

[25] For example, the World Bank, EBRD, OECD and others. See http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model_status.html

[26] See Internet link above.

of the UNCITRAL, such as the EU Member States. Elements of 'good practice' from the Model Law, for example concerning framework agreements, could be implemented voluntarily under systems not requiring them (but permitting them implicitly).

B. Analysis of Non-Traditional Regular Purchasing Arrangements in the UNCITRAL Model Law on Public Procurement (2011) and Guide to Enactment

B.1 Common Issues

B.1.1 Structure of Provisions, Main Definitions and Approaches

The 2011 UNCITRAL Model Law on Public Procurement (the Model Law) introduced explicit provisions concerning various forms of NTRPA, which it refers to as "framework agreements". While this terminology is similar to that used under the EU directives to describe some of the EU non-traditional regular purchase arrangement, references to 'framework agreements' in this Chapter refer specifically to the forms contemplated by the UNCITRAL Model Law.

The structure of the provisions and additional guidance concerning framework agreements is straight-forward. Relevant definitions of framework agreements or of the various features that framework agreements can take are provided at Art.2(e) of the Model Law. Conditions for use of framework agreements are set at Art.32, under Chapter II, Section 1 of the Model Law "Methods of procurement and their conditions for use". The main 'package'

of provisions concerning the procedures for framework agreements is provided for in a separate Chapter of the Model Law: Chapter VII (Arts.58-63). Some other provisions throughout the Model Law refer explicitly to framework agreements.

On the other hand, it is noted that the regulation of the two stages of the various types of frameworks provides for a mix of 'general procurement' provisions, and 'framework specific' provisions. For example, the first stage of closed framework agreements is generally carried out via the "general"/"standard" procurement methods envisaged by the Model Law in Chapters III-V. The 'general procurement' provisions for the first stage of closed frameworks are supplemented by 'framework specific' provisions in Chapter VII of the Model Law. Second stage of closed frameworks is mainly regulated by the 'framework specific' provisions in Chapter VII. In contrast, both first stage and second stage of open frameworks are mainly regulated under Chapter VII of the Model Law, due to the specific features of these arrangements.

C. Nicolas[27] makes an analysis of the "general" or "standard" procurement methods, other than open tendering, that might be employed for the establishment of a closed framework agreement. She concludes that in most cases procurement methods, other than open tendering, are likely to be inappropriate particularly as regards closed frameworks with second stage competition. The author acknowledges that using some of the procurement methods, other than open tendering, during first stage of a framework

[27] In "A critical evaluation of the revised UNCITRAL Model Law provisions on regulating framework agreements" (2012) 2 *PPLR* pp.39-40.

agreement, are more likely to be justified, depending on circumstances, in case of some closed frameworks without second stage competition, since such arrangements would be more similar to "traditional" or "classic" procurement.

It can thus be noted that the procurement method to be employed during first stage of a (closed) framework exercise is usually open tendering, whereas any other procurement method can only be used, as an exception justified by specific circumstances, if the conditions provided for under the Model Law are met. The use of such other procurement methods will need to be justified under Art.25(e) of the Model Law, separately from, and additional to, the justification of the use of a framework agreement, and the type of framework agreement selected, as required by Arts.32(2) and 25(g) of the Model Law.

The Guide to Enactment provides (in Chapter VII[28]) a general commentary and guidance on Chapter VII of the Model Law, including the benefits and potential risks of improperly using the various types of framework agreements, a commentary concerning Article 32 (conditions for using framework agreements), as well as article by article commentaries for all provisions under Chapter VII of the Model Law.

A "framework agreement procedure" is defined in the Model Law as a "procedure conducted in two stages: a first stage to select a supplier (or suppliers) or a contractor (or contractors) to be a party (or parties) to a framework agreement with a procuring entity, and a second stage to award a

[28] Pp.253-294.

procurement contract under the framework agreement to a supplier or contractor party to the framework agreement"[29]. This is a descriptive definition, and the provisions of the Model Law cover both stages of the award procedure.

Since it is only the second stage that ends with the award of a 'procurement contract' (as defined further in Art.2(k)), the implication is that all procedural safeguards provided by the Model Law also apply to the second stage of a framework agreement procedure. These include conditions applying to communication with suppliers, maintaining a record of the procurement, obligations relating to standstill periods referred to in Art.22, and subjecting the decisions taken in the second stage of the framework procedure to the challenge (review) proceedings in Chapter VIII of the Model Law[30]. This approach is particularly important since, as discussed in the US Chapter, the experience of the US federal procurement system shows that lacking oversight and control mechanisms during second stage of ID/IQ contracts led in many cases to misuse or abuse of such closed 'framework' arrangements.

The UNCITRAL Model Law shows that three main types of framework agreements are envisaged: closed frameworks without second stage competition, closed frameworks with second stage competition, and open frameworks. Recognising that frameworks could be "over-used or

[29] Art.2(e).

[30] S. Arrowsmith and C. Nicholas, "Regulating Framework Agreements under the UNCITRAL Model Law on Procurement", Ch.2 in S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* (West, 2009), pp.117-118.

inappropriately used", affecting value for money, competition, transparency, etc., the Model Law provisions were "designed to facilitate only the appropriate and beneficial use of frameworks, discouraging their use when they are not appropriate"[31]. Also, comprehensive guidance concerning the potential risks and ways to tackle them are provided in the Guide to Enactment.

The 2011 Model Law provides that there should be a specific limitation in time of closed framework agreements (maximum duration), aimed to avoid a potential negative effect on competition, or complacency of suppliers within the framework. However, the Model Law does not provide for a specific maximum duration. This aspect is left for the states to consider and include in national legislation. But the Guide to Enactment provides extensive guidance as to practical experience to date in various jurisdictions concerning the maximum duration of frameworks.

Also, the Model Law does not require member States to include provisions concerning guaranteed minimum and/or maximum quantities to be ordered under a framework agreement, or that the subject matter of framework agreement should be procured under that framework only, as ID/IQ contracts, or respectively, requirements contracts in the US federal procurement system do. Nonetheless, the Guide to Enactment points out that where suppliers are aware of the commitments, better value for money is

[31] Ibid, p.116.

likely to be obtained, trading off for the increased inflexibility that such arrangements involve for the purchaser[32].

Moreover, besides detailed rules concerning each type of framework, the Model Law provides for certain main controls that apply to *any* framework. It is thus provided that procurement contracts can be awarded during second stage of a framework agreement only to suppliers party to the framework agreement, and that such awards will be made according to the terms and conditions of the framework (art.62(1)&(2)). Similarly, changing the description of the subject matter of the procurement is prohibited throughout the duration of a framework, while other changes are possible but only to the extent expressly permitted under the framework agreement (art.63).

Detailed information concerning the operation of the framework agreement, including the manner in which contracts are to be awarded at second stage, must be pre-disclosed in the framework solicitation (at first stage), then carried forward into the framework agreement itself, and then (as applicable) into the second stage invitation to present submissions (arts.58(d),59(1)(d)(e)(f) and 62(4)(b) for closed frameworks; and arts.60(3)(e),61(e)(f) and 62(4)(b) for open frameworks). This provides an essential means for ensuring consistency throughout the duration of a framework. Similar controls apply to the subject-matter of the procurement and other elements, such as terms (of purchasing) that can be refined at second stage, and the duration of the framework (where applicable).

[32] P.266 (point 35).

B.1.2 Conditions for Use of Framework Agreements under the Model Law

Conditions for use of the three types of frameworks are jointly presented in the Model Law, in Art.32(1). The basis for use will be the purchaser's determination that: (a) the need is expected to arise on an indefinite *or* repeated basis during a given period of time[33]; or (b) the need may arise on an urgent basis, due to the nature of items to be procured. As stated above, Art.32(2) requires the purchaser to record with the procurement file the reasons and circumstances justifying the use of a framework agreement procedure, *as well as* to justify the type of framework agreement selected. The Model Law does not provide for specific conditions for use of particular types of frameworks but the Guide to Enactment provides some guidance in this respect. These determinations and decisions require a proper understanding of the purchaser's estimated requirement(s), potential response from the market, and its likely evolution over the duration envisaged for the framework.

Regarding conditions for use of a framework agreement in general (as opposed to using 'traditional procurement'), neither the Model Law nor the Guide to Enactment, elaborate as to what "is expected" in Art.32(1)(a) of the Model Law means. Namely, the type of assessment required to substantiate the 'expectation' that the needs are to arise on an indefinite or regular basis is not clarified. The Guide to Enactment simply states that the term should be "addressed" at the level of individual procurement systems through "rules or

[33] Author's emphasis.

guidance", and that the same should apply to "how to assess in an objective manner" […] the "anticipated needs"[34] [35].

A separate matter related to conditions in art.32(1)(a) of the Model Law concerns the "indefinite *or* repeated"[36] nature of expected needs. This suggests that a framework agreement could be used both to address recurrent (and indefinite) needs, and also "in view of a need that is expected to arise on an indefinite basis, but not necessarily on a repeated basis"[37]. In effect, the circumstance could result into, or even be intended for, a framework agreement involving a single call-off. An "indefinite" nature of anticipated needs, not attached to a "recurrent" nature, goes beyond the 'classic' view on the 'remit' of framework agreements. This is considered a positive development, to the extent that appropriate decision making process is in place, ensuring that additional costs and complexity of the arrangement, compared to a 'traditional' purchasing method, are outweighed by the benefits of establishing some terms (and possibly commitment) in advance of materialisation of the need[38].

On the other hand, art.32(1)(b) of the Model Law refers to the use of frameworks for urgent procurement. The situation envisaged here is not that of establishing a framework when an emergency arises; it is that of pre-establishing a framework, for items usually needed in urgent or crisis

[34] P.260 (point 18).
[35] Objectivity is contemplated despite flexibility of conditions (point 3 pp.268-269).
[36] Author's emphasis.
[37] S. Filipon, *The Winding Road from Policy Objectives and Procedural Rules to Practical Reality – An Overview of Framework Agreements and Electronic Procurement under the New UNCITRAL Model Law*, Section 2.3 (Paper prepared for the PPGR VI Conference, June 2013, Nottingham, UK).
[38] See also, Guide to Enactment, pp.260-261 (point 18).

situations, enabling purchasers to make quick orders and supply arrangements when emergencies occur[39]. Using framework arrangements for urgent procurement inevitably involves an indefinite and/or repeat nature of anticipated needs[40]. Nevertheless, objectivity is required for this assessment as well, as to type and likelihood of emergencies to be addressed, and selection of items needed to deal with the type of emergencies[41].

The Guide to Enactment supplements the Model Law by providing for an instrument to support decisions to embark on a 'framework agreement', rather than on 'traditional' procurement, from the perspective of costs involved in a framework arrangement procedure that are likely to be "higher than those for one single-stage procurement"[42]. Thus, a cost-benefit analysis should be undertaken by the purchaser to assess whether the higher administrative costs of establishing and operating a framework agreement would be amortised (or exceeded) by the savings obtained through repeat purchases. When indefinite or urgent needs are contemplated, this type of cost-benefit analysis may be more difficult to undertake in a way that would ensure meaningful results, since it basically seeks to compare the additional administrative costs of a two-stage procedure, with benefits that might not be directly convertible into monetary/cost terms.

It might however be overoptimistic to contemplate that any decision to proceed with a framework agreement, rather than 'traditional'

[39] Filipon, n.37.
[40] Ibid.
[41] Point 19 on p.261 of the Guide to Enactment notes that similar considerations should apply as for "indefinite purchases".
[42] P.269 (point 4, under Commentary to Art.32).

procurement, taken by any purchaser in any enacting State will be substantiated objectively with a proper cost-benefit analysis. If inclusion of such an analysis in the procurement record was intended[43], it is unclear why the requirement is not provided for in the Model Law itself, or at least in the Guidance on Procurement Regulations. Nevertheless, the mere fact that this tool is referred to in the Guide to Enactment suggests that the actual methodology for carrying out a cost-benefit analysis is left for enacting states to consider.

Another matter addressed to some extent in the Guide to Enactment concerns issues to consider when choosing among various types of framework agreements[44]. It is reminded that the Model Law itself does not include provisions in this connection. However, the Guide to Enactment specifies that "the link between the type of framework […] available and the type of framework […] to be selected by a procuring entity should be explained in the rules or guidance" issued by an enacting State[45]. The Guide then concludes that "the effective use of framework agreements procedures will require the procuring entity […] to consider the type of framework agreement that is appropriate by reference to the complexity of the subject matter to be procured, its homogeneity or otherwise, and the manner in which competition is to be ensured"[46].

In order to guide enacting states (and possibly purchasers) through the various 'framework' possibilities provided for in the Model Law, the Guide to

[43] At p.270 (point 8) (Guide to Enactment).
[44] Particularly pp.261-263 (points 21-24).
[45] P.261, point 21.
[46] P.259, point 15.

Enactment explains to some extent when an option is likely to be adequate. As regards choosing among the three main types of framework envisaged[47], the Guide starts from "How narrowly the procurement can or should be determined at the first stage" which "will dictate the extent of competition that is possible and appropriate at that stage", which then determines the extent of competition that will be required / appropriate at the second stage (if any)[48]. The Guide also touches options among single and multiple supplier frameworks[49], as well as the (conflicting) relationship between second stage flexibility, administrative convenience and efficiency, security of supply, facilitating SMEs participation in procurement, and/or obtaining better terms from aggregation of demand[50].

On the other hand, no provision or recommendation in UNCITRAL instruments suggests that where the conditions for use are met, a framework agreement must or should be pursued. However, some enacting States might consider such a step, should they trust their institutional capacity to a degree that would permit such an approach.

Indeed, sound 'framework' decisions may require significant levels of professional and institutional capacity and, in light of this, capacity building should be in place when introducing or updating rules on frameworks, as the

[47] See B.1.1.
[48] P.261, point 22.
[49] On this option, see also the US Chapter.
[50] The rationale for, and policy issues concerning, the use of different types of frameworks in general are extensively covered in S. Arrowsmith, *Framework Purchasing and Qualification Lists under the European Procurement Directives: Part I* (1999) 3 PPLR 115, at pp.117-126.

Guide recommends[51]. Specific advisory/consulting services should also be used to 'tailor' approach to a specific State and market. Consideration may be given by less experienced States to a gradual introduction of the various forms of frameworks, for example, the introduction, at an initial stage, only of open frameworks for purchasing commonly used items only, a possibility that the Guide to Enactment provides for explicitly[52]. Once additional experience is gained, the State in question may consider introducing more novel techniques such as frameworks for indefinite or urgent procurements.

At the same time, the justification for embarking onto a framework agreement, as well as the justification of the selected type of framework, are to be made available to any person, at request, "after the successful submission has been accepted or the procurement has been cancelled", under Art.25(2) of the Model Law. Those justifications could be challenged under Art.64, as any decision or action of a purchaser, though it is not entirely clear when and how this could be done, since Arts.66 and 67 require acts/decisions to be challenged - in most cases - before or within standstill periods, i.e. *before* the successful submission has been accepted[53].

Nonetheless, the intention of the Model Law is that any decision or action of a purchaser should, at least in theory, be challengeable. Thus, the possibility to challenge, and for an independent body to review such a decision is likely to generate two main beneficial effects. First, the purchaser is encouraged to consider seriously the justifications it prepares before

[51] P.259, point 15.
[52] P.257, point 9.
[53] See further Section B.1.3.2 below.

engaging in a framework procedure (a preventive effect). Second, the local independent review body (or relevant court) is to nuance and detail, via its case-law, what is considered to be an acceptable justification.

B.1.3 Challenge Proceedings

B.1.3.1 General

Another issue that concerns all types of framework agreements under the UNCITRAL Model Law on public procurement, albeit a few discrete differences apply to each individual type, as shown in the next sections, are challenge proceedings. By comparison to the 1994 Model Law, the 2011 Model Law has strengthened challenge proceedings in general, and this also has specific effects concerning the control and review of both stages of framework agreements.

Under the new Model Law, an effective challenge proceedings system is regarded as an indispensable part of a functioning public procurement system, whose purpose is to avoid discretionary or abusive behaviour on the part of purchasers by: enabling participants in a procurement process (in particular bidders), who have a direct interest in connection with the procurement proceedings, to challenge decisions or actions of the purchaser that are non-compliant with the applicable regulations, and of nature to cause loss and damage; having the challenge reviewed by an independent body; having the possibility to appeal a first instance decision; and securing the possibility to have a final decision in a challenge proceeding enforced.

The main 'package' concerning challenge proceedings and remedies that may be sought or obtained by aggrieved bidders, are provided for in Chapter VIII of the 2011 Model Law (Arts. 64 to 69). Other provisions are also relevant for the challenge system, such as Arts.22 and 23 concerning acceptance of successful submissions, notification of these decisions, standstill periods, entry into force of procurement contracts and contract award notices.

By comparison to the provisions in the previous 1994 Model Law, the challenge proceedings system under the 2011 Model Law is not regarded as optional any longer, giving a clear indication to enacting States that challenges mechanisms are considered a key feature of an effective procurement system.

In order to enable bidders to challenge procuring purchaser's acts or decisions that the former consider to be non-compliant, a special attention has been given to transparency issues. This is because bidders or potential bidders can only challenge procurement acts or decisions if they are aware of them, in due time.

A significant strengthening of 'contestability' has been brought by the 2011 Model Law in that it broadened the range of acts or decisions that can be challenged, basically to any act or decision of the procuring entity[54]. This approach has important implications for framework agreements (see further).

The improvements brought by the 2011 Model Law can be summarised to three main issues. First, the 'reconsideration' before the

[54] Art.64(1).

purchaser is currently optional and appealable[55]. Secondly, any aggrieved bidder will have recourse to a review body that is independent from the purchaser[56], thus ensuring an objective review of a challenge. Thirdly, any first instance resolution is to be appealable before a Court[57].

An important issue is that of standstill periods, or the compulsory delays between the notification of the acceptance of a successful submission to all bidders, and the actual conclusion of the procurement contract. This delay is aimed particularly at allowing for challenges to be lodged by unsuccessful bidders before a procurement contract is concluded, in case they consider the acceptance decision to be non-compliant with the applicable regulations.

It is reminded that the conclusion of a procurement contract might make potential remedial measures less effective or meaningful. Standstill periods are addressed under Art.22(2)&(3) of the Model Law. A certain degree of discretion is provided to the purchaser to proceed to contracting without a standstill period where it determines that "urgent public interest considerations" so require[58]. The actual duration of standstill periods is left for purchasers to establish on a "procurement-by-procurement basis", observing

[55] Arts.66&67.
[56] Art.67.
[57] Art.64(2)&(3).
[58] Art.22(3)(c). In this case, challenges could still be lodged, including against the decision to proceed without a standstill period, under Art.67(2)(ii) but remedial action will be considered or taken under the circumstances of an existing procurement contract.

however the minimum durations established by enacting States in their legislation[59].

The 2011 Model Law also provides a wide range of pre and post award remedial and interim measures, such as suspension, set-aside, damages, and other essential measures for an effective remedial system.

B.1.3.2 Applicability to Frameworks

Under the 2011 Model Law the full system of challenge proceedings *does* apply to both stages of a framework agreement procedure, with very limited exceptions that will be discussed in the following sections. Of particular relevance is the application of challenge proceedings and safeguards to the second stage of framework agreement procedures, mainly where competition is involved. In other public procurement systems this approach is either not clearly regulated[60], or explicitly repudiated by a legal 'ban' on 'delivery or task order protests'[61].

Traditionally, the second stage of a framework arrangement may be in many cases characterised by lack of transparency. This limits to a significant degree potential challenge, and thus they might encourage non-competitive, abusive or even corrupt behaviour.

In this context, while acknowledging that balancing procurement efficiency with transparency and contestability is undoubtedly a complex task, it is submitted that the application to the second stage of a framework

[59] Guide to Enactment, p.115, para.11&12.
[60] E.g. EU system (see Ch.V).
[61] See US Chapter, on IDIQ contracts.

agreement of full transparency and challenge proceedings, including all relevant attending safeguards, is a major step ahead. It encourages a beneficial use of frameworks, that promotes the advantages and that avoids, to the extent possible, the potential risks of improperly using this method of procurement.

To achieve the above, the legal 'construction' of the Model Law provisions is articulated on a number of general provisions and specific reconfirmations. The main general provisions that are relevant can be found in Art.2(k) of the Model Law that defines a procurement contract as the contract concluded between the procuring entity and a supplier (or suppliers) "at the end of the procurement proceedings". This provision, together with mentioning of the framework agreement procedure as a method of procurement under Art.27(2), and the language of Art.62 that refers to the "second stage of a framework agreement procedure", clearly emphasise that under the Model Law, framework agreements are deemed to be methods of procurement (specific procurement procedures) and not forms of procurement contracts[62]. Under Art.64(1) any decision or action of the purchaser may be challenged, which by implication, means decisions or actions during the first or second stage of a framework agreement procedure.

Other provisions refer specifically to how challenge proceedings apply to either or both stages of a framework agreement. Thus, Art.65(1) provides that "The procuring entity shall not take any step that would bring into force a

[62] As some states consider(ed), for example France and the US. By taking this approach the second stage of awarding tasks based on the framework arrangement could fall into the contract management area, and thus would not be subject to the transparency and challenge proceedings inherent to procurement procedures.

procurement contract or a framework agreement […]", where it is informed that a challenge has been lodged. This reconfirms that the interdiction to enter an agreement or contract applies to both stages of a framework agreement procedure. Further, arts.58(3) and 62(3) make it clear that notification concerning successful submissions and standstill periods apply in principle to both the first and the second stage of a framework agreement procedure. However, Art.22(3) provides that standstill periods shall not apply, among other limited situations, to the award of procurement contracts "[…] under a framework agreement procedure without second stage competition". *Per a contrario* this means that standstill periods shall apply to the award of procurement contracts under framework agreements procedures that involve second stage competition, which is actually explicitly confirmed in Art.62(4)(d).

A special attention needs to be afforded though to the interaction between the various aspects of a challenge mechanism. As pointed out at Section B.1.2 above, the Model Law appears to contain an inconsistency stemming from the interaction among 'transparency' over certain decisions and time-limits for challenging. This concerns a potentially 'sensitive' area of a framework purchasing process, i.e. challenges against decisions to proceed to a framework agreement and/or against the type of framework chosen. Under art.25(2) the purchaser's justification concerning these decisions "shall, on request, be made available to any person after the successful submission has been accepted or the procurement has been cancelled". This is all too late since the information in the justification is essential for such challenge and the

time-limits provided for lodging a complaint expire - in most cases - *before* acceptance of the successful submission[63].

The delay in accessing justifications limits drastically the ability to challenge 'framework decisions', which appears to be against the intention of the Model Law.

In reality, the appropriate time to challenge 'framework decisions' is as early as possible during the process, so that as little time and effort is spent on an award procedure that might in the end be cancelled, if the decision is found as unjustified by the review body. This could be easily achieved, for example by requiring explicitly that the justification be included in the solicitation and/or solicitation document This would indeed allow challenges as generally intended under the Model Law, and the deadline for challenging the justification could be earlier in the award procedure in all cases, i.e. "before the deadline for presenting submissions" under arts.66(2) and 67(2)(a). Alternatively, access to certain aspects of the procurement record under art.25, such as 'framework justifications', could be allowed at any time. In any event, a solution should be sought, since the issue seems wider, affecting in a similar way justifications to use procurement procedures other than open tender (and not just 'framework decisions').

[63] Arts.66(2) and 67(2) in conjunction with art.22(4).

B.2 Closed Framework Agreements without Second-Stage Competition

B.2.1 Definition and Sub-types

The 2011 Model Law defines a "Closed framework agreement" as a "framework agreement to which no supplier or contractor that is not initially a party to the framework agreement may subsequently become a party"[64]. It further defines the "Framework agreement procedure without second-stage competition" as a "procedure under a closed framework agreement in which all terms and conditions of the procurement are established when the framework agreement is concluded"[65].

By aggregating the two texts of the Model Law, a comprehensive definition of closed framework agreement without second-stage competition arises. A distinction should be made though between setting terms and conditions (at the first stage of a framework) and concretising obligations that arise (at second stage).

It can be noticed that frameworks without second stage competition are closest to 'traditional' procurement[66]. They can be concluded with one, or more suppliers. It is the only type of framework under the 2011 Model Law that can be concluded with a single supplier[67]. This means that single supplier frameworks must always establish all terms, which provides less flexibility but

[64] Art.2(e)(ii).
[65] Art.2(e)(v).
[66] Or could even overlap to some extent.
[67] Since the other type(s) of frameworks permitted under the Model Law, i.e. those with second stage competition, are defined as being concluded with "more than one supplier" (art.2(e)(iv)).

possibly additional control against misuse. The Model Law does not limit sub-types of frameworks[68]. Thus, a framework without second-stage competition could involve a minimum quantity guaranteed, a minimum or a maximum, or neither of these, and could commit, or otherwise, either or both parties. The guidance addresses briefly when such features could be useful.

B.2.2 Selecting This Type

Justifying this type of arrangement could be challenging, irrespective of whether it involves a single or multi-supplier arrangement. Where almost all characteristics of a procurement requirement are known and fully specifiable at the time when the procurement procedure is started, except for a few, non-core, ones that may be established in detail/concretise after the framework agreement is in place (such as the precise timing, location, or quantities for deliveries[69]) then a purchaser appears to be entitled to use a closed framework agreement without second stage competition. In this connection, the Guide to Enactment states: "If precise specification of the procurement needs is possible and if they will not vary during the life of the framework agreement, a framework agreement without second stage

[68] Other than what may result from the rules concerning their establishment/operation.

[69] Within certain limits or ranges provided for in the solicitation (and the framework). It is further considered that: (i) where no (quite tight) limits or ranges can be established in the solicitation for those 'non-core terms', a framework agreement with second stage competition may be preferable; and (ii) where full specifications or prices are not established at first stage of a framework agreement procedure, then a framework agreement with second stage competition will need to be established, as it will go against the Model Law's concept of framework agreements to have such essential terms precisely established without appropriate competition at call-off stage.

competition […] will maximize competition at first stage and should produce best offers"[70]. Because there is no reopening of competition at second stage and all terms have been established when the framework was concluded, this type of arrangement offers most administrative convenience at that stage (i.e. less complex ordering procedure and shortest lead-times).

However, frameworks without second stage competition present some disadvantages in certain circumstances. The Guide to Enactment explains that "[…] this approach is inflexible and requires precise planning: rigid standardization may be difficult or inappropriate, especially in the context of centralized purchasing where the needs of individual purchasing entities may vary, where refinement of requirements may be appropriate so needs are expressed with lesser precision at first stage, and in uncertain markets (such as future emergency procurement)"[71]. Further, where "the procuring entity's needs may not vary, but the market is dynamic or volatile, second-stage competition will be appropriate unless the volatility is addressed in the framework agreement (such as through a price adjustment mechanism)"[72].

The risk of the purchaser remaining stuck with terms that no longer reflect the market and/or even its own needs could be higher for this type of framework, in comparison to frameworks that involve reopening of competition at second stage. Similarly, while a purchaser's commitment to buy under the arrangement all of his relevant requirements, or part thereof,

[70] P.261, point 22.
[71] P.262, point 22.
[72] Ibid.

or a certain quantity, is likely to result in better terms (aggregate discounts) and security of supply, such commitment could also exacerbate negative consequences for the purchaser, where it exceeds actual needs or does not reflect evolving needs[73].

Another decision that needs to be made by a purchaser (and justified under Art.32(2) of the Model Law) is whether the framework will be with one or with more suppliers. Where individual suppliers present in the market are likely to be able to meet each individual delivery (order), as well as all deliveries (orders) expected under the framework agreement, then consideration should be given to a single-supplier framework for the reasons of savings from aggregation of demand, as well as for administrative convenience in, and potentially reduced costs of, managing the framework. If there is doubt as to whether the potential suppliers will have such capacities (or interest), then the purchaser may like to consider a multi-supplier arrangement for increased security of supply.

The decision to proceed with a multi-supplier arrangement may also be determined by other considerations. The main reasons are discussed by Arrowsmith[74] and some of could be particularly relevant for frameworks establishing all terms. Thus, "Where the nature of the order varies on each occasion, which bid offers the best value for money for a particular order may also vary, according to the precise nature of the order"[75]. This could be the case, for example, where the specifications and needed terms applicable to

[73] I.e. having to procure things that are not needed, or suffer contractual consequences (such as paying damages) for failing to order committed quantities.
[74] Arrowsmith, n.50, pp.122-126.
[75] Ibid, pp.123-125.

the various items to be procured under the framework are known at the time of its conclusion, but the quantities that will be needed of each item (for each delivery) are not known in advance. Since unitary prices offered by various suppliers for each item could vary, the framework contractor offering best value for individual orders could also vary[76].

Socio-economic considerations, such as promoting SMEs, if applicable under the relevant national regulations, could be another reason for choosing a multiple-supplier framework. SMEs might be able to compete for, and deliver, smaller orders under a framework agreement. These considerations are also referred in the Guide to Enactment, in the context of 'bundling'[77].

On the other hand, because in closed framework agreements suppliers that are not a party to such an arrangement may not tender for requirements procured under it (during its duration), the issue of a limitation of competition may arise. This is particularly the case if too large a share of the relevant market is reserved under a closed framework for too long a period. The issue could appear *prima facie* less problematic for closed frameworks without second stage competition. It might be argued that, since this type of arrangement involves full competition at first stage, there is not much difference from 'traditional' procurement, particularly as regards single-supplier frameworks.

[76] A similar situation could be where actual delivery locations are not known in advance with precision for various quantities of items to be ordered, where delivery to each individual location is costed separately by suppliers when establishing the framework.
[77] P.262, point 23.

However, caution should be exercised in light of natural tendency toward aggregation of requirements for longer periods of time under frameworks, stemming from the recurrent or indefinite nature of requirements. Market research and the review of expected needs conducted prior to starting the initiation of a framework procedure should inform a wide range of decisions concerning the procurement in question, such as the duration of the framework, or the number of framework suppliers[78]. The potential anti-competitive effect should be borne in mind when making these decisions, whether or not under a particular procurement system justification for them is required[79].

B.2.3 Procedures

B.2.3.1 First-Stage Procedures

As shown above, Art.58(1) of the Model Law provides that closed framework agreements (with or without second stage competition) must be established via the open tendering method or, exceptionally and where justified[80], via the other procurement methods.

The provisions of the Model Law concerning the 'general' procurement methods, including the contents of the solicitation, shall apply *mutatis mutandis* to the first stage of a closed framework agreement, and these shall be supplemented by the specific provisions in Arts. 58(2) and 59. Thus, the solicitation will have to specify that a framework agreement procedure is

[78] See Guide to Enactment, p.259 (point 15) and p.273 (points 11&12).
[79] E.g. even where the duration contemplated does not exceed the general maximum provided by an applicable regulation.
[80] According to the provisions under Chapters II, III, and IV of the Model Law.

involved, leading to the award of a closed framework agreement without second stage competition; whether the framework will be concluded with one or more suppliers, and any minimum or maximum number of suppliers that will become parties to the framework[81]; the duration of the framework agreement[82]; the description of the subject matter of the framework, and of all other terms and conditions established when the framework is concluded; whether the award of orders at second stage will be to the lowest-price or most advantageous submission and the manner in which the procurement contract(s) will be awarded[83]; as well as all further information necessary in order to allow the effective operation of the framework agreement in question, as applicable. The specific information required to be included is aimed on the one hand, to provide bidders with all information that is needed in order to decide whether they are interested to attend the procurement procedure (and if so, to prepare their offers) and, on the other hand, to provide controls and safeguards to prevent potential misuse or abuse of the framework by the purchaser[84]. All information that is relevant to the implementation of the framework, as it results from conducting the first

[81] Setting a low maximum number of suppliers to be admitted on a framework is likely to stimulate competition at first stage and encourage better value offers. Also, specifying the expected number of suppliers may discourage uncompetitive firms from submitting offers. For example, practical experience of the current author includes involvement as a member of an evaluation committee, where the solicitation did not state the number of firms that were to be allowed onto the framework. Over 20 submissions were received, but less than five were actually considered technically responsive such as to enter the framework.

[82] That must not exceed the maximum duration provided for the national legislation of the enacting State.

[83] See B.2.3.2.1.

[84] As is the requirement in art.59(2) concerning the conclusion of a closed multiple-supplier framework - of whichever sub-type - as “one agreement between all parties” (unless specific conditions apply and subject to justification being included with the procurement record in art.25).

stage, is to be carried forward and recorded in writing into the actual framework (art.59). This contributes significantly to ensuring consistency among the two stages, namely what is achieved at first stage is not defeated at the second.

For avoidance of doubt, Art.58(3) clarifies that Art.22 concerning the notification of the successful bidders and standstill periods do apply *mutatis mutandis* to the award of a closed framework agreement. This provision was necessary since Art.22 mainly refers to procurement contracts, whilst a framework agreement is not considered to be a procurement contract under the Model Law.

B.2.3.2 Second-Stage Procedures

B.2.3.2.1 Choosing a Framework Supplier to Perform an Order

The provisions of the Model Law and guidance concerning allocation of orders among framework contractors under multiple-supplier frameworks without second stage competition - i.e. choosing a framework supplier for each individual order – are very limited. It is submitted that this is a weakness. Enacting States might like, or should be encouraged to clarify and detail the matter if they choose to recognise and permit this type. In the current author's view, whilst objective conditions for allocating 'work' among framework contractors are required by the Model Law, they ought to be turned into much more visible requirements and clearly detailed options.

These should be in direct relation to the circumstances that determined selection of this type of framework in the first place[85].

Art.58(2)(d) in conjunction with art.59(1)(e)&(f) require that "the manner in which the procurement contract will be awarded" and whether that award "will be to the lowest-priced or the most advantageous submission" must be predetermined from the first stage and "provided to suppliers when first soliciting their participation […] at that stage". These provisions have a number of implications. First, rightly, purchasers are denied full discretion to allocate orders once a framework is concluded (which could easily result in favouritism, affect "fair, equal and equitable treatment"[86] or value).

Second, a 'rotation' system, where each individual supplier within the framework is in turn awarded orders, consecutively, as individual needs arise (for example in the alphabetical order of the name of the suppliers), also *seems* to be denied. Indeed, such allocation manner does not take account of "the lowest-priced or the most advantageous submission". It could also be easily abused by placing larger orders with favoured suppliers, or larger orders could just happen to go to suppliers that did not offer best terms for that call-off. However, the position concerning 'rotation' is not fully clear in the UNCITRAL instruments.

The economy of the published text of the Model Law suggests that the main method contemplated for allocating orders under frameworks without second stage competition is by taking account of the best terms offered. One

[85] See B.2.2.
[86] See Preamble to the Model Law, letter d).

option may be for each call-off to be allocated in the order of the ranking of the submissions, as resulted from their assessment at the first stage of the award procedure, subject to the availability of the supplier. When an order is to be placed, availability is checked with the bidder whose submission was ranked first. If this supplier is available to supply then the order goes to him. If this bidder is not available, the availability of the bidder that submitted the second ranked submission is checked and, if available, the order will be placed with this bidder, and so on ('cascading' in the order of ranking).

This system could be appropriate where there is a significant level of homogeneity and consistency of requirements among orders, security of supply is sought, and a single supplier might not be able to fulfil any and all orders. This method might in the end mean that all orders under a framework agreement will be awarded to the same supplier, if the highest ranked bidder is capable and available to supply them. But the approach allows a bidder to participate in the framework agreement even if he may not able to meet certain orders. At the same time, it can offer the purchaser an optimal combination of security of supply *and* value-for-money.

However, this approach presents the risk that orders would be placed in the order of priority of the best terms offered by suppliers in light of requirements *estimated* overall for the framework at first stage. In many cases these may not coincide with best terms for the *actual* orders placed, in particular where "the nature of the order varies on each occasion"[87], such as where the combinations of items and the quantities for orders are not known

[87] Arrowsmith, n.75 (see B.2.2 and also n.76).

at first stage and unit prices offered by various supplier vary (which is very frequently the case). It is thus preferable - or even strongly advised - for orders to be placed by applying the terms offered by suppliers at first stage to the *specific* requirements of each order. It is submitted that this is the main allocation method contemplated by the Model Law. It is not trouble free though and Enacting States need to circumstantiate it as discussed below.

The main issue it raises is the *criteria* that are to be used when applying the terms offered at first stage to the specific requirements of an order. In this connection the Guide to Enactment states: "The basis of the award will normally, but not necessarily, be the same as for the first stage"[88]. The example it then gives concerning the use of a different basis for award seems to relate to frameworks involving second-stage competition, but this should not exclude those without such competition.

Thus, the application of the same criterion/a as for the first stage is likely to be uncontentious, whether it involves award to the lowest price or the most advantageous submission (i.e. price and other award criteria, as provided for the evaluation of 'tenders' under arts.10&11). This approach is likely to be appropriate for straight-forward frameworks with significant levels of consistency among orders (and among the original estimation and actual orders). Similarly, it is likely to make sense in many cases to select framework contractors on the basis of most advantageous submissions (cost and quality), and to then place orders at second stage, among framework suppliers, on the basis of lowest-price submission as applied to the specific requirements of the

[88] P.280, point 14.

order in question. This approach could provide appropriate value where "the nature of the order varies on each occasion"[89] (within the 'parameters' originally set).

Potentially more problematic are situations where the criterion used at first stage is the lowest-price, whereas orders were placed (at second stage) by using a combination of factors, since the lowest-price criterion at first stage might have rejected submission(s) that could then best meet the other criteria to be used at second stage[90]. Some situations can also be problematic where a certain set of criteria is used to determine the most advantageous submissions at first stage, and a different set (and/or different weightings) to determine the most advantageous submissions at call-off stage, for similar reasons as above.

In any event, in relation to both these cases, the requirement in art.59(1)(e) – that the framework (and the solicitation for it) must specify whether the award of contracts at second stage "will be to the lowest-price or to the most advantageous submission" – cannot suffice. The criteria and weightings should also be pre-disclosed, as is required (only) for frameworks with second stage competition in art.59(1)(d)(iii). Enacting States should thus consider whether to permit (or limit) the use of such 'configurations' of framework without second stage competition, and in the affirmative,

[89] Arrowsmith, n.75.

[90] In particular, for example, where the features involved by the 'other' criteria have not even been considered as conditions for participation at first stage.

supplement the rules with additional safeguards as discussed here, to avoid potential misuse or abuse[91].

B.2.3.2.2 Transparency

Under frameworks without reopening of competition, there is no requirement for the purchaser to notify framework suppliers of its intention to award an upcoming order, for example prior to initiating assessment of first stage submissions with regard to that order.

Art.62 of the Model Law regulates the "Second stage of a framework agreement procedure" jointly for all types of frameworks. It comprises just one specific provision concerning frameworks without second stage competition. This is found in para.(3) that provides that the acceptance of a successful submission will follow the process and notification described in Art.22, but that para.(2) thereto will not apply.

Basically, this is to say that no standstill periods apply to the award of procurement contracts under framework agreements without second stage competition. It also means that, once a 'successful submission' is established by the purchaser for an order, it needs not notify the other framework suppliers about its determination (or the reasons therefor). Instead, the purchaser simply proceeds to "dispatch the notice of acceptance of the successful submission to the supplier [...] that presented that submission"

[91] Variation of weightings among specified ranges should probably be precluded in all cases, since this seems inconsistent with the idea of a framework that 'establishes all terms and conditions'.

under art.22(4). Then, once contract conclusion formalities are complete the purchaser gives notice of the contract "to other suppliers" under art.22(10).

In addition, under art.23 of the Model Law, the publication of award notices is compulsory for all procurement contracts, including those awarded under frameworks without second stage competition. For under the threshold contracts, award notices are to be published cumulatively from time to time, at least annually[92].

B.2.4 Challenges

It follows from the section above that ordering process under a framework without second stage competition remains internal to the purchaser up to informing the successful supplier, and unknown to 'fellow' framework suppliers until the awarded contract is concluded and in force. Further, the ordering process is unknown to any other potentially interested parties - such as participants in the first stage whose submissions had been rejected - until (some time) after the order contract has been concluded.

This means that challenges concerning second stage awards can only be lodged after the conclusion of the contract, since aggrieved parties are likely to have been unaware that an award was intended prior to that point. Consequently, only post-award remedies may be available, such as cancellation of the contract or damages. Remedial action could be more difficult, and less efficient, in particular where by the time the challenge is settled the contract has already been executed.

[92] Para.2.

This approach could, to some degree, be explained by the fact that there is no further opening of competition, and that the awards at the second stage are made on the basis of the submissions presented (and evaluated) during the first stage. Another reason may be to ensure the efficiency of this procurement method.

Such considerations may be reasonable for single-supplier framework agreements, where challenges are less likely. However, in the case of multi-supplier closed framework agreements without second stage competition Enacting States may like to consider strengthening further the challenge system, in light of the limited visibility concerning the selection of a supplier for each order at second stage. This might include provision for standstill periods for order award decisions[93].

It should be recognised though that, even as it currently stands (i.e. without potential strengthening discussed above), the UNCITRAL provision for challenging award decisions under this type of framework is the most advanced among the systems investigated[94].

B.3 Closed Frameworks with Second-Stage Competition

B.3.1 Definition and Sub-types

A closed framework agreement is defined in the Model Law as "a framework agreement to which no supplier […] that is not initially a party to

[93] Consideration might also be given to including reduced standstill periods (i.e. shorter than those applicable to the other types of awards), since challenges against awards made during the second stage of framework agreements without second stage competition should be straight-forward.
[94] See for example discussion in the EU chapter.

the framework agreement may subsequently become a party"[95]. Art.2(e)(iv) of the Model Law defines a framework agreement procedure without second stage competition as "a procedure under an open framework agreement or a closed framework agreement with more than one supplier […] in which certain terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded are to be established or refined through a second-stage competition". By aggregating the two definitions, a comprehensive definition of closed framework agreements with second stage competition arises.

As for frameworks without second-stage competition, the Model Law does not limit sub-types of frameworks[96]. It should however be noticed that enforcing framework suppliers' commitment to supply (where applicable) could be more difficult since framework suppliers may either not attend second-stage competition, or present unattractive submissions.

On the other hand, the definition itself outlines two 'sub-types' of frameworks with second-stage competition: one in which at first stage some terms are not established with precision, but are established within certain limits or parameters, and are to be established with precision at second-stage; and another one in which some terms are not established *at all* at first stage, and are to be (fully) established at second stage only. The latter sub-type may present additional flexibility, but also higher risks since there would be no pre-established limits for the terms not established at first stage, whereas

[95] Arti.2(e)(ii).
[96] See B.2.1 and n.68.

competition is limited to the framework suppliers at second-stage. Thus, additional caution is advised for this sub-type[97].

B.3.2 Selecting This Type, and Levels of Competition at Each Stage

An aspect arising from the definition[98] is that reopening of competition at second stage is not possible under frameworks that establish all terms with precision[99]. It is submitted that this is an unnecessary limitation[100]. Even where all terms are established at first stage, a purchaser may contemplate that even better terms could be obtained for (very) large orders though there is no guarantee that so large 'one-off' needs materialise. In this case he may like to reserve the right to reopen competition for orders above a certain volume/value.

Closed framework agreements with second-stage competition represent one more step further away from 'traditional' procurement. First, the subject-matter of the procurement needs not be fully specified as of the beginning of the award procedure for the framework. Second, not all terms and conditions are to be fully established during the first stage of the procedure, some of them being refined or established during the second stage. Submissions presented during the first stage of the procedure are not

[97] See collusion risks at B.3.3.2.
[98] In conjunction with that of closed frameworks without second-stage competition.
[99] A similar approach is present in the French procurement system.
[100] The EU 2014 Public Sector Directive explicitly provides for the possibility to reopen competition where all terms are established at first stage, subject to pre-disclosing it together with the objective criteria determining whether or not competition reopens for an order.

final[101] by reference to the actual procurement contract(s) that will be concluded during the second stage. Thus, first-stage submissions and their evaluation is used for selecting the framework suppliers and for establishing certain terms and conditions for the actual contract(s) but not all. Third, during the second stage competition is reopened among framework suppliers, in order to establish the 'best value' offer for each individual order, and to refine or establish terms that were not 'finalised' during the first stage. And fourth, the arrangement can only be a multi-supplier one.

It can be noticed that closed framework agreements with second-stage competition provide increased flexibility for the purchaser, and better chances of meeting specific needs that cannot be fully anticipated in every detail at the time when the framework is initiated. The potential for 'late customisation' of requirements makes this type of framework more amenable to be used as 'multi-agency' or multiple-user arrangements.

On the other hand, closed framework agreements with second-stage competition offer a means for some adaptation of terms to dynamic or volatile markets[102]. Thus, they could be useful where "It may not be possible when the basic terms and conditions are agreed, to know who will be able to make the most advantageous bid at the precise time the order is placed"[103]. Specific examples could include "information technology products" where

[101] And could be partial where some terms are not established at all at first stage.
[102] Guide to Enactment, p.262, point 22.
[103] N.50, pp.122-123.

"regular changes occur not just in relation to price but also […] to quality", some "professional services" or "business consulting services"[104].

However, the additional flexibility brought by this type of framework comes at the 'cost' of second-stage convenience. Reopening competition means that ordering is more complex a process and requires more time than in the case of frameworks without second-stage competition. The higher the number of terms being left to be refined or established at second stage, and of suppliers admitted onto the framework, the 'heavier' second-stage process is likely to be[105].

Where requirements (and terms) can be defined from the beginning in quite some detail, increasing the competition at the first stage by allowing a rather limited (small) number of framework suppliers may encourage the receipt of good value and meaningful submissions[106], since suppliers will see more opportunities of business at the second stage (there will not be many competitors at that stage). If during the second stage, suppliers are required to present enhanced offers for the specific features of each individual order, in a further competitive exercise among framework suppliers, then good value and terms that are in accordance with prevailing market conditions are likely to be obtained. Nonetheless, the number of framework suppliers should not be too low in order to allow for a meaningful competition at the second stage[107].

[104] Ibid.
[105] N.102.
[106] That suppliers trust they can implement.
[107] See also collusion risks at B.3.3.2.

When a less detailed description of future procurement requirements and applicable terms is possible at first stage, it appears more sensible to enhance competition at the second stage by allowing higher numbers of framework suppliers to join the framework. This is so because insufficient details available during the first stage could mean that first-stage submissions may not be fully relevant for the actual orders. However great care needs to be exercised, since very loose terms and very broad descriptions of requirements at the first stage may well result in an irrelevant selection of framework suppliers.

B.3.3 Procedures

B.3.3.1 First-Stage Procedures

The first stage of a closed framework agreement procedure with second-stage competition is to some extent similar to that of a closed framework agreement without second-stage competition. It will normally be required to follow the open tendering procedure, whilst the use of the other award procedures (provided by the Model Law) is only permitted exceptionally if the conditions for the use of those procedures are met.

In comparison to 'traditional' purchasing, additional information will need to be included in the solicitation and in the framework agreement *per se* (arts.58&59 of the Model Law). Such information is similar to that required for frameworks without second-stage competition[108], except for stating that the procurement will be conducted as closed framework agreement with second-

[108] See B.2.3.1.

stage competition, *and* subject to including supplementary information provided for specifically for this type of framework under art.59(1)(d).

It is thus explicitly stated that following will also have to be specified: a statement of the terms and conditions of the procurement that are to be established or refined through second-stage competition[109]; the procedures and anticipated frequency for any second-stage competition, and envisaged time-limits for presenting second stage submissions[110]; the procedures and criteria to be applied during the second-stage competition, including the relative weight of such criteria and the manner in which they will be applied, that *must* be compliant with arts.10&11 of the Model Law[111]; and the permissible range for varying the relative weights of evaluation criteria during the second stage (if applicable)[112].

The compulsory content of a solicitation for a closed framework agreement with second stage competition, that is also to be included in the actual framework agreement, is aimed to ensure coherence throughout the two stages and to 'motivate' proper procurement planning.

B.3.3.2 Second-Stage Procedures

The second stage of a framework agreement is regulated by art.62 of the Model Law, and most of its provisions concern the type of framework

[109] Art.59(1)(d)(i).
[110] Art.59(1)(d)(ii).
[111] Art.59(1)(d)(iii).
[112] Ibid.

agreements that involve second-stage competition[113]. These are included in art.62(4), and their main purpose is to ensure full transparency, competition and contestability for all framework suppliers in connection with all orders that are to be issued.

Thus, the first requirement is for the purchaser to simultaneously invite all framework suppliers to present submissions, or only those capable of meeting the order in question, provided though that *all* framework suppliers be given notice of the second-stage competition[114]. This allows framework suppliers to participate if they wish, precluding a purchaser from discretionarily inviting only some framework suppliers that are deemed 'capable' to meet a specific order. It is an excellent safeguard against unjustified use of limitations to (or exemptions from) second-stage competition. Whilst the Model Law is silent on what could be valid reasons for such limitation, these might include situations where a supplier does not offer delivery to some place(s), or a certain combination of items, where its capacity is busy with a previous order, and others.

The invitation will have to provide full information concerning the order in question, including a restatement of terms and conditions of the framework agreement that are to be included in the actual procurement contract, a restatement of the award procedures, award criteria, and their relative weights, a statement concerning the terms and conditions that are to

[113] Closed framework agreements with second stage competition and open framework agreements.
[114] Art.62(4)(a).

be refined or established through the second stage competition, as well as full details concerning the procedures for presenting submissions[115].

The purchaser must evaluate the submissions received by the deadline[116] in accordance with the award criteria stated in the invitation to second-stage competition. The acceptance of the successful submission will have to observe all procedural requirements under art.22 of the Model Law, including the application of standstill periods[117].

An important issue here is requiring, whenever possible, that second-stage submissions present enhancements compared to the first-stage submissions, in addition to being compliant with the terms that were refined, or further detailed by the purchaser. For example, it would not make sense to allow a certain supplier to enter a framework on the basis of its price as submitted during the first-stage, if during the second stage he would be allowed to present a much higher price. *Prima facie*, it may be considered that the further competition at the second stage should prevent the submission of higher offers, but there is a risk of collusion between framework suppliers (in particular if they are just a few), as they will know each other's identities[118]. They could thus make an 'under the table' agreement where they 'slice the

[115] Additional information required to be included in a second-stage invitation is provided in art.62(4)(b).

[116] Provided for their receipt in invitations to second-stage competition (art.62(4)(b)(iv)).

[117] Art.62(4)(d). However, standstill will not apply for 'under the threshold orders' or where the purchaser determines that urgent public interest require the procurement to proceed without a standstill period (arts.22(3)(b)&(c)).

[118] There may be practical situations when 'capping' the prices offered at the second stage may not be feasible. In those cases clear conditions should be included in the solicitation and the framework agreement concerning potential offers during the second stage that would be more onerous than those made in order to enter the framework agreement.

pie' (the total requirements to be procured under the framework) among themselves but raise their financial offers artificially for each order, such as each is allowed to 'win' certain orders at higher prices. If that happens, opportunities provided by this type of framework would be lost, best value would not be obtained, and effective competition could be seriously damaged. It should also be mentioned that the risk of collusion could exacerbate in connection with terms that are not established at all during the first stage.

In regards to criteria to be used at second-stage competition, there is explicit requirement that they must be among those that are applicable to the evaluation of tenders[119]. However, as in the case of frameworks without reopening competition, second-stage criteria may or may not be the same as that used at first stage. From the provisions it can be inferred that under the same framework some orders might be awarded to the lowest priced submission while others could be awarded to the 'most advantageous submission' provided that the option is stated in the initial conditions together with objective criteria for determining which criterion applies to each order[120]. Finally, commercial judgement needs to be exercised to ensure that the (sets of) criteria used at the two stages are consistent and converge towards achieving the intended objectives of the framework. At the same time, Enacting States may like to limit possibilities to amend second-stage criteria during the implementation of the framework (under art.63).

[119] Art.59(d)(iii) referring to arts.10&11.

[120] For example, best value to be used for orders larger than a certain value, and lowest price for those below that value.

B.3.4 Challenges

All actions or decisions taken by a purchaser during second-stage competition are challengeable, as expressly stipulated under Art.62(4)(b)(ix) of the Model Law. All relevant information in this connection, including the applicable standstill periods[121] must be included in the invitation to the second-stage competition. Notices concerning second-stage competition addressed to framework suppliers not invited to take part (issued at the same time with invitations to framework suppliers deemed "then capable" of meeting the needs of the order[122]) may also be challenged where deemed 'non-compliant'.

On the other hand, art.22 concerning acceptance of the successful submission is fully applicable to second-stage competitions, including second paragraph thereto[123]. Thus, once the evaluation of second-stage submissions is complete, the purchaser must "promptly notify each supplier […] that presented submissions of its decision to accept the successful submission at the end of the standstill period". This provides opportunity to challenge an intended award decision before entry into force of a contract. Thus, pre-award remedies are available to second-stage competition. All other transparency requirements concerning any awards are also applicable. These

[121] Or reasons why standstill does not apply.
[122] Art.62(4)(a)(ii).
[123] Which, as explained at B.2, does not apply to awards under frameworks without second-stage competition. Also, it may not apply for awards within a framework with second-stage competition, where the value of the order is 'below the threshold' or "public interest considerations" apply (art.22(3)(b)&(c)).

include notices of concluded procurement contracts (art.22(10)) and publication of public notices of award under art.23[124].

The features above make the challenge system under UNCITRAL frameworks with second-stage competition the most advanced among the procurement systems investigated in this research[125].

B.4 Open Framework Agreements

An open framework agreement is defined in the Model Law as a "framework agreement to which a supplier (or suppliers) […] in addition to the initial parties may subsequently become a party or parties"[126]. This type of framework must be established and maintained online[127] and shall provide for second-stage competition[128]. Thus, the potentially negative implications of closed frameworks that limit second-stage competition to the suppliers that joined the arrangement originally can be avoided in open framework agreements, since other suppliers can also participate in second-stage competitions, whilst increased competition could in turn result in better value offers.

However, this is not to say that suppliers that are not a party to an open framework can participate directly into second-stage competitions. They

[124] See B.2.3.2.2.
[125] For potential further improvements see Analysis (Ch.VI).
[126] Art.2(e)(iii).
[127] Art.60(1).
[128] Art.61(1) (also art.2(e)(iv)).

will have to become a party to the framework agreement first[129], by applying to become so at any time during the duration of the framework agreement[130].

A decision concerning an application to become a party to an open framework agreement should not be deliberately delayed in order to prevent the applicant from participating in a specific order call. On the other hand, Art.60(5) of the Model Law provides for a maximum time-limit for the examination of applications to become a party to an open framework agreement, to be established by enacting States[131]. This time-limit should be short, since only qualifications and responsiveness are examined during the first-stage of an open framework agreement[132].

Because suppliers are to be allowed to apply at any time during the life of an open framework agreement, the 'traditional' methods of procurement (such as the open tendering[133]) cannot be used for the first stage of this type of framework. It is of the essence of those 'traditional' procedures that only submissions received by the purchaser by a clearly defined time-limit - that is *common* for any and all tenderers - are to be examined, whilst submissions received after that deadline are to be rejected. Thus, a specific first-stage procedure is devised in the Model Law for open frameworks, which is a fully open one allowing for an on-going application process for entering the

[129] Art.62(2) states that procurement contracts under a framework agreement can only be awarded to a supplier that is a party to the framework agreement.
[130] Arts.60(4)&60(3)(d)(iv).
[131] The time-limit should be expressed in working-days and appears to flow from the date an indicative submission has been presented to the purchaser.
[132] Guide to Enactment: p.284 (point 8), p.285 (point 12).
[133] Or others referred to under Chapters II, III, and IV of the Model Law.

arrangement[134]. It can be noticed that in open frameworks the two stages are not necessarily subsequent, as they both run throughout the duration of the arrangement.

The Model Law clarifies[135] that the purchaser shall solicit participation in an open framework agreement by causing an invitation to be published in accordance with the requirements for open tendering[136], and then describes the required content for the invitation[137]. This includes: full data of the purchaser and of any other institutions that are entitled to award procurement contracts under the arrangement[138] (in the case of multi-agency arrangements, or centralise purchasing); that an open framework agreement is involved; information about how the framework agreement will operate, including notifications for future procurement contracts under it; the terms and conditions for suppliers to be included in the framework.

The solicitation must also state all information required to be set in the framework agreement. This is specified in art.61(1) and it is basically very similar to that provided for closed frameworks with second-stage competition[139], subject to some variation as regards the establishment of terms for future purchases. Under art.61(2), the purchaser is required to

[134] In arts.60&61 of the Model Law.
[135] In art.60.
[136] Art.60(2) referring to art.33.
[137] In art.60(3).
[138] Art.60(3)(a). Whilst this provision makes direct reference to the fact that open frameworks can be used for multiple-agency or centralised purchasing, other types of frameworks too can be used in this way as discussed above (also Guide to Enactment, e.g. pp.33,255,259,etc.).
[139] As regards the duration of the framework, it must be stated in the solicitation and the framework, but Enacting Stats are not required to impose a maximum legal duration since open frameworks do not limit (second-stage) competition in the way closed ones do.

republish at least annually the invitation during the entire duration of the open framework, and also to ensure unrestricted, direct and full access to the terms and conditions of the agreement and to all other information concerning its operation.

The first stage in open frameworks is not a 'competitive' one (as in closed framework agreements), and full competition is employed during the second stage of an open framework procedure. This is natural since the intention is to keep the framework open to suppliers that meet 'suitability' requirements. Therefore, the indicative submissions presented during the first stage are not evaluated competitively by making comparison among themselves (or ranking them on the basis of technical and financial merit), but they are only examined in terms of meeting the qualifications requirements and responsiveness. So, the submission examination exercise at the first stage is not intended to limit the number of framework suppliers by comparing their submissions[140]. Actually a meaningful comparison could not even be made given that suppliers may apply at any time.

These features raise the question of the manner in which terms of future purchases are set at first stage, an aspect that receives limited attention in the Model Law and the guidance. The "indicative" nature of first-stage submissions, the requirement for them not to be evaluated (competitively), but only examined for 'responsiveness' at first stage[141], and

[140] Limiting the number of suppliers is only allowed (as an option for Enacting States) where required by the "capacity limitations" of the "communications system" of the purchaser, under art.60(7) (see also art.60(3)(d)(ii)). However, the 'selection' is not to involve a comparison of the merits of indicative submissions either.
[141] E.g. Guide to Enactment, p.286, point 15.

the fact that they are to be regarded as 'not binding' in relation to second-stage competition[142], all seem to indicate that - at first stage - terms of future purchases are set by the purchaser as conditions for admittance onto the framework. Basically, an indicative submission from a supplier only confirms that he understands what the requirements (or minimum requirements) of the purchaser are likely to be at second stage, but they do not affect the terms set at first stage[143].

On the other hand, it can be noticed there is a difference in the scope of second-stage competition by comparison to closed frameworks involving reopening of competition. Thus, under open frameworks, terms and conditions may only be *refined* at second stage, whilst establishing terms at second stage is not envisaged[144]. This suggests that *all* terms of future purchases should have been set at first stage, even though some of them - possibly many - not with precision[145]. Even if the reason for this is that open frameworks are intended for "simple standardized items"[146], it has to be recognised that - in light of the manner in which terms are established at first stage (i.e. by the purchaser) - the price is actually to be *established* (rather than refined) through second-stage competition. The open framework

[142] Ibid, p.257.
[143] It might however be useful for a purchaser to have the option of taking the view (if appropriate in specific cases) that, to the extent a first-stage submission exceeds the minimum requirements of the purchaser, that submission becomes binding for the supplier in question as to the minimum terms that he is to offer in future second-stage competitions. See dynamic purchasing systems in the EU (at Ch.V.C.3.3.1).
[144] Art.61(1)(c). Also, Guide to Enactment, p.288, point 4.
[145] It seems peculiar that under closed frameworks it is permitted to establish terms through second-stage competition (though that type involves some limitation of competition at that stage) and not in open frameworks that do not limit competition.
[146] Guide to Enactment, p.287, point 2.

technique is relatively novel and implementation of the Model Law in Enacting States will need to streamline these aspects in the interest of clarity and legal certainty.

Once a decision has been reached concerning indicative submissions presented, the suppliers shall be promptly notified whether they have become parties to the framework and, if not, about the reasons for the rejection[147]. With this, the first stage of an open framework agreement is complete for the supplier(s) in question, certainly subject to any challenge lodged by an applicant against the purchaser's decision. However, it needs noticing that because applications to become a party to an open framework can be made at any time during its duration (and the possible overlap of stages) contestability by potentially interested third parties and the application of certain related measures present specific features.

A first aspect concerns standstill periods. These will not apply since art.60(8) does not refer to art.22[148]. In other words, a supplier already on an open framework will not have a chance to challenge first-stage admittance decisions concerning new-coming applicants before such decisions are effective. This seems sensible since suppliers already on a framework will always want to preclude additional ones to join, or at least delay additional competition for upcoming orders. Allowing such consequence would defeat the concept of an open framework, whose purpose is to allow for an increased competition during the second stage, and not to limit that

[147] Art.60(8).

[148] Where the law intended art.22 to apply, for example for the award of closed frameworks, clear references were included, such as is in art.58(3) or, for second stage-competition, in art.62(3).

competition. Post-admission challenges by fellow framework suppliers should not be affected though.

Conversely, new applicants will not have the procedural safeguard of the purchaser's prohibition to bring into force the framework agreement where a new applicant challenges the decision to reject him joining the framework. This is because the framework is already in force with other suppliers and the aggrieved applicant "will be able to be admitted to the framework agreement for future purchases if a challenge is resolved in its favour"[149]. However, there may be the possibility for suspending the operation of the framework, under art.67(3). This is to be decided by the relevant review body, depending on the circumstances of the case.

The second stage of an open framework agreement will always involve competition, as specified under art.61(1). The provisions concerning such competition, as well as challenges relating to the second-stage, are the same as for closed framework agreements with second-stage competition[150]. It should be pointed out here that an electronic reverse auction (ERA) could also be used as the second stage of a (closed or open) framework involving reopening of competition.

Open framework agreements sought to achieve some benefits of both 'supplier lists' and the more classic forms of framework agreements - in particular by avoiding the closure of competition that closed frameworks involve, and concentrating competition at the second-stage, when a

[149] Guide to Enactment, p.287, point 16. Consideration may be given to damages or other alternative remedies where the aggrieved applicant that is successful in his challenge lost chance to attend certain orders under the framework.
[150] See B.3.3.2 and B.3.4.

procurement need has materialised and terms offered are likely to reflect actual market conditions. Whilst the recognition and regulation of open frameworks is a very positive development, it is submitted that this should not have precluded the introduction in the Model Law of provisions concerning 'supplier list' arrangements[151].

B.5 Supplier Lists

We have shown in Ch.I that two major types of NTRPA arise from their definition: 'framework arrangements', which at first stage involve the assessment of 'suitability' of interested suppliers *as well as* the establishment of some terms of future purchases; and 'supplier lists' which at first stage *do not* involve the establishment of terms for future purchases. It follows that 'supplier lists' may range from a list of registered suppliers potentially interested to supply certain categories of items, to a list of registered suppliers whose 'suitability'[152] to supply specific items has been fully assessed at first stage[153]. On the other hand, the arrangements explicitly recognised by the Model Law (discussed at B.2-B.4 above) do involve the establishment of terms[154] at first stage.

It needs mentioning that at some points during the revision of the (1994) Model Law on Public Procurement the Working Team considered the

[151] Despite the view expressed in the published Guide to Enactment (p.254, point 3).
[152] I.e. qualifications and other applicable conditions.
[153] Arrowsmith and Nicholas, n.2, p.60.
[154] Even though the 'degree' and 'method' of establishing them differs among the three (main) types of frameworks, as discussed.

idea of introducing the concept of 'supplier list' in the new Model Law[155]. However, in the end this was rejected. The reasoning for it – mainly relating to "elevated risks to transparency and competition that suppliers' lists are considered to raise"[156] and an inherent lower degree of second-stage efficiency and convenience in comparison to frameworks[157] – seems unconvincing.

In a number of pieces published over time, Arrowsmith analysed 'supplier list' arrangements, addressing main typologies, as well as potential benefits, risks, and legal means to control those risks[158]. Some of these related specifically to the UNCITRAL instruments on public procurement[159].

In some cases, it may be possible to conduct 'suitability' assessment (or part of it) jointly for a number of subsequent purchases, even though the 'coherence' of envisaged future requirements does not permit the establishment of terms in advance (as it would be required under a framework arrangement). Similarly, the subject matter of procurement can also range to complex future requirements in the case of lists, whereas this is unlikely for frameworks[160] (or even 'precluded' for the open framework concept in the Guide to Enactment[161]).

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[155] Arrowsmith and Nicholas, n.2, pp.65-70.
[156] Guide to Enactment, p.254, point 3.
[157] Ibid, p.288, point 4.
[158] E.g. S. Arrowsmith, n.50, at pp.115-117, and *Framework Purchasing and Qualification Lists under the European Procurement Directives: Part II* (1999) 4 PPLR 161, at pp.171-173; S. Arrowsmith, n.13, at pp.33-36; also, Arrowsmith and Nicholas n.2, pp.60-70.
[159] The last two in the note above.
[160] Arrowsmith and Nicolas, n.2, p.61.
[161] See B.4.

In any event, lists could allow achieving some administrative efficiency at both the first and second-stage, by avoiding the need to repeat 'suitability' assessment for each individual future requirement. They could also facilitate proper planning of future requirements by grouping estimated future requirements and approaching them in advance, which would otherwise each have to be addressed as a 'one-off' full-cycle procurement process.

The main perceived risk in relation to lists seems to be that of the arrangement getting 'closed' to new-comers, thereby significantly restricting competition. However, this could be addressed by including legal requirements that the arrangement be maintained open and operated fairly, in the same way that an open framework is, i.e. by requiring regular (or permanent) advertising, providing for transparent and objective admittance criteria and conditions, allowing suppliers to apply for registration at any time, providing for a short time-limit for the assessment of applications, as well as appropriate oversight and challenge mechanisms over the admittance process. Additionally, conditions for establishing a supplier list arrangement could be provided for, together with appropriate justification, for example where the establishment of framework arrangement is not possible or appropriate for jointly approaching a 'group' of contemplated future requirements that are somehow related mainly in terms of the qualifications required from suppliers capable of performing them.

Arrowsmith distinguishes among 'mandatory' supplier lists, where registration on the list is a condition for participating in any procurements under it, and 'optional' lists where registration is not compulsory for

participating in procurements. In other words, in the latter type suppliers may request that their qualifications be assessed specifically for an individual purchase, on the occasion of that specific procurement exercise, and need not pre-register on the list in order to be permitted to attend. This is a very important distinction, since it can be noticed that both benefits and risks are likely to be higher with mandatory lists.

As shown, the 2011 Model Law does not include any explicit provisions on supplier lists. Mandatory lists are (implicitly) prohibited, since art.9(4) provides that "A procuring entity shall impose no criterion, requirement or procedure […] other than those for provided in this Law", and registration on a list could not be identified in the Law[162]. Still, optional lists do not appear to be precluded by the Model Law, given that they are, in principle, an option rather than a requirement for suppliers. However, the lack of explicit recognition is unlikely to encourage the use of optional lists and in particular an appropriate use by advertising the list.

C. Conclusions

While the 1994 UNCITRAL Model Law on public procurement did not regulate 'framework' purchasing at all, the new Model Law has introduced specific and detailed regulations concerning framework agreements, and significant guidance for enacting States. These cover a wide range of

[162] See Arrowsmith and Nicholas, n.2, p.66. For a similar approach refer to the 2004 and 2014 EU public sector directives, and the 2009 EU defence and security directive (See EU Chapter).

'configurations', capable to meet a wide range of estimated future procurement needs (for a longer term) involving some indefinite or uncertain aspects. The various types of framework will require different levels of procurement capacity to organise and operate. Thus enacting States may choose to proceed to a gradual introduction of framework agreements, starting with simpler types and moving onto more complex ones as their purchasers gain additional experience. Whilst some provisions of the Model Law, or the attending guidance might be perfectible or subject to further detailing or nuancing, they clearly represent a very advanced standard in the use of framework agreements in public procurement. Nevertheless, the opportunity to recognise and regulate open supplier lists has been missed. It is suggested that this aspect should be reconsidered in the not too far future.

CHAPTER III

NON-TRADITIONAL REGULAR PURCHASING ARRANGEMENTS UNDER THE WORLD BANK PROCUREMENT SYSTEM

A. Procurement Context

A.1 Institutional Perspective

The World Bank Group (WBG) is described a "premier development institution with global membership […]", whose purpose is to help developing countries "[…] adapt to the new landscape and take advantage of emerging opportunities", and to "assist developing countries and their people to overcome poverty and establish a sustainable path for development"[1].

In order to pursue these generous and wide objectives, the WBG provides a variety of products and services, through the five institutions of the Group. However, only two of these institutions, jointly referred as the World Bank (WB)[2], are relevant to our case-study: International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). They provide financial assistance to Governments as low-interest or free of interest lending for middle-income or low income countries[3].

The WB falls within a 'classic' definition of an international development bank, i.e. an institution that funds projects that do not

[1] *A Guide to the World Bank – Third Edition* (World Bank, 2011) pp.(xi)-(xii).
[2] S. Williams-Elegbe, *Public Procurement and Multilateral Development Banks – Law, Practice and Problems* (Hart Publishing, 2017) at p.10.
[3] Ibid.

otherwise meet standard commercial criteria[4]. Where the beneficiaries of internationally financed projects are Governments, then public procurement considerations tend to be particularly relevant, since the implementation of relevant public procurement rules and policies actually consist of the disbursement method of the funds provided to borrowing countries[5].

The term World Bank was initially used to refer only to the IBRD, and it first appeared in *The Economist* magazine in July 1944[6]. The foundation moment of the IBRD is considered to be the United Nations (UN) Monetary and Fund Conference, which took place in Bretton Woods, New Hampshire, in 1944. The IDA was then established in 1960 as part of the World Bank, and since 1975 the World Bank became the official name of both the IBRD and the IDA.

The first mission of the WB was to help Europe reconstruct after the Second World War, but after 1968 it focused on developing countries. The original focus on infrastructure projects has shifted in time to "financial and private sector development"[7].

The WB is a specialised agency of the United Nations (UN); its members (188) have to be members of the UN[8]. As a multi-lateral institution with world-wide activity, the WB maintains close relations, and cooperates

[4] S. Arrowsmith, J. Linarelli, and D. Wallace Jr., *Regulating Public Procurement – National and International Perspectives*(Kluwer Law International, 2000), p.99.
[5] Ibid.
[6] N.1, p.11.
[7] Williams-Elegbe, n.2, p.11.
[8] And of the International Monetary Fund.

with other international organisations. It has to follow the UN Charter[9], collaborates with other UN bodies and agencies and enters many partnerships with multilateral financial institutions, such as the four regional development banks[10].

A.2 Procurement Operational Environment – World Bank Financed Projects

The operational environment for WB procurement is formed by the WB financed projects, whose main and very wide objectives are to reduce poverty and improve the standards of living in all countries of the world. A few specific features characterise this procurement system and its activities. WB financed projects are governed by Legal Agreements[11] concluded between the Bank and a Borrowing Country, and are implemented by the Borrowing Country.

Unlike in case of national procurement systems, the issuer of the public procurement regulation or guidance (i.e. the Bank) is not actually the party who is to ensure the direct application in real life context of such instruments. Also, the party applying them (i.e. a relevant agency of the Borrower) is not a party that is subject to the jurisdiction of the issuer of the procurement regulation, such as would be, for example, a governmental department or agency in a national procurement system.

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[9] G.A. Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press, 2012), p.54.
[10] N.1, p.99; Williams-Elegbe, n.2, pp.11-16.
[11] Previously 'Loan Agreements'.

This apparent and potential disparity has to some extent been resolved in the case of the WB procurement system through a legal 'construction'. The WB procurement regulations become binding by their 'inclusion' (through reference) in the Legal Agreement that also commits the Borrowing State to ensure that the latter has priority over its national law.

Additional project-specific details are included in the Procurement Plan that also becomes a part of the Legal Agreement[12]. This comprises, amongst others, the selection methods to be applied for each procurement under the project, cost estimates, time-limits and review methods[13]. The Borrower is also required to justify its approach to each procurement, as stated in the Procurement Plan, in a Project Procurement Strategy for Development[14].

Whilst the Bank is not directly involved in the actual application of the procurement regulations, it maintains a "supervisory role"[15]. This arises from the Bank's Articles of Agreement requiring that any funds loaned be used only as intended with appropriate consideration to "economy and efficiency and without regard to political or other non-economic influences [...]"[16]. Trepte observes that this is the "source" of "the Bank's procurement policy"[17].

[12] Procurement Regulations for IPF Borrowers (2016) (hereinafter "PR"), para.4.2.
[13] Para.4.4PR.
[14] Paras.4.1-4.3PR and Annex V PR.
[15] Williams-Elegbe, n.2, p.3.
[16] Art.III, section 5(b).
[17] P. Trepte, "All change at the World Bank? The new procurement framework" (2016) 4 *PPLR* 121, at p.122. Also, para.1.2PR.

However, the Bank remains a third party in relation to any bidder or contractor in procurement conducted by the Borrower[18].

A.3 The Recent Reform and New Procurement Regulations

Between 2012-2016 a reform of the WB procurement instruments was conducted with a view to modernising the procurement rules applicable to WB financed projects. Trepte groups the main reasons for the reform in three categories: the change in the type of the Bank's projects, which required a more prominent adaptation of the procurement methods to actions other than large infrastructure projects; the "increasing wealth of middle-income countries" resulting in their capability to contract other loans, possibly with less "onerous" procurement conditions; and the emergence of "New international instruments and arrangements [...] which impose new obligations in respect of public procurement", or establish new international standards[19].

The reform was informed by wide consultations. As a result of the reform, in July 2016 "The World Bank Procurement Regulations for IPF Borrowers" (PR) replaced the previous (2011) Guidelines for Procurement of Goods, Works, and Non-consulting Services, as well as the (2011) Guidelines for Selection and Employment of Consultants. Whilst PR consolidates the rules for all types of requirements into a single document, selection methods for

[18] Para.2.1PR.
[19] Tepte n.17, pp.122-126.

consulting services are dealt with distinctly[20]. The 2016 procurement 'framework' also includes procurement Bank Policy, Bank Procedure, Bank Directive and Guidance[21].

The new procurement 'framework' is based on seven principles: value for money, economy, integrity, fit for purpose, efficiency, transparency and fairness. Consistent with these, "the regulations provide many choices for Borrowers to design the right approach to market" and "specify the rules that must be followed"[22]. New procurement methods have been included such as the request for proposals, or the competitive dialogue[23].

Also, a specific mechanism for dealing with procurement complaints was introduced in the Regulations as regards procurement for which the WB standard procurement documents are used[24], whereas complaints concerning other procurement are to be handled "as agreed by the Bank"[25]. All complaints continue to be addressed by the Borrower[26], but failing to do this "in accordance with the applicable requirements" may result in the Bank "exercising legal remedies" or "declaring misprocurement"[27]. Notably, standstill periods have been introduced, subject to some exceptions (which include call-offs under framework agreement)[28].

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[20] In Section VII.
[21] www.worldbank.org/procurement
[22] Introduction to PR.
[23] Trepte, n.17, pp.134-136.
[24] Para.3.27-3.31 and Annex III PR.
[25] Para.3.30PR.
[26] Consistent with the approach that the WB is a third party to such procurement.
[27] Para.3.24PR.
[28] Paras. 3.29&5.78-80. A standstill period is not required for call-offs under framework agreements, as is discussed later.

Under certain conditions, alternative procurement arrangements (APA)[29] may be used for a project, meaning the procurement rules of either an international or bilateral organisation, or those of the Borrower's agency, subject to appropriate assessment of such rules and approval from the Bank. For example, "When considering agencies from countries that have implemented the UNCITRAL Model Law on Public Procurement, the Bank will engage with UNCITRAL to determine which aspects of the model law have been implemented in the country of the agency being assessed to determine if they need to be assessed further using the APA Framework"[30].

Certainly, the focus of this chapter is on NTRPA as provided for by the WB procurement regulations, and less on such a procurement 'vehicle' as could be designed under APA. From this perspective, it is noted that the PRs maintain and develop the provision on framework agreements, slightly adjust the provision for procurement of commodities, but unlike the previous Guidelines, are silent on pre-qualification for a number of subsequent contracts.

B. Framework Agreements (FA)

B.1 Description, Types and Potential Uses

The main provisions concerning framework agreements are located in paras.6.57-6.59&7.33 of the Procurement Regulations (PR) and in Annex XV

[29] Para.2.4PR. This could be regarded as an adjusted form of the previous UCS ('use of country systems').
[30] Trepte, n.17, p.142.

thereto. Other provisions throughout the document apply to FA explicitly, by reference or implicitly.

A framework agreement is described as "an agreement with one or more firms that establishes the terms and conditions that will govern any contract awarded during the term of the FA (call-off contract)"[31]. It needs noticing from the outset that FAs are regarded as a 'particular type of contractual arrangement'[32]. Unlike the UNCITRAL Model Law[33], the PR do not distinguish a 'framework agreement procedure'. This (combined) view may have some implications concerning review mechanisms at call-off stage, and on the types of frameworks that can be accommodated under the PR, as is discussed later.

Irrespective of the description it seems beyond doubt that a 'framework' purchasing involves a two-stage procurement process (or method), whereas the 'framework agreement' is an interim outcome thereof, and each transaction is completed by awarding a contract under it. As regards terms and conditions established when a framework agreement is concluded, the PR is nearly silent. The overall provision may suggest that most or even all terms could be established, and that some of the terms are to be adjusted or refined, or even established at call-off stage. It seems to encompass a rather wide range of possibilities from this perspective, as may be appropriate in given circumstances.

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[31] Para.6.57PR.

[32] Under the previous (2011) *WB Guidelines: Procurement of Goods, Works and Non-Consulting Services* ('2011 Procurement Guidelines'), the provisions on FAs were included in Chapter III "Other Procurement Methods".

[33] See Ch.II.B.

It is however stated that those terms "will usually include the fee rate, charge rate or pricing mechanism"[34]. This indicates that whilst in most cases a framework agreement must include terms or conditions concerning the 'price' element of future call-offs (e.g. a set price, adjustable price, and/or price subject to further competition), there could be exceptional circumstances when the price element might not be agreed at that stage[35]. Such situations include the procurement of commodities, for which an 'adjusted' form of framework agreement is provided for separately[36]. It is possible that other situations are also contemplated, where the establishment of price (or pricing mechanism) might not be relevant or adequate at first stage, such as some open framework arrangements or some frameworks concerning consulting services. However, the position on these last two configurations is not clear, as discussed later.

A specific feature of FAs is that they are "established for the anticipated procurement of" items "as and when required, over a specified period of time"[37]. They are thus intended for anticipated needs for a given period of time[38], where those needs include some aspect(s) of uncertainty.

In the literature it has been emphasised that, pursuant to the recent review of the WB procurement policy and procedures, the applicability of FAs has been extended, both in terms of 'volume' and coverage[39]. This

[34] N.31; points 2.1(&4.2.d.i) Annex XV.
[35] On this point see also the discussion in the context of the EU.
[36] Para.6.51 and points 6.7&6.8 Annex XII. See below.
[37] N.31.
[38] As to the actual limitation of the duration see section following.
[39] Trepte, n.17, p.137; also, J. Górski, "The World Bank's New Procurement Regulations" (2016) 4 *EPPPL* 301, at 309.

development is in line with interim outcomes of the consultation process during the reform. Indeed, FAs can be very useful tools in WB project work, for a number of reasons. First, they can provide efficient and flexible purchasing vehicles, adaptable to tight time-limits and possible changes that tend to characterise project contexts. The current author's practical experience in development projects clearly indicates that vital project time and resources may be wasted on rather trivial and repetitive purchases where NTRPA are not available. Certainly, economies of scale may also be achieved by aggregating demand.

Second, because of the very remote areas where some of the WB projects are implemented, in the absence of aggregation of demand, there may be limited or no interest from the market to supply (or costs could be extremely high). Similarly, also because of the location of some of the WB projects (or Borrowers) which is exposed to emergency situations, such as earth earthquakes or hurricanes, pre-established FAs could be usefully employed for procuring on an urgent basis and at pre-agreed terms the items needed when such catastrophes arise, to deal with their consequences, secure evacuation, or limit their consequences. Finally, particularly in a donor aid or investment loan environment, FAs could be used for procurement of consulting services, for which there tends to be a regular need in this sector. Despite the potential beneficial uses, anecdotal evidence suggests that, whilst provision for FAs was included in the previous 2011 Guidelines for supplies, works and non-consulting services, this type of arrangement was rather rarely employed in practice under those Guidelines.

To deal with such needs the PR states by way of example that "FAs may be appropriate" for items other than consulting services under four types of circumstances[40]. First, the Regulations refer to "frequent reordering based on the same, or similar requirements, or set of specifications" – which basically involves recurrent purchases.

The second type of circumstance envisaged is "where different entities of the Borrower procure the same" items "and aggregating demand could lead to volume discounts". It can be assumed that "similar requirements" are also implied here, and that additional considerations might be accepted to justify a multiple-agency arrangement, even though not explicitly stated. These could include attracting the market in light of aggregated demand, administrative convenience at call-off stage, insufficient capacity of some agencies (on behalf of which a framework is carried out by another agency), or overall reduced transaction costs for the agencies.

The third type of circumstances provided for refer to "planning for Emergency Situations". In other words, this involves setting FAs in advance of emergency situation, based on some estimation of what may be needed to respond to them, followed by making call-offs as when such an event arises, as required. Finally, an appropriate use of FAs could be, under the PR, when "no single firm is considered to have sufficient capacity", which suggests ensuring security of supply might be envisaged here. As regards consulting services, appropriate situations for the use of FAs under the PR include "recurring" needs for such services and consolidating "requirements" for

[40] Para.6.58PR.

similar consulting services amongst "different entities of the Borrower"[41]. In the latter case, it can be assumed that indefinite requirements might also be accommodated, even where not necessarily 'recurrent' for each individual purchaser.

It should however be noticed that the 'expansion' in the applicability of FAs under the PR (as compared to the 2011 Guidelines) reported in the literature[42] is nuanced. On the positives, the limitation of maximum aggregated amounts for the use of FAs to those applicable to national competitive bidding under the 2011 Guidelines[43] has now been removed. Some limitation is certainly appropriate, notably in connection with closed frameworks, so as to permit periodic re-advertising and avoid long-term 'market closure' to the requirements procured under the framework, but this can be achieved by limiting the duration of a framework, and/or by assessing a maximum volume (where needed) on a case-by-case basis depending on individual circumstances of each arrangement, rather than pre-setting it *in abstracto*.

That restriction in terms of maximum aggregated value of FA under the 2011 Guidelines could have affected economies of scale (that are in many cases expected to arise from repeat purchases of some volume). It was also not very clear why under those Guidelines a one-off (traditional) contract

[41] Para.7.33PR.
[42] See above (and also Trepte, and Górski, n.39).
[43] Section 3.6 of 2011 Guidelines.

could have had a higher (or even much higher) value[44] than a 'group' of contracts to be awarded under FA.

The maximum duration of FA has also been extended under the Regulations. Whilst the 'basic' maximum period has remained unchanged (at three years), an option for extension "by up to a further two (2) years" is explicitly provided "if the initial engagement has been satisfactory"[45].

Increased flexibility is also now catered under the PR by eliminating conditions concerning the subject-matter of FA, as were previously provided in the 2011 Guidelines, such as "off-the-shelf" goods (or those of "common use") or "simple and non-complex nature" non-consulting services. Some level of standardisation and consistency among requirements across call-offs is inherent in FAs. But requirements with a certain degree of complexity might also be procured through some configurations of frameworks, notably those that lean closer to 'traditional' contracts[46].

Similarly, potential use of multiple-agency frameworks has been generalised under the PR, whereas under the 2011 Guidelines it was only mentioned in the context of non-consulting services. Provision is now also included for the potential use of FA "pre-existing" to a project subject to the Bank's satisfaction that such FA "is consistent with the Bank's Core Procurement Principles"[47]. Presumably, this could include a framework established by the same agency of the Borrower, under a WB financed project, or outside such project, as well as a framework established by

[44] Where procured under international competitive bidding (ICB).
[45] Point 4.2(g) Annex XV PR.
[46] See Ch.II.
[47] Point 2.2 Annex XV PR.

another agency of the Borrower to the extent the agency in question is entitled to use the framework. Such options, where acceptable pre-existing FAs are available, can save valuable project resources and time. During the course of this research the current author emphasised the lack of provision to this effect in the previous 2011 Guidance and its potential usefulness[48].

As regards consulting services, the current author submits that the apparent 'expansion' of FAs to cover such requirements may not be substantive. It is true that the previous 2011 Guidelines only provided for FAs for supplies, services and non-consulting services. However, the separate set of 2011 Guidelines for Consulting Services did provide for an arrangement called "Indefinite Delivery Contracts or Price Agreements" (IDC). During the course of this research the current author argued that IDC were in fact a specific form of FA for consulting and advisory services[49], however the space available here does not permit to repeat that argument. More importantly though, the current provision for FAs for consulting services, similarly to the previous provision on IDC, does not appear to clarify a number of practical and procedural matters concerning their establishment and operation, which raises questions as to their attractiveness for being employed or judiciously used[50].

On the other hand, the current Procurement Regulations introduce a number of limitations concerning the types or configurations of FAs that are permitted (for all categories of requirements), not present in the previous

[48] Draft IBRD chapter submitted on 14 February 2013.
[49] Ibid.
[50] See Section B.2.1.

Guidelines. It is thus stated that "An FA does not commit either party to procure or supply"[51]. The limitation is then detailed by specifying that framework contractors "have no guarantee of any call-off contracts"[52] and that "no commitment will be made with regard to possible volumes of items"[53]. In the same direction, it is also specified that a "FA is not an exclusive arrangement and the Borrower reserves the right to procure the same or similar" items outside that FA[54].

In other words, only FAs that are (entirely) non-committal and non-exclusive for both parties are permitted. It appears that it is not possible to guarantee the purchase of any quantities (or minimum quantities) under an FA, defined either overall for the arrangement or by reference to each individual framework contractor. Additional to the impossibility to commit to specific volumes of purchases under the FA it is also not possible to commit to buy the items covered by the FA from FA contractors only.

This type of FA offers flexibility (where quantities cannot be estimated with some degree of precision in advance), and may reduce risks of collusion at call-off stage in that framework since contractors are uncertain over the 'pie' to be shared, whilst the purchaser is not stuck with the terms of the FA and may use alternative purchasing vehicles for the same items[55]. From this perspective, in light of the feature of WB project procurement of being conducted by Borrowers, with possibly more limited means to prevent or

[51] N.31.
[52] Point 2.3 Annex XV. Similar text is under point 4.2(d)(iv) thereof.
[53] Point 4.2(d)(iv) Annex XV.
[54] Point 4.2(d)(v) Annex XV.
[55] For an 'exclusive' configuration of framework that could place the purchaser in a weak position (in Romania) see Ch.V.C.2.2.1.

address collusion, a preference for non-committal and non-exclusive FAs appears justified to some extent.

It should be noticed however that suppliers are unlikely to be able (or incentivised) to offer prices/terms reflecting volume discounts in the lack of certainty over volumes to be purchased[56]. From this angle, committal and/or exclusive arrangements are much more likely to result in economies of scale, particularly where adequate controls against collusion are included, such as objective call-off price/terms adjustment mechanisms clearly related to the price/terms proposed for admittance on the FA.

The current author submits that the (absolute) prohibition of committal and/or exclusive FAs, as contemplated by the PR, may affect in some cases the ability of this arrangement to adequately meet its stated scopes. This could in particular be the case when "volume discounts" are sought, for example where "frequent reordering" or the aggregation of demand from a number of purchasers are envisaged[57].

It should also be reminded that in the concept of the PR frameworks are not to be committal for contractors as well. This may be problematic in case of seeking to use FA for "planning for Emergency situations"[58], where an arrangement that obliges framework supplier(s) to supply if and when required by the purchaser is clearly preferable. It does not really help in dealing with an emergency situation if framework suppliers choose not to supply as and when needed. Certainly a correlative commitment to buy

[56] E.g. Trepte, n.17, p.137.
[57] Para.6.58(a)&(b)PR.
[58] Para.6.58(c)PR.

certain volumes needs not be taken by the purchaser, though a commitment to buy exclusively under the framework in case of an emergency may attract more interest and result in better terms being offered for admittance on the framework. Further, in (possibly distinct) situations where security of supply is sought[59], a lack of commitment from framework suppliers could result in failing to ensure security of supply, even in multiple-supplier frameworks.

Finally, a type of arrangement that has not received increased attention in PR compared to the previous 2011 Guidelines is open frameworks. Indeed, Annex XV to PR states that a FA "should normally be" a "closed panel" that is to say that "the constitution of the panel should remain unchanged" throughout the duration of the framework[60]. In other words "additional or replacement firms" must not be "added"[61] once the framework is concluded, though removal of a firm from the FA is permitted under certain circumstances[62].

Whilst open panels – namely FAs to which suppliers can apply for admittance at any time during their duration – are mentioned as a possibility[63], no specific procedure is provided for establishing them under the PR. Clearly the references to standstill periods prior to concluding an FA and to a public notice "of the conclusion of the FA" listing "the names of all firms that have been included in the FA"[64] are not intended (or appropriate) for open FAs. More generally, the requirement of establishing a FA by using

[59] Para.6.58(d)PR.
[60] Point 4.2(d)(iii).
[61] Ibid.
[62] Point 4.2(d)(vi) Annex XV.
[63] N.60.
[64] Point 4.3 Annex XV.

"open competitive procurement"[65] involves submission of bids or proposals against a set time-limit applicable to any interested party, and a competitive evaluation of the submission received by that time-limit[66]. These features are incompatible with permitting interested suppliers to apply for admission at any time, which is of the essence in open FAs. From this perspective, regarding FAs as a specific form of contractual arrangement, as the PR do, rather than as a procurement method (or procedure) inherently confines FAs to closed configurations.

The above is not to say that open frameworks, or committal, or exclusive arrangements are entirely excluded in WB projects. They might be used where the application of the domestic procurement system of the Borrower (instead of the PR) is permitted under alternative procurement arrangements (APA)[67] and the domestic system in question caters for such type of framework.

The limitations applicable to types of FAs envisaged under the PR simplify decisions concerning their use to some extent. However, choosing amongst a 'traditional' procurement contract and a framework, or the number of framework contractors could remain challenging for Borrowers, as could similarly be the substantiation of the options proposed[68] to the satisfaction of the Bank. Certainly, knowledge of the relevant market is essential, but some source of inspiration could be found in the Guide to

[65] Point 4.1 Annex XV.
[66] E.g. paras.5.31-32,5.36-37,5.40-48PR.
[67] See Part A.
[68] In the Procurement Plan or Project Procurement Strategy for Development.

Enactment attending the UNCITRAL Model Law[69]. For example, where a FA is envisaged for repeat procurement, a cost-benefit analysis indicating that volume discounts would exceed the additional costs of establishing a framework could be helpful.

Further FA design challenges may arise under the PR concerning establishment of call-off processes that are appropriate to circumstances of the procurements covered by an FA, as discussed later.

B.2 Procedures and Requirements

B.2.1 Establishing a Framework Agreement

As briefly pointed out above, Annex XV requires the use of "open competitive procurement with appropriate request for bids/request for proposal documents". These methods and approach to market offer the widest publicity and, in effect, potentially maximise competition at this stage. The open competitive approach to market "provides all eligible prospective Bidders/Proposers with timely and adequate advertisement [...] and an equal opportunity to bid/propose"[70]. Since no distinction is made in Annex XV a decision on approaching the international or national market follows the general rules in paras.6.13-6.18PR for goods, services and non-consulting services, and paras.7.24-7.25PR for consulting services. In light of aggregation of requirements FAs could exceed the relevant country thresholds and thus be required to approach the international market.

[69] See Ch.II.

[70] Para.6.11PR referring for goods, works and non-consulting services. Similar provision is in para.7.22PR concerning consulting services.

No other methods or approaches to market are envisaged for the establishment of FAs, which seems appropriate. Because closed FAs potentially restrict for a long-term access of suppliers not originally admitted onto the FA to the procurement of items covered by the FA, it is important that the admittance process is as open and competitive as possible. Also, particularly complex items, requiring very specific procurement approaches are less likely to be of a repetitive nature, which is inherent in most frameworks.

The request for proposal or for bids selection methods (RFP/RFB) are mainly designed for 'traditional' (one-off) procurement. As explained, this makes them incompatible with open frameworks. To be used for establishing (closed) FA the RFP/RFB provisions of the regulations are supplemented with some additional rules in Annex XV. But these do not appear to provide a full 'adjustment' of 'traditional' mechanisms even for closed FAs, in particular as regards consulting services. Thus, all open competitive selection methods for consulting services involve an initial short-listing process, based on qualifications. The resulting shortlist must include between five and eight firms[71] that are then invited to submit proposals in order to select the successful bidder(s) for being awarded a contract or being admitted on the framework. This may provide an adequate number of proposers where a framework with a single supplier, or with just very few suppliers, is contemplated.

[71] Para.7.17PR.

However, it could be problematic where a framework for consulting services with a larger number of contractors is appropriate. It appears that a framework with more than eight firms cannot be established under the PR, since the short-listing process (required to start with[72]) can only result in a short-list comprising a maximum of eight firms. But even for frameworks with eight or slightly less than eight firms, the competitive element at first stage could be insubstantial where, for example, eight shortlisted firms are invited to make proposals and the framework is to be concluded with all of them (or even with slightly fewer)[73]. This, in turn, could affect the terms being established through 'competition' at first stage. On the other hand, an assessment of only qualifications for establishment of a framework agreement is not envisaged by the PR (and this could have turned the arrangement into a 'supplier list' type of arrangement).

It should also be noticed that under the PR, for short-listing purposes the criteria to be used "normally includes: core business, relevant experience, technical and managerial capability of the firm"[74]. However, "Key personnel are not evaluated at this stage"[75]. As applied to FAs this position differs from that under the previous IDC, where the initial solicitation (REOI) set "selection criteria focusing on the relevant qualification and expertise of the required experts"[76], which tend to be essential in many consulting services, and the result of the process was a "long list of qualified experts". However, the PR

[72] Para.7.16PR.
[73] Though informing shortlisted bidders of the intended number of suppliers to be admitted on the FA is not compulsory – see below.
[74] Point 7.1(f) Annex XII PR.
[75] Ibid.
[76] Section 4.5 of 2011 Consultant Guidelines.

might compensate by envisaging FAs for individual consultants as well[77] whereas in FAs involving consulting firms, key personnel is to be evaluated as part of the assessment of technical proposals[78].

Returning to Annex XV, it is provided, irrespective of the requirements to be covered, that in case of a multiple-agency FA "a lead entity is appointed to act on behalf of the group of entities" and that "Each entity in the group is identified in the request for bids/request for proposal documents at the time of going to market"[79]. It can thus be noticed that frameworks established by an entity for use by a certain category of other entities, without identifying users individually (and possibly without involving them in its preparation)[80] are not envisaged by the PR. This is considered an appropriate limitation in a project context as well as for planning/management purposes.

As regards the strategy concerning the number of framework suppliers, Annex XV states that this number "should be proportionate to the anticipated demand" which "allows all FA firms an opportunity to be awarded a call-off contract"[81]. It is also provided that a decision as to whether a FA with a single or "with several" suppliers is to be "based on market conditions" and the estimated requirements[82].

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[77] Para.7.33PR. However, no specific rules concerning such FAs are provided.
[78] Point 4.1(b) Annex X PR.
[79] Point 3.2. However, good practice would probably suggest stating that a FA is involved and identifying each purchaser from the very initial documents for approaching the market such as the Specific Procurement Notice or Request for Expressions of Interest.
[80] For a discussion of this 'type' of frameworks in the EU and UK see Ch.V.C.2.3.3.2 and Ch.V.C.2.3.3.2.1.
[81] Point 2.3.
[82] Point 3.1.

Whichever the decision reached, the number (or maximum number) of framework contractors to be admitted on the FA is not listed among the minimum information to be provided in the RFB/RFP documents. This could be useful in cases where initial selection or pre-selection applies, and indeed in case of short-listing for consulting services FAs, in order to incentivise those invited to offer best possible terms for getting admittance on the FA. However, not informing bidders on the intended number of framework contractors could lead to favouritism in the process of admitting firms on the framework, as well as prevents bidders from making a realistic estimate of potential sales under the FA against which appropriate terms can be proposed.

Some aspects concerning the establishment and operation of FA are required (at a minimum) to be included in RFP/RFB documents[83]. These include "a description" of the items to be covered, "an estimate of the total volume/scope [...] and, as far as possible, the volume/scope and frequency of the call-off contracts", "the qualification and evaluation, and evaluation methodology" for establishing the FA, and the duration of the framework.

The RFP/RFB must, additionally, include "terms and conditions of contract that will apply to call-offs", such as statements concerning to the effect that the price (or price mechanism) "shall be agreed with each firm, and be valid for the terms of the FA", that contracts will be placed, "as required", that the FA is "a closed panel"[84] and that the FA is a non-committal and non-exclusive arrangement, as discussed above. Circumstances that could result in

[83] Point 4.2 Annex XV.
[84] Or, possibly (but not "normally") an open panel.

removing a firm from the FA, and the process for it must also be stated. Importantly, the "secondary procurement method or methods" for call-off processes must be specified in the first stage documents for establishing the FA. These express requirements are very welcome. They support controlling an adequate use of FAs, including stage consistency to some extent, though certainly they are to be further detailed and supplemented on a case-by-case basis.

As shown, requirements concerning the information of the bidders as regards the decisions reached during the evaluation of bids, standstill periods, and public notice of conclusion of the arrangement are explicitly provided to apply for the conclusion of FA[85], thus allowing bidders an opportunity to debriefing, as well as to challenge the process where appropriate.

A modified form of 'framework' appears to be envisaged for the procurement of commodities, namely "items such as: grain, animal feed, cooking oil, fertilizers, or metals" which "often involves multiple awards for partial quantities to assure security of supply, and multiple purchases over a period of time to take advantage of favourable market conditions and to keep inventories low"[86]. Commodities are thus goods whose price fluctuates depending upon the demand and supply at any particular time (volatile price markets). Commodity framework suppliers "may be invited to quote prices linked to the market place at the time of, or prior to, shipments"[87]. Also,

[85] Point 4.3 Annex XV.
[86] Para.6.51PR (and point 6.7 Annex XII).
[87] Point 6.7 Annex XII.

standard contract conditions and forms prevalent on the market, and bid validities "as short as possible" are to be used[88].

Because of the specific nature and features of commodity markets the establishment of price, even in the form of adjustable price or pricing mechanism, for a longer period, such as for the term of an FA is usually not possible. Thus, the price 'element' is likely to be missing from commodity FAs, which also has implications on the process of establishing such FA, since the 'traditional' selection methods provided generally for FAs do involve a competitive assessment of offers, including financial ones. However, the PRs do not elaborate on the envisaged adjustments for such processes. The previous 2011 Procurement Guidelines regarded the arrangement as a list of prequalified suppliers (rather than an FA) for future multiple-awards, to whom requests for quotations were issued when needed[89].

It could be that only an assessment of qualifications is still permissible for admission onto a 'commodity framework' since the PRs continue to refer to a "list of bidders"[90] in this context. Additionally, when e-reverse auctions are used for procuring commodities, this could be done from "prequalified/registered" firms[91] (and it is unclear if this 'configuration' is regarded as FA). The current 'terminology' preferred by the PR for the procurement of commodities (at least where e-reverse auctions are not used) – e.g. framework agreement – may have been influenced by the fact that 'pre-qualification for a number of contracts' having been recognised under the

[88] Ibid.
[89] Section 2.68.
[90] Point 6.7 Annex XII.
[91] Point 6.8 Annex XII.

2011 Procurement Guidelines for any types of items other than consulting services (and not just commodities)[92] does not appear to be envisaged any longer by the PR.

Whichever way it is to be regarded, procurement of commodities under the WB system provides a good example of adaptation to the particular features and structure of the specific market, allowing purchasers for flexible, "agile supply" approaches, that traditional procurement methods (including a 'standard' type of FA) would not offer.

B.2.2 Call-off Processes

An important control over the use of FAs is included in the requirement that "FAs shall only be used between the Borrower's procuring entity/s and the FA firm/s"[93]. This applies to both demand and supply sides of an FA. Namely no purchaser other than that/those identified in the RFP/RFB for the FA is entitled to buy under the FA. Similarly, a call-off process can only involve firms who are a party to the FA. The requirement does not only concern closed frameworks. It would also apply to open FA (in the unlikely event of one under the PR), in the sense that a call-off could only involve firms already admitted on the framework at the time of that call-off process.

As a general approach to call-offs, it is clarified that "the Borrower does not need to openly advertise individual contract opportunities to be awarded as call-offs"[94]. Indeed, the open advertisement of the establishment

[92] Section 2.10.
[93] Point 3.2 Annex XV.
[94] Point 4.1 Annex XV.

of the FA should suffice, for closed or open FAs alike. A requirement to re-advertise openly each call-off would be unnecessary and defeat the intended efficiency at call-off stage, as the EU experience with dynamic purchasing systems under the previous (2004) directives clearly indicates[95].

Call-off processes are described at point 5.2 of Annex XV. They can take the form of "mini-competition" or "direct selection". Both types of processes must "be based on objective criteria [...] that have been described in the FA". As a matter of good practice such criteria (including details thereof, such as ranges of weighting for them, where applicable) should be pre-disclosed from the initial procurement documents for the award of the framework, and then carried forward into the actual FA upon its conclusion. Whilst this is not expressly specified, it could be implied in point 4.2(e) of Annex XV that requires "the secondary procurement method or methods" to be included in the RFB/RFP for the framework.

Call-offs under a FA could involve mini-competition, or direct selection. An FA could involve "as an option both" forms of call-off processes[96], certainly subject to this having been pre-disclosed. Where mini-competition is used it is provided that offers[97] are requested "from some or all of the panel members"[98]. However, there is no indication as to circumstances that would justify a limitation of competition among panellists. This is probably to fall under the "objective criteria" requirement, for example where from the information already available to the purchaser it is clear that the supplier

[95] See Ch.V.C.3.
[96] Point 5.2 Annex XV.
[97] I.e. quotes, bids or proposals.
[98] N.96.

would not be capable of carrying out that call-off (e.g. the supplier does not serve a specific location, does not offer the needed items, or its capacity is fully booked with a previous call-off, etc.). As for the criteria to be applied in the mini-competition itself, as among the panel members invited, it is specified that these could involve "lowest evaluated cost" (where quotations are used) or "expertise, proposed solutions and value for money" (where bids or proposals are used)[99].

Where direct selection is used for call-off processes, examples of criteria provided in the PR include the location "where call-off contracts are awarded to the firm that is best able to deliver based on their location" and the delivery location of the items[100]. Also, "balanced division" of requirements involving rotation among suppliers is mentioned subject to some conditions[101].

Irrespective of the type of call-off process used, "The price for individual call-off contracts shall be based on the fees, charge rate or pricing mechanism detailed in the FA"[102]. This is an important safeguard for an appropriate use of FAs. As discussed, it needs not apply in case of commodity frameworks. On the other hand, criteria and selection method at call-off stage need not be the same as those used for the establishment of the FA, though some relation will need to exist to secure value.

Whilst the options provided for call-off process potentially offer significant flexibility for purchasers and efficiency at call-off stage, there may

[99] Point 5.2(a) Annex XV.
[100] Point 5.2(b)(i) Annex XV.
[101] Point 5.2(b)(ii) Annex XV.
[102] Point 5.3 Annex XV.

also be problematic aspects in the approach of the PR. First, the choice of call-off process for an FA is not linked to the situation of all terms for future purchases being set, or otherwise, at the establishment of the FA. Where not all terms are set (with precision) in the FA, the question that arises at call-off stage is how to establish (or refine) the outstanding terms – in addition to choosing an appropriate framework contractor for the specific call-off (under multiple-supplier FAs).

If mini-competition is not used for this purpose the only alternative solution appears to be negotiating those terms with the selected contractor. In some cases, this might leave an undesired area of subjectivity in placing call-offs, in particular as the PR do not indicate whether or to what extent the general conditions applicable to direct selection (outside the context of FA)[103] are to apply to call-offs. Conversely, where all terms are set in the FA, reopening competition may be redundant, unless further discounts can realistically be expected.

It might have been preferable if some preferences for call-off processes were stated in the PR to guide users, such as for mini-competition where not all terms are established in the FA (with possible exceptions or limitations for small-value orders, or as otherwise justified); and for direct award to the framework contractor offering best terms for the specific call-off based on its original offer for admission on the FA when the FA establishes terms (again with possible exceptions when reopening competition may be appropriate, or when using other objective criteria could be desirable).

[103] Paras.6.8-6.10&7.13-7.15PR.

It should in this context also be mentioned that in the current author's view, 'rotation' could be open to abuse or discretionary decisions, and could affect value even where no such conduct is involved[104]. An exception to this concerns arrangements that guarantee a certain quantity to each framework contractor individually[105]. However, as shown, such frameworks are not envisaged by the PR. Thus, this method should be used with caution.

Second, the PRs are silent as to any transparency requirements concerning call-off processes. It is not specified whether, in the case of mini-competition not inviting all FA firms, those not invited are to be informed of an envisaged call-off[106]. Similarly, it is not provided whether a notification of the decision of the evaluation of mini-competition submissions is to be issued at least to participants. Equally, it is not stated whether any transparency requirements apply at all for call-offs not involving a mini-competition. On the other hand, standstill notices or publication of public award notices are explicitly not required for any type of call-offs[107].

If any transparency requirements are implied (other than those explicitly not required) then it seems incongruous to expect Borrowers to 'anticipate' them, when in the first place it is assumed that the limited capacity in the domestic procurement system in question required the use of the WB procedures. Conversely, if no transparency requirements are

[104] See Ch.II.
[105] Ibid.
[106] Similarly, in such cases it is not clear whether an adjusted form of 'pre-selection' or 'initial selection' or 'short-listing' is envisaged, and if so, to which extent the requirements generally applicable outside the context of FA would apply to call-offs. In most cases, however a repetition of such further selection (in addition to that conducted when establishing the FA) would seem redundant.
[107] Para.5.95PR.

envisaged at call-off stage ((which could be 'consistent' with the PR approach that regards FAs as a "particular type of contractual arrangement", rather than a 'method' or 'procedure') most call-off processes are likely to remain outside any bidder complaint mechanism. This does not appear to be 'compensated' by specific measures concerning Bank oversight of call-offs, which could anyway be quite inefficient given that FAs usually involve large numbers of potentially low value call-offs, but whose aggregated value becomes significant.

Still, nothing should prevent the Borrower to propose at project planning stage, or a relevant Bank officer to require, transparency measures, as well as bidder complaint mechanisms in light of the risks involved by lack of oversight at call-off stage[108]. But stronger requirements in the PRs could have enhanced confidence in FAs by bank officers and Borrowers alike.

C. Conclusions

Overall, the 2016 regulations have expanded the potential uses of FAs, though this expansion is nuanced. Notably, the limitations on aggregated value/volume of purchases under FA, and to specific types of items, which were applicable under the previous 2011 guidelines, have now been removed. On the other hand, the 2016 regulations include restrictions on committal or exclusive FAs, types which were not precluded by the 2011 Guidelines.

[108] That such risks are real and significant clearly arises from the US experience – see Ch.IV.

Open arrangements are not 'promoted' by the 2016 regulations, possibly on a view that these are inherently linked to "electronic procurement systems" and thus their use must be subject to the Bank's satisfaction "with the adequacy of the system, including its accessibility, security and integrity, confidentiality, and audit trail features"[109]. In effect there is no substantive progress in the area of open arrangements. At the same time 'pre-qualification' for a group of contracts to be awarded at the same time or subsequently, which was provided for under the 2011 Guidelines (for items other than consulting services), is not envisaged any longer under the regulations. This could have proven a useful 'vehicle' for subsequent purchases where terms cannot be established in advance, including, but not limited to commodities.

The main focus of the current regulation is on (non-committal/non-exclusive) closed FA. Many of the provisions are to be welcome, and represent good progress by comparison to the previous Guidelines. They allow for flexible design of framework 'vehicles', apparently with many available options, as may be needed depending on circumstances, consistent with fit-for-purpose and value-for-money principles. From this perspective, the approach to FA is similar to the more general approach of the PRs[110].

However, an appropriate use of FAs in this context hinges, to a very large extent, on the knowledge and experience of the Borrowers and Bank officers involved. An approach more articulated on regulation preferences

[109] Para.5.58PR.

[110] But significantly different, for example, from that concerning e-reverse auctions, for which only a very simple type is contemplated involving lowest bid price (para.6.1-6.3PR).

(subject to exceptions were justified) and on transparency requirements and oversight at call-off stage might have rendered FA more ‘self-sustainable’.

CHAPTER IV

NON-TRADITIONAL REGULAR PURCHASING ARRANGEMENTS UNDER THE US FEDERAL PROCUREMENT SYSTEM

A. Procurement Context

A.1 Background and History

There are a number of reasons why US federal procurement system has been included as a case study for this research: size of the US procurement market, its multi-faced experience including with NTRPA, its historical evolution, and influence on other procurement systems, particularly at international level.

The sheer volume of the US federal procurement system and its tendency to increase make this system both attractive and relevant for the research: about 500 billion USD is being spent yearly on government procurements, "an amount that increased during the Clinton and George W. Bush Administrations"[1]. In terms of coverage, it deals with both civilian and defence procurement[2] in quite a consistent fashion, in accordance with the responsibilities of the US Federal Government, which comprises a number of civilian functions, as well as the defence function. However, quite a lot of

[1] See D.I. Gordon and G.M. Racca, "Integrity challenges in the EU and U.S. procurement systems", Ch.1, Part II in G.M. Racca and Christopher R. Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts – Balancing Corruption Concerns in Public Procurement Internationally* (Bruxelles: Bruylant, 2014) 117, at p.121.

[2] Title 10 of the US Code (USC) deals with defence procurement and Title 41 of the USC deals with civilian procurement.

civilian procurement is dealt with by the individual States, according to their local regulations, which may differ to some extent from federal regulations.

As regards its long history, one of the main "players" of the system, ensuring an independent, third-party review of award procedures, the Government Accountability Office (GAO) has provided an "independent administrative forum for the relatively quick resolution of disputes concerning the award of federal contracts" since as early as mid-1920s[3], which means almost 100 years of experience in reviewing bid protests. Also a number of procurement regulatory instruments were enacted as early as the 1940s[4].

The history of the US system involves an evolution of the trade-offs between the various values of public procurement and, consequently, of the balance between rigidity of regulation and flexibility in decisions that procurement officers could take. While the early days displayed a certain degree of rigidity, the focus shifted, starting with the 1990s, on efficiency and speed of supply, rather than on observing strict transparent and competitive rules[5], or open and efficient review systems. This was in line with the US Government objectives at that time and a tendency towards business-like procurement[6]. However, there are more recent developments, after 2008, possibly triggered by GAO's reports emphasising a relatively large number of

[3] N.B. Bleicher, W.I. Dunn, D.I. Gordon and J.L. Kang, "Accountability in Indefinite-Delivery/Indefinite Quantity Contracting: The Multifaced Work of the U.S. Government Accountability Office" (2008) 37 (3) *PCLJ* 375 at p.376.

[4] E.g. *The Armed Services Procurement Act* of 1947 or *The Federal Property and Administration Services Act* of 1949, in *Bid Protests at GAO* (Ninth Edition) (GAO, 2009) p.5.

[5] S.L. Schooner, "Desiderata: Objectives for a System of Government Contract Law" (2002) 11 *PPLR* 103.

[6] S. Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (AEI Press, 1990).

cases when competition or transparency requirements were not fully observed and/or by the lessons of Hurricane Katrina[7]. For example, additional transparency requirements were included for larger orders (over USD 5 million) under certain types of task/delivery order contracts (see below).

There appear to be at least two main international "dimensions" of the US federal procurement systems. One dimension consists of the US's participation in, and influence on, international instruments, such as the GPA or the UNCITRAL Model Law on Procurement. Just by way of example, Wang on China's accession to GPA indicates that the first step taken by China towards the GPA "[…] was largely a result of the immense pressure asserted by the US […]"[8]. On the other hand, the US Department of State Advisory Committee on Private International Law participated in the Working Group that revised the 1994 UNCITRAL model law on procurement[9]. Introduction of rules concerning framework (indefinite-delivery indefinite-quantity "IDIQ") arrangements is one of the major elements of novelty of the 2011 Model Law on Public Procurement that replaces the 1994 Model Law.

The second international "dimension" consists in the use of IDIQ arrangements by the United States Agency for International Development (USAID) providing economic and humanitarian assistance worldwide. The

[7] E.g. the report of the US House of Representatives, The Committee on Government Reform – Minority Staff, Special Investigations Division, from August 2006, called "Waste, fraud and abuse in Hurricane Katrina Contracts".

[8] In *China's Accession to WTO's Governement Procurement Agreement: Domestic Challenges and Prospects in Negotiation* (2009) 48 *China Policy Institute, Briefing Series* (The University of Nottingham) p.8.

[9] Federal Register, June 15, 2007 (Volume 12, Number 115), page 33273, Public Notice 5808 of the US Department of State. See also, P.M. Lalonde, C. Yukins, D. Wallace Jr. and J. Matechak, "ABA SIL International Procurement Committee Year in Review" (2007) 42 (2) *The International Lawyer* 479.

offices of this Agency, in the US and in many other countries where the Agency operates, use existing IDIQ arrangements for the procurement of the items needed for projects, by placing task or delivery orders within such arrangements.

The scope of this case study is limited to the US *federal* procurement system, namely procurement carried out by federal agencies as defined in Titles 10 and 41 of the US Code (USC) and in the Federal Acquisition Regulation (FAR), and it does not include procurement of any of the individual states that form the US.

While the US federal procurement regulations inevitably have an impact on those of the individual states, within the logics of integration within the "Federation" as required by the US Constitution, it should be noticed that the main focus of the federal procurement system appears to ensure efficiency of the federal procurement system itself rather than on establishing targets or providing guidance for procurement regulation by individual states. The scope of the US federal procurement system is limited to purchasing activities of the Federal Government, its main concern being to ensure efficiency, effectiveness and practicality of the procurement process in order to serve as best possible the interests and agenda of the US Federal Government.

An important feature of the US federal procurement system is that it relies heavily on NTRPA, particularly for (but not limited to) standard items. Some of these arrangements are remarkably complex (multi-agency/multi-supplier ones) and of high value. The history of such arrangements starts in

the 1950s when the General Services Administration (GSA) launched the so-called Federal Supply Schedule (FSS) initially intended as an efficient, procedurally streamlined and simplified mechanism for purchasing of office supplies by other agencies as well.

While the Economy Act of 1932 permitted procurement by one agency through another agency, this was not common before 1990s[10]. Indefinite delivery contracts referred to at FAR16.5 (that became effective in 1984) provided for three separate regular purchasing arrangements referred to as "indefinite delivery" contracts: definite quantity contracts, requirements contracts and indefinite quantity contracts (or IDIQ). FASA[11] (1994) encouraged multi-award arrangements, while the Clinger-Cohen Act of 1996 introduced the so-called "Government Wide Acquisition Contracts" for IT purchasing[12] (GWAC). These too are task order or delivery order contracts, being operated either by the Office of Management and Budget (OMB) or under a delegation of authority issued by the GSA, as per FAR2.102. The extensive use IDIQ contracts, GWACs and/or GSA Schedules was consistent with "more business like procurement" approach of the 1990s, in the sense of providing agencies with efficient and simplified purchasing arrangements by placing orders in already existing IDIQ contracts or in Schedules, as well a wider degree of discretion in the selection of contractors.

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[10] D.I. Gordon and J.L. Kang, "Task-Order Contracting in the U.S. Federal System: The Current System and Its Historical Context" Ch.5 in S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation of the 21st Century* (West, 2009) 215 (mainly p.217).

[11] *The Federal Acquisition Streamlining Act* (FASA).

[12] Bleicher et al., n.3, p.384. Also FAR2.101.

A.2 Institutional Framework

Executive Agencies are the federal institutions or certain corporations wholly owned by Government to which the federal procurement regulations apply, i.e. institutions that award procurement contracts in accordance with federal procurement regulations[13]. A legal definition of the term can be found in 41USC403(1).

The Office of Federal Procurement Policy (OFPP) (41USC404-406) provides overall procurement direction to promote economy, efficiency and effectiveness in the federal procurement system. OFPP's functions include unification of procurement practice, and formulation of laws, policies, regulations, procedures and forms, providing the Administrator of the Office with wide capabilities to shape the federal procurement system[14]. The OFPP is also involved in the development of the acquisition workforce particularly by directing the Federal Acquisition Institute; it is a policy body and it does not interfere with individual contract award procedures conducted by agencies.

Review bodies though are entitled to look into the legality of decisions issued by Agencies in their conduct of individual contract award procedures. It is important to outline the main factors that shape the US federal procurement review system. In our view, these are: (i) the lack of what the EU law calls 'standstill periods'[15]; (ii) a 'stay' of contract performance pursuant to lodging an application for review that may be overridden by determination of

[13] Equivalent of 'contracting authorities' in the EU procurement system.
[14] See also A.W.H. Gourley and A. Cliffe, "United States" in H-J. Prieß (contrib.ed), *Getting the Deal Through Public Procurement: An overview of regulation in 37 jurisdictions* (GCR, 2013) p.242.
[15] Ibid, p.247.

the head of the agency[16]; and (iii) a preoccupation for minimum possible disruption to the procurement process caused by the review process.

Of particular relevance to the operation of the federal procurement system is GAO's activity. There are three main lines of GAO activity described in the literature[17]: (i) appropriation law decisions and opinions; (ii) bid protest decisions; and (iii) audit reports on procurement activity. GAO provides for an administrative forum for bid protest resolution in a relatively quick and less formal fashion. GAO started this activity in the 1920s and in 1984 it received statutory entitlement for the review activity under Competition in Contracting Act (CICA).

The "head" of GAO is the Comptroller General and the main function of the institution is to monitor that the appropriations made by Congress to Executive Agencies of the Federal Government are actually used for their intended purpose and in accordance with the applicable statutes[18]. This is where the bid protest resolution function arose from, as a mechanism for oversight of the budgetary execution. Another review body is the Court of Federal Claims, and whose decisions can be appealed at the US Court of Appeals for the Federal Circuit[19].

Thus, as pointed out in literature, the US federal system "attempts to provide, a balance between allowing contracting officials to exercise their discretion and judgment in spending public funds [...] and ensuring integrity of

[16] Requirement introduced by the Competition in Contracting Act (CICA), 1984. However, where an application for review is submitted before contract award, the contract may not be awarded pending review (see preceding note).
[17] See further, Bleicher et al., n.3 (whole piece).
[18] Ibid, p.375.
[19] Gourley and A. Cliffe, n.14, p.247.

public procurement through effective accountability [...]"[20], namely through bid protests[21] and audits.

A.3 Legal Framework

A historical view over the legal sources of the US federal procurement system helps emphasising the US long history in this area, evolutions, trends and current issues. The Guide entitled *Bid Protests at GAO*[22], describes the *Armed Services Procurement Act (1947) and the Federal Property and Administration Services Act (1949),* as amended from time to time, being the "main statutes controlling public procurements". As mentioned above, acts relevant to federal procurement were issued even before the dates of the two main acts, for example the *Economy Act of 1932*[23].

The most important amendments mentioned by the Guide to the two main acts include: the *Competition in Contracting Act* (CICA 1984), the *Federal Acquisition Streamlining Act* (FASA 1994) and the *Federal Acquisition Reform Act* (FARA 1996)[24]. Below is a brief description of the major changes that these acts brought to the shape US federal procurement system.

CICA 1984 introduced at least three major changes worth noting for the purposes of this research: (i) the concept of "full and open competition" as a norm in federal purchasing; (ii) provision of explicit statutory basis for the

[20] Gordon and Racca, n.1 p.128.
[21] D.I. Gordon, "Bid Protests: The Costs Are Real, But the Benefits Outweigh Them" (2013) 42 (3) *PCLJ* 489.
[22] Ninth Edition (GAO, 2009) pp.5-6.
[23] Allowing for one agency to procure through another agency.
[24] Additional acts relevant to federal procurement were issued, but here we will focus only on acts triggering major shifts in the US federal procurement system.

bid protest system at GAO; and (iii) provision that submission of protests triggers a stay of proceedings or performance (see preceding section). In connection with ID/IQ contracts though the "full and open competition" test only applied to the award of the "umbrella" arrangements, and the award of orders under the "umbrella" arrangement was simply not covered by statutory regulations[25].

The 1994-1996 reform brought relevant measures in connection with ID/IQ contracting[26]. First, FASA (1994) provided the "statutory basis" for a preference for multiple-supplier ID/IQ contracts ("multiple awards"). Secondly, following growing concern over the non-competitive award of orders, FASA required that "for orders above $2,500, every one of the multiple contract holders was to receive <<a fair opportunity to be considered>> for award of each order". Thirdly, an explicit ban on the award of orders was imposed except for exceeding the scope of the "umbrella" contract. Instead, "task and delivery order ombudsmen" were established at each Agency to hear complaints in connection with the award of orders, however this was not the most effective way to deal with such protests[27].

A development of 2008, possibly triggered by reports of abuses of the IDIQ contracting, showed further concern[28] regarding the need for enhanced

[25] Gordon and Kang, n.10, p.221.
[26] Bleicher et al. n.3, pp.384-386.
[27] For further details on federal procurement legislation in the 1980s and 1990s, see J.F. Nagle, *History of Government Contracting* (Second Edition) (The George Washington University, 1999) pp.495-518. Also, concerning approach to ID/IQ contracts in that period, G.L. Albano and C. Nicholas, *The Law and Economics of Framework Agreements* (CUP, 2016) pp.100-104.
[28] C.R. Yukins, "Are IDIQ Inefficient? Sharing Lessons with European Framework Contracting" (2008) 37 *PCLJ* 545.

competition and transparency in connection with the award of orders, in particular those of high value. The *National Defense Authorisation Act* for Fiscal Year 2008 (NDAA), Section 843[29], provided for "greater transparency and review" in connection with the award of orders over USD 5,000,000, while orders of USD 10,000,000 (or above) may be protested exclusively with GAO[30].

Another relevant feature of the US federal regulatory system is codification/consolidation. The Acts mentioned above are codified/consolidated under the US Code, Titles 10 and 41. Codification provides for systematisation and organisation of legislation, and for comprehensive links and references. Implementing regulations are codified in the FAR (or Title 48 of CFR).

It is noteworthy the potential use of NTRPA in emergency situations, in light of the experience faced by the US federal procurement on the occasion of Katrina hurricane when there was an urgent need for certain supplies and services to relieve the consequences of the disaster. The literature[31] emphasised that the response to the effects of the hurricane was slower, not as efficient as expected and even in some instances it brought about dangerous solutions. Thus the concept of 'emergency procurement' emerged.

Starting from the assumption that such catastrophic events are to happen inevitably, and items usually needed to deal with such events are known in advance, albeit exact quantities or delivery places are not known

[29] Bleicher et al., n.3, pp.399-400.
[30] See also FAR16.504&505; and Albano and Nicholas, n.27, pp.112-114.
[31] W. Sims Curry, "Contracting during Emergencies", in W. Sims Curry, *Government Contracting – Promises and Perils* (CRC Press, 2010) at pp.209-235.

beforehand, indefinite delivery contracts seem to be adequate arrangements to be established in advance, in order to allow for orders to be placed efficiently and effectively, as and when needed[32].

B. Analysis of Non-Traditional Regular Purchasing Arrangements in the US Federal Procurement System

B.1 Overview

The US federal procurement system implements a number of different regular purchasing arrangements, of various degrees of complexity, classified in two main categories: indefinite-delivery contracts, mainly regulated under Section 16.5 of the Federal Acquisition Regulation (FAR16.5), and Federal Supply Schedules, mainly regulated under FAR8.4 and FAR38.

These arrangements cover a wide range, from rather straight-forward ones (single agency, single contractor) to very sophisticated ones involving one agency organising an arrangement with more suppliers, or very many suppliers, and very many agency buyers accessing the arrangement and issuing orders or delivery orders to their purchasing needs. While all such arrangements are generally referred to as "task or delivery order contracts", there are significant differences between indefinite delivery contracts and schedules, such as reasons and ways to enter them, ordering regulations, and protest mechanisms.

[32] See J.I. Schwartz, "Katrina's lessons for ongoing US procurement reforms efforts" (2006) 6 *PPLR* 362.

The four main regular purchasing arrangements employed in the US federal procurement system are presented below. Three of them are different forms of indefinite-delivery contracts: definite quantity contracts, requirements contracts, and indefinite-delivery indefinite-quantity contracts (IDIQ contracts). The fourth arrangement that will be analysed is the Multiple Award Schedule (MAS) Program directed by the General Services Administration (GSA), including blanket purchase arrangements that can be placed against such schedules.

B.2 Definite Quantity Contracts

A definite quantity contract[33] is the simplest and most straight-forward regular purchasing arrangement in the US federal procurement system. Basically, purchasers and bidders go through a standard procurement procedure (as a first stage process) following which a supplier is selected and a definite quantity contract is concluded. This first stage is not different procedurally from "traditional" forms of procurement under US federal procurement system, as regulated in the US Code (USC) and the FAR.

At the time of contracting all elements are certain for parties under a definite quantity contract, including the period of the contract and quantity of supply or services to be provided[34]. The Agency guarantees the purchase of specified quantity of items over the contract period, and, failing to do so will trigger its liability. The only aspects not known when launching the

[33] FAR16.502.

[34] R.C. Nash Jr., K.R. O'Brien-Debakey and S.L. Schooner, *Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement*, Fourth Edition (Wolters Kluwer Law & Business/CCH Incorporated, 2013) p.167.

procurement and at the time of contracting are deliveries - i.e. the time, precise location (among 'designated' locations) and fractions of total quantity forming the subject of individual orders. Second stage of the arrangement, namely placing orders once the definite quantity contract is concluded, is also straight-forward as there will only be one contractor and no competition involved when issuing orders. As and when a need becomes actual, the agency simply issues an order stating specific quantities, locations and times, and the contractor has to make deliveries as per all contractual or order conditions.

The simplicity of this regular purchasing arrangement and level of certainty it provides for the parties involved might call into question whether it can be called a "non-traditional" regular purchasing arrangement. In the EU, for example, such arrangement would not normally be regarded as a 'framework' arrangement. In any event, definite quantity contracts are at a 'confluence' area between 'traditional' contracts and NTRPA, being the closest arrangement to 'traditional' purchasing.

A definite quantity contract provides advantages when the total quantity to be procured over a period of time is certain at the start of the procurement and where the items are easily available or they are available after a short lead time[35]. Nonetheless, where there is a risk that the full and precise quantity will not be required by the agency, then other, more flexible arrangements will be needed, that do not trigger the responsibility of the

[35] FAR16.502.

agency in case the fixed and precise quantity is not ordered, such as requirements contracts or ID/IQ contracts.

By its nature a definite quantity contract is a single-agency single-contractor arrangement. Theoretically, a definite delivery contract could also be used as a multi-agency single-contractor arrangement; however this appears unlikely because of the level of coordination required among more agencies to meet a fixed quantity of services or supplies, and also because of the availability of other, more flexible arrangements.

B.3 Requirements Contracts

Compared to definite quantity contracts, requirements contracts provide more flexibility regarding total quantity to be supplied under the contract, but less flexibility in buying items covered by a requirements contract outside that contract. At the risk of over-simplification, a requirements contract grants an "exclusivity" status for successful bidder with whom the contract is concluded for the period of that contract[36]. Buying the same items outside the contract is only allowed in exceptional circumstances, such as an inability of the contractor to deliver urgently needed goods, earlier than the time of next order or than the contractual delivery deadline, and subject to a request for an accelerated delivery (under the requirements contract) being issued by the Agency and refused by the contractor[37].

[36] M.W. Kipa, K.R. Szeliga. and J.S. Aronie, "Conquering Uncertainty in an Indefinite World: a Survey of Disputes Arising under IDIQ Contracts" (2008) 37 (3) *PCLJ* 415-466 at p.418.

[37] FAR52.216-21 providing for standard clauses for requirements contract.

FAR16.503 defines a requirements contact as follows: “A requirements contract provides for filling all actual purchase requirements of designated Government activities […], with deliveries or performance to be scheduled by placing orders”. However, “all requirements” is not an absolute statement, as further clarified in FAR, since the Agency has an obligation to include in the solicitation and in the contract a “realistic estimated total quantity”. Without such an estimate of total quantity, bidders would miss essential information that is absolutely necessary to enable them putting forward a bid. For example, in absence of a total quantity estimate, bidders would not be able to assess whether they have the capacity to deliver what will be required, nor will they have any realistic basis for submitting a financial proposal. Consequently, the Agency would not have a basis for evaluation of bids. Since requirements contracts can be of high dollar value, total quantity estimate can also serve as a business plan for the bidders, for example, to change their production methods or management systems or supply systems to meet the increased requirements, reduce lean times, or prices, enhancing thus value for money toward the Agency.

Similarly, the estimate has to be a realistic one; certainly, if the estimate is unrealistic or completely unrealistic, then the procurement is unlikely to be successful as regards value for money, or even contractual problems may arise. The FAR gives few indications as to what should generate a realistic estimate, i.e. one that is based on “previous requirements and consumption” or on “other means” and that uses “the most current

information available"[38]. Certainly, in litigation other elements may also be considered.

In requirements contracts the estimate does not guarantee (it is not a 'representation') to the contractor that the estimated quantity will be required or ordered. Normally, this means that there will be no compensation (no equitable price adjustment) if the total quantity ordered under the contract is below the estimated or the maximum estimated quantity[39]. However, there will be compensation if the contractor proves that the estimate was not realistic. Case-law has clarified that the estimate can be challenged successfully and compensation awarded by a relevant review body if the contractor proves that the estimate has been prepared with negligence, since estimated quantities are the only indication based on which contractors prepare their quotes and the Agency selects the successful contractor[40].

Having a "captive client" for a long period of time, particularly if the client buys large quantities of items under a requirements contract, contractors may have a tendency to become complacent and less interested to enhance value for money and competitiveness. Ensuring a "captive" client for large sales and for long periods of time, could also trigger temptations toward fraud and corruption. Further, the sheer volume of sales or purchases might distort the market. These are some reasons that legislators might

[38] FAR16.503.
[39] FAR16.503(a), FAR52.216-21. J. Cibinic Jr., R.C. Nash Jr. and C.R. Yukins, *Formation of Government Contracts* (Fourth Edition) (The George Washington University; Wolters Kluwer, 2011), p.1350-1351.
[40] See cases quoted by Kipa et al., n.36; also Cibinic, Nash and Yukins, n.39, pp.1351-1354.

consider limiting the use of such contracts either in time[41] or in terms of value. However, the US federal procurement system has taken an additional approach.

Thus, no requirements contract with an estimated value over USD112 million can be awarded to a single source unless specific circumstances are met[42]. Such circumstances are dealt with under FAR16.504 regarding indefinite-delivery indefinite-quantity (ID/IQ) contracts and include the impossibility to separate tasks, contracts that provide for fixed unit prices, situations when only one offeror is qualified and capable to do the work at prices acceptable to the Government, or public interest[43].

Also, no requirements contract for advisory and assistance services in excess of three years and USD13.5 million can be awarded to a single source unless a determination is made by a relevant procurement officer (or other official) that the requirements "are so unique or highly specialized that it is not practicable to make multiple awards" under an ID/IQ contract[44].

This approach is consistent with the statutory multiple-award preference introduced by *Federal Acquisition Streamlining Act* (FASA 1994).

The explicit language of the FAR that refers to filling all needs "from one contractor", seems to suggest, *prima facie*, that requirements contracts are envisaged as single-agency single-contractor arrangements[45]. However, in

[41] In the US federal system a 10 year time-limit applies to task or delivery order contracts issued by the Department of Defense, whereas a 5 year general limit applies to all contracts under FAR (Cibinic, Nash and Yukins, n.39, p.1343).
[42] FAR16.503(b)(2).
[43] FAR16.504(c)(1)(ii)(D).
[44] FAR16.503(d)(1).
[45] FAR16.503(a).

the literature it has been discussed that multi-contractor requirements contracts may be permitted since "the government can obtain more competition by dividing the requirement among two or more contractors", particularly when smaller contractors could be interested and "the government's requirements are large"[46]. The language of FAR regulation is interesting in light of increased security of supply multiple award requirements contracts would provide for the Agency, as well as the multiple award preference introduced by FASA. The mentioned authors advised the officer to consider a definite quantity contract before retorting to a requirements one, particularly when the needs can be accumulated quantitatively[47].

First stage of the arrangement, namely selecting the contractor(s) and awarding requirements contract, follows the general/'traditional' procurement procedures of the US federal procurement system. Second stage of the arrangement, i.e. awarding orders under the requirements contract is straight-forward as there usually is only one contractor. If a requirements contract is concluded with more than one supplier, then, when allocating successive orders, the Agency should "maintain as close a ratio as is reasonably practicable between the total quantities ordered from the two contractors"[48].

Quite complex a matter for procurement officers organising award procedures for requirements contracts may be to ensure that the quantity

[46] Cibinic, Nash and Yukins n. 39, p.1346.
[47] Ibid, p.1341.
[48] Ibid, p.1347, quoting Alternate III for FAR 52.216.21.

estimate is realistic in the meaning required by FAR and confirmed by relevant case-law, as a pre-requisite to achieve value for money, and to avoid potential contractual problems if the estimated quantity is not ordered and it can be proven that the estimate was not realistic. Selecting the right contractor is also a very important matter, maybe more important than in most other procurements or arrangements, because requirements create a certain degree of reciprocal dependency (between Agency and contractor(s)), and consequently procuring items covered by requirements contract outside that contract may be difficult.

Requirements contracts represent one more step further away from traditional procurement compared to definite quantity contracts. In definite quantity contracts when starting the procurement and contracting, all elements are known except for the actual delivery schedule. In requirements contracts, there is one additional element that is not known with certainty, but only as a realistic estimate: total quantity to be supplied or delivered under the contract. Definite quantity contracts guarantee a certain total quantity of items to be procured while requirements contracts guarantee that all requirements for certain government activities will be purchased from the contractor(s), unless exceptional circumstances arise.

B.4 Indefinite-delivery / Indefinite-quantity Contracts (ID/IQ)

An even further step away from traditional procurement, providing increased flexibility to agencies, is represented by ID/IQ contracts[49]. An ID/IQ contract only guarantees that the agency will purchase from the contractor, through task or delivery orders, a minimum quantity of items over the contract period. This minimum can be very low in order to be considered contract consideration[50]. According to FAR 16.504, in order to be binding the minimum must be "more than a nominal quantity" but it should not exceed the amount that the agency is fairly certain to order.

The agency will be bound to purchase through orders only the nominal minimum. However, the agency will be entitled to order during the contract period, and the contractor will be bound to supply, any quantity of items above the nominal minimum up to a maximum stated in the contract, defined in terms of quantity or value. Further, above the nominal minimum, agency can order not only to the contractor but it can also purchase outside the ID/IQ contract[51] from other suppliers or providers.

Thus, it can be easily noticed that ID/IQ arrangements provide increased flexibility and convenience for the agency. But, flexibility and convenience may have a price and may also mean increased complexity or challenges.

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[49] FAR16.504.
[50] Kipa et al., n.36.
[51] Ibid. p.418 quoting the Court of Federal Circuit in case *Travel Ctr. V. Barram, 236 F3.d 1316,* as well as *Abatement Contracting Corp v. United States, 58 Fed. Cl. 594, 604 (2003)*.

If the defined nominal minimum quantity is very low and the potential maximum quantity is very high, bidders may tend to quote high unit prices or rates, corresponding to their low minimum quantity that is guaranteed. If the agency then decides to order from the same contractor, above the nominal minimum large quantities of items up to the potential maximum established in the contract, there is a risk that the same or similar high unit prices will continue to be quoted or used, potentially affecting value for money over the contract duration. Clearly, if a need that could not be predicted when initiating the procurement arises, then ordering under the ID/IQ contract in the conditions described (over the nominal minimum) provides for flexibility and convenience. If the need could have been better predicted when initiating the procurement and it was not included in the nominal minimum, then orders above the minimum may simply become extravagance, or even waste. As in requirements contracts, making the right estimates by the agency before initiating the procurement is utmost important for such arrangements if they are to meet value for money. However, the consequences of failing to meet estimates, and the standard of assessment, are different under ID/IQ contracts and requirements contracts.

In many cases, because of the diligence standard of assessment in preparing the estimate, some contractors preferred, in litigation, to support the allegation that the contract was actually a requirements contract and not an ID/IQ contract. This is so because in a requirements contract contractors have a better chance of obtaining remedy if the agency ordered below the estimated maximum (which in requirements contracts coincides with

estimated quantity), and the estimate has been prepared negligently[52]. By contrast, in an ID/IQ contract only the nominal minimum quantity is guaranteed for purchase by the agency, and the potential maximum anticipated under contract basically creates no obligation for the agency, irrespective of negligence in the agency's preparation of estimated potential maximum. Further, even against allegations of bad faith in the preparation of the potential maximum estimate under ID/IQ contracts, remedy to aggrieved bidders might be unsuccessful. The logic behind this approach is that "the contractor does not have a reasonable expectation that the Government will order more than the minimum quantity" and that the potential maximum does not have a "legal significance"[53].

Case-law was also pretty much consistent considering that the nominal minimum guaranteed purchase quantity, as identified in the solicitation and the contract, is the drawing line regarding contract obligations and liability. If the agency does not order, through task or delivery orders issued during the contract period the nominal minimum, then the aggrieved contractor is likely to be granted remedy, but only to the level of unrealised profits for the difference in sales between the nominal minimum and the quantities (or value) actually ordered by the agency by end of contract period, and not above.

While first stage of actually awarding the ID/IQ contract or contracts is straight-forward, following the general procedures for award of public

[52] Kipa at al, n.36, p.428.
[53] Ibid. For further details concerning the relevant case-law and the solutions given by US review bodies, see also subsequent pages of that piece.

procurement contracts at US federal level, second stage is also straight-forward but only in the case of single supplier ID/IQ contracts. However, because under ID/IQ contracts the agency can purchase above the nominal minimum from other economic operators, the arrangement also allows for multiple awards or ID/IQ arrangements with more than one contractor being selected within the same solicitation. Because of the statutory preference for multiple awards, the usual form of ID/IQ contracting is multiple awards process, whereas single supplier ID/IQ arrangements are only possible under certain circumstances defined in the FAR that a procurement officer is able to justify. Multiple awards though bring significant complexity to ID/IQ arrangements compared to single award indefinite delivery arrangements, particularly as far as second stage of the process is concerned, i.e. selecting among contractors already on the ID/IQ contract to place orders, and protesting placement of task or delivery orders under ID/IQ contracts.

FASA (1994) introduced a requirement for procurement officers to give preference to multiple awards of indefinite delivery contracts under a single solicitation for the same or similar items “to the maximum extent practicable” (FAR 16.504(c)(1)(i)). This was in line with the approach prevailing in the 1990s in the US that public sector procurement should be much more business-like, providing for practicality, convenience, and flexibility. Indeed, having more contractors able and willing to supply upon order toward satisfying a certain need of the agency, without being bound to purchase from a certain contractor above the nominal minimum, provides not only for flexibility and convenience but also for security of supply. In arrangements with only one

contractor, and in particular in requirements contracts because of the "exclusivity" status of the contractor, if the contractor gets into difficulties, or does not perform satisfactorily, these difficulties will immediately have an impact on the supply and on filling the Agency's needs. By contrast, in multiple awards ID/IQ contracts, the agency will have more than one supplier available and willing to supply, to whom the Agency can turn by issuing orders to satisfy its needs as they materialise.

Another reason for preferring multiple awards ID/IQ contracts is to avoid concentration of too much business into a single supplier's "yard", since this may distort the market or even competition in future procurements of the same agency or in similar procurements of other agencies. Actually, as in case of requirements contracts, no task or delivery order contracts (including ID/IQ contracts) whose estimated value is in excess of USD 112 million may be awarded to a single source unless specific circumstances are met. These circumstances are those applying to requirements contracts over USD 112 million[54]. Distinct circumstances apply to ID/IQ contracts for advisory and assistance services exceeding three years and USD 13.5 million[55]. If the circumstances apply to a specific procurement then the head of agency / procurement officer has to make a written determination to this effect and keep it on file.

The FAR also provides for some elements that procurement officers should consider when planning the acquisition in order to decide on the appropriate number of contractors in a multiple award ID/IQ exercise. These

[54] See preceding section.
[55] FAR16.504(c)(2).

include scope and complexity of requirement, expected duration and frequency of orders to be placed, the mix of resources the contractor must have to perform orders, and ability to maintain competition between contractors throughout the contract's duration[56]. Circumstances when multiple-awards "must not" be used are also listed, including[57]: (i) only one contractor being able to supply because items to be procured are highly specialised; (ii) connection between tasks dictates that only a single contractor can perform them; (iii) expected costs of administering multiple awards outweigh the benefits of making multiple awards; (iv) based on procurement officer's knowledge of the market, more favourable terms and conditions will be achieved if a single award is made; (v) total estimated value of the contract is less than the simplified acquisition threshold[58]; (vi) multiple awards would not be in the best interest of the Government.

After the elements above have been considered and a decision made as whether an ID/IQ contract with a single source will be placed, or whether a multiple award ID/IQ arrangement will be organised, a written determination by the procurement officer justifying the decision will be prepared and kept with the procurement file[59]. Following this a 'standard' bidding procedure will be launched, as first stage of ID/IQ procurement, i.e. selecting among interested bidders and concluding the ID/IQ arrangement with one or more suppliers. The FAR provides though for a few specific elements that a

[56] FAR16.504(c)(1)(ii)(A).
[57] FAR16.504(c)(1)(ii)(B).
[58] In accordance with FAR2.101 this threshold usually is USD150,000; however, higher thresholds can apply in specific circumstances.
[59] FAR16.504(c)(1)(ii)(C).

solicitation must include in case of ID/IQ procurement. These apply to both single source and multiple-award ID/IQ procurements.

Firstly, the solicitation must include the duration of the contract, and the period or periods for which the Government may extend the contract. Secondly, the solicitation must specify the minimum and the maximum quantities the Government will acquire under the contract. Thirdly, a statement of work needs to be included describing the general scope, complexity, and purpose of the supplies or services to be supplied under the contract, allowing bidders to decide whether to bid or not, and to prepare a bid. Also, the solicitation must include the procedures that will be used once ID/IQ contract(s) are in place, such as ordering media, and in case of multiple awards, the procedures and selection criteria that will be used for selection of suppliers for specific task or delivery orders; such procedures or criteria must ensure that each ID/IQ contractor will be provided a fair opportunity to be considered for each order[60] above USD 3,500[61] (see below).

Out of the above, two elements require a special attention in case of multiple awards, as literature and case-law have emphasised, since such elements can raise a number of practical issues. The two elements are inter-related: procedures for selection of contractors to whom individual orders are to be awarded, and protesting such awards by aggrieved contractors who believe their rights to receive orders have been ignored or breached. As shown, when awarding orders, the procurement officer must ensure that all

[60] FAR16.504(a)(4).
[61] FAR16.505(b)(1).

contractors within the ID/IQ arrangement are provided with a fair opportunity to be considered[62].

It is provided (FAR.16.505) that, unless specific circumstances are met "[…] the contracting officer does not synopsize", meaning that normally there is no need to publish calls for orders, or in any event not necessarily in the media where 'traditional' procurements are published. However, the media for making orders must be provided for in the contract. Actually, the contracting officer does not need to invite all ID/IQ contractors to submit offers for individual orders if the value of the order is below simplified acquisition threshold[63] and provided that by doing so he does not prevent any contractors from their right to be provided with a fair opportunity to be considered. For orders below USD 3,500 there is no requirement for all contractors to be provided with a fair opportunity to be considered. Basically, such orders can be placed as most convenient for the agency.

In FAR16.505 there are specific provisions for order calls, which must be: within the scope of the ID/IQ contract, issued within the contract performance period and within the maximum contract value or quantity provided for by the contract. Similarly, a clear description of the services or supplies must be included allowing for cost or price to be established when the order is being placed. Also, contracting officers should keep submission requirements to a minimum when calling for orders, and that they may use

[62] FASA attempted to introduce in this way enhanced competition among contractors at second stage of ID/IQ procurements.
[63] See n.58.

streamlined procedures or oral presentations. However, cost or price must always be considered in the selection decision.

Two additional conditions apply to orders exceeding the simplified threshold but not exceeding USD 5,500,000[64]. First, a fair notice of intent to make the purchase must be issued to all contractors, including a clear description of items and basis on which the selection will be made. Second, all contractors responding to the notice of intent must be provided with a fair opportunity to submit an offer and to have that offer fairly considered.

Further competition requirements apply to orders in excess of USD 5,500,000[65]. These requirements include: (i) a reasonable period for contractors to reply to the notice of intent (sent to all contractors); (ii) disclosure of evaluation factors and sub-factors, and their relative importance; and (iii) a post-award debriefing regarding the outcome of the exercise[66].

Where providing a fair opportunity to be considered is not possible or desirable to select a contractor for placement of an order within a multi-contractor ID/IQ arrangement, the FAR provides for specific circumstances that allow for an exception to fair opportunity. Such circumstances comprise: (i) extreme urgency; (ii) unique or highly specialised goods or services; (iii) a follow-on from older orders (provided that in such previous orders fair opportunity was followed); (iv) meeting a minimum guarantee (v) orders set-aside for small businesses; and others. Specific rules apply to the preparation

[64] FAR16.505(b)(1)(iii).
[65] These were originally introduced in 2008 for orders above USD 5 million following "serious concerns about the use of task order[s] to conduct major acquisitions" and about the need for increased "transparency and review" - Acquisition Advisory Panel Report to Congress, as quoted in Bleicher et al., n.3, p.399.
[66] FAR16.505(b)(1)(iv).

and approval mechanism for a justification for exception from fair opportunity, depending on the order value. Thus, the justification must be in writing, and must be made publicly available in specified media. Also a notice is to be published following the award of an order subject to an exception from fair competition on www.fedbizopps.com[67], which is the "single point of entry website" for all Government proposed procurement actions and contract award notices (for which publication is required)[68]. Various levels for approval of justification of exceptions from fair opportunity are provided, depending on the value of the order. Justification and posting are not needed for small business set-aside orders.

While increased procedural and competition (fair opportunity) requirements apply to higher value orders it is noted that within the parameters described above, contracting officers enjoy a large degree of flexibility in awarding orders in multiple award ID/IQ contracts. It is even the language of the FAR that explicitly states that contracting officers "may exercise broad discretion in developing order placement procedures"[69]. Additionally, FASA 1994 introduced a ban on protesting orders under ID/IQ contracts (except where an order exceeded the scope of the ID/IQ contract) which was intended to ensure convenience and practicality of ID/IQ contracting. This provided an even wider area of discretion for contracting officers which brought about case-law interpretations of the ban on ID/IQ order protest and, consequently, the ban was then softened. Under the

[67] FAR16.505(b)(2)(ii)(D)*(1)(i)* referring to FAR5.301.
[68] Gordon and Racca, n.1, p.139.
[69] FAR16.505(b)(1)(ii).

circumstances, the relevant review body, i.e. GAO, had no alternative but to dismiss many protests without a review on the merits, because of lack of jurisdiction.

In an attempt to maintain a certain level of oversight over the award of orders under ID/IQ contracts, GAO employed two other exceptions from the FASA ban that were not explicit in the FASA: (i) down selections, i.e. "reductions in the group of potential vendors", for example, narrowing "the field of eligible vendors for future orders under a multiple award ID/IQ contract to a single vendor"[70]; and (ii) award of orders under the GSA Schedules[71] that we will look at in the following section. There was certainly proper justification for these implicit exceptions from the ban.

'Down selections' were quite rightly considered practices against the spirit of the regulation of ID/IQ arrangements, as it would not make sense to have a multiple-award ID/IQ contract if the order or orders awarded to a contractor basically prevent all other potential contractors in the ID/IQ arrangement from being awarded future orders. On the other hand, since the ban only relates to ID/IQ contracts and GSA Schedules are dealt with separately in the FAR, the award of orders under GSA Schedules was not considered to fall under the scope of the ban.

Beyond these exceptions, many awards of orders under ID/IQ contracts remained "below the radar" of GAO review. However, the changes in the procedures for the award of orders over USD 5,000,000 (currently over USD 5,500,000) and also extension of GAO's jurisdiction to the award of

[70] Bleicher et.al, n.3, p.390.
[71] Ibid, p.392.

orders above USD 10,000,000 suggest that increased competition and oversight were needed in connection with the award of orders. This extension of jurisdiction means that GAO can review on merits protests of orders in excess of USD 10,000,000, and not only if such protests fall within the exceptions described above. The GAO Report to the House of Representative for 2008 indicated in a footnote that more than 49 protests of those filed in that year were attributable to the extension of jurisdiction in connection with task orders.

Also, these changes to the regulations are likely to have been triggered by growing concern over the award of orders as emphasised in the post-Katrina hurricane literature or in GAO's audit reports emphasising the risks associated with inter-agency contracts[72]. For avoidance of doubt such audit reports of GAO are not dealing with individual procurements but with the procurement process in general, or with certain elements of that process.

However, for orders below USD 10,000,000 the ban still applies, with the exceptions discussed above. Therefore, an independent, third party review on the merits of a protest against such an order continues to be difficult[73]. Instead, FASA took the view that GAO jurisdiction to review order protest be replaced with an alternative system where a task or delivery order ombudsman was established in each agency to deal with complaints, according to the procedures provided for in the contract, and to ensure that such contractors are provided with a fair opportunity to be considered. This

[72] Ibid, p.406.

[73] Further on this, G.M. Ebert, "Protests of Orders: A Drizzle or a Downpour: Examining the Results of the Government Accountability Office's Exclusive Protest Jurisdiction Following the NDAA Amendments to FASA" (2016) 45 (4) *PCLJ* 613.

was not necessarily the most effective way to review such complaints, since even if the ombudsman may be independent from the contracting officer he cannot possibly be fully independent of the agency that designated him, and whose official the ombudsman is. Therefore, a fully independent review cannot be achieved through the ombudsman. As it can be noticed, FASA tried to find some middle-ground between the need for more transparency and competition in the award of orders on the one hand, and the likely disruptions that submissions of task order protests would bring to procurement via orders, on the other hand.

"[...] ID/IQ contracting now plays a central role in the federal procurement system"[74]. It presents the advantages of flexibility and, in case of multi-contractor arrangements, that of security of supply. As in the case of requirements contracts, the precise quantities (and deliveries) are not known at the time when the procurement is started, nor at the time when entering the contract, and these will be defined through orders issued during the contract period. While in requirements contracts the quantities are estimated, and therefore there may be remedy for contractors if the quantity ordered is below the estimation and the estimation was negligently prepared, in ID/IQ contracts only the purchase of the nominal minimum is guaranteed. Ordering below the potential maximum in ID/IQ arrangements will not entitle the contractor to compensation from the agency, while ordering below the nominal minimum will. Another difference between the two types of contracts is that while in requirements contracts the agency cannot normally

[74] Bleicher et al. n.3, p.413.

buy similar items outside that contract, there is no such limitation in ID/IQ contracts[75].

However, as is evident from the literature[76], there was growing concern related to securing meaningful competition when placing orders. It was stated that additional guidance and rules should be necessary in connection with issuing orders in multiple award ID/IQ contracts, and that FAR provisions and revisions (related to the issuance of such orders) "amounted to nothing more than <<purely generalized suggestions>>"[77]. Also, quoting prices based on nominal minimum quantities in ID/IQ contracting, if the potential maximum is much higher than the minimum guaranteed, and the agency orders up or close to the potential maximum, is not likely to generate economies of scale, as quoted unit prices normally decrease if based on higher expected sales quantities.

Beyond the advantages and shortcomings of ID/IQ contracting, and of the complexities of multiple award ID/IQ contracting, a couple things need to be emphasised. First, ID/IQ contracting, and particularly multi-award contracting remains one of the main vehicles of procuring recurrent needs in the US federal procurement system. Second, practicality, speed and convenience appear to outweigh transparency and contestability in the second-stage of a multiple award ID/IQ arrangement, for many orders, in particular smaller ones, but also to some extent quite large ones.

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[75] See also Cibinic, Nash and Yukins, n.39, pp.1389-1391.

[76] E.g. Bleicher et al, n.3; or, M.J. Lohnes, "Attempting to spur competition for orders placed under multiple award task order and MAS contracts: the journey to the unworkable Section 803" (2004) *PCLJ* (33) 599; or the Report of the US House of Representatives, n.7.

[77] Lohnes, n.76.

B.5 GSA Schedules

Another vehicle aiming at a quick and convenient procurement process for "commercial supplies and services"[78] is the Multiple Award Schedule (MAS) Program directed by the General Services Administration (GSA). This programme has a long history starting in 1949. In the 1990's it had an explosive development, with more and more schedule contractors being involved in the programme and with more and more orders being placed. Various reports and literature emphasised the expansion of MAS sales, as well as the MAS contracts[79]. One article reports the significant growth, as follows: (i) sales volumes from 4 billion in 1992 up to 34.8 billion in 2008; and (ii) number of schedules contracts administered, from 1,817 in 1994 to 17,683 in 2006[80].

Schedules are lists of suppliers, items and services they provide and prices offered, following a selection process carried out by GSA[81]. Such lists are established and administered by GSA in a catalogue that is available to Government Agencies, including on-line, as *e-Library*. Schedule contracts are contracts concluded between the (GSA), with interested contractors willing to be included in the GSA catalogue and to supply products or provide services to various Government agencies, upon orders or based on blanket purchase

[78] FAR38.101(a).
[79] E.g. GAO report entitled "Contract Management: Opportunities to Improve Pricing of GSA Multiple Award Schedule Contracts", published in (2006) 6 (3) *JPCL*.
[80] R.R. Hutchinson, "Oversight of GSA Federal Supply Schedule Contracts: From Internal Compliance Programs to Civil False Claims Actions" (2008) 37 *PCLJ* 569.
[81] Cibinic, Nash and Yukins, n.39, pp.1144.

agreements (BPA[82]). It should be noted that whilst originally the use of GSA Schedules was compulsory for "all federal agencies", this changed after 1990s when "GSA lost its role as a mandatory source of supply"[83].

The process of entering the MAS programme (first stage, when selecting contractors and establishing schedule contracts) is briefly described by the GAO mentioned above[84]. The process has a few specific features. Upon a solicitation of offers for certain goods or services, issued by GSA, interested vendors submit proposals. More vendors can submit proposals for similar or like products or services. Other contractors may already have been included in the MAS programme at the time of a specific solicitation. Relevant MAS center analyses the proposal as to its eligibility and completeness[85].

Before including a contractor in the programme, if the offer is determined as eligible and complete, the most important step is to establish whether prices offered by that contractor are fair and reasonable for the Government agencies to purchase such items, under a specific procedure. This basically means in terms of MAS to ensure that the prices offered (or further negotiated, or maintained during the duration of the schedule contract) for MAS are at least as advantageous as the most privileged price offers contractors use in their business for their other clients[86].

There are a number of instruments that GSA officers can (and should) employ during the assessment of offers received from interested operators to

[82] Ibid. pp.1184-1188.
[83] Gordon and Racca, n.1, p.137.
[84] N.79, mainly p.303.
[85] Ibid.
[86] See also Albano and Nicholas, n.27, p.106.

ensure that fair and reasonable prices are secured in practice. They employ, among others, means such as market research, documents relating to vendor's sales history, and pre-award audits. The process may involve additional stages (and sub-stages), depending on the procurement. One of the most relevant assessment instruments is the pre-award audit where vendor's documents may be inspected at the vendor's head-office to ensure that the information submitted by the vendor is accurate and complete, and therefore that the basis for establishing the fair and reasonable price is correct. However, not all assessments of vendor's offers entering MAS are subject to such an audit.

The literature has emphasised that a significant reduction of the number of such audits took place in particular after 1996[87], combined with a reduction of other controls during the contract period or towards end of contracts for the purposes of renewal of schedule contracts. All these have resulted, in many cases, in excessive spending by Government due to contractors abusing the system and failing to provide appropriate information either to enter the system, or to maintain the most privileged price offers during the contract period[88]. A number of further instruments have been introduced to ensure that price information submitted by contractors is accurate and up to date, including internal compliance programs, such as

[87] N.79, mainly p.303.

[88] On criticism about the process of establishing/maintaining fair and reasonable prices in GSA schedules, see further, Gordon and Racca, n.1, pp.137-138 and A.E. Wodward, "The Perverse Effect of the Multiple Award Schedules' Price Reductions Clause" (2012) 41 (3) *PCLJ* 527.

Contractor Codes of Business Ethics and Conduct[89]. Such controls have their clear role maintaining a clean and ethical business conduct in particular when working with the Government.

MAS continues to be a big success in terms of the value of sales, and not less, in terms of the commissions charged to users for such sales[90]. Once a contractor is awarded a schedule contract, it will have the chance of receiving task or delivery orders, or be awarded blanket purchase arrangements, that Government agencies can employ to procure items, under second stage of this non-traditional regular purchase arrangement. FAR8.4 describes the applicable ordering rules. One of the main differences between ID/IQ multiple award orders and orders issued against schedules, is that the order award protest ban does not apply to orders issued against schedules.

MAS basically is a huge "non-traditional" purchasing arrangement, where GSA enters into and administers a large number of schedule contracts with various suppliers. The first stage of the arrangement, when schedule contractors are selected and schedule contracts concluded is started by GSA before an agency needs are actually known (or materialised). The GSA initiates the process based on the assumption that Government agencies will always need various commercial items.

For each category of similar or like products or services, there are many schedule suppliers, so that competition among them can be achieved

[89] C.L. Vacjetta and S. Curley, "An Effective Compliance Program: A Necessity for Government Contractors under IDIQ Contracts and Beyond" (2008) *PPLR* (37) 593.
[90] The fee is also known as the "the industrial funding fee" (IFF). It is charged to GSA contractors on a quarterly basis as "a percentage of the total quarterly sales". See Cibinic, Nash and Yukins, n.39 p.1142.

during second stage of the arrangement, when agencies award orders or BPAs to existing GSA schedule contractors. Orders are used for filling one-off needs, while blanket purchase agreements (BPAs) are used "to fill repetitive needs for supplies or services"[91]. BPAs can be placed against one or more schedule contractor(s), can be "used by multiple agencies, and may be for five years"[92]. Under FAR8.405-3(a)(3)(i) a preference applies for multiple-award BPA (again somewhat similar to that under ID/IQ contract). In case of BPAs placed against schedule contracts, the procurement actually involves a third stage, namely placing orders under the BPA.

It needs noticing that GAO held that BPAs are not contracts, that orders under BPA are placed on the basis of the 'main' schedule contract, and in effect orders under BPA can only be placed by the time the schedule contract has expired[93]. It was suggested that a more adequate 'name' for BPA would be "blanket orders"[94].

Procedures that must be followed by ordering activities intending to purchase items from schedules are quite detailed. The FAR structures these procedures by: (i) the nature of the purchase, i.e. order or BPA; (ii) the value of the purchase; and (iii) the nature of the item(s) being procured, i.e. items requiring a statement of work and items not requiring a statement of work. A statement of work (SOW) defines the features or performance (or other characteristics) of a product or service, while items not requiring a SOW are, in general terms, 'standard' or 'catalogue' items.

[91] FAR8.405-3(a)(1).
[92] Nash, O'Brien-Debakey and Schooner, n.34, p.59.
[93] Cibinic, Nash and Yukins, n.39, p1187.
[94] Ibid.

As fair and reasonable prices have been pre-determined by GSA with schedule contractors during first stage of schedule procurement (when selecting schedule contractors), procedures during second stage, for awarding orders or BPAs, generally require some level of competition but it is not "full and open competition standard" applicable to "traditional" procurements, consistent with the approach that schedules should be a vehicle for quick and convenient procurement. However, orders placed under MAS, according to FAR8.4 are considered by FAR to have met full and open competition. In any event, contracting officers may and, in some cases, are required to seek further discounts from selected schedule contractors by comparison to prices listed in the GSA catalogue, although schedule contractors are not bound to offer such further discounts[95].

Beyond particular features of items requiring a SOW and items not requiring a SOW, procedures follow similar approaches, and these are determined by the value of the exercise[96]. For orders below the micro-purchase threshold (USD 3,500) the order can be awarded to any schedule contractor able to meet the agency's need and although "not required to solicit from a specific number of schedule contractors, ordering activities should attempt to distribute orders among schedule contractors"[97]. As it can be noticed, the approach is somewhat similar to the one employed for orders under that threshold in multiple-award ID/IQ contracting.

[95] R.J. Sherry, G.M. Koehl and S.A. Armstrong, "Competition Requirements is General Services Administration Schedule Contracts", (2008) 37 *PCLJ* 475.
[96] FAR8.405-1 and subsequent.
[97] FAR8.405-1.

For MAS orders (or BPAs) between the micro-purchase threshold and the simplified acquisition threshold, "the ordering activities must place orders with GSA Schedule contractors on a best-value basis"[98]. Additionally, the contracting officer must review at least three schedule contractors through *GSA Advantage!* on-line service or request quotations from three schedule contractors that can provide the required supply or service. Alternatively, if there are reasons for restricting the number of sources, as provided under FAR8.405-6, ordering activities must document the circumstances, the requirement being somewhat similar to that applied under ID/IQ multiple-award contracting.

Finally, for proposed orders (or BPAs) exceeding the simplified acquisition threshold, the contracting officer must provide a Request for Quotations (RFQ) describing the requirement and the basis for selecting the offer, and must publish this on *e-Bay*, an electronic means allowing for all interested schedule contractors to take notice of the opportunity and submit an offer. Alternatively, FAR provides that the ordering activity officer must provide the RFQ to as many schedule contractors as possible, according to the market research conducted, such as to ensure *receipt* of at least three offers. Also, the ordering activity contracting officer must ensure that all offers are fairly considered, that the successful offer is selected based on RFQ, and that orders are placed on a best value basis described in the FAR.

As regards orders from BPA, if the BPA arrangement is with one contractor, then orders are placed directly, as and when the needs for supply

[98] Sherry at al., n.95, p.467.

or services within the scope of the BPA arise. If the BPA is with more contractors then placement of orders will need to observe the BPA ordering procedures, which, again, depend on the value of order[99].

GSA schedule procurement represents the furthest step away from "traditional procurement". The MAS program is by its very nature a multiple-agency multiple-contractor arrangement, organised by a third party – the GSA. When the GSA starts the first stage of the process by launching calls for applications, the needs are neither known, nor actual in any way. The process is started on the assumption that commercial items of all kind are going to be needed by agencies at some point. Interested contractors then enter schedule contracts. They commit to most advantageous price offers against being listed in the GSA catalogue, which provides opportunities for sales through orders or BPAs awarded by a wide range of Government agencies. There is no guaranteed quantity of items to be supplied to ordering agencies, but there is an indefinite potential.

C. Conclusions

The US federal procurement relies to a great extent on "non-traditional" recurrent purchasing arrangements. Practical experience clearly demonstrates that purchasing standard items needed regularly require specific purchasing arrangements that cater for a quick and convenient acquisition method. Going through a full "traditional" procurement each and

[99] FAR8.405(3)(c).

every time a need for standard items materialises is likely to be inefficient and time consuming. The four main non-traditional regular purchasing arrangements of the US federal procurement system analysed in this chapter, with their advantages and shortcomings, provide the example of a very experienced system that developed a wide range of such NTRPA to suit various procurement circumstances, each of them representing one more step away from “traditional” public procurement, as well as one more intense shade in a spectrum described at one end by “traditional” public procurement, and at the other end by “business like procurement”.

CHAPTER V

NON-TRADITIONAL REGULAR PURCHASING ARRANGEMENTS UNDER THE EU PUBLIC PROCUREMENT SYSTEM: THE EU LAW LEVEL AND SPECIFIC DOMESTIC APPROACHES IN THE UNITED KINGDOM, ROMANIA AND FRANCE

A. Scoping and Organisation

In this chapter we look at 'intra-EU' procurement, namely public procurement conducted by covered purchasers from EU Member States. 'Intra-EU' procurement includes the EU law level, whose norms must be coordinated among EU Member States, as well as the national procurement systems of Member States – of which the current research has looked at UK, Romania and France.

While national systems must ensure that the requirements of the EU public procurement law are transposed into their legal systems[1], they are allowed to issue or follow their own public procurement procedures and regulations to the extent that such procedures or regulations do not contradict the requirements of the EU law[2]. Thus, among Member States there will be certain common procurement approaches, principles and

[1] Since majority of public procurement rules at EU law level are enacted by using the legal instrument of directives.

[2] See S. Arrowsmith and S. Treumer, "Competitive dialogue in EU law – a critical review", in S. Arrowsmith and S. Treumer (eds) *Competitive Dialogue in EU Procurement* (Cambridge University Press, 2012) pp.9-13; also, P. Trepte, *Public Procurement in the EU – A Practitioner's Guide* (Oxford University Press, 2007) pp.1-3.

requirements, as imposed by the EU law, but there will also be national differences, as permitted within the 'limits' or 'framework' provided for by the EU public procurement law.

This chapter deals with NTRPA, as currently regulated at the EU law level, through specific legal instruments imposing obligations on Member States. Those legal instruments are, mainly, the EU procurement directives: the public sector (or 'classic') directive[3], the utilities directive[4], and the defence and security directive[5]. These are supplemented by two procurement remedies directives (and other instruments referred to as appropriately). The rules in the directives apply only to procurements whose value exceeds certain thresholds specified in the directives[6], and the scope of the current chapter does not include procurements below those thresholds, or those otherwise excluded from remit of the EU procurement directives.

Where Member States examined offer specific domestic approaches, experiences or traditions that are significant for analysing NTRPA in the wider context of this research, such domestic aspects are presented in specific sub-sections of this chapter, where appropriate. Thus, "national" sub-sections

[3] 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 L94/28.3.2014, p.65). (Hereinafter 'PSD').
[4] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L94/28.3.2014, p.243). (Hereinafter 'UD').
[5] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L216/20.8.2009, p.76). (Hereinafter 'DD').
[6] Art.4PSD; art.15UD; art.8DD.

present specific domestic approaches toward achieving the requirements imposed by EU law, but do not cover purely 'domestic' procurement approaches for purchases not covered by procurement directives.

Some NTRPA are regulated by a number of EU sectorial procurement regimes. Notably framework agreements are recognised and regulated in all three sectors ('classic' public sector, utilities, and defence), and dynamic purchasing systems are regulated in two of the sectors ('classic' and utilities).

B. Procurement Context

B.1 Approach and Institutional Considerations

The EU law shapes to a significant degree public procurement systems of all (currently) 28 EU Member States. Almost all substantive procurement norms are found in directives. This choice of legal instruments by the EU legislator explains to a considerable degree the approach and features of the public procurement system. It should also be noted that relevant case-law of the European Court of Justice (ECJ) is compulsory for Member States.

Whilst a regulation, as a legal instrument, is directly applicable and binding in all respects for all Member States[7], a directive "shall be binding, as to the result to be achieved, […], but shall leave to the national authorities the choice of form and methods"[8]. Transposition of a directive into national law

[7] Art.288TFEU.

[8] Ibid. However, under the "direct effect" doctrine, "individuals may enforce in national courts the rights conferred by the directives" subject to certain conditions – OECD, Sigma, *Brief 1 Public Procurement - Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions* (OECD, Sigma, 2016) at p.4.

takes the form of either enacting new domestic legislation of the appropriate level, or amending existing legislation such as to ensure that results provided for in the directive are met. In effect, some degree of discretion is allowed to Member States.

A directive provides for flexibility allowing not only for desired norms to be approximated or harmonised among Member States, but also within each Member State's own legal, administrative and institutional environment. This instrument takes account that in some areas of EU legislative intervention there may be a need to adapt approaches to different national contexts. Public procurement has been perceived as one such subject that requires a flexible approach.

It is also important to look at the legal basis of the procurement directives in the Treaty for Functioning of the European Union (TFEU). All three procurement directives "were adopted under the EU's internal market provisions"[9], as it results from their preambles[10]. It follows that the directives are mainly concerned with maintaining and enhancing the good functioning and openness of the EU internal market defined as "an area without internal frontiers in which free movements of goods, persons, services and capital is ensured […]"[11].

Thus, Recital 1 of the 2014 Public Sector Directive states: "The award of public contracts […] has to comply with the principles of the Treaty […], and

[9] S. Arrowsmith, "The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies" (2012) 14 *Cambridge Yearbook of European Legal Studies* 1, at p.5.
[10] Referring to arts.53(1),62&114TFEU (or their predecessors) – Arrowsmith, n.9, p.2.
[11] Art.26(2) TFEU.

in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency."

The 'procurement' directives are less concerned with provision of detailed rules or guidance as to how procuring entities should achieve efficiency or value-for-money in their individual procurement processes, and focus on coordination and harmonisation of measures supporting development EU internal procurement market at macro-level, as well as other EU objectives[12]. The main 'addressees' of the directives are Member States (and not the covered purchasers). It is for Member States to pursue efficiency and value-for money in public procurement, as well as other (domestic) objectives to the extent not conflicting with EU law.

EU regulation of public procurement mainly through directives has been a constant since the 1970s, when public procurement was initially regulated explicitly using secondary law. Whilst the margin of discretion of Member States could be described as limited, the 2014 Pubic Sector Directive has introduced an additional 'layer' of constraint. Thus, in some respects it appears to prevent Member States from *not* making available to their purchasers certain procedures or techniques, or from limiting their use, in light of domestic circumstances. The approach includes framework agreements and may generate additional transposition and interpretation issues.

[12] See Arrowsmith and Treumer, n.2.

It follows from the above that EU public procurement system as mainly regulated through directives differs from the other case studies analysed under this research in a number of ways. It can be described as an 'indirect' procurement system to a wide degree, in that its provisions and instruments mainly address EU Member States, rather than their purchasers. In contrast, the US federal procurement system is actually intended as a comprehensive public procurement system for purchasers under its own jurisdiction.

The UNCITRAL Model Law on Public Procurement, as the EU directives, is also addressed to States and legislators, rather than to purchasers. However, while the adoption of the UNCITRAL Model Law is entirely voluntary for States, the flexibility provided by the EU directives for Member States is limited in that the EU directives impose obligations on EU Member States concerning the results to be achieved through domestic legal instruments.

There are certainly many differences between the EU public procurement system (as regulated by the directives) and the World Bank procurement system.

B.2 History and Coverage

In the early days of the construction of the European Community (EC), it did not take long for EC institutions to come to the conclusion that specific measures were needed to ensure establishment and proper functioning of internal market, and that such measures had to regard, among others, public sector buying. An initial concern related to discrimination on grounds of nationality in public procurement and this was addressed as early as the

1960s in two General Programmes which were then partly implemented through the so called 'liberalisation' directives, whose main focus was to eliminate restrictions on the free movement of goods and freedom to provide services[13].

Those measures proved to be insufficient to secure the freedoms provided for in the Treaty, and the need for further positive action was perceived, meaning to coordinate the laws of Member States concerning public contract award procedures. 'Coordination' directives were a 'qualitative' move; the initial ones were Directive 71/305/EEC (concerning public works) and Directive 77/62/EEC (concerning public supply contracts). Whilst repealed in 1993, these instruments had set the founding stones for the current EU public procurement law.

The 1980s were a period of review and analysis of the integration of the public procurement market. Notable developments are towards the end of the decade when Directive 89/665/EEC[14] came to regulate review mechanisms concerning public procurement, namely making available means to aggrieved tenderers to challenge procurement acts and decisions of covered purchasers.

The objective of Directive 89/665/EEC was to establish a specific public procurement review mechanism, including legal standing, competence of a review body independent from the purchaser, availability of quick and specific measures (suspension), other reparatory measures as appropriate, and enforceability of the decisions delivered by the review bodies. Together with

[13] Trepte, n.2, pp.27-29.
[14] OJ L395/30.12.1989.

initial procurement coordination directives, Directive 89/665/EEC set another 'building block' of the EU public procurement law system.

An additional impetus to the regulation of public procurement was brought by the Single European Act (1986), with its ambitious agenda of establishing a "single market" by 1992. First, the utilities sector was brought onto a procurement regulatory regime through Directive 90/531/EEC[15]. Extension of regulatory regime to utilities sector was relatively quickly followed by a corresponding extension of the remedies regime to this sector, through Directive 92/13/EEC[16].

One further extension of the regulatory regime, in July 1992, regarded inclusion of public sector (non-construction) services, which become covered procurements through Directive 92/50/EEC[17]. The next "legislative action" of the 1990s, was a consolidation exercise concerning some of existing directives.

The first decade of the millennium brought new changes to procurement regulatory regime, further along alignment, organisation and extension coordinates. In 2004 a new consolidated directive was adopted for the public sector, which covered, for the first time together, supply, services and works contracts (substantive procurement rules) - Directive 2004/18/EC[18] (hereinafter '2004PSD'). At the same time a new directive on utilities

[15] OJ L297/29.10.1990.
[16] Directive 92/13/EEC (OJ L76/23.3.1992).
[17] OJ L209 /24.7.1992.
[18] OJ L134/30.4.2004.

substantive rules was adopted – Directive 2004/17/EC[19] (hereinafter '2004UD').

The 2004 directives were driven by a perceived need for modernisation, simplification and increased flexibility[20]. It is important to note that the 2004PSD recognised and regulated framework agreements for the public sector. Also, the 2004 directives introduced in both sectors 'dynamic purchasing systems', a specific type of open arrangement for repeat procurement of 'common use' items.

As a consequence of the new substantive procurement rules and ECJ case-law, the two remedies directives have also been 'up-dated' in a coordinated fashion in 2007, through a single amending act which covers remedies in both sectors – Directive 2007/66/EC[21] (hereinafter 'Remedies Directive' (RD)). Finally, in 2009, the regulatory regime was further extended to include defence and security procurement, which was addressed through Directive 2009/81/CE[22] (hereinafter 'Defence Directive' (DD)) – which includes both substantive and remedies provisions.

The 2004 public and utilities directives were in force for a decade. In 2011 a consultation and review were initiated[23] and, following the drafting

[19] Ibid.
[20] See for example, M.K. Larsen, "The New EU Public Procurement Directives", in R. Nielsen and S. Treumer (eds), *The New EU Public Procurement Directives* (Djøf Publishing, 2005) p.10
[21] OJ L335/20.12.2007.
[22] OJ L216/20.8.2009.
[23] European Commission, *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market* (Brussels, 27.1.2011) COM(2011) 15 final.

process, the current 2014 public and utilities directives were enacted[24], and 2004 directives were repealed. Time-limit for transposition of the 2014 directives into national legislation of Member States was 18 April 2016. All three Member States investigated in the current research met that time-limit.

The roots of the 2014 directives lie in the 2020 Strategy for smart, sustainable and inclusive growth[25]. The main strategic directions envisaged for procurement were to supporting innovation, protection of environment, and SMEs. At the same time the objectives of procurement policy concerned ensuring "the most efficient use of public funds" and maintaining procurement markets open "EU-wide"[26]. Certainly, the 2014 procurement 'package' has generated wide debate and analysis concerning the extent to which simplification and flexibility 'agenda' has actually been met, legal certainty was improved or otherwise, as well as the impact of the 'package' on specific aspects of procurement[27].

It can however be noticed that consolidation of public and utilities sector rules (into a single instrument) did not take place, the remedies directives were not reviewed jointly with the revision of substantive procurement rules, and a distinct regulatory regime was introduced for concessions. The specific impact of the 2014 public and utilities directives on NTRPA is discussed at Section C.

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[24] N.3&n.4.
[25] Commission Communication COM(2010)2020 of 3.03.2010.
[26] N.23, p.3.
[27] See e.g.: S. Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK,* Volume 1, Third Edition (Sweet&Maxwell, 2014); C. Bovis, *The Law of EU Public Procurement (Second Edition)* (OUP, 2015); and F. Lichère, R. Caranta and S. Treumer (eds), *Modernising Public Procurement: The New Directive* (European Procurement Law Series Vol.6) (Copenhagen: Djøf, 2014).

It should also be mentioned that the total estimated volume of procurement market regulated at EU level accounted in 2015 for 450.21 billion Euros[28]. The use of framework agreements has become increasingly popular after coming into force of 2004 directives; between 2006 and 2010 "the number of framework agreements increased by a factor of almost four"[29]. In 2010 "[…] framework contracts accounted for about one seventh of the value of all the contracts published in the OJEU", which meant about 14% of the total EU directives purchase volume, with most intensive user countries being (in 2009) the UK, France, Germany and Denmark[30]. Also, in 2009 Romania was one of the seven EU member states where "framework agreements covered more than a quarter of all contract notices"[31].

B.3 Current Directives

B.3.1 Public Sector Directive (PSD)

The 2014 public sector directive continues to provide 'general' procurement regime for public institutions falling under the definition of "contracting authorities" in the instrument[32], in respect of purchases above the 'EU thresholds'[33]. The principles under the directive, such as equal

[28] Public Procurement Indicators 2015 (December 19, 2016) (http://ec.europa.eu/growth/single-market/public-procurement/studies-networks/).
[29] Annual Public Procurement Implementation Review 2012, Brussels,9.10.2012, SWD(2012)342 final, p.26.
[30] Ibid.
[31] Ibid.
[32] Art.2(1)(1).
[33] Art.1(1). The thresholds (from 1.1.2018) are: EUR 5,548,000 for works, EUR 144,000 for services and supplies contracts (central government authorities), and EUR 221,000 for services and supplies contracts (sub-central government authorities); Delegated Regulation (EU) 2017/2365 OJ L337/19.12.2017).

treatment and transparency, are in art.18. In terms of coverage, a larger number of services are now subject to full procurement regime, though a 'light touch regime' is provided for certain social and other specific services[34], where procurement exceeds a certain threshold[35]. This research analyses NTRPA as regulated by full regime, and not how they might be organised under the 'light touch' regime.

There are also relevant developments in the area of "techniques and instruments for electronic and aggregated procurement"[36]. Framework agreements continue to be covered where total value of expected orders under a framework exceeds EU thresholds, and irrespective of whether the value of individual orders is below the thresholds. However, PSD brings an end to the discretion of Member States as to permitting or not permitting purchasers to use frameworks. Member States must now allow *all* purchasers to use frameworks[37]. It can also be argued that under the new directive Member States cannot even limit the use of frameworks to certain types of configurations thereof, which may create implementation complexities.

The rules concerning dynamic purchasing systems have been streamlined and simplified, particularly regarding second stage of the arrangement for awarding specific contracts[38]. Also, express provision as regards structuring and content of electronic catalogues has been provided[39], including their potential uses under framework agreements and dynamic

[34] Arts.74-76 and Annex XIV.
[35] EUR 750,000 (art.4(d)PSD)).
[36] Language of directives (e.g. Title II, Ch.II PSD).
[37] Art.33(1).
[38] Art.34.
[39] Recitals 55&68; art.36.

purchasing systems. At the same time the rules concerning centralised and joint procurement have been developed to clarify responsibility of parties establishing or using these arrangements[40], and specific rules have been introduced for centralised or joint procurement "involving contracting authorities from different Member States"[41].

Official lists of approved economic operators and certification by designed bodies[42] have been adjusted. However, a 'mandatory list' type of arrangement similar to qualification systems in the utilities sector continues to be prohibited for the public sector.

B.3.2 Utilities Directive (UD)

Application of the 2014 Utilities Directives continues to be determined by a triple 'qualification': (i) by nature of purchasing organisation: (ii) by type of sector and activity in pursuit of which a specific procurement is being carried out; and (iii) by nature of specific national market sector/activity. Additionally, the UD only applies to procurements exceeding relevant value thresholds (for the utilities sector).

Traditionally, utilities rules have provided for additional flexibility (compared to public sector) taking account of the more 'commercial-like' environment in which utilities operate[43]. Additional flexibility has also been

[40] Arts.37&38.
[41] Art.39.
[42] Art.64.
[43] Further on utility procurement, see e.g. T. Kotsonis, "The 2014 Utilities Directive of the EU: codification, flexibilisation and other misdemeanours" (2014) 4 *PPLR* 169; S. Torricelli, "Utilities Procurement", Ch.9 in M. Trybus, R. Caranta and G. Edelstam (eds), *EU Public Contract Law – Public Procurement and Beyond* (Bruylant, 2014) 223.

traditionally provided in the utilities sector regarding arrangements falling under our definition of NTRPA.

Whilst the UD introduces an explicit limitation of duration of frameworks agreements and some express rules concerning the award of contracts at call-off stage thereunder[44], the provision is still less prescriptive than that in the public sector. On the other hand, rules concerning dynamic purchasing systems have been streamlined, similarly to public sector[45]. As its predecessors, the UD continues to permit qualification systems – a 'mandatory list' type of arrangement[46].

Regarding electronic catalogues and centralised/joint procurement, the UD provision is[47] pretty much along the line of those in the public sector.

B.3.3 Remedies Directives for Public and Utilities Sector Procurement

The review rules were substantially developed through the 2007 amendments[48], whereas the 2014 amendments extended the application of reviewing mechanism to concessions (and updated references to the relevant material provisions of the 2014 procurement and utilities directives)[49]. It is thus relevant to relate here to the 2007 amendments. Two of the novelties thereof were the formalisation of standstill periods, and the introduction of the remedy of ineffectiveness (and/or of alternative penalties).

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[44] Art.51.
[45] Art.52.
[46] Art.77.
[47] Arts.54-57.
[48] Through directive 2007/66.
[49] 2014 amendments to remedies rules were operated through Title IV (arts.46&47) of the Concessions Directive (2014/23).

The obligation of observing a standstill period has been formalised together with minimum periods applicable: 10 or 15 days depending on the means of communication of award decisions[50]. This consists of a mandatory 'stay' of an award procedure following communication of an award decision, and gives "tenderers and candidates concerned" an opportunity to analyse whether that decision should be challenged for illegality, before the conclusion of a contract. It seeks to secure that where procurement legislation has been breached, remedial action can be effectively taken before a contract is concluded.

The 2007 amendment also sought a significant strengthening of post-contractual review mechanisms, particularly through the remedy of ineffectiveness. This involves that a contract concluded in breach of procurement law should, under certain circumstances, not be enforceable and performed.

It is also noteworthy pointing out that the directive refers explicitly to framework agreements and dynamic purchasing systems. The process of awarding (or admitting suppliers onto) such arrangements is covered by the scope of the remedies rules[51]. As regards contracts awarded based on a framework agreement and/or dynamic purchasing system, Member States may replace standstill periods with the alternative remedy of ineffectiveness[52].

[50] Art.2a(2) of Directive 89/665 as amended(PSR)&Directive 92/13 as amended(USR).
[51] Art.1(1)2(PSR)&(USR).
[52] Recital 9 to Directive 2007/66.

The 2017 Report from the European Commission […] on the effectiveness of the remedies directives[53] concludes that "the Remedies Directives, in particular the amendments introduced by Directive 2007/66EC, largely met their objectives in an effective and efficient way […]"[54]. Whilst it is recognised that some provisions still need clarification, notably resulting from the "interplay" between remedies directives and 2014 procurement directives[55], those do not appear to include any specific 'remedies' aspects concerning NTRPA. Nevertheless, the current author suggests that some adjustments in this connection might be usefully considered in the future[56].

B.3.4 Defence Directive (DD)

The regulatory regime was extended in 2009 with specific material rules coordinating the award procedures in the fields of defence and security. Both material and review provisions are included in the same instrument (directive).

Whilst some procurement in the field of defence had always been subject to the public sector regime, Member States tended to rely on an excessive interpretation of the exception provided for in art.296TEC (currently art.346TFEU) to exclude "often even non-sensitive procurement in the field of

[53] Brussels, 24.1.2017 COM(2017)28 final(accompanied by Commission Staff Working Document "Evaluation of Modifications Introduced by Directive 2007/66/EC […]"), Brussels, 24.1.2017 SWD(2017)13 final.
[54] Report [COM(2017)28 final] at p.8.
[55] Working Document (n.53) e.g. at pp.8,9,43,46,55.
[56] See also A. Sánchez-Graells, "*'If it ain't broke, don't fix it'*? EU requirements of administrative oversight and judicial protection for public contracts" in S. Torricelli and F. Folliot Lalliot (eds), *Administrative oversight and judicial protection for public contracts* (Larcier, forthcoming).

defence […] from EU public procurement rules"[57]. This, in conjunction with other aspects of the defence sector, caused a very fragmented defence procurement market in the EU that was characterised as consisting of a number of individual "national markets fenced off with regulatory barriers to entry aimed at protecting national defence industries"[58].

The DD only applies if the subject matter of procurement concerns specific items, such as military equipment, or sensitive equipment[59], and certainly if the procurement exceeds relevant value thresholds (for the defence sector)[60]. The size of this market sector is significant[61].

As regards NTRPA, DD only provides for framework agreements. It does not cater for dynamic purchasing systems or for 'mandatory list' type of arrangements.

DD includes – unlike the other procurement sectors – provision for potential use of framework agreements as a means for subcontracting by a 'successful tenderer'. However, it is reported that during the period 2011-2016 the (optional) subcontracting provisions of DD, which include the

[57] OECD Sigma, *Brief 23 Public Procurement – Defence Procurement* (OECD, Sigma, September 2016), p.3.
[58] Ibid.
[59] Art.2.
[60] More generally on EU defence procurement see, e.g. M. Trybus, *Buying Defence and Security in Europe – The EU Defence and Security Procurement Directive in Context* (CUP, 2014).
[61] Overall defence expenditure in the EU is estimated at 200 billion in 2015 (http://www.eda.europa.eu/docs/default-source/documents/eda-defencedata-2014-final - accessed 04.09.2017) and at around 81-82 billion per year for the period 2011-2015 (European Commission, *Report […] on the implementation of Directive 2009/81/EC […]*, Brussels, 30.11.2016, COM(2016)762 final, at p.2).

framework agreement 'avenue', were not used and "the number of published subcontract notices" for the period was "negligible"[62].

The EU Commission's evaluation of first five years of implementation of DD revealed a mixed picture: whilst the value of contracts awarded under it has increased "more than tenfold", its use "across Member States remains uneven", with the UK authorities being the most intensive users[63]. However, most defence purchases in the EU have not been carried out under the regime instituted by the directive[64].

B.4 Overview of the Three Member States Examined: the UK, Romania and France

The UK joined the European Communities[65] in 1973. A very distinctive feature of the UK public procurement system is, as emphasised by Arrowsmith, that it does not have a "[…] longstanding tradition of regulating public procurement through detailed rules that are binding and enforceable"[66]. Instead, the system preferred "to rely on the judgment of individual procurement entities and officials who have traditionally been

[62] N.61, Report COM(2016)762 final, p.7.
[63] Ibid, p.3.
[64] N.61, p.4.
[65] Established in the 1950s, having become what is now called the European Union.
[66] S. Arrowsmith, "Methods for Purchasing On-Going Requirements: the System of Framework Agreements and Dynamic Purchasing Systems under the EC Directives and UK Procurement Regulations", Ch.3 in S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Public Procurement: Procurement Regulation for the 21st Century*, (Thomson Reuters/West, 2009) p.141.

given significant discretion"[67]. This has also influenced, historically, its approach to implementing the EU directives.

Current directives were transposed in domestic law through the Public Contracts Regulations 2015[68] ('PCR'), the Utilities Contracts Regulations 2016[69] ('UCR'), and the Defence and Security Public Contract Regulations 2011[70] ('DSPCR'). PCR and UCR apply to England, Wales and Northern Ireland. DSPCR in contrast applies "throughout the United Kingdom (including Scotland) but excluding Gibraltar"[71].

Generally, the UK implementing regulations are 'minimalist' in approach[72] in that they reproduce much of the text of the directives, usually without adding further conditions or details[73] and without limiting the options that the directives provide for Member States. These options are normally 'cascaded' to contracting authorities or entities) so as to afford wide flexibility and discretion to purchasers[74], consistent with the UK's traditional approach.

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[67] Ibid.
[68] SI2015/102, replacing Pubic Contracts Regulations 2006 (SI2006/5).
[69] SI2016/274, replacing Utility Contract Regulations 2006 (SI2006/6).
[70] SI2011/1848.
[71] J. Falle and C. Dwyer, "United Kingdom", Ch.19 in J. Davey and J. Falle (eds), *The Government Procurement Review* (Law Business Research, 2013), p.230.
[72] P. Telles, "Awarding of Public Contracts in the United Kingdom", in M.E. Comba & S. Treumer (eds.), *Award of Contracts in EU Procurements* (Djøf, 2013) p.251.
[73] A notable exception is Part 4 PCR that provides for additional domestic obligations.
[74] In some cases, not pursuing an option of the directive offers enhanced flexibility, for example not imposing a shorter time-limit for "the mandatory use of full e-communications" (e.g. A. Gatenby, B. Gillian and L. Dobson, "United Kingdom", Ch.21 in J. Davey and A. Gatenby (eds), *The Government Procurement Review* (Law Business Research, 2017), p.240). More generally on the regulations, see also, P. Henty, "Implementation of the EU Public Procurement Directives in the UK: the Public Contracts Regulations 2015" (2015) 3 *PPLR* NA74.

In 2016 the UK voted to leave the EU, however, this does not affect the research since 'Brexit' will not occur until 2019[75].

In contrast, Romania is one of the newest Member States having joined the EU in 2007. Thus, its experience with the EU law is more limited, which also reflects in a less coherent long-term public procurement strategy. Legislative changes have been very frequent.

The current public, utilities and remedies directives are implemented in Romanian legislation, mainly, through three distinct laws of 2016: the Public Procurement Law (PPL)[76], the Utilities Procurement Law (UPL)[77], and the Procurement Remedies Law (PRL)[78]. The PPL and UPL are completed, each, with Implementing Norms (IN) approved through Government Decisions (GD)[79], which in some respects are inconsistent with the laws they seek to implement. Regarding defence sector, the relevant directive was transposed, with some delay, through Government Urgency Ordinance 114/2011, as amended by Law 195/2012 (DSL).

Finally, France has been a founding member of the European Communities. It also has a very long tradition, starting at the beginning of the 19th century, of regulating public procurement through detailed 'hard law' national rules[80], namely prescriptive and binding legal norms that are subject

[75] See further, S. Arrowsmith, "The Implications of Brexit for Public Procurement Law and Policy in the United Kingdom" (2017) 1 *PPLR* 1.
[76] Law 98/2016.
[77] Law 99/2016.
[78] Law 101/2016.
[79] GD 395/2016 for public sector (PIN); GD 394/2016 for utilities (UIN).
[80] See e.g. L. Folliot-Lalliot, *The French Approach to Regulating Frameworks under the New EC Directives*, Ch.4 in S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* (Thomson Reuters/West,

to judicial review, such as decrees, ordinances or codes[81]. For example, in the past there were several versions of 'Code des Marchés Publics' (CMP). Whilst naturally involved in the drafting of the Community law on public procurement[82], France has also encountered difficulties in integrating EU law concepts into its domestic law[83].

The current directives concerning substantive procurement rules for the public, utilities and defence sectors have been transposed in French law mainly through three domestic instruments: Ordinance 2015-899 concerning public procurement (hereinafter "PO"), Decree 2016-360 concerning public and utility procurement ("PD"), and Decree 2016-361 concerning defence and security procurement ("DSD"). However, unlike the directives, these three instruments are not each 'assigned' a specific sector. The PO could be described as a 'framework law' for all three sectors (public, utilities and defence).

The PO is supplemented by two decrees. In this case decrees operate as 'secondary legislation' providing for (detailed) implementation rules for the ordinance in areas assigned by the ordinance. The PD supplements the PO as

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2009) p.194; M. Frilet and F. Lager, *France*, in R. Hernández García (ed) *International Public Procurement – A Guide to Best Practice* (Globe Business Publishing, 2009) p.217.

[81] F. Lichère clarifies the meaning of code in the French context as "[…] a gathering of different binding texts linked with the same subject matter" in "Award of contracts covered by the EU Public Procurement rules in France", in M.E. Comba and S. Treumer (eds), *Awards of Contracts in EU Procurements* (DJØF, 2013) p.69.

[82] Folliot-Lalliot, n.80 above, p.195, emphasises the 'inspiration' role that the 1964 French Public Procurement Code had for "the first EC Directive on public works contracts".

[83] Ibid.

regards the public and utilities jointly. The DSD supplements the PO with regard to the defence sector.

C. Analysis of the Types of Non-Traditional Regular Purchasing Arrangements under the EU Directives (Including Specific Approaches in Selected Member States)

C.1 Summary

There currently are three 'major' or 'generic' types of NTRPA provided for in the EU public procurement system: framework agreements, dynamic purchasing systems and qualification systems. The table below illustrates the 'distribution' of relevant arrangements among the three procurement sectors regulated by the directives.

Arrangement Type / Regulatory Regime	***Framework Agreements***	***Dynamic Purchasing Systems***	***Qualification Systems***
Public Sector	X	X	
Utilities	X	X	X
Defence	X		

Framework agreements are recognised and regulated in all three sectors (though different rules apply in some respects for each sector). As the name suggests, these can be classified as framework 'arrangements' since

first stage gets into establishing certain terms for future procurements. Under 2014 directives providing for dynamic purchasing systems (public and utilities), this arrangement can be organised either as a framework arrangement or as a 'list' type of arrangement (i.e. not establishing terms at first stage)[84].

In contrast, qualification systems continue to be provided for only in utilities sector. This type of 'mandatory' list arrangement is not permitted in the other two regimes. However, 'optional' list type of arrangements will be discussed (including in public and defence sectors), though not explicitly regulated. Also, because of their potential relationship with optional lists, official lists of approved economic operators and certification (in public and defence sectors) are addressed, though official lists and certification cannot be regarded as specific NTRPA *per se.*

C.2 Framework Agreements

C.2.1 General

The main provisions concerning framework agreements are at art.33PSD, art.51UD, and arts.3(1)&29DD. However, specific rules concerning certain aspects relating to frameworks are spread throughout the text of each directive. Many of the general rules on awarding contracts also apply to frameworks, though in some cases a degree of 'adaptation' is needed, for

[84] See C.3 below.

example because a framework could be a awarded to more than one supplier[85].

It is important to emphasise the varying degree of discretion allowed by each of the directives to Member States regarding regulation of framework agreements. Thus, 2014PSD has operated what could be a significant change. Under previous (2004)PSD framework agreements were optional, meaning that Member States had the discretion to decide (through domestic legislation) whether to permit the use of these arrangements to purchasers under their jurisdiction or not[86], or to limit the permitted uses[87]. Whilst all three Member States examined provided for framework agreements in their domestic legislation under 2004PSD, two of them (France and Romania) did limit their use.

In contrast, under 2014PSD Member States do not appear to retain such discretion[88], though the boundaries of such curtailing could be debatable. It is noteworthy that France and Romania appear to manifest some 'inertia' in that their current domestic legislation continues to provide for certain limitation of use of framework agreements, to certain configurations thereof. It is theoretically possible that a purchaser in these countries might pursue a configuration of framework not envisaged in domestic legislation, relying on the direct effect of directives in cases of inappropriate

[85] The European Commission issued guidance as an explanatory note in 2005, pursuant to introducing frameworks in previous (2004)PSD [Ref. ARES(2016)810203 – 16/02/2016].
[86] Art.32(1) 2004PSD.
[87] S. Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK,* Vol.1, Third Edition (Sweet&Maxwell, 2014) pp.1110-1112.
[88] Art.33(1)1 2014PSD.

transposition. Nevertheless, in practice it seems unlikely that a purchaser would be prepared to have to defend his case in legal proceedings.

Similarly, in utilities sector frameworks are not 'optional' for Member States[89]. From a Member State perspective, the safest approach as regards transposition of framework provisions in the 2014 directives appears to be 'copy-out', supplemented by guidance, as does the UK. However, it should be recognised that in some Member States, depending on their administrative culture, (non-binding) guidance alone could be insufficient to instil an appropriate use of frameworks.

In the defence sector frameworks are optional[90]. Nevertheless, all three Member States examined have provided for frameworks in their domestic legislation.

C.2.2 Definition and Types

The directives provide for a unitary definition of a framework agreement, that is "[…] 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"[91]. Whereas this definition *per se* seems to focus on the outcome of first stage of a 'framework arrangement', the substantive provisions dealing with framework agreements clearly take a 'framework agreement procedure'

[89] Art.51(1) 2014UD (repeating provision in 2014PSD) (n.88).
[90] Art.29(1)DD (repeating provision in 2004PSD (n.86).
[91] Art.33(1)2PSD. (Similar definitions provided under art.51(1)2UD, and art.1(11)DD).

approach[92]. They differentiate between the two stages of such an arrangement, which comprise a first stage aimed at establishing a 'framework agreement' as described above, and a second stage for the award of contracts under the 'framework agreement'.

In literature it has been argued that frameworks "are not a procedure, they are a type of technique and instrument for aggregated procurement"[93]. Such categorical repudiation seems unnecessary. Whilst main provisions on framework agreements are included in the structure of PSD and UD under a chapter on such 'techniques and instruments', the Defence Directive includes provisions on framework agreements precisely under the "Procedures" chapter.

On the other hand, the content of provisions does not link any effect to the denomination of 'technique' or 'instrument'. For example, while framework agreements are mainly used for aggregate procurement, nothing in the actual rules prevents frameworks to be used for other purposes[94], such as to deal with indefinite requirements. In contrast, procedural content of a framework agreement purchasing process is far more prominent.

It can be noticed that both single-contractor and multiple-contractor frameworks, as well as single-agency and multiple-agency frameworks are explicitly envisaged by the legal definition of framework agreements.

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[92] P. Trepte, n.2, p.375.

[93] M. Andrecka, "Framework agreements, EU procurement law and the practice" (2015) 2 *Procurement Law Journal* 127, p.146, referring to Risvig-Hamer, "Chapter II: Techniques and instruments for electronic and aggregated procurement" in Steinike and Vesterdorf (eds), *Commentary on EU Public Procurement Law* (Nomos, primo 2015).

[94] See infra, C.2.3.

Framework agreements must be established for a "given period", namely they must not be concluded for indefinite periods of time. Depending on circumstances, particular attention is usually given to avoiding excessively long period framework agreements that are likely to negatively affect competition[95].

The legal definition *per se* makes no distinction between closed arrangements or open arrangements. However, procedural rules under PSD and DD do clarify that only closed framework agreements are permitted by providing that call-off procedures for the award of contracts under framework agreements are to be applied "[…] only between those contracting authorities clearly identified for this purpose […] and the economic operators party to the framework agreement as concluded"[96].

Concerning other potential features of framework arrangements, it can be noticed that the directives provide for flexibility in that framework agreements do not have to be mandatory (or committal, or exclusive). A purchaser is allowed to procure outside an established framework[97], for example if it is unsatisfied with the contractors' performance or simply if it identified better terms elsewhere on the market. Recital 61(3) of 2014PSD now explicitly states that purchasers "should not be obliged […] to procure works, supplies or services that are covered by a framework agreement, under that framework agreement".

[95] Ibid.
[96] Art.33(2)2PSD. Similar provisions are found in art.29(2)2DD.
[97] Unlike, for example, requirements contracts in the US federal procurement system.

Such flexibility may be particularly useful for example in the case of sub-optimal closed framework agreements, or as a 'preventive' tool against collusive practices among framework contractors. Being aware of the possibility of the purchaser to procure outside an established arrangement might act to some extent as a deterrent for framework contractors from offering terms that do not reflect the market during the call-off stage.

On the other hand, nothing prevents a purchaser from taking on additional commitments such as sourcing all its requirements for the subject-matter of the procurement from an established framework arrangement[98], where it considers that this approach may trigger better terms or increased value from expected aggregate demand. In principle, decision on mandatory or non-mandatory framework is probably best placed at purchaser's level, on a case-by-case basis.

As defined in the Directives, a framework agreement (as the outcome of the first stage of a 'framework agreement procedure') does not necessarily imply binding obligations among parties. However, this might be the case depending on the intent of the parties as well as the applicable national law[99], which reflects the nature of the EU supra-national regime to some extent.

Still, a clear distinction should be made between a 'binding framework agreement' and a 'procurement contract'[100]. With the exception of single-contractor framework agreements where all terms and conditions are

[98] Or commit to buy a certain minimum volume.
[99] See Trepte, n.2, pp.208-211.
[100] The Commission's Explanatory Note on Frameworks (2005) (n.85) (section 1.1) seems insufficiently nuanced.

established, including commitments to buy and sell[101], conclusion of a framework agreement does not normally itself trigger the effect of any supplies being delivered or work being performed, or of any payment obligations. Such effects are generated by call-off contracts issued under the framework agreement and according to the terms established under it[102].

Consequently, all phases of a framework up to reaching a 'procurement contract' with such effects should in principle be considered and treated as framework procedural stages, with full oversight and monitoring requirements being applicable. This is irrespective of whether a framework agreement *per se* is deemed to form a 'binding contract' or otherwise.

For the public and defence sectors, a distinction is made in the relevant directives amongst frameworks that *do not* establish all terms and those that *do* establish all terms. In the former case the award of call-offs involves reopening of competition amongst framework contractors, whereas in the latter case call-off awards are made on the basis of "the terms and conditions of the framework without reopening competition"[103] (though provision is also made in the public sector for reopening competition in this case, subject to some requirements).

[101] Only realisation of committed obligations taking place at 'call-off' stage.
[102] See S. Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005) pp.1062-1065.
[103] Art.33(4)PSD; similarly, art.29(4)DD. See further C.2.4 below.

C.2.2.1 Specific Approach in Romania: Limitation to Committal Frameworks

The Romanian legislation provides for some useful clarifications and controls for ensuring an appropriate and efficient use of frameworks. However, the very tight commitment to buy the subject-matter of a framework (including of the type that involves reopening competition) under that framework, as provided for in the secondary legislation (implementing norms), could in fact exacerbate collusion risks at call-off stage and affect value. Under that legislation, by concluding a framework agreement, the purchaser commits to the following obligations: not to conclude a procurement contract with any other contractor for the subject-matter of the framework throughout its duration, as well as to "award contracts" to framework contractors "each and every time it intends to procure" the subject-matter of the framework "by observing the essential conditions established upon its conclusion" (art.108(1) of Procurement Implementing Norms 'PIN' – see p.180 and note 79 above). Exceptionally, the purchaser is permitted to procure the subject-matter of the framework outside it where the framework contractor(s) are "not capable any longer to honour the requests of the purchaser" (art.108(2)PIN).

Certainly, in frameworks not establishing all terms, and thus involving reopening of competition, there is always the possibility that framework contractors may not attend call-off competitions, or they could make uninteresting offers for call-offs. This type of framework is less amenable for being committal to the supply side (whereas frameworks that establish all

terms are much more so, since all terms are set at the first stage, including the rules concerning whom of the framework contractors is to perform a call-off).

But the IN 'forces' committal frameworks, including of the type involving reopening of competition. It needs emphasising in this context that, under Romanian legislation, framework contractors are only permitted to improve the terms that are subject to the reopening of competition at call-off stage[104]. If no such improved terms are obtained during the call-off stage, the purchaser has the obligation to award the contract to the framework contractor who ranked first during the initial stage of awarding the framework agreement "by taking into consideration the conditions and elements provided for in its initial offer as updated"[105].

This might be an option where all terms have been established (at least provisionally) at first stage, but the IN do not clarify what the position should be for frameworks in which competition reopening "shall be based on […] other terms" than those "applied for the award of the framework agreement"[106]. In this case it would seem that negotiation of the outstanding terms with the first ranking contractor (as at first stage) is the only option, but there might be little to negotiate since the purchaser *must* award the contract to this contractor.

If the framework contractor selected for award of a call-off "does not have the capacity" to perform the call-off "because the quantity for the call-off exceeds the estimated quantity", the purchaser must award the

[104] Art.110(5)PIN.
[105] Art.110(7)PIN.
[106] Art.33(5)PSD as implemented in art.119PPL.

"difference" to the other framework contractors, and is allowed to procure it outside the framework *only* if none of the framework contractors "has the capacity"[107].

Further, if the framework contractor selected for award of a call-off is unable/unwilling to supply, without justification, the purchaser must also award the call-off to the other framework contractors and is allowed to procure it outside the framework *only* if none of the framework contractors "has the capacity"[108]. In this case the defaulting framework contractor(s) is to "suffer the consequences provided for in the framework agreement for failing to meet its obligations", but the IN do not elaborate here[109].

In light of these heavy restrictions for the purchaser, framework contractors could be tempted - if not 'invited' - to circumvent substantive competition by 'agreeing' not to offer any improvements of the terms in call-off competitions, and to 'share the pie' on the basis of the terms tendered to enter the framework at first stage (possibly subject to minimal 'improvements'). The collusion risk that is inherent in closed frameworks involving reopening of competition is elevated where such frameworks are also committal for the purchaser (further on collusion in frameworks more generally see Section C.2.4.2.1). The effort in the PIN to 'paint' a committal framework involving reopening of competition could be regarded as an example of possible configuration. But restricting the use of frameworks involving reopening of competition to this configuration appears not only

[107] Art.111(1)PIN.
[108] Art.111(2)PIN.
[109] Art.111(3)PIN.

inconsistent with the approach of the 2014PSD, but also impractical for purchasers.

It needs noticing that France also used to require that frameworks be committal for purchasers in the past (subject to different requirements from those applicable in Romania and shown above), but this does not apply any longer under the current (2016) French regime.

C.2.2.2 Specific Approach in France: Regarding the Framework as a 'Contract'

The new (2016) French regime provides for a single legal definition of framework agreement (accord-cadre)[110] that can be found in art.4(3)PO. This applies to all three sectors – public, utilities and defence. It states that ACs are "contracts" concluded between one or more purchasers (who are subject to the ordinance) and one or more economic operators, whose subject is "to establish the rules concerning the purchase orders to be issued or the terms governing the subsequent procurement contracts [marchés] to be awarded during a given period, in particular with regard to price and, if need be, the quantities envisaged".

Describing a framework agreement as a 'contract' seems to be an element of domestic tradition. To the extent that any framework agreement within the scope of the definition in the 2014 directives can be organised as a 'contract' under French law, there is no harmonisation issue. However, if qualification as a 'contract' under French law excludes certain types of

[110] Hereinafter "AC".

frameworks as defined in the 2014 directives – for whatever reasons, for example insufficiently defined object, lack of required commitments, etc. – then the French legal definition might not 'fit the bill' in so far as the public and utilities sectors are concerned. As shown, Member States do not appear to have the option any longer to limit – through domestic law – the use of frameworks to certain purchasers or certain types of frameworks. The position used to be different under the previous (2004) directives, i.e. Member States had the option to limit uses of frameworks. This is still the case under the 2009 Defence Directive.

Under the previous (2006) French regime framework agreements were also defined as contracts[111], consistent with this option allowed in the 2004 directives for the Member States. The guidance at the time explained ('thematic fiches')[112] that a framework agreement "[…] is a contract comprising obligations and commitments for each party", it must not just "summarily outline its needs", and that it "is not an empty shell which does not engage any of the parties[113]. This might suggest that an arrangement where, for example, none of the parties commit to buy or sell (which would be perfectly valid under the directives, if all other requirements are met) was not permitted by French law. Qualifying a framework agreement as a contract is likely to offer, in some (but not all) cases, certain advantages in terms of

[111] Art.1(I)3 of the 2006 Code des Marches Publics (2006CMP) and art.1(3) of Ordinnance 2005-649.
[112] "Les Accords-Cadres" available via http://www.economie.gouv.fr/daj/accords-cadres , p.2/11. The document can also be found as Fiche 8 of the Vade-mecum.
[113] Current author's translation. Similar wording is included in the updated (2017) Guidance on Frameworks.

responsibility, enforceability, maintaining consistency between the two stages[114].

C.2.3 Selecting This Arrangement

C.2.3.1 Conditions

None of the current EU procurement directives provide for any conditions for use of framework agreements. Thus, under the directives, frameworks can be employed for recurrent, indefinite, or emergency requirements. The main provisions on frameworks are located in the PSD and UD in a chapter on 'electronic and aggregated procurement', which suggests that repeat procurement is the main envisaged use. However, nothing in the directives prevents employing frameworks in other circumstances.

Similarly, the directives do not require purchasers to prepare a justification concerning the use of a framework agreement, rather than a 'traditional' contract or a different type of NTRPA. Consequently, no justification of a particular type of configuration of framework is required either.

A requirement applies to multi-contractor frameworks under the defence regime and regards the minimum number of parties to a framework agreement which "[…] must be at least three […]"[115]. It also applied in the past under the 2004PSD. While this condition is likely to aim at ensuring a sufficient degree of competition at call-off stage, the legal text does not distinguish between frameworks involving second-stage competition and

[114] N.112.
[115] Art.29(4)DD.

frameworks not involving such competition. Imposing three contractors could be counter-productive for the latter type of framework.

The 2014PSD does not maintain this requirement for the public sector. This is considered a positive development permitting purchasers to establish the number of contractors according to circumstances of individual procurements.

C.2.3.1.1 Specific Experience in France: Conditions – Past and Present

As discussed, under the 2014 EU directives, purchasers appear to be given full discretion to design their frameworks so long as they observe EU law. Nonetheless, Member States, or their specialised agencies, can certainly issue non-binding guidance highlighting the potential advantages and pitfalls of various uses or types of frameworks. At the same time, the history of French regulation can offer some orientation.

Under the current (2016) and the previous (2006) French regimes the decision to procure through framework agreements is/was at the discretion of purchasers. However, prior to the 2006 regime specific conditions did apply in France to the use of the various framework arrangements. Folliot-Lalliot provides a brief but comprehensive overview[116]. From 2001 – unlike before – purchasers did not have full liberty to procure by way of a framework arrangement. Under art.72 of 2001CMP, purchase order contracts could only be used "When for economic, technical or financial reasons, the ordering rate

[116] Folliot-Lalliot, n.80, pp.198-208.

or scope of the requirements to be met cannot be completely finalised in the contract […]"[117]. The same requirement can be found in art.71(I) of 2004CMP.

This was the 'general' condition allowing the 'shift' from a traditional/classic procurement to a framework type of arrangement (or in the legal language of the time to 'split contracts' – "marchés fractionnés"). But this condition alone only offered access to what Folliot-Lalliot referred to as the regular type of "the purchase order contract per se"[118]. That 'arrangement' was a single-supplier framework contract which determined the quantity or value of the procurement by way of a minimum *and* a maximum, as well as the specifications, the object of the procurement and the price, or the method for its calculation[119]. The maximum limit could not exceed the minimum by four times[120].

A specific type of single supplier 'framework' was the purchase order contract without minimum and maximum. To use this arrangement an additional condition applied under art.71(II) of 2004CMP which needed to be duly justified by the purchaser. This condition was that: "the amount of the requirements and the rate at which purchase orders are to be issued cannot be determined by the public entity in advance"[121]. In slightly different language a similar condition had applied under the 2001 CMP[122].

[117] As traslated by L. Folliot-Lalliot, see above p.198. It needs noting that the text of that author refers to art.71, which is probably an editing error.
[118] N.80, p.200.
[119] Ibid.
[120] Art.71(I)(1) of 2004CMP.
[121] As translated by Folliot-Lalliot, n.80 p.202.
[122] Art.72(I)2.

Additional conditions had to be fulfilled in order to use a multiple-supplier purchase order contract. These conditions were, first, the impossibility of a single supplier to carry out the entire requirement, or the need to ensure security of supply[123]. The 'standard' type of multiple-supplier arrangement to which these conditions offered access was one without reopening of competition for the issue of orders. In fact, this type included two sub-types corresponding to the single-supplier arrangements discussed above. Thus, one sub-type was a 'standard' multiple-supplier arrangement with minimum and maximum (sub-type A), while the other was a 'standard' multiple-supplier arrangement without minimum and maximum (sub-type B)[124].

In order to use sub-type A two sets of conditions had to be met: first, the general condition for any 'framework' arrangement and, second, one of the conditions for 'standard' multiple-supplier frameworks referred in the paragraph above. To use sub-type B three sets of conditions had to be met: those for sub-type A plus those corresponding to the single-supplier arrangement without minimum and maximum. The procurement of 'standard' multiple-supplier frameworks involved tendering for different lots with identical requirements. The contract stipulated the way in which orders were

[123] Art.72(I)3 of 2001CMP and art.71(III) of 2004CMP.

[124] This sub-type, multiple-supplier frameworks without minimum and maximum *and without* reopening of competition, does not appear to be referred to specifically in Folliot-Lalliot's quoted work. However, it is explicitly provided for in the 2001 and 2004CMPs (see n.123).

issued, without reopening of competition among the suppliers who were awarded the various lots[125].

On the other hand, a multiple-supplier arrangement with reopening of competition (without a minimum or maximum) was only permitted when rendered necessary by: the high volatility of product prices, rapid obsolescence of products, or emergency situations not attributable to the purchaser and incompatible with the time required by the preparation of a (separate) procurement[126]. A similar arrangement was also permitted for products or materials for which certain features could only be established as a result of the carrying out of a scientific or technologic research mission[127].

In light of today's liberal approach of the directives as regards the use of framework agreements, or indeed of the tradition in countries like the UK, the older French provisions referred to above might appear (excessively) restrictive. However, bearing in mind the time of their 'action'[128] they were remarkable in regard to the legal 'articulation' of various categories of frameworks. In particular, the gradual nuancing of the circumstances for the use of each type of 'framework arrangement' is something that might have deserved to outlive the legal norms that initially expressed them – by transforming those norms, after their repellence into flexible, non-binding guidance.

[125] Folliot-Lalliot, n.80, p.203.
[126] Art.71(IV) of 2004CMP and art.72(I)4(a)(b)(c) of 2001CMP.
[127] Art.71(V) of 2004CMP and art.72(I)4(d) of 2001CMP.
[128] I.e. before the recognition of frameworks in the 2004 Public Sector Directive and at a time when the Commission was quite reluctant to accepting multiple-supplier arrangements.

However, this has not been done so far[129]. That 'wisdom' which in some form saw light by way of the 2001 and 2004CMP might be lost, potentially giving way to a predominant use of frameworks for administrative convenience, rather than anything else. In the absence of substantive guidance as to framework design and decisions, purchasers may like to use as a source of inspiration, *mutatis mutandis* the Guide to Enactment of the 2011 UNCITRAL Model Law on Public Procurement[130].

C.2.3.2 Controls

Controls relate to requirements mainly intended to ensure an appropriate use of framework agreements once they have been established, rather than affecting directly the decision to establish, or otherwise, such an arrangement. In the EU directives, at a general level, under art.51(2)3UD and art.29(2)DD it is prohibited to "use framework agreements improperly or in such a way as to prevent, restrict or distort competition". As regards public sector, a similar statement can now be found in recital 61 of 2014PSD. Since it represents an application of general principles of the directive to the specific

[129] The updated 2017 Guidance (similarly to the previous guidance concerning the 2006 regime) limits itself, in this connection, to providing brief descriptions of various aspects, such as: some examples of when the use of frameworks could be appropriate (p.2); stating that frameworks without reopening competition can offer a quick and efficient response to needs as they arise, whereas frameworks involving reopening of competition offer adaptability to needed adjustments to the requirement (p.2); explaining the consequences of not meeting minimum orders (where provided) (pp.5-6); or that frameworks that do not guarantee a minimum order, or the exclusivity of supplier(s) do not incite tenderers to make attractive proposals (p.8). Significant emphasis is placed on the 'contract' features of frameworks, and the commitments of the parties.

[130] See Ch.II.

subject of frameworks, alternative location into the recitals section should not affect its strength[131]. Specific controls are discussed below.

C.2.3.2.1 Limitation in Time

A first control is a limitation in time of the duration of any framework agreement[132]. This is important particularly because framework agreements as regulated under the EU procurement regimes are closed arrangements where contractors not initially a party to, may not later join them throughout their duration. An indefinite (or excessive) period would seriously affect competition on the market. Other negative effects may involve framework contractor complacency or collusive practices.

The definition of framework agreements clearly refers to "a given period" by this meaning that frameworks have to be limited in time as an essential aspect of their operation. Additionally, a maximum duration is also explicitly provided for in each of the sectors: four years for the public sector, eight years for utilities, and seven years for defence[133]. However, in some circumstances, where justified, a longer period may be used, for example where contractors "need to dispose of", and "must make available" throughout the period of the framework, equipment whose "amortisation period" is longer than that of the framework[134].

[131] Arrowsmith n.87, p.1178, also suggests that the CJEU is likely to consider the prohibition as applying to PSD.
[132] See A. Geddes, *Public and Utility Procurement – A Practical Guide to the UK Regulations and Associated Community Rules (Second Edition)* (Sweet&Maxwell, 1997), p.31.
[133] Art.33(1)3PSD; art.51(1)3UD; art.29(2)4DD.
[134] Recitals 62(2)PSD; 72(2)UD.

However, enforcing these controls through supplier review mechanisms (alone) could prove inefficient, since suppliers would probably prefer to be part of a longer term arrangement. Thus, they are unlikely to challenge a longer duration or the justification therefor, particularly at the start of an award procedure for a framework agreement[135]. Alternative oversight and/or enforcement mechanisms appear needed in this respect.

As for duration of a framework agreement, this refers to the period within which call-offs can be made. This means that the actual duration of the framework 'arrangement' or 'process' is likely to actually be longer than that of the framework agreement *per se*, as the last call-offs may extend beyond its duration[136].

Similarly, duration of a call-off "does not need to coincide" with that of the framework in question[137]. Nonetheless, excessively large or long orders placed towards the end of a framework agreement may be regarded as abuses of the framework and purchasers should manifest a fine balance in this respect[138].

Certainly, the duration of any given framework agreement is to be established on a case-by-case basis by the purchaser and it needs not coincide with the maximum duration provided for in the applicable procurement regime. Such duration may be shorter than 'general' maximum provided in an applicable directive. Although there is no legal requirement for shorter

[135] Publication of justification is usually required in contract notice (at market approach), despite some inconsistencies in the provision.
[136] Recital 62(1)PSD and 72(1)UD.
[137] Recital 62PSD.
[138] P. Trepte, n.2, p.437.

durations to be justified, it would be good practice for a purchaser to satisfy itself that the set duration of a framework agreement is an appropriate one[139].

C.2.3.2.2 Prohibition of Substantial Amendments

Another specific control provided for in the operation of framework agreements relates to prohibition of making substantial amendments to the terms of framework agreement when awarding contracts under it[140]. This derives from the principle of equal treatment, since 'substantial' amendments are 'capable' of (retrospectively) affecting the outcome and conditions of first stage competition, and therefore selection of framework contractors.

In effect, 'substantial amendments to the terms of a framework agreement are prohibited at all times (not just when placing contracts under it). Other amendments may be permitted, allowing for some flexibility. The 2014 directives include express provisions in this connection[141].

UD does not include an express and specific provision prohibiting substantial amendments through contracts awarded under a framework agreement. However, this is clearly covered both by the general requirement

[139] On this issue, see discussion in UNCITRAL Chapter.
[140] Arts.33(2)3PSD; art.29(2)3DD.
[141] Art.72PSD and art.89UD, codifying existing ECJ case-law. See S. Treumer, "Contract changes and the duty to retender under the new EU public procurement Directive" (2014) 3 PPLR 148; also C. Risvig Hamer, "Regular purchases and aggregated procurement: the changes in the new Public Procurement Directive regarding framework agreements, dynamic purchasing systems and central purchasing bodies" (2014) 4 *PPLR* 201 (pp.205-206).

that frameworks shall not be used "improperly or in such a way as to prevent, restrict or distort competition"[142] and by general rules on 'modifications'.

C.2.3.2.3 Stage Consistency

A wider control could be referred to as stage consistency. This includes prohibition of making substantial amendments (discussed above) but encompasses additional measures seeking to ensure that the scope of a framework, as established at the outset, is not 'hijacked' during implementation, and that what has been achieved at first stage is not denied or contradicted by call-off stage. Some aspects of stage consistency are not regulated explicitly and can be inferred from general principles and policy.

A notable aspect of "stage consistency" (not addressed expressly in the directives) is linked to the relation between criteria for the award of the framework agreement itself and criteria used for the award of contracts under it. In literature, this element was thoroughly analysed by Arrowsmith[143]. Some variation amongst criteria used at each stage of a framework agreement is possible (or even needed in some cases, for commercial considerations). However, that relationship amongst the criteria used needs to take account of securing equal treatment in a wider sense: that of providing equal chances to any interested supplier of offering most efficient proposals for the *objective* needs of the purchaser[144]. In other words the criteria used at first stage

[142] Art.51(2)3UD.
[143] Arrowsmith, n.66: pp.171-172 & n.87:1161-1163 .
[144] See P. Trepte, n.2, pp.13-15. It is submitted that in case of frameworks this concept should concern the overall arrangement. This, in turn requires, a degree of consistency among the two stages.

should not result in selecting framework suppliers that are irrelevant for the future call-offs, and deny access to suppliers that could better placed to meet the call-offs.

An example could be selecting framework contractors for consultancy projects based on lowest price, followed by the award of orders under that framework using the criterion of the most economically advantageous tender. In effect, using during the call-off stage factors that were not taken into consideration during the first stage, may easily result into the selection of framework contractors that are not particularly relevant for call-offs.

It is suggested that the introduction of an explicit statement in the directives as to the importance of criteria consistency may serve an additional (and deserved) safeguard for the principle of equal treatment in the running of framework agreements.

An additional (substantive) aspect that could affect stage consistency may involve defining the object of procurement in too broad terms, making it difficult to ensure that selection of framework contractors during first stage will be relevant for second-stage orders.

There is also a 'formal' or 'documentary' aspect of consistency. This involves all relevant terms and conditions should be included in tender documents for the award of the framework agreement, then carried forward to the actual framework agreement, and then further to second-stage awards. Whilst this is implicit in transparency requirements, the 2014 directives have also strengthened to some extent the explicit provisions on this point.

C.2.3.2.4 Specific Approaches in Member States: Price Adjustment Clauses in France and Romania

While framework conditions and controls of an EU law origin have been implemented with some approximation in France, it needs emphasising that French domestic law provides for an additional stage consistency tool: price revision clauses. These are of general use, subject to certain conditions[145] and, in effect, also applicable to framework agreements.

The 2013 (French) Guide on Prices in Public Procurement[146] explains how price revisions operate in frameworks[147]. It is likely that that guidance remains valid since the provision in the current decrees concerning prices (including revisable and provisional prices) is in most part taken over from the 2006 CMP[148]. The guidance refers to frameworks that do not establish all terms, since at the time it was issued arrangements which established all terms were dealt with under 'marchés à bons de commande'. Nevertheless, the updated French guidance on frameworks clarifies that frameworks establishing all terms are subject to the general rules concerning prices that "require contractual documents to establish a determined or […] determinable price"[149].

[145] Arts.17-19PD; arts.14-16DSD.
[146] "The Price in Public Procurement – Guide and Recommendations – The formation and variation of prices in public procurement. Legal elements and practical modalities", DAJ, April 2013, Version 1.1 (available in French via http://www.economie.gouv.fr/daj/tres-attendu-guide-prix-dans-marches-publics-est-en-ligne?language=fr).
[147] Pp.77-78.
[148] Arts.17-19 thereof. Price revision (and provisional prices) clauses can also be found in earlier versions of the CMP.
[149] At https://www.economie.gouv.fr.daj/conseil-acheteurs-fiches-techniques p.12.

The purchaser has the obligation to state in the procurement documents for the framework agreement the form of price (unitary or global) and the mechanism for its determination. For single-contractor frameworks (that do not establish all terms) tenderers must offer a binding price. However, that price is to be regarded as a ceiling price for subsequent purchases, under an explicit clause of the framework agreement. The ceiling price may be revised if provision for this is included in the framework agreement (compulsory in some instances for any procurement). Revision methods are provided for in the decrees.

In regards to multiple-contractor frameworks the guidance clarifies that contractors are bound to ceiling prices, range prices or "a firm price completed by a variable amount" (the variable amount being presented during subsequent competition)"[150]. Again, if the framework includes a price revision clause, then ceiling, range of fixed prices will be revised accordingly, and mini-competitions will be conducted under the revised coordinates.

The mechanism appears a multi-facet control. First, the prices tendered during the award of the framework stage do not only serve to gain entry onto the framework. They become limits (or basis) for prices that framework contractors can offer in call-off competitions. This provides a strong link between the first and the second stage of a framework agreement. It is also an effective measure against collusion among contractors at call-off stage.

[150] N.147.

As in the French regime, an important control is also provided for in the Romanian legislation concerning the price tendered for the purposes of entering a framework agreement. Under art.117(1)(b)PPL, in the case of single supplier frameworks, the framework agreement must stipulate "the unitary price that the economic operator provided in his offer and on the basis of which the price of each subsequent contract will be determined"[151]. In the case of multiple supplier frameworks "unitary price[…], other financial or commercial promises" are also to be included in the actual framework, under art.109(1)(b)PIN[152], as well as price adjustment formulas[153].

At the same time, in the case of multiple frameworks involving reopening of competition framework contractors are only permitted to improve during the call-off competition the terms they had offered at the first stage to enter the framework[154]. Where price adjustment was provided for "the improvement of this element relates to the updated value obtained from the application of the adjustment coefficients"[155]. These are very useful controls in an area where the directive is not very clear.

C.2.3.3 Specific Configurations

C.2.3.3.1 Price Element in First Stage

One aspect that has been subject to some debate is whether establishment of terms as to price (or a pricing mechanism) during first stage

[151] A similar provision can be found in art.112(1)(b)DSL.
[152] See also art.115(1)(b)DSL.
[153] Art.109(1)(c)PIN.
[154] Art.110(5)PIN.
[155] Art.110(6)PIN.

of setting up of a framework is of the essence for the existence of a framework agreement under the EU directives, or whether it is permitted for this element to be left (entirely) for the call-off stage. The directives provide some indication in this connection in the definition of frameworks. It is also clear from the overall provision that, most of competition should be placed during first stage. Also, price (pricing mechanism) is one of the main elements of competition in any procurement, at least from a value-for-money perspective[156].

These arguments suggest that price or pricing mechanism must usually be established in the framework agreement[157]. The only possible exception could be for the procurement of commodities, where the specific features of the markets in question make it objectively impossible to establish any pricing mechanism in advance of orders. However, using a dynamic purchasing system might be more appropriate for such situations[158].

C.2.3.3.2 'Generic' Multiple-Agency Frameworks

Specific issues can arise related to the so-called "generic" frameworks << […] that is, frameworks that do not identify all user authorities by their exact name, but provide that the framework is set up for use by a generic group of authorities, such as "universities", "local authorities" or even "the

[156] See also M. Bowsher QC and L.E. John, "The use (and abuse?) of framework agreements in the United Kingdom", in H.R. Garcia (Consulting Editor), *International Public Procurement – A Guide to Best Practice* (Globe Business Publishing Ltd., 2009), p.357.
[157] Despite an inadequate statement in the Commission's Explanatory Note (n.85).
[158] See also Arrowsmith n.87 pp.1133-1134.

public sector" or "contracting authorities" >>[159]. Recital 60 of PSD clarifies that "framework agreements should not be used by authorities which are not identified in them".

The text of the recital continues by stating that users who "are parties to a certain framework agreement from the outset should be clearly indicated by name, or by other means, such as a reference given to a certain category of contracting authorities, within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified". Where registers of purchasers entitled to use frameworks placed by a central purchasing body (CPB) are maintained by the latter, these should also record the date from which those purchasers "acquire the right to have recourse" to the procurement devices placed by CPB. This is to prevent the retrospective inclusion of purchasers in already existing frameworks[160].

However, the directives do not make explicit a requirement for involving all individual users of a (planned) framework from the planning stage. In fact the 2014PSD appears to be satisfied of the 'closed nature' of the arrangement to the extent that user-purchasers "are clearly identified in the call for competition or invitation to confirm interest"[161]. This, in conjunction with a view that rules in the directives concerning the estimated value of a framework could be more relaxed once it is clear that the aggregated value of

[159] S. Arrowsmith, "Implementation of the new EC procurement directives and the Alcatel ruling in England and Wales and Northern Ireland: a review of the new legislation and guidance" (2006) 3 *PPLR* 95.
[160] Risvig Hamer n.141, p.203.
[161] Art.33(2)2.

the framework in question exceeds the applicable EU threshold[162], can offer significant flexibility for centralised frameworks intended for 'government-wide' use or otherwise very large numbers of users. In such cases, consulting or involving all intended suppliers could be inconvenient.

However, practical problems can arise from a 'vague' estimation of the value (and, more generally, requirements) that could arise from not involving potential users in the preparation of the frameworks, such as actual call-offs exceeding the estimation, or being significantly lower than the estimation. It should be borne in mind that, because a framework establishes terms competitively at first stage, it is particularly important that requirements are realistically estimated[163] and made known to tenderers, since they 'calibre' their offers in light of some expectation of sales. On the other hand, very 'wide' frameworks could negatively affect competition on the market in question[164].

A type of arrangement that appears more amenable to being organised as a 'generic' arrangement is dynamic purchasing systems[165]. This is because in this case terms of future purchases are not established

[162] It the literature it was supported that the rule on aggregating the value of all contracts that could be placed under a framework agreement (or dynamic purchasing system) should be considered in relation to the "rationale for requiring aggregation […], namely that the size of the transaction as a whole means that it is likely to be of cross-border interest", see further S. Arrowsmith, "Dynamic purchasing systems under the new EC Procurement Directives – a not so dynamic concept?" (2006) 1 *PPRL* 16 at p.28.

[163] The "estimate of the likely size of the requirement" (i.e. the total estimated value of the framework) should probably be a "bona fide and plausible estimate to be made", rather than a 'guess'. Arrowsmith, n.159, p.98.

[164] See further, A. Sanchez Graells, *Public Procurement and the EU Competition Rules,* Second Edition (OUP, 2015), pp.347-363.

[165] See C.3.

(competitively) at first stage, and the overall estimated value or size of the requirement is thus less relevant.

C.2.3.3.2.1 Specific Domestic Experience: 'Generic Frameworks' in the UK

'Generic frameworks' as described above, have been of particular interest in the UK because of their intensive use[166]. In some cases, certain bodies first placed a 'generic' framework and then sought to persuade potential users to make purchases under them against a commission.

As is customary, the UK regulations generally follow the directives and thus do not provide for any specific conditions or rules concerning the use of multiple agency frameworks (including 'generic' ones). It can however be noticed that, for the defence sector, the DSPCR omit the demand side from the relevant provision of the DD relating to the closed nature of a framework agreement (at both the supply and demand side)[167]. A similar approach was taken in the previous (2006)PCR, but this was not carried forward in the current (2015)PSD[168].

The Guidance on Framework Agreements, issued by the Crown Commercial Services (CCS) for the public and utilities sectors, includes the identification of contracting authorities in the call of competition as a key

[166] Though there are recent initiatives for rationalising the use of parallel frameworks, and establishing mandatory centralised frameworks (such as those placed by the Crown Commercial Service - CCS).
[167] Reg.20(3)DSPCR implementing art.29(2)2DD.
[168] Reg.33(5)PCR implementing art.33(2)2PSD.

point[169]. In this connection it states that potential users must be 'clearly' identified "either by name either by name or by other means" such as "a link to a list of relevant authorities" or "reference to a specific class of contracting authorities in a defined region that can be identified on the internet"[170].

On the other hand, the Defence Frameworks Guidance takes a more restrictive approach: "If you identify the procurers by general description or reference to a particular class of procurer, you should include an up to date list of the procurers concerned so that the tenderers know who the potential procurers will be – the more detail that you can provide on the identity of the procurers the better and wherever possible you must aim to identify each individually by name"[171].

As discussed in the preceding section, the issue of the way in which the identities of the users of a framework agreement are to be presented in a call for competition should not be detached from other substantive matters, such as the rules of estimating the value of a framework agreement, or indeed the 'mechanics' of establishing terms at the first stage of a framework agreement.

Under the DSPCR, the estimated value of a framework agreement "is the aggregate of the values estimated […] of all the contracts which could be entered into under the framework agreement"[172]. The difference as compared to the text of the directive appears to be of nuance and language

[169] At https://www.gov.uk/guidance/transposing-eu-procurement-directive (p.4).
[170] Ibid.
[171] At https://government/publications/the-european-defence-and-security-public-contracts-regulations-dspcr-2011 (Ch.11, para.35(b)).
[172] Reg.9(16)DSPCR.

rather than material. PCR and UCR include similar provisions with the relevant 2014 directives[173].

It is clear that the process of estimating the value of a multiple-agency framework will inevitably need to include an estimation of "[…] all the potential call-offs over the lifetime of the agreement that may be made by all contracting authorities that are permitted to use the framework, *not just the intended call-offs by the contracting authority which is procuring the framework agreement"*[174] (current author's emphasis). However, no further indication is provided as to what the estimation of other purchasers that may use a framework should involve. That this aspect is likely to present certain difficulties in practice arises from a recommendation to the effect that "the risk of exceeding the advertised scope of the framework agreement" with multiple users "can be mitigated further by providing a range of the estimated value for the framework"[175].

Centralised purchasing through the CCS is in principle mandatory for central government. But some of the frameworks it places are also intended, in addition to the central government, for the 'wider public sector' that can use them on a voluntary basis[176]. Certainly, at such wide uptake those frameworks are inevitably 'generic'. It can be noticed that the practice of

[173] Reg.6(8)PCR; reg.17(8)UCR.
[174] CCS Frameworks Guidance, p.6. For a similar recommendation, Defence Frameworks Guidance, para.32.
[175] Defence Frameworks Guidance, para.32.
[176] National Audit Office (NAO), "Cabinet Office - Crown Commercial Service. Report by the Comptroller and Auditor General" (HC786, Session 2016-17), NAO 2017; also https://www.gov.uk/goverment/organisations/crown-commercial-service

providing in the call for competition a range for the estimated value of the framework is indeed present in some of the CCS frameworks.

Whilst expressing a 'maximum' (as requested by the directives and the regulations) as a range could seem inappropriate, it is nevertheless practical where, as in 'generic' frameworks, there is quite a significant degree of uncertainty as regards actual use. It is preferable that potential tenderers are given an estimate as 'accurate' as possible, rather than creating an unjustified over-expectation. However, the breadth of such range might in some cases fail to offer a meaningful basis for establishing at first stage (through competitive bids) terms reflecting an expectation of sales from tenderers[177].

Some of the difficulties in managing high numbers (i.e. hundreds) of large scale and coverage multiple-purchaser frameworks are evidenced in the 2017 NAO report on CCS[178]. While CCS frameworks generated savings for departments, the report also found that "CCS cannot show that its frameworks are always the best deals available". Apparently "benchmarking" information was not available to this effect. On the other hand, some frameworks were extended "beyond their original expiry date […] without competition or market testing". In effect "CCS and departments have issued contracts using expired frameworks" which "contravene public contracting regulations".

[177] E.g. OJEU Contract Notice – CCS Framework Agreement for Advertising and marketing services (OJ/S S170/03/09/2016 306636-2016-EN), estimated total value: range between 11400000 and 42000000 GBP (Framework RM3796); OJEU Contract Notice – CCS Framework Agreement for Merger and acquisition services (OJ/S S247/22/12/2016 452725-2016-EN), estimate total value between 2 billion and 3 billion GBP.

[178] N.176, Report NAO 2017, pp.10&38-39.

Nevertheless, the use of multiple-purchaser frameworks in the UK represents a very significant practice and experience, as well as an interesting application of the rules on frameworks. The CCS procurement devices for common goods and services clearly offer a high degree of convenience, as well as savings for purchasers. This is very important since significant effort and time is likely to be spent on such purchases in environments where such centralised mechanisms are not available[179]. The current author maintains that dynamic purchasing systems are more amenable (than frameworks) to being organised as 'generic' arrangements. From this perspective, the carrying out of dynamic purchasing systems by the CCS[180] is to be welcome.

On the other hand, where the use of centralised frameworks is optional, as could be the case in 'wider public sector'[181], the (simultaneous) availability of a plurality of 'generic' frameworks for the same items and for the use of the same entities - usually placed by different central purchasing bodies (CBP) - could have some undesired effects on the relevant market in supply chain. In particular, a tendency to 'maximize' the estimation of the overall purchases to be made under a framework could easily become manifest, for a variety of reasons: ensuring that all users and all orders can be accommodated, the hope for obtaining larger savings, or the hope that larger number of users will be convinced to use the framework (among those

[179] The current author's practical experience clearly indicates this (for example in the context of aid and assistance projects).
[180] E.g. for vehicle conversion services.
[181] Although some centralised frameworks that are binding for the contracting authorities have also been reported (Andrecka, n.93).

'generically' included, without being consulted in advance) resulting, where applicable, in proportional charges being thus levied.

Caution should be exercised, as the lack of more detailed planning and thorough estimation – which, as shown, might be inherent to placing frameworks in this way – presents the risk of that the estimated size of the requirement(s) be manifestly detached from reality, in the sense of (serious) overestimation. This may be unfair to potential tenderers, as their offers is very likely take account of this element when preparing their tenders to access the framework. The older frameworks guidance issued by the former Office of Government Commerce (OGC) - currently not applicable and archived - warned that "Having too many frameworks for the same product or service will not encourage the market to bid or offer value for money if bidders are not convinced about the likely level of take up"[182].

Where suppliers are not convinced that the estimated size is realistic they are unlikely to offer best value. Where they have initially trusted the estimate and offered best terms to enter the framework as in relation to the overall estimated size, but then find that the actual orders are abruptly below expectations they might refrain from honouring call-offs. Any losses or unrealised profits on a framework agreement will inevitably be internalised by suppliers in their tenders for other framework agreements or other public contracts and (re)charged to the public sector. The same will apply to the costs of tendering for a large number of parallel frameworks.

[182] Section 3.1 (p.4) of that Guidance, accessible via http://webarchive.nationalarchives.gov.uk/20110601212617/http:/ogc.gov.uk/documents/OGC_Guidance_on_Framework_AgreementsSept_08.pdf, p.5(para.3.5).

It should perhaps be recognised that because of the numerous legal and practical implications of multiple-agency framework contracting more specific guidance, or even rules, may be desirable. These could drive centralised purchasing through framework agreements further, and avoid the risk for such arrangements to become redundant or even a hindrance to efficiency and effectiveness in public procurement. From this perspective the UK experience should be of great value at EU level and most certainly for countries with more limited a practice of such arrangements.

A further implication of multiple-agency framework purchasing, in particular in the form of generic arrangements, could be that the same entity may be entitled to procure the same items from a number of different frameworks running in parallel (i.e. placed by different CPBs or other consortia). The question then is which framework the entity in question should choose.

The directives and the regulations are silent on this situation. It might be argued that the terms for each framework had already been subject to transparency and competition requirements, and thus there would be no need for further assessment. However, in literature it has been pointed out rightly that: “Based on the transparency principle […] an obligation is arguably implied for the purchaser to show objective commercial grounds for choosing one particular framework, to ensure that the discretion to choose between frameworks is not abused for illegitimate reasons, such as to favour national

providers"[183]. Value for money should also probably require objective commercial judgement when choosing among the frameworks.

Where the frameworks in question establish all terms for the future purchases and do not involve second-stage competition a comparison between the terms offered by framework contractors in relation to the purchaser's requirement should be straight-forward. However, where they do not establish all terms, and finalisation of terms requires second-stage competition, a comparison between the options available, prior to actually conducting a competition could be more difficult (simply because the terms that will be offered cannot be known in advance).

An additional burden for a purchaser being entitled to use a number of parallel frameworks may be first to ascertain what actually are all the frameworks that he is entitled to purchase from if some of these where 'generic' ones and the purchaser in question was thus not individually identified, specifically consulted, etc. Thus, whereas centralised framework purchasing should have provided entities with a simple and efficient vehicle for making orders, they might instead find themselves in a rather uncertain situation, as described above. In the author's view some methodology for choosing among frameworks in such cases should be provided for, or at least suggested in guidance.

[183] Arrowsmith n.102, p.692.

C.2.4 Procedures

C.2.4.1 First-Stage Procedures

Procedures for awarding a framework agreement under the EU directives are the general procedures normally used for 'traditional' procurements. There are variations amongst the three EU procurement sectors as regards the 'general' award procedures – that can be used by purchasers in all circumstances and without a need to justify their choice – as well as 'special' award procedures that can only be used under specific circumstances.

Usually, the 'general' procedures are those providing for widest degree of transparency and competition (such as open or restricted procedures). In practice, as discussed in the UNCITRAL chapter, in many cases award procedures other than open or restricted procedures are less likely to be adequate for purposes of establishing framework agreements.

Generally, first stage procedures for award of framework agreements and for selection of the framework contractor(s), do not differ from those used for 'traditional' procurements. Transparency requirements and challenge procedures are also very similar to those provided for 'traditional' procurement.

However, there are some matters specific to framework agreements. Thus, there is specific information that needs to be provided in the contract notice or solicitation, for example for example that a framework is envisaged, whether this is a single or multiple supplier framework, the duration of the framework (together with justification where this is longer than the

recommended maximum duration for the regime in question), and others[184]. Also, there are specific rules for estimating overall value of a framework agreement which is "the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement"[185].

Similarly, for frameworks involving reopening of competition there are specific rules concerning the minimum yearly turnover required as selection criteria, which is not to "exceed two times […] the expected maximum size of specific contracts …]"[186]. However, where this is not known maximum ceiling will be twice the estimated value of the framework. On the other hand, in both cases maximum can be exceeded "in duly justified cases"[187].

One of the elements that needs to be stated in the call for competition is the number of framework contractors contemplated to be admitted onto the framework. Certainly, actual number is likely to be influenced by market response. In all cases there will need to be objective justification for variations in the number of admitted suppliers compared to the number envisaged.

A related question is whether it would be possible for a framework agreement to be awarded to all tenderers who meet all relevant (qualitative selection and award) criteria, but without a 'competitive' reduction of the number of framework contractors at this stage[188]. This would permit a wider competition at call-off stage which might be appropriate in certain cases,

[184] E.g. whether second stage competition is involved, the terms that are to be refined or established during second stage competition, or the award criteria to be used during second stage competition, the anticipated value or frequency of call-offs, where known, etc.
[185] Art.5(5)PSD; art.16(5)UD; art.9(9)DD.
[186] Art.58(3)PSD.
[187] Ibid.
[188] Arrowsmith n.66 p.161.

when it may not be possible (or appropriate) to establish terms in advance of an actual order (for example on volatile price or commodity markets).

Such a configuration might be achievable by providing for a (very) large maximum number of framework contractors in conjunction with very relaxed (low) criteria. This could be regarded as being against the 'spirit' of the framework 'concept' which involves establishing most terms during first stage. Also, it would not be really efficient at call-off stage, since reopening of competition would be significant, rather than 'mini'. Thus, even if permitted under the rules, the arrangement seems 'imperfect' from a number of angles. Again, dynamic purchasing systems in current (2014) regulation are far more appropriate for such procurement, since they do not involve a competitive reduction of suppliers at first stage and remain open for supply side throughout their duration.

In the 2014 directives there is also express provision for the use of electronic catalogues in the context of framework agreements[189]. An electronic catalogue is described as "a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment"[190]. Thus, tenders for the award of a framework agreement may be required "in the form of electronic catalogues"[191] if "the use of electronic means of communications is required"[192]. Where electronic catalogues are required, these are to be prepared by tenderers "in accordance with the technical

[189] Art.36(4)PSD; art.54(4)UD.
[190] Recital 68PSD; recital 77UD.
[191] N.189.
[192] Art.36(1)PSD; art.54(1)UD.

specifications or format established by the contracting authority"[193]. In the case of multiple-supplier framework agreements, the use of electronic catalogues at first stage also enables (as an option to purchasers, provided it is stated from the outset) the use electronic catalogues also at call-off stage, under specific rules that are discussed in the section below.

C.2.4.2 Call-off Procedures

C.2.4.2.1 Overview

In the public and defence sectors contracts awarded under single-supplier frameworks must be "awarded within the limits of the terms laid down in the framework agreement"[194]. Explicit provision is also included to the effect that the purchaser "may consult" the framework supplier "in writing, requesting it to supplement its tender as necessary"[195]. It follows that where all terms are established in the framework itself with sufficient precision, consultation is not needed and call-off procedures could consist of issuing an order to the framework contractor. But where not all terms are established with precision further consultation at call-off stage is a necessary step towards completing a call-off contract.

As regards multiple-supplier frameworks in these sectors, a distinction is explicitly made among frameworks establishing all terms and those which do not establish all terms, and this distinction has implications on call-off procedures. In the latter case, the purpose of call-off procedures is twofold: to

[193] Art.36(2)PSD; art.54(2)UD.
[194] Art.33(3)1PSD; art.29(3)1DD.
[195] Art.33(3)2PSD; art.29(3)2DD.

refine or settle the terms not completed at first stage and to establish which of the framework contractors performs a specific call-offs. Where all terms had already been set with precision in the framework itself (at first stage) the purpose of call-off procedures is (mainly) to establish which of the framework contractors is awarded a specific call-off. However, it could also include improvement/adjustment of terms established in the framework.

In the case of frameworks that do not establish all terms, the PSD and DD provide that the award of call-offs involves reopening of competition amongst the framework contractors on the basis of the terms and using the criteria provided for in the framework agreement (and having been carried forward from the procurement documents for it). Whilst the award criteria to be used in the mini-competition have to be those generally provided in the directives for the award of contracts[196], they need not be the same with those used during the first stage, though some relationship among them will be inherent, in light of stage consistency, as well as commercial considerations (as explained elsewhere).

Basically, second stage competitive procedures involve: (i) an approach in writing of all framework contractors capable of performing the contract, that includes the provision of a reasonable time-limit for submission of tenders; (ii) a requirement that tenders must be submitted in writing and by the time for submission; (iii) a requirement that the content of the tenders is to remain confidential "until the stipulated time-limit for reply has expired"; and (iv) the award of each contract "to the tenderer that has submitted the

[196] Arrowsmith, n.87 pp.1152-1153.

best tender on the basis of the award criteria set out in the procurement documents for the framework agreement"[197].

The provision for competitive second stage awards seems to reasonably 'fit the bill'. Still, there appear to be a number of weaknesses in the existing provisions. First, the publicity requirements may need additional attention, since some decisions and processes seem to remain outside the 'radar' of potentially interested bidders or framework contractors. For example, the provisions are silent on the issue of objectively establishing which ones of the framework contractors are to be deemed 'capable of performing the contract'.

Presumably, this determination is to be made on the basis of the 'qualification' criteria (and the corresponding data and documents provided by the framework contractors during the first stage), as applied specifically to the requirements of each individual contract to be awarded under a framework agreement. However, there is no explicit provision in this connection, which may leave a 'grey' area of subjectivity, as to eventual limitations (or exceptions) to call-off competition. Also, there is no transparency requirement to inform each and every framework contractor of an up-coming opportunity (as is in the UNCITRAL Model Law)[198], as well as of the determination concerning the contractor's capability or otherwise of performing the contract. Such a requirement would allow the concerned framework agreement contractors to challenge unjustified decisions that may

[197] Art.33(5)PSD; similar provisions are under art.29(4)DD.
[198] See Ch.II.

subjectively limit competition. Additional transparency issues at call-off stage are discussed later in this chapter.

Another aspect that could be regarded as a weakness concerns the fact that the risks of collusion in call-off competitions are not referred to. Such risks are elevated in this context since the arrangement is closed and the admitted suppliers may be just a few, will know each other's identities, as well as the estimated requirements at the demand side. Framework contractors could thus be seeking to impose less advantageous conditions than those generally available on the market, or than those that would normally result from genuine mini-competition within the framework agreement in question.

Whilst managing collusion risks involves many aspects[199] (rather than just regulatory ones), it might be that procurement regulation could also assist this process[200], at least by pointing out to purchasers (or even Member States) that such risks may be a real concern in closed frameworks involving reopening of competition. It should also be noticed that the 2014PSD addresses collusion more generally and in the context of irregular tenders[201], something that was not present in the 2004PSD. Whilst it can be argued that a duty for purchasers to seek preventing collusion may be implied in the requirement not to use frameworks in way that prevents, distorts or restricts

[199] G.L. Albano and C. Nicolas, *The Law and Economics of Framewok Agreements – Designing Flexible Solutions for Public Procurement* (CUP, 2016), in particular ch.9 (pp.212-252). But see also, P. Arden, "Legal regulation of multi-provider framework agreements and the potential for bid rigging: a perspective from the UK local government construction sector" (2013) 5 *PPLR* 165.

[200] A. Sánchez-Graells, "Prevention and deterrence of bid rigging: a look from the new EU directive on public procurement", in G.M. Racca and C.R. Yukins (Eds.), *Integrity and Efficiency in Sustainable Public Contract / Balancing Corruption Concerns in Public Procurement Internationally* (Bruylant, 2014), pp.171-198.

[201] Recital 59; art.26(4)(b); art.35(5)3.

competition, a more explicit approach to collusion in this context could have been useful.

In the literature it has been discussed the possibility to address potential collusion by providing less detailed information concerning the anticipated requirements (i.e. by reducing transparency, so that collusion 'strategies' are more difficult to prepare and implement)[202]. However, in the current author's view, transparency needs to be maintained or even expanded in some respects as is suggested above (and see also the sections below). It is submitted that the key is using closed frameworks involving reopening of competition only when this type is really appropriate in light of the specific requirements and market circumstances.

As regards multiple-contractor framework agreements that do establish all terms (less the realisation of the committed obligations), second-stage procedures do not usually involve reopening of competition since there is no need to establish or refine terms. However, under the 2014PSD (but not DD) provision is also made for the possibility to reopen competition for certain call-offs under such frameworks, as shown.

Where competition is not reopened (and all terms are set in the framework itself) the PSD provides that call-offs are awarded "following the terms and conditions of the framework agreement"[203]. It also provides that "the objective conditions for determining which" of the framework contractors "shall perform them" must have been "indicated in the procurement documents for the framework" and (then) "set out" in the

[202] N.199.
[203] Art.33(4)(a).

framework itself[204]. The DD simply states that call-offs are to be awarded "by application of the terms laid down in the framework agreement"[205].

It thus appears that call-offs should be awarded by applying the criteria that is pre-established (from the procurement documents for the framework) to the actual requirements of each specific call-off[206]. Such criteria clearly include the award criteria provided generally for contract awards[207]. However, the language of (art.33(4)(a))PSD seems to contemplate that 'objective conditions', other than the award criteria provided generally for contract awards, could also be used for framework call-offs without reopening of competition (certainly observing the principles of equal treatment and transparency)[208]. In this connection Recital 61 states that such objective conditions "may […] include the needs or the choice of the natural persons concerned", an approach which seems inconsistent with the 'general' award criteria.

The 'objective conditions' may also permit 'aleatory' awards, that is to say award methods not related to the terms offered (such as rotation, or alphabetical order), however, the current author suggests, as was discussed in relation to the UNCITRAL Model Law, that these should be treated with great attention since they can easily shelter favouritism and affect value[209].

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[204] Ibid.
[205] Art.29(4).
[206] See further discussion by Arrowsmith n.87, pp.1141-1146.
[207] In art.67PSD.
[208] Arrowsmith, n.206.
[209] For a different view, F. Lichère and S. Richetto, "Framework agreements, dynamic purchasing systems and public e-procurement" in F. Lichère, R. Caranta and S. Treumer (eds), *Modernising Public Procurement: The New Directive* (Djøf, 2014) 185, at p.217.

Additional clarifications, or even limitations, concerning 'objective conditions' in the directive itself would have been desirable.

As already mentioned, the 2014PSD also provides for the possibility to reopen competition for certain call-offs, even where all terms had been set at first stage[210]. In this case, the choice between reopening competition or making a call-off "directly on the terms set out in the framework agreement shall be made pursuant to objective criteria, which shall be set out in the procurement documents for the framework agreement"[211]. All other rules for reopening competition or awards based directly on the terms set at first stage must be observed accordingly.

This option seems adequate for situations when it is anticipated that improvements in the terms generally offered for the framework might be obtained for certain orders, such as larger orders over a specified value. Recital 61 of PSD also refers to "the need for a higher degree of service or […] developments in price levels compared to a predetermined price index". However, care should be exercised. Contractors might not be prepared to offer their best possible terms at first stage (knowing that further competition may take place for some call-offs), but the terms offered by them at first stage will apply anyway to call-offs awarded without reopening competition.

Finally in contrast to the public and defence sectors, the provision in the utility sector does not distinguish, for the purposes of call-off procedures, amongst single or multiple supplier frameworks, and amongst frameworks establishing, or otherwise, all terms at first stage. In all cases call-offs "shall be

[210] Art.33(4)(b).
[211] Ibid.

awarded on the basis of objective rules and criteria" that "shall be set out in the procurement documents for the framework agreement"[212] and "shall ensure equal treatment"[213] of all framework contractors. For multi-supplier frameworks call-off procedures "may include reopening the competition"[214]. In this case the purchaser "shall set a time limit which is sufficiently long to allow tenders […] to be submitted and […] shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement"[215].

It follows that all procedural options available in the public sector are also available here and, additionally, flexibility is offered concerning call-off negotiations with framework suppliers both for the purposes of establishing or refining terms not set with precision at first stage, or for improving/refining terms even where all terms had been set at first stage[216]. Certainly, whatever the design of the call-off procedures, they must observe the principle of equal treatment and requisite transparency.

C.2.4.2.1.1 Specific Approach in France: Explicit Exception to Call-off Competition in Frameworks That Do Not Establish All Terms

The current (2016) French decrees include a provision which may appear as derogating from the general rules on framework mini-competitions. It is thus stated that a framework agreement (not establishing all terms) may

[212] Art.51(2)1.
[213] Art.51(2)2.
[214] N.212.
[215] N.213.
[216] Kotsonis, n.43 at p179.

stipulate that the award of certain call-offs is not to involve reopening of competition[217]. This only applies where "for technical reasons" a subsequent purchase can only be entrusted to a specific contractor – a typical example being where the subject matter of that procurement cannot be substituted by other (alternative) items and there is only one contractor that is able to supply the required items[218].

In reality, rather than derogation, such situation appears to provide an explicit application of the provision in the directives, according to which the reopening of competition requires purchasers to "consult in writing the economic operators capable of performing the contract"[219]. Where only one economic operator is *objectively* capable of supplying the *objectively* required items, it would make no sense to invite any other contractor.

C.2.4.2.2 Could a Call-off Consist in a (Secondary) Framework?

The EU directives do not include express language in this connection, but no reason could be identified to preclude such call-offs. Two interpretations are possible. One interpretation involves a limitative approach, revolving around a literal interpretation of the directives, which refer to call-offs as to 'contracts', according to which a call-off consisting in a 'sub-framework' (under a primary framework) are only permitted where the 'sub-framework' qualifies as a 'contract'.

[217] Art.79(II)3PD; art.71(III)2DSD.
[218] Ibid.
[219] Art.33(5)(a)PSD; art.29(4)(2) second para(a) of DD.

However, an open interpretation of this point of the directive - favoured by the current author - is also possible. Under this approach, the relevant EU provisions focus is on ways to perform a framework agreement and do not exclude establishment of a 'sub-framework' under the main framework agreement, as an 'intermediary' stage between the main framework agreement and actual procurement contracts to be awarded. It is irrelevant whether or not such sub-frameworks qualifies as a 'contract', or the type of 'sub-framework' involved (i.e. establishing all terms, involving reopening of competition, single, or multiple-supplier, etc.) to the extent that: (i) the terms and conditions of the main framework agreement are fully observed; (ii) the award of contracts under the sub-framework fully observes all legal rules concerning the award of call-offs; and (iii) the award of a 'sub-framework' is not an abusive way of performing the main framework, for example by way of 'reserving', through the sub-framework, a disproportionate part or the totality of the orders only to some (or one) of the main framework contractors[220].

Call-offs in the form of a 'secondary' framework arrangement can be efficient and effective purchase mechanisms, notably where a purchaser seeks to satisfy some of its recurrent requirements under a multiple-agency framework agreement.

[220] For 'abusive' orders, see also 'down-selections' in US federal purchasing (Ch.IV).

C.2.4.2.2.1 Specific Approach in France: 'Frameworks in Frameworks'

An 'addition' brought by the French instruments to the provisions of the EU directives concerns the possibility of framework agreements that do not establish all terms to award call-offs that take, themselves, the form of a (secondary) framework agreement, provided that the latter does establish *all* terms governing performance of the purchase in question[221]. As discussed in the preceding section, the directives do not include express language in this connection. The explicit clarification in French law of the possibility for call-offs to be organised as framework arrangements is to be welcome. As shown, a similar *(mutatis mutandis)* concept referred to as "blanket purchase arrangement", exists in the US federal procurement system[222].

Among the EU Member States case studies in this research, France is the only one explicitly recognising this option in legislation and this is not a recent development: the provision was also present in the 2006 CMP[223]. In that previous regime, 'marchés à bons de commande' where inadvertently classified in the CMP as procurement contracts, which might provide a historic explanation for permitting call-offs to take this form (but not in the form of a framework arrangement not establishing all terms and involving a further – secondary – mini-competition).

[221] Art.79(I)2PD; art.71(I)2DSD.
[222] See Ch.IV.
[223] Arts.77(VI)&250(VI).

C.2.4.2.3 Electronic Avenues

The 2014 EU directives include specific provisions concerning for the use of electronic catalogues in the context of framework call-off procedures involving reopening of competition[224]. The first situation envisaged, is where tenderers are invited "[…] to resubmit their electronic catalogues, adapted to the requirements of the contract in question"[225]. On the occasion of the 'resubmission', the 'adapted' electronic catalogues will include the improved terms offered by contractors, and which were subject to the reopening of competition.

The second situation envisaged is where purchasers "notify tenderers that they intend to collect from the catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the contract in question […]"[226]. This appears to relate to an intention for the initially submitted catalogues to be complemented by contractors with regard to certain terms (for which competition is reopened for a particular call-off). While not expressly catered for framework agreements, the e-catalogue complementing aspect would seem somewhat similar to what is provided for dynamic purchasing systems[227].

In other words, for a call-off the purchaser first 'generates' an adapted offer on the basis of the electronic catalogue submitted during the first stage of the framework, i.e. on the basis of the terms established in the framework. Then it calls for competition with regard to certain terms, either established in

[224] Art.36(4)&(5)PSD; art.54(4)&(5)UD.
[225] Art.36(4)(a)PSD and art.54(4)(a)UD.
[226] Art.36(4)(b)PSD and art.54(4)(b)UD.
[227] Art.36(6)PSD; art.54(6)UD.

the framework but subject to reopening of competition (as per the procurement documents for the framework) or not yet established by the framework (but referred to in the procurement document for the framework).

A potential application of the e-catalogue collection of information method could be for a framework that provides for call-offs awards under it both with, and without competition, under art.33(4)(b)PSD: collection of information could then be used for establishing the basis for competition, where call-offs are awarded through reopening of competition; and for establishing the best terms offered in relation to a specific call-off directly on the basis of the initial submissions (at the stage when the framework agreement was set), where reopening of competition is not envisaged.

Finally, a specific way of organising second stage mini-competition under a framework agreement is by conducting an electronic auction[228]. This possibility is provided for under all three regimes[229], subject to certain specific conditions.

C.2.4.2.4 Notices and Transparency

Arrowsmith notices that transparency requirements in the EU directives concerning call-off procedures under framework agreements are in some respects unable to support monitoring and review of such awards properly[230]. As shown, where the call-off stage involves reopening of

[228] The use of electronic auctions is not limited to the award of contracts under a framework agreement though.
[229] Art.35(2)2PSD; art.53(2)2UD; art.48(2)2DD.
[230] Arrowsmit, n.66, pp.174-181. The author refers to the public sector but similar considerations apply to defence and utilities.

competition, and not all framework suppliers are invited - since not all relevant are deemed 'capable' for a specific call-off - there is no requirement in the directives, as is in the UNCITRAL Model Law, to inform suppliers not invited that a call-off is underway. This is likely to prevent the framework contractors in question from being able to challenge a decision not to be invited in the call-off, where appropriate (since they might not be aware that a call-off is intended).

But this is not the only problem. Contract award notices regarding call-offs, informing the public that a call-off has been awarded[231], are not required either. Instead, for call-offs under a framework agreement it is provided expressly that purchasers "shall not be bound to send a notice of the results of the procurement procedure for each contract based on that agreement"[232]. In the public and utilities sectors an option is nevertheless provided for Member States to require purchasers to "group notices" concerning the award of call-offs under a framework agreement "on a quarterly basis", in which case "the grouped notices" are to be sent for publication "within 30 days of the end of each quarter"[233]. The option is implied in the DD as well, since it would not involve sending individual notices for each call-off.

However, under the directives (for all three sectors) Member States have the option not to require the publication of contract award notices for any call-offs based on a framework agreement. Requiring a contract award

[231] As provided for contracts and framework agreements in general – to be published within 30 days of conclusion in the public and utilities sectors (art.50(1)PSD; art.70(1)UD); and within 48 days of award/conclusion for the defence sector (art.30(3)1DD).
[232] Art.50(2)1PSD; art.70(2)1UD. Very similar provision is also in art.30(3)2DD.
[233] Art.50(2)1PSD; art.70(2)1UD.

notice for each call-off, including small value ones or those under the thresholds could affect the efficiency envisaged for the call-off stage. But it is equally true that not requiring any sort of contract award notice (grouped, or otherwise) for call-offs above thresholds affects monitoring and review of the decisions concerning such call-offs[234].

On the other hand, the directives are not explicit as to the application of the provisions concerning the information of candidates or tenderers as regards call-off award decisions[235]. In respect of 'traditional' procurement contracts and the award of framework agreements (i.e. first stage procedures), it is provided that purchasers must "as soon as possible inform each candidate and tenderer of decisions reached concerning of a framework agreement, the award of the contract or admittance to a dynamic purchasing system". Also, upon request from an unsuccessful tenderer the purchaser must within 15 days provide "reasons for the rejection of its tender".

In absence of explicit provisions concerning call-offs under frameworks, three interpretations are possible[236]: that the above obligations do not apply to call-offs; that they do apply to call-offs; or that they apply but only to frameworks involving reopening of competition. From a good practice perspective, the current author suggests that information should be performed in all cases. Arrowsmith submits that this is also the correct legal interpretation since "orders are public contracts under the directives"[237].

[234] Arrowsmith, n.230.
[235] Art.55PSD; art.75UD; art.35DD.
[236] Arrowsmith, n.230.
[237] Ibid, pp.176-177.

However, the matter may be confused even further by the rather convoluted provisions in the Remedies Directive on the communication of intended contract award decisions to candidates or tenderers concerned in the context of standstill periods[238]. That communication involves similar information as discussed in the previous paragraph, though it must be sent together with information on the applicable standstill period. Nevertheless, the standstill communication may not apply at all where Member States use the derogation from standstill obligations in respect of call-offs under framework agreements[239] (as discussed further in the section following).

The 'aggregated' effect of these provisions is that certain call-offs are affected by a significant deficit of 'visibility', notably call-offs awarded without reopening of competition, or call-offs awarded under a limitation of competition (i.e. where not all framework contractors are deemed 'capable' for a certain call-off). In these cases abusive or illegal awards may be difficult to spot by fellow framework contactors, or other potentially interested suppliers.

C.2.4.2.4.1 Specific Approach in the UK: Domestic Requirement for Making Publicly Available Certain Information about Call-off Awards

A recent development in UK domestic law relates to informing the public about call-offs awarded under frameworks in the public sector. As was

[238] Art.2a(2) of Directive 89/665 as amended.
[239] Art.2b(c) of Directive 89/665 as amended.

discussed in the preceding section the approach in the directives - permitting Member States the option not to require the publication of any contract award notices in respect of any call-offs under frameworks - is questionable from a monitoring perspective. Whilst the 2014 directives provide for an option for Member State to require quarterly publication of grouped contract award notices for call-offs, the UK regulations have not opted for this[240].

Instead, for the public sector, there is provision in the PCR, not stemming from EU law[241], to the effect that certain information is to be made available through the UK national media specialised on public procurement opportunities ('Contracts Finder') when a call-off is placed under a framework agreement[242]. Call-offs below EU thresholds are also to be published, since there is (separate) requirement for provision of information concerning the award of such public contracts[243]. In this connection, the Procurement Policy Note – Legal Requirement to Publish on Contracts Finder[244] states that the requirement includes "calloffs from framework agreements and contracts that may not have been openly advertised, for example, because they have a lower value than an authority's standing order limit".

C.2.5 Legal Review and Remedies

Review procedures in EU directives (in all three sectors) cover both first stage of a framework agreement, as well as, in principle, call-offs. All

[240] Reg.50(4)PCR; reg.70(4)UCR.
[241] In Part IV of PCR.
[242] Reg.108(1)(b)PCR.
[243] Reg.112PCR.
[244] CCS, Action Note 07/16, 18 July 2016.

review measures required for 'traditional' procurement also apply to the award of the framework itself. However, as regards the second stage of a framework agreement, there may be potential 'fractures' in a proper operation of remedial mechanisms. These arise both from insufficient transparency at call-off stage, as discussed above, and from what can be regarded as an imbalanced and "convoluted" regulation of review procedures in connection with certain call-offs[245]. The specific features of the remedial provision at call-off stage are discussed below.

Thus, Member States are permitted to provide for derogation from the application of standstill periods for the award of (any) call-offs under framework agreements[246]. This supports the efficiency envisaged for the call-off stage, but could affect the review of call-off decisions. All three Member States examined in this research have made use of this option. Where the derogation is invoked, Member States are obliged to provide for the remedy of ineffectiveness of the call-off contract, however, this only applies where "there is an infringement" of the provisions concerning the *reopening of competition* and the call-off exceeds the EU thresholds[247].

It follows that where that there is no obligation to 'enforce' ineffectiveness in the case of contracts awarded on the basis of framework agreement that does not involve second stage reopening of competition. This seems an incongruent approach in particular for call-offs above the EU

[245] Arrowsmith n.66, pp.180-181, but see entire criticism at pp.174-181.
[246] Art.2b(c)D89/665; art.58(c)DD.
[247] Ibid.

thresholds. As shown in the preceding section, awards without reopening competition may 'escape' any transparency.

Returning to call-offs awarded by reopening competition (and above EU thresholds), Member Stats may provide, as in the case of 'traditional' contracts, for retroactive ineffectiveness, that is to say "[…] retroactive cancellation of all contractual obligations […]", or for prospective ineffectiveness, namely a limitation of "[…] the scope of cancellation to those obligations which still have to be performed"[248].

Under art.2e(2) of the public sector remedies directive[249], provision is made for alternative penalties that are to be applied in completion of the *ex nunc* cancellation of contractual obligations. Such penalties are also to be applied when a Member States provides review bodies with the option of not considering "[…] a contract ineffective, even though it has been awarded illegally […] if the review body finds, after having examined all relevant aspects, that overriding interests relating to the general interest require that the effects of the contract should be maintained"[250]. Alternative penalties may consist in "the imposition of fines on the contracting authority" or "the shortening of the duration of the contract"[251].

Where a Member State invokes the derogation from standstill periods for framework call-offs, a purchaser may still voluntarily apply the standstill period for a call-off involving reopening of competition, to avoid the

[248] Article 2d(2)(1)D89/665.
[249] In conjunction with art.2d(2)(2)D89/665.
[250] Art.2d(3)D89/665.
[251] Art.2e(2)D89/665.

consequences of ineffectiveness[252]. In this case a standstill notice must be provided to the 'tenderers concerned' including the relevant reasons for the decision (as required in art.55(2)PSD) and "a precise statement of the exact standstill period applicable"[253].

It is suggested that the transparency and review provisions for call-offs under frameworks would benefit from strengthening.

C.2.5.1 Specific Approach in the UK: Relationship between Framework Affected by Ineffectiveness and Call-offs Awarded under That Framework before Declaration of Ineffectiveness

Under the UK regulations only prospective ineffectiveness applies[254], even where retained by a Court. It could well be that by the time a challenge is lodged and resolved the call-off contract may have already been executed entirely – for example, if it is of a relatively short duration.

The UK regulations also address a matter which the directives are silent about – the implications of ineffectiveness of a framework agreement on call-offs under that framework agreement[255]. In this case, the regulations make a specific application to the matter of the prospective concept over ineffectiveness. In other words, a specific contract entered into before a declaration of ineffectiveness was made in respect of the framework in

[252] Art.2d(5)D89/665.
[253] Art.2a(2)D89/665.
[254] Reg.101PCR; reg.116UCR; reg.62DSPCR.
[255] Reg.103PCR; reg.118UCR; reg.64DSPCR.

question "[…] is not to be considered ineffective merely because a declaration of ineffectiveness has been made in respect of the framework agreement"[256].

Thus, ineffectiveness of a framework agreement does not automatically involve ineffectiveness of call-off contracts awarded before the framework is declared ineffective. Ineffectiveness may apply to those contracts only if a specific claim has been lodged for each such specific contract, within the relevant time-limits as applicable to them, and irrespective of whether this was made simultaneously with a claim concerning ineffectiveness in respect of the actual framework agreement[257]. Where overriding reasons relating to a general interest relate specifically to any such specific contract as provided for under reg.100PCR, the Court must not make a declaration of ineffectiveness in respect of that particular call-off contract[258].

C.3 Dynamic Purchasing Systems (DPS)

C.3.1 Description Instead of Legal Definition

Dynamic purchasing systems, as vehicles for recurrent purchases, are provided for under the EU public sector and the utilities directives. Unlike framework agreements, DPS are not envisaged in the defence procurement regime. This appears to be the case because DPS are intended for 'standard' items (as will be shown below) and this kind of requirements are not envisaged as much covered by the defence regime. Nevertheless, in the

[256] Reg.103(2)PCR.
[257] Reg.103(4)PCR.
[258] Reg.103(5)PCR.

literature it has been pointed out that "there are some contracts for which they could be used" (in the defence sector)[259].

The 2014 directives do not provide for a legal definition *per se* for DPS, unlike the predecessor (2004) directives[260]. Instead, certain essential features of the arrangement are evidenced. It is thus provided that a DPS "shall be operated as a completely electronic process, and shall be open throughout the validity of the purchasing system to any economic operator that satisfies the selection criteria"[261]. It is also emphasised that "All the candidates satisfying the selection criteria shall be admitted to the system, and the number of candidates to be admitted to the system shall not be limited […]"[262].

In order to award a contract under a DPS, the purchaser must "invite all admitted participants to submit a tender" and "shall award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out" in the relevant procurement documents for the establishment and operation of the DPS[263]. Such criteria may "where appropriate, be formulated more precisely in the invitation" to call-off competition[264].

From a legal drafting perspective, the regulation of DPS might have been conceptually assisted by a clear legal definition of it, as a specific type of an open 'non-traditional' regular purchase arrangement, involving two

[259] M. Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Directive in Context* (CUP, 2014) pp.350-351.
[260] See art.1(6) of 2004PSD; art.1(5) of 2004UD.
[261] Art.34(1)PSD; art.52(1)UD.
[262] Art.34(2)1PSD; art.52(2)1UD.
[263] Art.34(6)PSD; art.52(6)UD.
[264] Ibid.

distinct processes: (i) an on-going admission process, where any interested suppliers meeting the selection requirements can apply for, and be granted in an expeditious fashion, admission to the system at any time during the existence of the arrangement; and (ii) the award of call-offs where all contractors admitted on the system at the time of each individual call-off are invited to tender for the procurement. The existence and purpose of the two stages of a DPS emerge then from the substantive provisions concerning this type of procurement arrangement, though in a rather convoluted way.

In the past, DPS have been described as "essentially multiple framework agreements conducted through electronic means"[265]. This was consistent with the regulation of DPS under the 2004 directives: under those directives admittance onto a DPS involved meeting selection criteria *and* "an indicative tender" which complied "with the specification"[266]. The latter requirement suggested that at least some terms and conditions of future purchases were more likely to be established on the occasion of the establishment of the DPS and/or on the occasion of admittance of each contractor onto the system (though not on a competitive basis, but as requirements imposed by the purchaser).

As shown above, the 'standard' configuration for DPS under the 2014 directives only involves at first stage an assessment of whether applicants for admission onto the system satisfy selection criteria[267]. The requirement for

[265] P. Trepte, n.2, p. xxviii.
[266] Art.33(2) of 2004PSD; art.15(2) of 2004UD.
[267] Defined in art.58PSD as "suitability to pursue the professional activity", "economic and financial standing", and "technical and professional activity". An assessment of grounds for exclusion (art.57PSD) will also be performed, as applicable.

indicative tenders has been removed, recital 63PSD[268] explaining that this had been "identified as one of the major burdens" (under the 2004 directives). Since only selection criteria is assessed, it follows that terms are not established at first stage, suggesting that this 'configuration' of DPS could be described as being closer to the concept of 'supplier list' or 'qualification system' type of arrangement, rather than a 'framework agreement'.

Nonetheless, a different 'configuration' of DPS is implied in the context of the electronic catalogues. Under art.36(6)2PSD[269], a purchaser may require that requests for participation in a DPS "be accompanied by an electronic catalogue in accordance with the technical specifications and the format established" by it. Since an electronic catalogue is a form of presentation of a tender[270], it follows that some terms are likely to be established at the first stage of this configuration of DPS[271]. This is confirmed by the fact that, at call-off stage, the purchaser may, under certain conditions, collect information from those catalogues in order to "constitute tenders adapted to the requirements" of the call-off that are to be "completed subsequently by the candidates"[272]. This configuration of DPS could be regarded as closer to the concept of an open type of 'framework agreement'.

[268] And recital 73UD.
[269] And art.54(6)2UD.
[270] Art.36(1)PSD; art.54(1)UD.
[271] Though, again, through requirements imposed by purchasers, and not through a competitive reduction of number of contractors at first stage.
[272] Art.36(6)&(4)(b)PSD; art.54(6)&(4)(b)UD. On constituting tenders at call-off stage based on electronic catalogues under framework agreements, see also C.2.4.2.3.

Overall, the nature of DPS might be described as 'hybrid'[273], since any configuration involves the provision of estimated quantities at first stage[274] and predetermined procedures for the award of contracts within the system. Whilst it is positive that a variety of configurations of DPS may be organised under the current directives, it would have been preferable if the provisions concerning them were more integrated and contained, with enhanced clarity.

C.3.2 Selecting This Arrangement

The directives do not include any provisions concerning procurement planning and decisions to embark on carrying out a DPS.

From a practical point of view, a DPS offers the benefits of maintaining an open communication channel with the 'real' market (outside the system in question), thereby the risks of collusion and complacency being significantly reduced by comparison with (closed) framework agreements. On the other hand, the prospects of achieving better value from expected aggregate demand are less promising in the case of DPS, because of the increased fragmentation of requirements and uncertainty over the actual number of competitors during each round of call-offs.

Certain conditions for the use of a dynamic purchasing system apply under the directives. First, the subject-matter of the procurement must consist of "commonly used purchases the characteristics of which, as generally available on the market, meet the requirements of the contracting

[273] Term used by M. Trybus, n.259.
[274] Art.34(4)(b)PSD; art.52(4)(b)UD.

authorities"[275]. This long-winded way of expressing it was criticised in the literature for introducing an unnecessary degree of complexity without delimiting precisely the scope of covered items[276]. It has been noted that covered items should probably not be subject to "[…] adaptation for the entity's use"[277], although minor customisation such as inscribing the organisation's name or logo on various items of stationery might possibly be catered for. Such items may include, by way of example, office supplies and stationery, standard spares, or non-complex services such as cleaning or maintenance services.

It is likely that the condition is meant to ensure a threefold purpose: (i) that the arrangement is mainly used for meeting on-going requirements; (ii) that meaningful competition is attracted for call-offs, the lack of which, would not justify the use of a dynamic purchasing system; and (iii) that the assessment of admissibility on the system during the first stage does not involve a complex technical evaluation (for the configuration involving electronic catalogues at this stage), which could delay the overall assessment, and affect efficiency of the process.

The second condition is that the process must be "completely electronic"[278]. This involves not just the publication of relevant notices[279] and ensuring to any interested suppliers "[…] unrestricted and full direct access

[275] N.261.
[276] Arrowsmith, n.162, p.18.
[277] Ibid.
[278] N.261.
[279] Publication Office of the EU ensures that the full text of call for competition shall continue to be published "for the period of validity of the dynamic purchasing system" (art.51(4)(b)PSD; art.71(4)(b)UD).

[…] to the procurement documents" throughout the duration of DPS[280], but, apparently, all other steps involved in the process. In this connection, it is provided that "All communications […] shall only be made by electronic means"[281]. The legal obligation concerns both ways communication with the purchaser, including the electronic submission of tenders at both stages, and there does not appear to exist a binding obligation concerning an automatic (electronic) assessment of submissions. However, such an electronic assessment would be required if an electronic auction is conducted in order to award contracts under a DPS[282].

The third condition in the operation of dynamic purchasing systems concerns a prohibition of billing any charge to interested suppliers or to parties to the system[283]. The scope of this condition is probably to eliminate any barriers in the free access of suppliers to such systems (if they meet the other admittance requirements). This could result in failure to ensure meaningful competition at the second-stage which is of the essence, since DPS involve competition at that stage only[284].

Because DPS are open arrangements at the supply side, the main controls for their operation are permanent advertising[285], short time-limits for

[280] Art.34(4)(d)&53PSD; art.52(4)(d)&73UD.
[281] Art.34(3)PSD; art.52(3)UD.
[282] Art.35PSD; art.53UD.
[283] Art.34(9)PSD; art.52(9)UD.
[284] As shown, the first stage of DPS does not involve a comparison among submissions received from various applicants, but only an assessment of each individual submission against the selection criteria (and specifications, where electronic catalogues are used) established by purchaser as admission conditions.
[285] See n.279.

assessing applications for admittance on the system[286], the requirement to invite all admitted contractors to call-off competitions[287], and awarding call-offs on the basis of criteria pre-disclosed from the establishment of the DPS. The duration of a DPS is less relevant than in the case of a (closed) framework agreement, since new suppliers can join at any time. Whilst the 2004 directives imposed limitations on the maximum duration of a DPS, the 2014 directives have removed such controls, though they do, rightly, require that the duration be stated in the call for competition[288]. Any change in the validity period is to be notified to the European Commission[289].

For similar reasons, the possibilities of harming competition under a DPS appear more limited (than in the case of framework agreements)[290]. Using selection criteria during the first stage that are not relevant for the actual call-offs might still result, deliberately, or otherwise, in allowing onto the system contractors that are not properly 'equipped' to perform call-offs, or in preventing fully capable contractors from entering the system. Nonetheless, this risk is seen by the current legislator as low, since the explicit provision in the 2004 directives that DPS should not be used so as to affect or distort competition has also been removed.

Finally, it should be noticed that, because terms are not established (competitively) at first-stage, DPS appear more amenable than framework

[286] See below.
[287] Where the system was divided into categories of items objectively defined, all contractors admitted for the category corresponding to the call-off in question must be invited.
[288] Art.33(8)PSD; art.52(8)UD.
[289] Ibid.
[290] Sanchez Graells, n.164, pp.365-366.

agreements to being used as 'generic' multiple-agency arrangements: a detailed and accurate estimation of the actual requirements for future purchases is less relevant for the purposes of admittance during the first stage.

C.3.3 Procedures

C.3.3.1 First-stage Procedures

The current directives approach the entire process as an adjusted form of restricted procedure[291]. It is accurate that there will be similarities between the latter procedure and a DPS, since the outcome of the initial stage only consists in the admission to the system of candidates who meet selection criteria (with no contract or agreement *per se* being awarded or concluded), and only selected candidates are then to be invited to tender for specific procurements. However, there is also something 'fictional' in the approach, and it might have been more straight-forward to address DPS as a specific, stand-alone, procurement vehicle.

Thus, selection assessment under DPS is an on-going process throughout the duration of the arrangement, at any time when interested suppliers request admission to the system, as a result of a permanently live advertisement. Similarly, all candidates meeting selection criteria must be

[291] N.262.

admitted, and their number cannot be reduced (as permitted for the restricted procedure *per se*)[292].

Some specific provisions concern first-stage procedures. In order to establish a DPS, the purchaser shall cause the publication of a call for competition clearly stating that a DPS is involved[293], and shall show in the procurement documents "at least the nature and estimated quantity of the purchases envisaged" together with operational and technical details concerning the operation of the system[294]. Also, where applicable, "the division into categories" of items to be purchased are to be indicated, and the "characteristics defining them"[295], which "may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area" where call-offs "will be performed"[296]. If categories are used, then the purchaser must specify the selection criteria for each category[297].

Initially, a fixed time-limit of minimum 30 days applies for receipt of requests to participate, from the contract notice, but "no further time limits […] apply once the invitation" for the first call-off is issued[298]. Normally, the assessment of requests to participate must be completed within 10 working days of receipt, though the period may be extended in certain

[292] Ibid.
[293] Art.34(4)PSD; art.52(4)UD.
[294] Ibid.
[295] Ibid.
[296] Art.34(1)PSD; art.52(1)UD.
[297] Ibid.
[298] Art.34(2)2(a)PSD; art.52(2)2(a)UD.

circumstances[299]. Once a decision on the admission (or otherwise) of an applicant was reached the purchaser must inform the "operator concerned at the earliest possible opportunity"[300]. This provision has been criticised for its lack of specificity[301].

As regards calculating the estimated value of a DPS, the same rules apply as for framework agreements[302]. However, the rules concerning the ceiling for yearly turnover requirements (as part of selection criteria) diverge from those applicable to frameworks. The language concerning DPS is not entirely clear in this connection[303] and, in light of the objective of SME participation, the current author submits that the ceiling is to be construed as twice the estimated value of largest call-off envisaged under the DPS[304].

An aspect that may be regarded as forming part of the first stage of a DPS is the option provided to purchasers to recheck 'qualification' of suppliers admitted onto the system "at any time during the period of validity" of the DPS [305]. This may be needed (or desirable) in particular in DPS with very long duration, and the lack of specific rules in this connection has also been identified as a weakness[306].

Related to this it is provided that the purchaser "may require admitted participants to submit a renewed and updated self-declaration" concerning

[299] Art.34(5)PSD; art.52(5)UD.
[300] Ibid. The requirement is also stated in art.55(1)PSD and art.75(1)UD.
[301] A. Eyo, "Evidence on the use of dynamic purchasing systems in the United Kingdom" (2017) 6 *PPLR* 237.
[302] Art.5(5)PSD; art.16(5)UD.
[303] Art.58(3)PSD.
[304] Unless specific circumstances apply (n.301).
[305] Art.34(7)PSD; art.52(7)UD.
[306] Eyo, n.301, at p.246.

exclusion and selection criteria[307]. However, the consequences of missing the five working day time-limit are not specifically clarified.

The five working day time-limit is optional in nature anyway, since the purchaser "may" require (or otherwise) the renewal of the self-declaration. The time-limit appears in fact a minimum recommended time-limit in case the purchaser considers such renewal is needed. If in the first place the purchaser is not bound to require renewed self-declaration, it should also be able to accept it after the time-limit, but only to the extent equal treatment is not affected[308].

Finally, as shown, no explicit provisions are included as to what first-stage procedures should involve where an electronic catalogue is required to accompany each application for admission. In light of the general approach toward DPS it is inferred that such an electronic catalogue will be assessed for compliance with the requirements of the purchaser.

In the silence of the instrument, purchasers might take the view that the terms in the electronic catalogues are binding to the extent they meet the purchaser's requirements. However, it seems also possible to regard all terms in an electronic catalogue as binding for the supplier in question, even where these exceed the requirements of the purchaser (and be regarded as minimum terms for future call-off competitions). This might be an (implied) hypothesis for the option where the purchaser "constitutes" call-off 'tenders'

[307] N.305.

[308] This might prove tricky in some cases, for example where all DPS contracts are required to provide the renewed self-declaration but only a minority of them meets the time-limit, which does not make it for proper competition in future awards (if others are excluded).

that are then to be completed by suppliers on the system during second-stage competitions[309]. It would have been preferable if the instruments elaborated on these methods.

C.3.3.2 Call-off Procedures

Call-off procedures represent a main area of simplification and improvement of the regulation of DPS under the 2014 directives in comparison to their predecessor (2004) directives. Under the latter the initiation of each call-off was conditioned by the publication of "[…] a simplified contract notice inviting all interested economic operators" to apply for admission on the DPS, and by completion of the evaluation of all applications for admission received pursuant to the publication of that indicative contract notice[310]. It was only after this exercise that tenders for the specific call-off in question could be requested (from all suppliers admitted on the system). This was an unnecessary hindrance to the efficiency of the call-off stage, which generated an infrequent use of this procurement method[311].

Fortunately, that 're-run' of the first-stage on the occasion of each call-off has now been eliminated by the 2014 directives, significantly improving the 'take-up' of DPS in some Member States, such as the UK[312]. Thus, under the 2014 directives, once a specific need arises for items covered by a DPS,

[309] Art.36(6)PSD; art.54(6)UD.
[310] Art.33(5) of 2004PSD; art.15(5) of 2004UD.
[311] Arrowsmith, n.162, p.29; n.66, pp.185-186; S. Arrowsmith, "Modernising the EU's Public Procurement Regime: a Blueprint for Real Simplicity and Flexibility" (2012) 3 *PPLR* 71(at p.79).
[312] Eyo, n.301.

the purchaser simply proceeds to inviting tenders from "all admitted participants"[313].

In general call-off procedures should not raise major issues. The use of electronic means should ensure that indeed *all* tenderers are invited simultaneously[314]. A minimum time-limit for receipt of tenders is established at "10 days from the date" when the invitation is issued[315]. Certainly, the actual time-limit should be adequate to allow tenderers to properly prepare their tenders. An electronic auction can also be organised at this stage for the award of contracts[316]. A call-off is to be awarded to the best tender received in accordance with the criteria established in the contract notice for the DPS[317]. Those criteria could be "formulated more precisely in the invitation to tender"[318].

As in case of frameworks, the rules concerning the provision of information to tenderers as to the 'result' of the award procedure[319] do not specifically refer call-offs under DPS. Nevertheless, for the reasons shown above (in the section on framework agreements) it is submitted that those requirements do apply to the award of DPS call-offs. It should also be noticed that *contract award notices* are required for call-offs under DPS, either in the

[313] Or all those admitted for the category of items relevant for the call-off (art.34(6)PSD; art.52(6)UD).
[314] As required under art.54(1)PSD or art.74(1)UD.
[315] Art.34(2)2(b)PSD; art.52(2)2(b)UD. In certain cases the time-limit (including a shorter one) may be established by mutual agreement with the candidates (art.28(4)PSD; art.46(2)2&3UD).
[316] Art.35(2)PSD; art.53(2)UD.
[317] Or other relevant procurement document for the DPS, depending on the call for competition used (art.34(6)2PSD; art.52(6)2UD).
[318] Arts. above.
[319] Art.55PSD; art.75UD.

form of individual notices (for each call-off) or as quarterly grouped notices[320]. This position is more appropriate than that concerning call-offs under frameworks, where Member States may elect not to require the publication of any contract award notice.

C.3.3.2.1 Specific Domestic Approach in Romania Concerning 'Frameworks' Awarded under DPS?

An interesting provision, included in Romanian legislation[321], refers to "contracts or framework agreements awarded through a dynamic purchasing system". It is however unclear whether DPS call-offs consisting of framework agreements are indeed envisaged. It could be just a drafting error, since the only place in the instruments where this appears is in the context of publishing contract award notices (for call-offs under DPS).

So far, the use of DPS in Romania seems a very rare occurrence (if at all). A simple search on the specialised domestic media (www.e-licitatie.ro)[322] only generated a few notices concerning DPS, and none over the last few years. Similarly, a search on TED has not returned any DPS notices for Romania. It is possible that limited experience to more novel procurement methods contributed to this wording in the legal instrument.

[320] Art.50(3)PSD; art.70(2)3UD.
[321] Art.145(3)PPL; art.155(3)UPL.
[322] In January 2018.

C.3.4 Review Procedures

As concerns legal review mechanisms, DPS should not usually raise major issues, both stages being reasonably covered by the general rules and measures in the EU directives. For the purposes of the remedies directives "contracts include public contracts […] and dynamic purchasing systems"[323]. Thus, both stages of DPS are catered for.

There are some particularities though. With regard to first-stage procedures, it can be noticed that standstill periods are not relevant because there is no contract award decision or conclusion involved. Consequently, the remedy of ineffectiveness (as well as alternative penalties) also appears irrelevant in most cases in connection the admission stage of a DPS. However, an interested supplier could challenge the contract notice (or other call for competition) for a DPS, the relevant procurement documents, or the decision concerning his own application for admittance.

It follows that any interested supplier will be "protected" against abusive behaviour of a purchaser concerning the rejection of its application for admission or delaying unjustifiably a decision on the application[324]. But interested suppliers wishing to apply for admittance, or contractors already admitted may be less "protected" against decisions that may favour admittance onto the system of suppliers that do not meet the required criteria and conditions, simply because no information in connection with the admittance (or otherwise) of other suppliers is made available to them. In

[323] Art.1(1)of D89/665(as amended). Similar provision is included in D92/13.
[324] And also against illegal provisions in the call for competition, or the procurement documents.

light of the full and open competition at call-off stage, this risk and its potential effects appear moderate. Still, it is suggested that acceptance decisions on DPS may benefit from increased attention from alternative review mechanisms (at national level), such as *ex-post* controls by procurement audit or supervision body.

As regards the legal review avenues available during the call-off stage, these are generally thorough and comprehensive. The entire range of remedies may be applicable in a straight-forward fashion, depending on circumstances. Member States are given the option to derogate from the application of standstill periods for call-offs under DPS, and replace this measure with ineffectiveness, for both public and utilities regimes[325]. As in the case of call-offs under frameworks involving reopening of competition, where the derogation is invoked ineffectiveness would still not apply where a purchaser voluntarily observes the standstill period (and associated information requirements)[326].

Because of the ongoing nature of the first stage, there might be situations of interaction among stages in terms of remedies sought. For example, a supplier challenging the decision rejecting his application to join the system might also request the cancellation (or suspension) of a call-off procedure initiated by the purchaser before the finalisation of his application. Such interaction situations are not addressed explicitly in the current instruments and might benefit from increased attention in future revision/streamlining of both the procedural and review rules.

[325] Art.2b(c)D89/665; art.2b(c)D92/13.
[326] Art.2d(5)D89/665; art.2d(5)D92/13

C.4 Qualification Systems

Qualification systems are recognised and permitted in the utilities sector only. They are provided for mainly under art.77UD, though the directive deals with various aspects that are relevant to qualification systems in a number of different provisions, such as those concerning publication of notices, means of calling for competition, or the use of exclusion grounds.

A legal definition of qualification systems is not included in the directive. We have shown in the introductory chapter[327] that two major types of arrangement arise from our definition of NTRPA: 'framework arrangements', which at first stage involve the assessment of 'suitability' of interested suppliers *as well as* the establishment of some terms of future purchases; and 'supplier lists' which at first stage *do not* involve the establishment of terms for future purchases. As regards the latter, Arrowsmith distinguishes among 'mandatory' supplier lists, where registration on the list is a condition for participating in any procurements under it, and 'optional' lists where registration is not compulsory for participating in procurements[328].

From the overall economy of the relevant provisions of UD it can be inferred that a qualification system is a contracting entity driven mechanism for establishing mandatory lists of suppliers[329] whose 'suitability'/'qualification' has been assessed, at least in part, for various types

[327] Ch.I.A&B.
[328] See Ch.II.B.5 and the references to pieces by that author there.
[329] See also Trepte n.2 p.366 and subsequent.

of contracts or procurement needs. The economic operators who are registered on a qualification system, i.e. those who meet the applicable criteria (which must be objective), will "[…] then form a pool from which the utility may draw those who are to be invited to bid or negotiate on future contracts"[330].

The 'mandatory' (or 'exclusive') nature of the arrangement arises from art.77(5)UD which states: "When a call for competition is made by means of a notice on the existence of a qualification system, specific contracts [...] covered by the qualification shall be awarded by restricted or negotiated procedures, in which *all* tenderers and participants are selected among the candidates *already* qualified in accordance with such a system"[331]. The same seems to apply when specific contracts are awarded by competitive dialogue and innovation partnership under a qualification system[332].

A qualification system is an open arrangement. Thus, "entities […] shall ensure that economic operators are at all times able to request qualification", under art.77(1)UD. Also, in order to establish a qualification system an entity must publish (in the OJEU) a notice on the existence of a qualification system "indicating the purpose of the qualification system and how to have access to the rules concerning its operation"[333]. The notice also acts as a means for calling for competition for subsequent contracts[334], and the EU Publications

[330] Arrowsmith n.102, p.970.
[331] Current author's emphasis.
[332] Arts.44(4)(b),48(1)&49(1)UD in conjunction with art.68UD.
[333] Art.68(1)UD. Annex X to UD states the additional information required for this notice.
[334] Annex X, point 7 (UD).

Office ensures its permanent publication throughout the "period of validity" of the system[335].

On the other hand, it needs noticing that a qualification system can be a single or multiple purchaser arrangement. Further, it may be argued that it could be an open arrangement at the demand side as well. In this connection art.77(3)UD states that where a purchaser considers that the qualification system organised by another entity "meets its requirements, it shall communicate to interested economic operators" the identity of that entity.

Consistent with open nature of the arrangement, its duration is not limited by the instrument. The period of validity is to be indicated in the notice on the existence of a qualification system[336], whereas "any change" to that period must be notified to the EU Publications Office by using specific forms[337].

It should also be noticed that the term 'qualification' in the context of assessment for entry onto a qualification system potentially includes a range of aspects concerning a supplier, considered relevant by a purchaser in light of its planned procurement(s). The requirement in art.77(2)UD is for contracting entities to establish objective rules for the exclusion and selection of economic operators requesting qualification"[338]. These 'objective criteria and rules' *may* include exclusion and selection criteria referred to under the public

[335] Art.71(4)(c)UD. This is an improvement compared to publication rules in previous (2004)UD.
[336] Art.68(2)UD (and point 6 of Annex X).
[337] Art.68(2)UD.
[338] And also for the operation of the system, including "inscription" in it or "periodic updating of qualifications".

sector regime[339] or technical specifications[340]. Thus, 'qualification systems' may cover a wide range of 'first-stage' assessments, from mere registration of interest, to partial or full 'qualification', to an assessment of specifications, or even to the possibility of reducing the numbers of those qualified, as the system "may involve different qualification stages"[341].

Procedurally, it seems surprising – if not disappointing – that the (2014)UD has carried forward the provisions in the previous (2004)UD[342] concerning the six-month time-limit for contracting entities "to inform applicants of their decision as to qualification"[343] (i.e. as to the admittance or otherwise on the system). This appears excessively long, potentially leading to abuses, as does the 'shorter' four-month time-limit for reaching a decision[344]. Within this lax period a procuring entity could for example deliberately delay a decision concerning the admission of an applicant to avoid its participation in a certain procurement exercise. During the same period, it could also 'informally' notify a preferred supplier and could quickly assess and grant admission to him, in time to 'catch' a procurement exercise based on that qualification system.

Clearly, these provisions on time-limits appear unlikely to facilitate wise admission decisions in particular in the context of 'interactions' between

[339] Art.80UD referring to arts.57&58PSD. However, certain utility entities must use some of the exclusion criteria in art.57PSD.
[340] Art.77(2)UD.
[341] Ibid.
[342] Art.49(3) of 2004UD.
[343] Art.75(4)UD.
[344] Ibid. In most cases a (much) shorter period is needed to complete a full evaluation of competitive tenders. It is thus puzzling why the assessment of interest and/or of a number of 'suitability' or 'capability' criteria should be allowed to drag on for so long.

'newcomer' applications and calls for tenders under the system in question. It would have been preferable to include a much shorter time-limit for decisions or admission, or even a prohibition to delay a decision on admission where the contracting entity is aware of up-coming procurements that the applicant might like to tender for.

On the other hand, once admitted on a qualification system, bringing the qualification of a supplier to an end during the duration of a qualification system appears to be subject to adequate procedural safeguards against abuses[345]. However, these provisions cannot compensate for the 'damage' potentially brought to a qualification system by the long time-limits for deciding on admission of applicants.

As regards remedies in the context of a qualification system, the interaction (or overlaps) between stages are not addressed specifically. In this connection, somewhat similar matters may arise, as in the case of DPS[346].

It emerges in fact that, in particular in the 2014UD, a number of similarities can be identified amongst qualification systems and DPS[347] – such as, permanent advertising, open access throughout the validity, or notifying changes in the validity. The possibility to specify the criteria for the award of contracts in the notice on the existence of a qualification[348] system should also be mentioned in this context. Certainly, there are significant differences as well, notably the fact that DPS are confined to 'common use' purchases, whereas this is particularly not the case of qualification systems. Also, the

[345] Art.75(5)UD.
[346] C.3.4 above.
[347] 'Standard' DPS configuration, not involving establishment of terms at first stage.
[348] Annex X, point 10 of UD.

'second-stage' award procedure may be different[349]. It is likely that a DPS type of arrangement could be organised under the rules of qualification systems, though the reverse may not apply.

Perhaps in the future it could be built on the 'common' areas amongst qualification systems and DPS to substantiate the recognition of a mandatory list type of arrangement in the public sector, somewhat similar to qualification systems in the utilities sector. The current author submits that qualification systems in the utilities sector, as currently regulated, would need just very limited adjustments to 'fit' the public sector: mainly, a drastic reduction of the time to assess applications for admission and for informing applicants on the decision reached, and confining the selection and exclusion criteria to those specifically provided for in the PSD.

Since 'mandatory list' arrangements are (still) not permitted in the public sector[350] their recognition seems long overdue. Arrowsmith noticed back in 2005 that "in light of the potential advantages of mandatory lists" their introduction in the 2004 directive would have been useful[351]. However, this has not even occurred in the 2014 directive.

[349] Other differences apply, for example charges may be billed to applicants in case of qualification systems (art.77(6)UD), whereas this is not permitted in the case of DPS.
[350] Other than to the extent a DPS falls in this category. See also C.5 below.
[351] Arrowsmith n.102, p.770.

C.5 Official Lists of Approved Economic Operators and Certification by Bodies Established under Public or Private Law ('Official Lists')

Under this title the public sector and the defence regimes[352] recognise and regulate certain mechanisms intended to facilitate the assessment of supplier 'suitability'[353] in any type of procurement procedure. The mechanisms involve a 'standardisation' and simplification of documentary evidence and verification on how candidates or tenderers meet what the directives refer to as criteria for qualitative selection (or some of them). Such criteria may include various aspects concerning the personal situation of candidates or tenderers (exclusion grounds), the suitability to pursue a professional activity, their technical and professional ability, economic and financial standing, quality assurance standards and environmental management standards.

The main purpose of the provisions on official lists appears to concern preventing unjustified restrictions to accessing procurements by suppliers from other Member States that may result from an improper operation of such documentary evidence mechanisms. It should be noticed first that establishing (or maintaining) an official list is optional for Member States[354]. Where an official list exists, the Member State in question must notify the

[352] The relevant provisions are in art.64PSD and art.46DD.

[353] This term is used in a wide sense including in principle any verification and assessments made concerning the conditions for participation in a procurement exercise, with the exception of an evaluation of the technical and financial proposals submitted. In other words, as used in this chapter the term covers "criteria for qualitative selection" in the language of the directives.

[354] Art.64(1)PSD; art.46(1)DD.

Commission and the other Member States of the address of the "body […] to which applications shall be sent"[355].

Leaving aside the full details of the situations and information that have to or may be assessed within 'qualitative selection'[356] under the directives, the operation of 'official lists' is straight-forward. Basically, these mechanisms have the role of 'hubs' and 'repositories' for various proofs that suppliers would otherwise have to provide to purchasers as part of qualitative selection requirements for procurements. When regulating qualitative selection the directives also define the proof that will have to be considered sufficient by a purchaser in respect of various aspects or criteria.

Rather than having to supply the various (and quite possibly numerous) pieces of documentary evidence for each procurement contract (or purchaser), official lists may support reduce this burden by submitting such documentation only once to the 'official list body'. That body verifies the evidence and data in it, in accordance with the provisions of the directive, which are exactly those concerning 'qualitative selection' as they would apply to purchasers, and where satisfied, records the data[357]. Then, for each contract suppliers registered on an official list may submit to the purchaser a certificate of registration on the official list to prove fulfilment of the relevant qualitative criteria[358].

Official lists may not completely simplify all documentary evidence issues, but they can streamline some of them. Thus, official lists may only

[355] Art.64(1)PSD; similar requirement is found in art.46(8)DD.
[356] Which are complex and exceed the scope of this thesis.
[357] Art.64(2)PSD; art.46(1)DD.
[358] Art.64(3)PSD; art.46(2)DD.

cover certain elements of those that "qualitative selection" may refer to. On the other hand, some of the qualitative selection aspects may be so comprehensive and/or specialised that a general registration on a list or certification system may not be particularly helpful (e.g. in specialised consulting services).

In order to ensure that, where introduced, official lists are not used in a discriminatory way the directives institute a number of compulsory provisions concerning their operation. Thus, as shown, the conditions for registration must observe all the conditions that a purchaser would have to follow in relation to qualitative selection criteria and proof[359]. Similarly, certificates issued "shall state the references which enabled" the registration of a supplier[360].

Registration on an official list constitutes "a presumption of suitability with regard to requirements" covered by the list in question and information resulting from registration "shall not be questioned without justification"[361]. However, these rules operate only in favour of economic operators established in the Member State holding the official list in question[362]. It is inferred that this may include the State of the purchaser in question.

On the other hand, suppliers from other Member States may not be obliged to undergo registration in the country of the purchaser as a condition for participation in a procurement exercise. Instead, the purchaser will have

[359] N.357. Also, art.64(6)PSD.
[360] Art.64(3)PSD; art.46(2)DD. But see also the expansion of information requirements concerning "documents produced as evidence" by suppliers in art.64(8)PSD.
[361] Art.64(4)&(5)PSD. See also art.46(3)&(4)DD.
[362] Art.64(5)PSD; art.46(4)DD.

to "recognise equivalent certificates from bodies established in other Member States" or other equivalent documentary evidence concerning the qualitative selection criteria[363].

The text of the directives appears to indicate *per a contrario* that registration of suppliers established in the Member State holding the list could be made compulsory. Presumably this could be permitted if, for example, there is a general requirement by the Member State in question, which requires any national supplier to get registered in order "to be considered for government contracts[364].

Another very relevant rule concerning the operation of official lists is that they must be open to suppliers at any time and the decision regarding registration (or otherwise) is to be issued "[…] within a reasonably short period of time"[365]. Finally, for registration of economic operators from other Member States, where they wish to register, the same proof or statements shall be required of them as from national suppliers[366].

The distinctive note, that, it is submitted, draws a line between 'official lists' and NTRPA as defined in this current research is that the organisation of official lists is not entrusted to individual purchasers but to assigned bodies "established under public or private law" that are "complying with European certification standards"[367]. Purchasers are only players and not 'managers' of the official list, and it is argued that they are secondary players. This is

[363] Art.64(7)PSD; art.46(5)DD.
[364] Arrowsmith n.87, p.1303.
[365] Art.64(6)PSD; art.46(6)DD.
[366] Art.64(6)PSD; and art.46(5)DD.
[367] Art.64(1)PSD.

because purchasers are bound to accept registration on official lists as a presumption of 'suitability' (under the conditions discussed) but they cannot require such registration as a means of proof of suitability, at least as regards economic operators from other Member States.

From this perspective, suppliers should be regarded as main players of the system since they have the option and initiative of using for the purposes of individual procurements the registration on an official list as a presumption of suitability. They will also have the option - but not the obligation - to register on a list in the country of the purchaser.

Thus, the official lists are not purchaser driven and, in effect, they are very unlikely to specifically assist purchasers in structuring potential suppliers by 'specialities' as a first step towards some sort of 'regular' purchase arrangement as defined in this thesis. On the other hand, mandatory lists (organised by the purchaser) are implicitly prohibited by the directives in the public and defence sectors in that these instruments clearly prescribe the permitted proof - that can be required by the purchaser - concerning qualitative selection requirements, but such proof do not include registration on a list organised by purchaser[368].

But there appears to be nothing in the directives preventing the organisation of optional lists - not in the sense of 'official' ones - by purchasers if they observe all applicable rules concerning 'qualitative selection'[369] as well as the general award rules for the procurements in question, and if such lists

[368] Arrowsmith n.87, pp.1312-1313. But see also Case C-74/09 [2010] E.C.R. I-07271 to which the author refers (ibid and p.1201).
[369] Including those concerning 'official lists'.

are advertised[370]. In this case, participation in award procedures would be open both to suppliers registered on such a list, which would benefit from a presumption of being 'qualified' or 'suitable' in connection with the aspects referred to by the list in question[371], as well as to non-registered suppliers who are interested and whose 'qualification' or 'suitability' is to be fully assessed during award procedure in question. Participation of both 'categories' of suppliers must be ensured under equal terms, with no 'advantages' for already registered suppliers other than a presumption of suitability, as discussed above[372].

Still, the use of optional lists as 'non-traditional regular purchase arrangements' as defined in this research remains of relatively limited practical relevance. The fact that the permitted use of such lists is implicit in the text of the Directives, rather than addressed explicitly, leaves a potential area of legal uncertainty, which is unlikely to encourage purchasers to 'organise' optional lists.

D. Conclusions

Our 'trip' through the EU public procurement system will have shown that there has been a continuing preoccupation of catering at the EU law level for certain forms of what we call 'non-traditional regular purchase

[370] A requirement that appears to stem from TFEU; see Arrowsmith n.87, p.1319.
[371] They may need though to complete or update that evidence.
[372] Arrowsmith n.87, p.1315 referring to Case C-71/92, *Commission v. Spain*.

arrangements'. There currently is a high level of sophistication of the relevant provisions.

So far, framework agreements have enjoyed a great success since their introduction in the 2004 directives. DPS though were quite rarely used in practice under those directives but are now, under the 2014 directives, increasingly attractive. There certainly is potential for further streamlining the rules concerning these methods, as well as those on qualification systems, as was discussed throughout the chapter. Similarly, the procurement review regime concerning NTRPA could benefit from 'fine-tuning'.

The three parallel regimes (public, utilities and defence) include many similar provisions, while differences among them may not always be justified by pragmatic considerations, and some of them may just be reflections of sectorial 'inertia'. For example, there appears to be no reason why public sector or defence procurement should not be able to use an arrangement similar to 'qualification systems' for regular purchases that do not fully meet the conditions for framework agreement or dynamic purchasing systems. In fact, the approach of the 2014PSD on this point appears particularly unbalanced: an 'ultra-liberal' approach to frameworks and a continuing prohibition on mandatory lists.

Whilst an opportunity for consolidation of the public and utilities directives into a single instrument was not used in 2014, it is submitted that efforts in that direction (for all sectors and including procurement review)

should be considered in the future[373]. The rules on framework agreements might for example benefit from being consolidated throughout sectors. This could encourage an increased use of multiple-agency frameworks (something that may currently be prevented in some cases by the different rules applicable to the various sectors).

Overall, the EU system provides a very comprehensive approach to the subject of NTRPA.

EU law shapes to a significant degree the procurement systems of Member States. But the latter 'enrich' the overall EU public procurement system not only through involvement in the drafting of directives, but also, notably, through specific approaches and experiences, as was discussed throughout this chapter.

Thus, the UK the regulations provide an innovative interpretation of the rules of the directives probably offering the widest flexibility to purchasers as permitted under EU law. Similarly, interpretations that promote procurement efficiency are sought, for example the prospective ineffectiveness and its application to call-offs based on an ineffective framework. On the other hand, France and Romania 'contribute' with specific controls or clarifications supporting an appropriate use of frameworks, such as binding rules on price revision at call-off stage (or France's explicit recognition of 'frameworks in frameworks').

Even where certain aspects of directives are not pursued in Member States this also enriches the overall EU experience. Romanian practice shows

[373] Certainly, tailored provisions concerning certain aspects that would require specific sectorial 'treatment' are not excluded from this approach.

that simply ‘parachuting’ procuring methods or concepts, without appropriate guidance, or technical assistance, could easily result in a long time ‘ignorance’ of such elements (such as DPS).

CHAPTER VI

ANALYSIS – COMPARATIVE PERSPECTIVES

A. Arrangements Identified: Shades of a Phenomenon[1], Rather Than Separate Concepts

Previous chapters mainly provided a vertical analysis, by procurement system, and within each system, by purchasing arrangement. They also involved some 'intra-system' horizontal comparisons, among the various arrangements identified in each system.

The current chapter provides a comprehensive horizontal analysis. Using the general structure used for the main individual arrangements identified in case studies, this chapter compares all purchasing arrangements that were the subject of this research, by way of their essential elements, such as definition, types, conditions and controls, procedures and remedies. Each of the following sections deals with such an essential element and provides a synthesis of relevant matters for the entire range of arrangements investigated in the research by drawing inputs from them.

In Chapter I we defined non-traditional regular purchasing arrangements (NTRPA) in public procurement as those arrangements designed and/or implemented to meet on-going, recurrent or indefinite

[1] Similar terminology is used by S. Arrowsmith, for example in "Framework purchasing and qualification lists under the European procurement Directives: Part I (1999) 3 *PPLR* 115 at p.116. On the other hand, G.L. Albano and C. Nicholas, in *The Law and Economics of Framework Agreements – Designing Flexible Solutions for Public Procurement* (CUP, 2016) pp.13-14, appear to have reservations on this approach, but their argument might not consider certain types of arrangements.

requirements for a long-term period through purchasing such items from the free market, and where the parties, at the initiative of the purchaser, seek to go through a number of procedural stages and/or to establish a number of contractual terms, but not all, in advance of the moment when an actual need for specific items arises, followed by placement of subsequent contracts or orders whenever the actual needs for items arise, based on the procedural stages conducted in advance, or based on the terms agreed beforehand.

On this basis, the preceding chapters identified and discussed such arrangements as existing in selected case-studies. Looking at them jointly, as procurement mechanisms, a wide variety and some very significant differences among them, including the way they are regulated, can easily be noticed. Beyond this apparently heterogeneous picture though, the underlying process of establishing purchasing arrangements (or part thereof) where some elements concerning envisaged purchases are uncertain or indefinite at the time when the process is initiated is common. This commonality provides an essential aspect of the thesis and the main enabler of the comparison exercise it involved[2].

From the angle of a 'traditional' procurement exercise, NTRPA could be looked at as 'incomplete' transactions. In the case of 'traditional' procurement three main elements of a transaction - requirement, terms, and commitments (to buy and sell) - are all present and fully defined. In the case of NTRPA an incomplete transaction emerges first for the overall estimated or predicted requirement (first stage). This is then followed by a number of

[2] It ensured that the *tertius comparationis* requirement of any comparative method was met – i.e. the arrangements compared are comparable.

'complete' transactions concluded based on the first stage, covering parts or certain 'segments' or the overall requirement (second stage), when such 'partial' requirements materialise. It should be noticed that intermediary stages are not excluded in some cases though[3].

A varying degree of 'incompleteness' at first stage characterises the specific types of NTRPA. 'Incompleteness' relates to the uncertain or indefinite aspect(s) among those aspects constituting a 'complete transaction'. At one end of the spectrum, some NTRPA configurations are very similar (or close) to a 'traditional' procurement, possibly with just one aspect being affected by some uncertainty. In this 'confluence area' the distinction between 'traditional' procurement and NTRPA may not always be straight-forward, since a 'traditional' contract may also involve the supply of successive tranches of similar items, and might accommodate some adjustment of terms.

An illustration of this point is offered by 'definite-quantity contracts' in the US federal procurement, which are regarded in the FAR (at 16.502) as a type of 'indefinite-delivery contracts'. However, the total quantity to be supplied under such 'definite-quantity contract', the price(s) and delivery locations are all set at the time of contracting, while orders express specific timings and quantities to be supplied to 'designated' delivery locations. In the EU system this type of arrangement does not receive separate treatment and it would not be considered a framework agreement. This already suggests a continuum of possible arrangements with some indefinite or 'open' aspects.

[3] See Section F.3 below.

Just one step further, the NTRPA features turn more prominent, as indefinite areas of arrangements become more significant. Again, the US federal procurement system provides a good illustration of the gradual departure from 'traditional' procurement. Thus, in 'requirements contracts' the total quantity under the arrangement is not guaranteed but a realistic estimate is. The next arrangement in the order of 'distance' from 'traditional' procurement in the US federal system consists of ID/IQ contracts. Here, the purchaser's commitment to buy is limited to a minimum quantity guaranteed under the contract, which can be very low. ID/IQ contracts could be single-supplier arrangements, but preference is for multiple-contractor arrangements. There are also multi-agency ID/IQ configurations.

In other procurement systems, similar or different shades in the spectrum are present, though they might be less immediately visible, because they are not treated separately. In the EU system[4] for example, arrangements that would be quite similar to a US requirements contract (or ID/IQ) could be organised as specific 'configurations' of framework agreements. On the other hand, an 'EU' framework agreement need not commit the purchaser to buy anything (as the US arrangements referred above require), whereas the World Bank frameworks must not commit either party to buy/sell.

The more aspects, or elements, are affected by uncertainty (or left open) at first stage, the further away in the spectrum the NTRPA configuration in question will be from 'traditional' procurement. In some circumstances it is impossible or undesirable to establish in advance any terms for future

[4] Subject to domestic implementation rules; however, the 2014 directives may eliminate discretion of Member States to limit use of frameworks.

purchases. However, it may still be possible to make some steps in advance toward meeting future needs, for example by establishing a list of potentially interested suppliers whose 'suitability' is assessed prior to a procurement requirement having materialised. This category includes arrangements like qualification systems in the utilities sector of EU procurement, or 'optional lists' that were discussed in the context of EU public and defence sectors.

Similarly, it may be undesirable to limit the pool from which the contractor(s) will be selected for future purchases to the group of suppliers which were admitted onto an arrangement at the time it was established[5]. In this case, the two stages of NTRPA go in parallel throughout the duration of the arrangement and may overlap at the points of individual purchases under the arrangement. These can be described as 'open' arrangements and include 'open framework agreements' under the UNCITRAL Model Law on Public Procurement (2011), 'dynamic purchasing systems' in the EU public and utilities sectors, 'qualification systems' in the EU utilities sector, 'optional lists' in the EU public and defence sectors, and FSA (MAS) Schedules in US federal procurement.

Open arrangements can include arrangements that establish terms, such as UNCITRAL open framework agreements or FSA Schedules, and arrangements that do not establish terms, such as EU qualification systems, (some) dynamic purchasing systems, and optional lists. The last could actually be regarded, among the arrangements identified in this research, as being the

[5] On the other side of the coin, a somewhat similar aspect can arise with regard to purchasers who may be interested to use an existing arrangement when they were not involved in its establishment.

furthest away from 'traditional' procurement since it does not establish any terms (or commitment) and its use is not a condition for access to the purchase(s) it relates to.

At practical level NRTPA involve managing uncertainties surrounding certain procurement needs, on the basis of some prediction. At policy level those arrangements involve regulating the management of such uncertainties. The following sections map out a world of 'indefinite purchasing' as it results from the juxtaposition of the arrangements identified in the research (over twenty 'types') against the structure developed for the analysis. It is hoped that the analysis brings a contribution to academia by way of restructuring approaches to the subject, bringing to light new insights and opening gates for further research.

B. Defining a Non-traditional Regular Purchasing Arrangement

In most cases (legal) definitions of NTRPA are 'synthetic', namely they focus on the outcome of the first stage of an arrangement. This kind of definition usually summarises distinctive features of an arrangement (as compared to 'traditional' contracting), but fails to provide an overview of the entire purchasing mechanism involved[6]. The need to complete a 'formal' definition with other features or requirements relevant to the arrangement in question but stipulated in other provisions to obtain an accurate 'picture' is not unusual. In some cases there is no explicit legal definition of an

[6] For example, EU framework agreements.

arrangement at all, such as for dynamic purchasing systems in the 2014 directives.

Providing for an accurate and complete legal definition in the relevant legal instrument offers an increased level of legal certainty over the 'essentials' of an arrangement, and guides interpretation of the other rules concerning that arrangement. It is submitted that a definition along the lines of our definition of NTRPA, as applied to a given arrangement, would meet those beneficial features. The definition of framework agreements in the 2011 UNCITRAL Model Law does this, first by distinguishing among a 'framework procedure' and a 'framework agreement' and clarifying their meaning. Second, the Model Law provides definitions for the sub-types of possible configurations of framework agreements. This is likely to bring additional legal certainty.

Conceptually, regarding a framework arrangement as a contractual arrangement, rather than a procedure (or procurement process), may have inherent implications on an arrangement, as the World Bank, US and France case-studies indicate. These could involve limitations of certain types of arrangement, or transparency and review at call-off stage.

Similarly, supplier list types of arrangement could benefit from explicit legal definitions. However, no such definitions were identified in the case-studies examined.

C. Classification of NTRPA

C.1 General

The wide variety of NTRPA configurations identified in the systems reviewed call for a comprehensive classification. The classification below expands classic taxonomies by Arrowsmith[7] with types or features of arrangements identified in this research.

C.2 'Framework' Arrangements and 'Supplier List' Arrangements

A first distinction results from our definition of NTRPA and employs the criterion of the outcome of the first stage of an arrangement. Thus, one 'type' of arrangement, referred to in this thesis as 'framework' *arrangements*[8]*,* involves that some terms of future purchase(s) are established at first stage. This aspect differentiates them from supplier lists[9]. Such terms could include firm, adjustable or maximum prices; minimum, maximum or indicative quantities; delivery places and/or time-limits; insurance; warranties; etc. In the systems reviewed, US requirements and ID/IQ contracts, US GSA schedules, EU (and Member States), UNCITRAL and WB framework agreements fall (in principle) in this 'category'.

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[7] S. Arrowsmith, "Framework Purchasing and Qualification Lists under the European Procurement Directives: Part I" (1999) 3 *PPLR* 115 and "Part II" (1999) 4 *PPLR* 161; S. Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (Third Edition, Vol.1) (Sweet & Maxwell, 2014), pp.1106-1110&1112-1113. Also S. Arrowsmith and C. Nicholas, Chs.1&2 in S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* (West, 2009) pp.58-70&102-116.

[8] Not to be confused with 'framework agreements' in specific procurement systems.

[9] For a rather different approach on the distinction between 'frameworks' and 'lists' see Albano and Nicholas, n.1, pp.13-14.

On the other hand, in other arrangements, referred to in this thesis as 'supplier lists', the outcome of the first stage is not the establishment of terms governing future purchases but merely the identification of suppliers who might be interested in supplying certain (types of) items and/or whose 'suitability' is partially or fully assessed. Qualification systems in the EU utilities system is an arrangement falling in this category. EU official lists of approved economic operators (or certification by certification bodies) also 'intersect' this type of 'scheme' in a wide sense, though they are not 'purchaser driven' and not designed to meet procurement needs as envisaged by a specific purchaser.

The distinction should not be regarded as absolute, since many nuances are possible. There will be differences between a framework arrangement which sets most of the terms at first stage[10] and an arrangement which only concerns a ('generic') type of items and only establishes, say, a (maximum) delivery period from issuance of an order. The latter would be closer to a 'supplier list'. At a practical level, a dynamic purchasing system in the EU public and utilities systems can be a 'supplier list' but it may also be a 'framework' type of arrangement where electronic catalogues are submitted at first stage, and then completed at call-off stage[11].

The level of specification of the requirement in the 'outcome' of the first stage of NTRPA is not a net differentiator between 'frameworks' and 'supplier lists'. For certain 'frameworks', in particularly those that set most (or all) terms during the first stage, the requirement can be expected to be

[10] Such as a requirements contract in the US system.
[11] Ch.V.C.3.

specified quite in detail. However, a 'framework' arrangement may only establish some terms at first stage, which leaves room for more flexibility as regards specification as well. Similarly, a 'supplier list' may regard 'generic' categories of items, or items specified to varied degrees, but the subject-matter of a 'list' could also be fully specified[12].

Beyond possible interference, the distinction between 'framework' and 'supplier list' type of arrangement is very useful since it influences the approaches needed to warrant an adequate design and use of an arrangement. Where terms are being set at first stage, it is particularly important to ensure that these remain relevant for the future purchases made during the second stage.

Where terms are not set at first-stage an arrangement offers increased flexibility but the award of call-offs at second stage is likely to be less efficient and expeditious, since *all* terms need to be established 'from scratch'. For this type of arrangement stage consistency, although needed, appears more straight-forward.

C.3 Singularity and Plurality of Parties at the Supply Side and Demand Side, Including Closed and Open Plurality

Sub-classifications of NTRPA usually start from the distinction between 'frameworks' and 'supplier lists'[13]. Nevertheless, there are criteria which can be applied to both categories of arrangement, such as the singularity or plurality of parties on the demand or supply side of an arrangement. Thus, an

[12] See e.g. qualification systems in the EU utilities sector.
[13] Arrowsmith, n.7.

arrangement can involve one purchaser (single-agency arrangements) or a plurality of purchasers (multiple-agency arrangements). Similarly, it can involve one supplier (single-supplier arrangements) or a plurality of suppliers (multiple-agency suppliers). Combinations like single-agency-multiple-supplier, and multiple-agency-multiple-supplier can apply to both 'frameworks' and 'supplier lists'. Single-supplier configurations can apply to frameworks but they seem very unlikely for 'supplier lists'.

Where a plurality of parties on each side of an arrangement is present the arrangement may be closed or open, depending on whether suppliers and/or purchasers not originally a party to, or involved into the establishment of, the arrangement can join it later, throughout the duration of the arrangement. For example, an EU framework agreement will in principle be closed both at the demand side and at the supply side. In contrast, arrangements like EU dynamic purchasing systems or qualification systems, or UNCITRAL open framework agreements are open at the supply side, since interested suppliers can apply to join at any time during the life of the arrangement.

On the other hand, the 'openness' of an arrangement at the demand side has received less explicit attention in the systems reviewed. However, it can be inferred that an EU qualification system may present this feature. In the UK, a practical development concerns 'generic' framework agreements. These are arrangements that may be used by awarding call-offs by purchasers which might not have actually been involved in their establishment, but which

have been envisaged as parties, generically by the entity organising the arrangement[14].

The closed or open 'aspect' of an arrangement has significant practical consequences. On the supply side closed arrangements may generate, for the purchases in question, a 'micro-market' that is isolated from the real market outside the arrangement. In the systems reviewed closed 'framework' arrangements[15] usually involve a competitive exercise at first stage aimed at obtaining good (competitive) terms and reducing the number of suppliers to what is appropriate[16].

However, for closed frameworks not establishing all terms, the smaller the number of framework contractors, the higher may be the risk of collusion among framework suppliers at call-off stage, as concerns the setting of the outstanding terms for individual orders[17]. Hence the need to cater for stage consistency controls in this type of arrangements, meaning that the terms offered by framework contractors at call-off stage must be consistent with those that allowed them to access to the framework in the first place[18].

On the other hand, arrangements that are open at the supply side do not involve a competitive exercise at first stage aiming at limiting the number

[14] Ch.V.C.2.3.3.2.1.
[15] E.g. US requirements contracts and ID/IQ contracts, UNCITRAL closed framework agreements, EU (and Member States) framework agreements.
[16] Under the EU directives it is debatable whether a framework agreement involving none or very lax competition at first stage could be permitted.
[17] See EU chapter. This risk exacerbates in the case of 'committal' frameworks for the demand side.
[18] Namely, terms that are more (or at least similarly) advantageous for the purchaser as those originally offered at first stage, or within margins of an adjustment mechanism also established during the first stage.

of suppliers to be admitted[19]. Indeed, it appears difficult to imagine a proper competitive exercise without a common time-limit for the submission of competitive tenders. Irrespective of whether terms are established[20] or not[21] in an arrangement that is open at the supply side, the assessment of 'bids' or 'applications' at first stage only involves a comparison of each of them with the conditions or standards requested by the purchaser, and not a comparison among the 'bids' or 'applications' received. The risk of collusion is lower in the case of arrangements that are open at the supply side since it is likely that many suppliers will be involved in the arrangement, and there is always the possibility of newcomers who could derail any collusive 'scheme' amongst pre-existing suppliers on the arrangement.

There seems to be equivalence at the demand side. An arrangement permitting purchasers not originally involved to join later seems to fit well with first stage procedures which do not involve a competitive exercise amongst interested suppliers. Namely, arrangements that are open at the supply side seem more easily amenable to being open at the demand side as well. Conversely, arrangements that are closed at the supply side also tend to close the demand side.

Since arrangements that are open at the supply side do not involve a competitive exercise at first stage, an 'accurate' estimation of the overall requirement to be covered by the arrangement is not vital. A 'rough'

[19] Exceptionally, the number of suppliers might be limited in certain circumstances in UNCITRAL open framework agreements.
[20] As in UNCITRAL open framework agreements, some EU dynamic purchasing systems or US GSA Schedules.
[21] As in EU qualification systems or some EU dynamic purchasing systems.

estimation is likely to suffice and a further increase of that estimation by new purchasers should not affect the terms of future purchases since most of the competition for the purchases shifts towards the second stage (in the case of EU dynamic purchasing systems, EU qualification systems and UNCITRAL open framework agreements), or an alternative mechanism is used for the establishment of most of the terms (in the case of US GSA Schedules). In the latter case, each interested supplier is required to demonstrate that it offers its 'most favourable' terms in order to be admitted, that is to say (at least) the best terms as offered to any other purchaser.

It should also be noticed that ensuring best chances for good procurement through a 'supplier list' arrangement makes it necessary for it to be maintained open (at the supply side) throughout its duration, involving permanent or regular advertising, objective criteria for admittance, a reasonable time-limit for finalising the assessment and appropriate transparency. To the contrary, supplier lists that become closed bear significant risks to shelter complacency and/or collusion among the suppliers admitted, resulting in poor terms being proposed at call-off stage, favouritism or corruption[22]. In light of such risks, none of the procurement systems reviewed in this research recognises closed 'lists'. Such 'arrangements' should not be contemplated since they would not appear to bring any (legitimate) benefits to the demand side.

[22] These risks are higher in the case of a 'mandatory' list, as to which see below.

C.4 'Framework' Sub-categories

Under this heading we look at sub-categories of 'framework' arrangements that were not covered in the preceding sections. Using an obligation to buy and/or, respectively, to sell under the arrangement as a criterion, frameworks may be committal or non-committal for the parties[23].

Four combinations are thus possible: (i) committal at both the supply and demand sides; (ii) non-committal at both the supply and demand sides; (iii) committal at demand side and non-committal supply side; (iv) non-committal at demand side and committal at supply side[24].

The approach of the various systems differs. The EU and UNCITRAL systems allow in principle for all combinations. This is consistent with the scope of these systems. Countries adopting the UNCITRAL model law can certainly decide whether they wish to cascade all those options to their purchasers, or whether they only permit some types of frameworks.

Similarly, under the 2004 Public Sector Directive, EU Member States could limit, if they so wished, their purchasers to using only certain types of framework agreements. The UK did not introduce any limitations in this connection. On the other hand, France did impose a condition for both types of (closed) framework arrangements recognised in the 2006 CMP to be committal for the purchasers.

Committing to purchase under a 'framework' arrangement is likely to generate better terms in a competitive exercise at first stage. At the same

[23] Sometimes called 'mandatory' or 'non-mandatory'.
[24] For an analysis of such categories in the context of EU and UK public procurement, see S. Arrowsmith (2014), n.7 pp.1106-1110.

time such an arrangement assumes that the purchaser remains pretty much 'locked' within that framework, which might exacerbate 'collusion' amongst framework contractors. Unless the framework supplier(s) are bound to supply at call-off stage, terms set during first stage may remain simple abstractions. Thus, a configuration that is committal for the demand-side and non-committal for the supply side should only be used in very exceptional circumstances – such as shortage of supply. Nevertheless, enforcing 'commitment to supply' may be less than straight-forward in frameworks involving reopening of competition.

The US federal procurement system presents a mixed picture in terms of 'commitment' in 'framework arrangements'. At the more 'traditional' end of the US spectrum of NTRPA, definite quantity contracts and requirements contracts are committal 'frameworks' both for the purchaser and for the supplier. Moving into ID/IQ contracts, these are committal too for both sides, but only partly and to different degrees.

In contrast, under the current WB regulations, only frameworks that are non-committal for both sides are permitted.

Single-supplier committal 'frameworks' are usually straight-forward to implement. For multiple-supplier frameworks, depending on whether a framework establishes all terms at the first stage and/or the call-off mechanism it involves, enforcing the commitment of the suppliers may be a complex aspect. Frameworks that establish all terms at first stage *and* which do not involve a reopening of competition at call-off stage should not pose any significant issues in terms of commitment. However, where some terms

are not set at first stage, or where competition is reopened at call-off stage, framework suppliers could avoid the 'commitment to supply' by not participating in second-stage competition. If participation in mini-competitions is compulsory under the framework, suppliers may propose 'unattractive' or non-conforming bids. Thus, where call-offs cannot be issued directly or 'constructed' on the basis of the terms set at the first stage, *without further involvement from framework suppliers*, the framework should probably be regarded as non-committal for the supply side.

The aspect of commitment in open frameworks has received little attention so far. As regards the demand side, it should in principle be possible for the purchasers to commit to purchase the subject matter of an UNCITRAL open framework agreement or EU dynamic purchasing system exclusively under that arrangement. However, the impact on the terms offered by the suppliers at first stage is likely to be marginal. As regards the supply side, commitment appears difficult to realise in these arrangements. The standard 'mood' for these arrangements appears to be non-committal at both sides. It should be noticed that an arrangement establishing terms at first stage without a competitive exercise and by reference to the applicants 'most favourable terms'[25], is also likely to be pretty much 'commitment neutral'.

Other categories of frameworks are self-explanatory. By using the criterion of procedure type used at each stage of arrangement, there could be: frameworks involving a competitive exercise at first stage[26], or not

[25] Like US GSA Schedules.

[26] E.g. US requirements contracts and ID/IQ contracts, EU or IBRD framework agreements.

involving a competitive exercise at first stage[27]; frameworks involving a competitive exercise at second stage, or not involving a competitive exercise at second stage. By using the criterion of terms established at first stage, frameworks could set all terms at first stage[28], or could set only some of the terms then[29]. Finally, a framework arrangement could be regarded by a domestic system as a contract[30], or could not meet such determination. As discussed, at policy level it seems preferable for the concept of a framework arrangement to be considered distinctly from that of a contract.

C.5 'Supplier list' Sub-categories

Under this heading we look at categories of 'supplier list' not covered at Sections C.2 and C.3. A preliminary aspect is the extent to which commitment might apply to 'list' type of arrangements. Since no terms are established during the first stage of 'lists' it appears illogical to 'commit'. The standard 'mode' for 'supplier list' type of arrangement is thus non-committal for both the demand and the supply side.

By the criterion of the 'organiser' of a 'supplier list', these can be organised by the purchaser, or by a third party who is not a purchaser. Qualification systems in the EU utilities sector fall under the first category,

[27] E.g. UNCITRAL open framework agreements, EU dynamic purchasing systems or US GSA Schedules.
[28] When call-offs may be awarded directly based on those terms without reopening competition. However, in some cases reopening competition may still be preferred (an option catered for explicitly in the 2014 Public Sector Directive).
[29] When some form of reopening competition is usually needed for setting or refining the reminder of the terms.
[30] See framework agreements in France; also US requirements or ID/IQ contracts.

whereas official lists of approved economic operators[31] in the EU public and defence sectors fall under the second category. Being organised by a purchaser, qualification systems allow for, and can support, a strategic and streamlined approach toward future requirements related in some way. In contrast however official lists do not have that capacity since they are not organised in view of any concrete estimation of future needs. Instead they 'assess', or rather record, 'suitability' generally and abstractly. Thus approved lists can be used both for 'traditional' purchasing as well as for 'non-traditional' purchasing.

A major distinction in the context of 'supplier lists' has been addressed by Arrowsmith. This concerns an option that suppliers might or might not have to participate in a specific procurement by using an existing list or by expressing interest to participate and proving suitability in alternative ways, without the need of having been registered on the list[32]. Where a supplier is not permitted to participate in a procurement unless registered on the relevant 'supplier list', such list is referred to as a 'mandatory list'; instead, where a supplier may participate in a procurement even if not registered on a relevant 'supplier list' is referred as an 'optional list'.

The differences between the two are significant. A mandatory list provides increased procedural efficiency since at the time a specific purchase is started the aspects covered by the list need not be revisited for any participant in the specific procurement. This type of list has been regarded by legislators as involving potential risks like favouring suppliers already on the

[31] Or certification by bodies established under public or private law.
[32] Arrowsmith (2014), n.7, pp.1311-1312.

list against 'new entrants'. In effect, neither the 2011 UNCITRAL Model Law nor the 2014 EU Public Sector Directive (or indeed the 2009 EU Defence Directive) has recognised mandatory lists.

Amongst the systems reviewed in this research only qualification systems in the EU utilities sector and pre-qualification lists for a number of subsequent contracts under previous (2011) WB Guidelines fall under the category of 'mandatory lists'. However, the current 2016 WB Regulations do not appear to envisage such pre-qualification lists any longer. In the current author's view this reluctance is not justified where the list is maintained genuinely open, which can be ensured by appropriate transparency, objective criteria and rules for admission applied equally to all interested suppliers, and appropriate review mechanisms.

Risks presented by 'optional lists' appear lower since interested suppliers can in principle access specific procurements that such a list relates to without needing to register on it. This may depend though on the award method for the procurement in question[33]. Procedural efficiency of optional lists may be limited since a full suitability assessment is needed for those suppliers who are interested to tender for a specific procurement to which the optional lists relates, but who are not interested to register on that list. In procurement systems recognising mandatory lists it can probably be assumed that optional lists are also permitted for purchasers, even though not explicitly. Conversely, in the EU public and defence sectors or in the UNCITRAL

[33] Ibid.

system, which implicitly prohibit mandatory lists, nothing appears to preclude purchasers from using optional lists.

D. Decisions and Design

D.1 'Traditional' Procurement or NTRPA?

When a purchaser considers NTRPA, a proper analysis of the procurement need envisaged should be conducted. In principle, as a starting point, a NTRPA is likely to make sense when the uncertainties surrounding the procurement need are real and objective or the indefinite aspects are desired and justified. In the first case, the procurement need cannot be defined (objectively) with sufficient precision so as to enable the establishment of all terms for the purchase(s) in a way that is responsive and appropriate for the need[34]. In the second case, the procurement need might be amenable to establishing all terms at the time of initiating the procurement process, but external factors, such as the estimated evolution of market conditions, make this undesirable.

NTRPA require an increased planning effort. They are not a substitute for good planning. The success of NTRPA is very likely to depend on the market dynamics over that period.

Some of these arrangements tend to be (significantly) more complex than 'traditional' purchasing, meaning that their establishment and administration may involve additional costs and require more experienced personnel to handle both its setting up and the call-off stage. A cost analysis

[34] Which might be evolving.

exercise appears thus desirable to support the decision making process. This could help appreciate, where repeat purchases are envisaged, whether the additional cost and effort involved by NTRPA would be outweighed by overall savings which can arise from better prices being offered in light of expected aggregation of demand. However, excessive aggregation under closed arrangements may significantly restrict competition on the market of the subject-matter of the arrangement throughout its duration[35].

Even where a procurement need could be defined so as to organise a 'traditional' purchase, it may be preferable to put in place a NTRPA in order to facilitate SMEs participation in public procurement (by 'fragmenting' the requirements, and subject to suitability requirements that are proportional to the 'fragments'). On the other hand, not using NTRPA for recurrent purchases could result in small and repeated procurements, which individually could fall below thresholds for transparent and competitive purchasing. This may bring significant disadvantages, such as increased transaction costs (from repeating a full-cycle procedure for each 'segment'), less advantageous terms (from lack of aggregation), and it could facilitate favouritism and affect competition.

In the systems reviewed the position concerning decisions among 'traditional' and NTRP procurement varies. The UNCITRAL Model defines conditions for use of framework agreements, related to the fact that the need for the subject matter of the procurement is expected to arise on an indefinite or repeated basis, or the need may arise on an urgent basis. The Model Law also requires the justification of a decision to embark on a framework

[35] Also, collusion or even corruption could be facilitated.

agreement, as well as the type of framework chosen, to be recorded. That decision could be challenged by aggrieved suppliers (though this may not be a straight-forward process).

It is submitted that a requirement for purchasers to record decisions to embark on NTRPA, together with the reasons therefor, is always good practice, in that it alerts purchasers as to the need to analyse the procurement need in order to establish an appropriate way to tackle it. Where this requirement is accompanied by general conditions for use of NTRPA and the possibility for suppliers to challenge that decision, the analysis is likely to be treated more seriously and in depth. The UNCITRAL seems to have a thorough and balanced approach. Consideration could be given to 'importing' it *mutatis mutandis,* possibly improved as needed[36], to other systems.

In the WB system quite similar 'parameters' for the decision to embark on a framework arrangement seem to apply. Namely such an arrangement may be used where the anticipated need is recurrent, indefinite, or likely to arise under emergency situations. However, here the reasons (justification) for the decision to use a framework are included in project documents that are prepared by the borrowing agency and subject to the Bank's approval. This approach is consistent with the nature of procurement under development programmes by international donors/lenders.

[36] E.g. by requiring justification and reasons for embarking on traditional procurement.

In the US federal system the 'landmarks' provided for under the FAR for both requirements contracts and ID/IQ contracts concern an uncertainty[37] over the precise quantities that will be needed as well as a recurrent nature of the estimated requirement. Indefinite needs or those that may arise in emergency situations are not explicitly covered. Nevertheless, the potential use of task order contracting for emergency situations was addressed in the literature by using the argument of the recurrent nature of 'disasters' and, in effect, of certain items needed to cope with them[38]. Decisions to use an indefinite delivery contract are part of acquisition planning[39].

Under the EU directives, the position is quite the opposite of those described above. Here, the use of NTRPA is rather a 'discretionary option' for purchasers. The directives do not require a justification for embarking onto NTRPA. Also, there are no conditions provided concerning the use of framework agreements (or qualification systems in the utilities sector) relating to the features of the procurement need[40].

This 'liberal' approach seems to assume that each and every purchaser will be conscious of the potential consequences of the option between 'traditional' and NTRPA, and it will proceed to a thorough analysis of the envisaged need of its own motion, without any 'incentive' (i.e. requirement) at law or policy level. While this approach may be justified under the

[37] Of different degree in case of each mentioned arrangements (see Ch.IV).
[38] See, again, Ch.IV.
[39] FAR Part 7.
[40] As regards dynamic purchasing systems, the 'standard items' condition exists, but there is no requirement to justify the decision.

directives, in light of their role at EU level[41], it could be more problematic where Member States do not supplement it with the necessary conditions for using NTRPA (rather than 'traditional' purchases) in appropriate circumstances, and discouraging their use in inappropriate circumstances.

None of the EU Member States in this research currently include, at domestic law level, 'incentives' for an appropriate analysis of the circumstances which might justify, or otherwise, the use of framework agreements or qualification systems[42]. In the past the French public procurement law – the older versions of the CMP – did include strict conditions for use of certain 'framework' arrangements. Under the previous (2004) Public Sector Directive, the margin of discretion of Member States allowed them to limit uses of framework agreements as deemed appropriate. That directive clearly would have permitted Member States to include conditions for use of NTRPA as well as requirements for purchasers to justify and record their decisions to use NTRPA. Member States could also have provided for (domestic) judicial review courses of action concerning these decisions if they wished. However, none of the three Member States studied had done so.

Under the 'ultra-liberal' approach of 2014 Directives it is even questionable whether Member States would still have those possibilities (should they intend to). The current language of the directives seems to leave all options concerning framework agreements at the decision of the

[41] I.e. maintaining and enhancing the good functioning of the EU internal market by opening public procurement markets of Member States (see Ch.V.B.1).
[42] There is some limited guidance though (e.g. in France and UK).

purchaser, precluding Member States from limiting in any way their use through domestic instruments. While affording adequate flexibility to purchasers in using NTRPA should be pursued, allowing for purely discretionary decisions to embark on NTRPA in all cases and all circumstances could affect sound procurement. It is clear that the assessment of the particular features of a procurement need will always have to be done at the purchaser's level, but some 'aid' in this process at policy or/and legal level encouraging an appropriate use of NTRPA may be useful in many cases. Obviously, this is not to suggest that excessive or arbitrary limitations to the use of NTRPA by law are in any way desirable.

To conclude, it is submitted that a thorough analysis of the procurement need and of the consequences of using either a NTRPA or 'traditional' procurement is an essential first step for any purchase for ensuring an adequate approach to addressing that need. This applies at purchaser, policy and legislation levels. In the current author's view this matter has received insufficient attention in the systems reviewed by this research, with the notable exception of the UNCITRAL Model Law[43]. At a practical level, that analysis should always be conducted by procurement officers whether or not required by law or guidance.

In some cases a purchaser may be entitled to procure by using an arrangement set up by another entity, whether or not that purchaser has been involved in the preparation or setting up of that NTRPA[44]. A first situation concerns an arrangement that is fully open at the demand side, such

[43] And its Guide to Implementation.
[44] E.g. multiple-agency NTRPA (in centralised or joint procurement mechanisms).

as the US GSA Schedules. A second situation could relate to the so-called 'generic frameworks' as used in the UK. Another situation could be the use of a qualification system set up by another entity in the EU utilities sector. In such situations, or similar, an additional step, prior to assessing an appropriate arrangement to address the procurement need, should be for the purchaser to identify any (pre)existing NTRPA established by other entities which might be used for that purchase. The procurement systems reviewed do not approach at law or policy level decisions amongst 'traditional' purchasing or the use of a pre-existing NTRPA arrangement (where available).

D.2 Selecting an Appropriate / Desirable Type of NTRPA

D.2.1 General

Similarly to decisions among 'traditional' purchases and NTRPA, a requirement at law/policy level for the purchaser to justify and record its option for a specific type/sub-type of NTRPA can only be found – among the case-studies reviewed – in the UNCITRAL, World Bank and the US federal procurement systems.

Under the UNCITRAL system this choice may be subject to scrutiny from interested suppliers, whereas under the WB system it is subject to approval by the Bank. In the US federal procurement system the choice between multiple-supplier and single-supplier indefinite delivery contracts must be documented by the purchaser, as part of acquisition planning. In contrast, in the EU directives, there is no requirement at all to justify and record the decision to embark on any type or sub-type of NTRPA. The EU

Member States reviewed in this research have cascaded the same approach.

Regarding specific conditions for use of certain types of NTRPA, the picture is even more diverse. The UNCITRAL Model Law does not include conditions for use of each of the *specific* types of frameworks but guidance is provided in this connection in the Guide to Enactment. States implementing a UNCITRAL based system may choose to include some of the recommended circumstances when a certain type of framework could be appropriate from the Guide into the actual legislation of that State.

The WB Regulations do not state conditions for use specific configurations of *framework agreements* though they do provide for an 'adapted' form of framework that is available for commodity items only.

While the US federal procurement provides in the FAR conditions concerning the use of various types of indefinite delivery contracts, the EU has taken pretty much the opposite approach as no conditions apply in the directives to the use of the various framework agreement 'configurations'. The Member States reviewed have followed the same 'trend' under the 2004 and 2014 directives.

D.2.2 Options between Categories / Sub-categories of Framework Arrangements

Options among types/sub-types of framework arrangements can be quite complex. They are very common, too, in the systems reviewed, since

quite similar types (and sub-types) of framework arrangements can be found in almost all case-studies[45].

Where purchasers determine that a framework arrangement (rather than traditional purchasing) is necessary to address a procurement need, they face similar questions: single or multiple supplier framework?; if multiple contractor framework, then closed or open?; if closed framework, then with or without second-stage competition, and how many suppliers?

For the US federal procurement system the question concerning closed or open 'framework' is not relevant, since GSA Schedules (the only open arrangement in this system) is an already existing centralised arrangement. Similarly, the question as to whether the call-off stage should involve competition or otherwise is less relevant in the US system, since in ID/IQ contracts call-off procedures are determined by the size (i.e. value) of each order[46].

D.2.2.1 Single Supplier or Multiple Supplier Framework?

The US federal procurement provides, in the FAR, potential answers to the question concerning the use of a single or multiple supplier framework arrangement, and to the question of establishing an appropriate number of suppliers for a closed arrangement. Among the systems reviewed this is the only one that currently addresses, in a legal/regulatory instrument, circumstances which could justify those decisions. It is noteworthy they are

[45] Certainly, this is not to say that those 'configurations' are identical in various systems.
[46] FAR16.505(b).

provided in the context of a wider US policy preference towards multiple-supplier task order (ID/IQ) contracting[47].

The FAR places a 'cap' on the maximum value of a single-supplier framework arrangement. This may have some benefits but there are limitations on intended effects. Framework arrangements being longer term arrangements, their (aggregated) value tends to be high and corruption temptations are also likely to be high, particularly as regards closed frameworks. Where single-supplier frameworks are envisaged temptations may be even higher since whoever wins gets in principle the entire 'cake'. Excessively large single-supplier frameworks may also affect competition in the relevant market. In some cases though even where a multiple-supplier arrangement is initially envisaged it may turn out during first-stage that only one supplier among those attending is capable or qualified for that framework, or that only one supplier attends, so the framework ends up being a single supplier arrangement.

An opposite approach to establishing a ceiling value up to which certain types of 'framework' arrangement can be used might be to set a threshold below which they must not be used. This could secure better chances that the higher administration costs of a framework are outweighed by the economies of scale from expected aggregate demand and/or repeat purchases, but might exclude single call-off arrangements for indefinite requirements[48].

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[47] Ibid.

[48] E.g. the previous regime in France did not seem to envisage dynamic purchasing systems below the EU thresholds. In the US federal system, multiple-supplier

In the US system the "multiple award preference"[49] applies in fact only to cases when the use of multiple awards is not prohibited. Wrapped up in a multiple-award preference, the rules up to the ceiling for single-supplier arrangement will lead in many cases to single supplier arrangements. It might even be argued that to a significant extent it is a preference towards single awards. This actually makes sense and it is in fact consistent in broad brush with both the suggestions in the UNCITRAL Guide to Enactment as well as with conditions applicable in France in the past. Since award procedures for closed frameworks are competitive (at first stage), it is likely in many cases that single-supplier frameworks result in better terms and prices due to higher expected aggregated demand and more certainty for the supplier in getting business under the arrangement.

However, single supplier arrangements are permitted in the US federal procurement system above the ceiling in a number of situations, such as where "The contract provides only for firm-fixed price[…]"[50] for call-offs, in the form of unit price for products or price for specific tasks. This suggests that abusing large single contractor frameworks without firm/fixed prices are of concern. Where full consistency among call-offs is required or only "one source is capable and qualified of performing the work at a reasonable price"

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arrangements are not permitted where "the total estimated value of the contract is less than the simplified acquisition threshold" – FAR16.504(c)(1)(ii)(B)(5). That threshold is usually $150,000 and can be higher in some circumstances (see FAR2.101).

[49] Relevant for indefinite delivery contracts where their estimated amount exceeds certain amounts (e.g. $112 million for items other than advisory and assistance services) (see FAR16.504(c)).

[50] FAR16.504(c)(1)(ii)(D)(1).

single supplier arrangements are permitted over the ceiling[51]. Embarking on a single supplier arrangement over the ceiling requires a written determination by the head of the agency (purchaser) that the relevant condition(s) are met.

Another perspective on the matter concerns the potential for a supplier to specialise exclusively on certain specific aspects of work under a framework arrangement, which could then result in the need for call-offs to be awarded to that supplier only, whether on that framework or in a subsequent one. On this point, the FAR quite rightly advises that such situations should be avoided[52]. An obvious way to do this might indeed be to have a multiple supplier arrangement, to start with. However, this in itself might not secure that exclusive specialisation does not arise, since much depends on the call-off award procedures and their outcome, for example, where during second- stage competitions the same supplier offers best terms for most or all orders.

In the US federal system purchasers enjoy more flexibility in establishing call-off procedures, in particular for smaller orders, which is likely to facilitate accommodation of the requirement concerning avoidance of excessive specialisation. However, in other systems, such as the EU or UNCITRAL, where such flexibility in call-off procedures is not available, a potential solution might be a framework establishing all terms as well as a guaranteed minimum quantity for each of the suppliers. Under such systems a

[51] An additional situation when single contractor frameworks are permitted over the ceiling concerns public interest due to exceptional circumstances. In this case Congress must be notified.
[52] FAR16.504(c)(1)(ii)(a).

concern regarding excessive specialisation could fall under an obligation not to use frameworks in such a way as to restrict, distort or prevent competition.

Similarly, for multiple-supplier arrangements, FAR provides for a number of aspects that should be considered when deciding an appropriate number of contractors to be engaged in a closed 'framework' arrangement[53]. These include: "the scope and complexity" of the subject matter of the arrangement, the expected duration and frequency of call-offs, "the mix of resources" that a supplier needs in order to carry out the expected call-offs, and the ability to maintain competition among suppliers during the duration of the framework. The general applicability of these aspects to other procurement systems is self-evident[54]. This certainly implies a thorough analysis on a case-by-case basis of both the expected requirement *and* the relevant market players.

While a single supplier arrangement or an arrangement involving a small number of suppliers is likely to result in better terms in view of higher expected aggregated demand[55], it may fail to provide for security of supply, or to fill the expected need. For example, where a number of large orders overlap in time, a small number of suppliers might not have the capacity or resources to cope with those orders. Similarly, in the case of non-committal

[53] Ibid.

[54] However the need to ensure a sufficient number of framework contractors for the purposes of maintaining competition at call-off stage received an inadequate and inflexible application in the previous (2004) EU public sector directive and in the (still current) EU defence directive (see EU chapter).

[55] It could also offer a 'lighter' administration effort and cost.

arrangements, an insufficient number of suppliers may result in lack of interest into (i.e. non-attendance for) certain call-offs[56].

At the same time, the extent to which the 'scope' of the requirement can be determined at planning stage is also likely to influence the number of framework contractors. If most, or all, terms governing future purchases under the arrangement can be established at first stage of the arrangement it could then make sense to concentrate competition at this part of the procedure[57], which means a single contractor or as small as possible number of contractors. On the other hand, if only a few terms can be established at first stage, or the subject-matter of the requirement cannot be determined in detail or with precision, it then makes sense to secure an adequate level of competition at call-off stage, once the estimated needs become actual and specifiable[58]. This, in turn, involves a larger number of suppliers being admitted onto the arrangement at first-stage. But where relevant market conditions are unpredictable and/or unstable it is also preferable to have competition focus closer to the moment when the need becomes actual, and this is likely to involve admitting a larger number of suppliers during first stage, irrespective of how closely the scope of requirement can be determined when planning the framework.

Certainly, fine tuning among inter-linked elements is needed on a case-by-case basis, for balancing potentially conflicting aspects. For example, whereas a closed framework with a small number of suppliers may result in

[56] The risk of non-attendance is not eliminated by a larger number of suppliers but it is likely to be lower.
[57] See UNCITRAL Chapter.
[58] Ibid.

better terms (from higher expected aggregated demand), risks of collusion during the call-off stage are also likely to be higher.

As shown, in the EU directives there is no requirement to document and record a decision making process as regards embarking on a specific type of framework agreement, as well as no conditions applicable for such decision. The EU Member States reviewed cascade this approach, and, under the 'ultra-liberal' approach of the 2014 directives Member States might not even be permitted to introduce such conditions, or otherwise limit the use of frameworks to certain configurations or to certain purchasers, in a way that is deemed appropriate for the Member State in question[59]. Then the only way to guide purchasers through the various types of NTRPA and choosing one that meets their specific needs seems to be through guidance. However, on this subject guidance is scarce.

It should be noticed that in the past (before 2006) the legislation in France did provide for strict conditions under which certain types of framework arrangements could be used. Thus, under art.71 of the 2004CMP[60], 'task order contracts' could only be used where, "because of economic, technical or financial reasons, the extent or rhythm of the need to be satisfied cannot not be fully established in the purchase deal"[61]. The standard configuration for such a 'framework' was a single supplier arrangement, with certain features. In the cases mentioned above, but only for reasons duly justified by the impossibility of a single supplier to "carry out

[59] S. Arrowsmith (2014) n.7 at p.1112. The extent to which that limitation will actually be applied to Member States is, in fact, not entirely clear at the moment.
[60] Similar provisions were also in art.72 of the 2001CMP. See Ch.V.C.2.3.1.1.
[61] Current author's translation.

all the requirements" or by "the need to ensure security of supply", the purchaser was permitted to pass a multiple supplier arrangement (of the type that establishes all terms and not involving reopening of competition[62]).

Finally, a multiple-supplier closed framework arrangement configuration involving reopening of competition at call-off stage was only permitted where such a procedure was necessary because: "of the high volatility of product prices", "or of the rapid product obsolescence", or where issuance of an order was rendered necessary by a situation of imperative emergency not attributable to the contracting public person[63]. It can be noticed that the French instrument at the time provided for a very subtle, gradual but direct relationship between the indefinite or uncertain features of an envisaged procurement need, on the one hand, and the permitted configuration of a framework arrangement to cater for that need, on the other hand. That approach might seem nowadays excessively prescriptive and inflexible, in particular in some systems. It does not seem to cater, for example, for the potential negative consequences that an excessively large single-supplier arrangement may have on competition, or for the risk of exclusive specialisation of a single supplier.

However, the old French legislation cited does provide for a wise general 'mechanism' for analysis of the options between various configurations of closed framework arrangement, which, it is submitted, could be turned into guidance. This could be useful not just for France but for other

[62] Art.71(III) of 2004CMP. That reopening of competition was clearly not envisaged here results from analysing art.71(III) jointly with art.71(IV)&(V) of 2004CMP.
[63] Art.71(IV) of 2004CMP.

Member States as well. It would guide purchasers through the relevant framework options and it would also allow purchasers to do otherwise where justified.

D.2.2.2 Framework Involving Reopening of Competition at Call-off Stage vs Direct Orders Based on the Terms of the Framework, and Committal vs Non-committal Framework

While the EU directives approach offers full flexibility as to the type framework agreement to be used by a purchaser, consistent with its envisaged procurement need, it could also lead to an inappropriate use of framework agreements. The potential advantages that these arrangements could offer - such as better prices from expected aggregation of demand, security of supply, administrative convenience[64] and/or flexible supply arrangements[65] - may not be convergent, and might require different types of frameworks. For example, the simplest ordering procedures, potentially involving shortest lead times between materialisation of needs and delivery, are likely to be offered by frameworks establishing all terms at first stage. These allow under both the EU and UNCITRAL systems, for orders to be issued directly based on the terms of the framework agreement, without the need to reopen competition among framework contractors. However, this type of arrangement is unlikely to offer much flexibility of supply arrangements, or

[64] I.e. simpler ordering procedures or shorter delivery times.
[65] I.e. late product or service customisation, low inventories, no commitment above actual needs.

any significant room for late product or service customisation, since all terms are pre-established.

On the other hand, the attraction of administrative convenience and flexibility of the supply arrangements offered by frameworks might be accompanied by an erroneous perception that 'administrative convenience' also involves less preparation and planning effort before initiating the exercise for the award of the framework agreement. Where this happens, both 'value' (i.e. better terms from expected aggregated demand) as well as administrative convenience at call-off stage could be negatively affected. If the requirement could have been determined in a sufficient measure as to allow for the establishment of all terms at first stage, as well as to establish the required number of suppliers, then better terms may have resulted from the framework 'exercise'. Moreover, simplest and most efficient ordering at call-off stage is likely to result from frameworks that establish all terms at first stage.

However, in absence of adequate conditions (or at least guidance) a superficial assessment and planning effort of the requirement before initiating the award procedure for a framework may result in an inappropriate type of framework being used for the estimated procurement need in question – for example, a framework agreement with a larger number of suppliers and involving reopening of competition. Such an arrangement would offer increased flexibility at call-off stage since some terms could be established or refined at that stage. But it is important to ascertain at planning stage that that flexibility is in fact needed and not just the result of insufficient needs

analysis and planning. This certainly does not mean that frameworks involving second stage competition should be avoided – quite to the contrary, they are needed and appropriate in some cases, which could include volatile or extremely dynamic market conditions, a necessity or policy to maintain low inventories, delayed product or service adaptation or customisation, or simply an *objective* impossibility or undesirability to establish all terms at first stage.

In principle, when planning a framework it should be attempted to ascertain whether establishing all terms is feasible. If it is feasible, it should then be considered whether this is also desirable. Where both conditions are met, it then probably makes sense to consider awarding a framework agreement that does not involve a reopening of competition at call-off stage. This, in conjunction with establishing the smallest number of framework contractors capable however of filling that need, could result in a framework that offers both good value and administrative efficiency at call-off stage. This 'scenario' assumes though rather stable a relevant market for the duration of the arrangement in question, permitting for terms/price adjustment formulas included in the framework from the outset to maintain framework terms 'competitive' in comparison to those available on the open market.

However, an analysis of the procurement need may also reveal that, while establishing all terms is feasible, it would not be desirable. Reasons for this could include an expectation that for certain larger call-offs contractors might be prepared to offer even better terms than those submitted in order to get access onto the framework, or an uncertainty over whether market conditions could arise during the framework period, possibly not capable of

being dealt with through terms or price adjustment formulae. Thus, there could be two sub-options: either to organise a framework agreement involving reopening of competition, in respect of the terms whose establishment at first stage is undesirable, or to award a framework agreement establishing all terms but also providing for the possibility to reopen competition at call-off stage under certain conditions[66].

The latter sub-option is explicitly provided for under the 2014 EU public sector directive[67]. An element which could make this configuration of arrangement attractive is also the possibility to render it effectively committal for the supplier(s), where this is desired. Since all terms are established at first stage, it follows that a condition could be included in the framework (from the outset) to the effect that, where there is no attendance in a call-off reopening of competition, the purchaser may award the order to the framework contractor whose terms, as offered at first stage, provide best value for that order, and that the contractor selected in this way be bound to supply[68]. The same could apply in the case of a framework that does not establish all terms *with precision*.

[66] In light of an expectation of competition reopening, some suppliers might not be prepared to offer their best terms at first stage (so they can offer improved terms at call-off competitions).

[67] Art.33(4)(b). France does not provide explicitly for this option. Also, a similar option is not provided for explicitly in the 2011 UNCITRAL Model Law. However, it can probably be accommodated subject to additional transparency requirements and/or through the organisation of different lots.

[68] A more elaborate condition might permit purchasers to award an order based on terms submitted by framework contractors at first stage, even where there is (some) attendance in call-off reopening of competition, but it does not result in better terms for that order than those offered at first stage. Certainly, strict transparency controls are needed to prevent abuses.

However, it might be less straight-forward (and possibly ineffective) to ensure that a multiple supplier framework in which some terms are not established *at all* at first stage[69] be committal for the supply side, because setting the terms not established at first stage requires a basis for setting them at call-off stage, and this, in most cases, consists in reopening of competition[70]. In turn, this assumes attendance at competition reopening. While this might in principle be made compulsory under the framework conditions, for example subject to financial penalties or exclusion from the framework, attendance obligation might be 'eluded' by framework suppliers by offering completely 'uninteresting' terms.

It can be concluded that frameworks committal for the supply side fit better with closed arrangements in which all terms are established at first stage. While committal frameworks for the supply side are not entirely excluded for frameworks in which some terms are not established at all (or are only set in very loose limits), the suppliers' commitment could be more difficult to implement. Where such configuration is linked with a purchaser's commitment to buy exclusively under that framework, collusion risks may exacerbate placing the purchaser in a weak position, as discussed in the context of Romania[71].

A few other aspects require some consideration regarding committal frameworks. Thus, in principle, a purchaser's commitment to buy under a closed arrangement is likely to result in better terms being offered to access

[69] Or are established in very loose limits.
[70] Subject to limited exceptions.
[71] Ch.V.C.2.2.1.

the framework, since the suppliers' expectation of aggregated demand is higher. On the other hand, care needs to be given to the fact that the purchaser is likely to remain stuck with those suppliers and with the terms established for the duration of the framework. Appropriate controls are thus particularly needed in this type of frameworks.

Still, unless very exceptional circumstances apply, a balanced approach is advisable. Thus, it usually makes sense for a framework committal for the purchaser to be committal for the supplier(s) too. As shown though, this is more straight-forward in cases when all terms are set at first stage, and could be more problematic where some terms are not established at all at that stage.

It should also be borne in mind that a framework committal for the demand side but not committal for the purchaser may offer additional flexibility but it is likely to come at an additional cost. Two aspects have an impact here. First, retaining availability usually involves an effort and has a price tag. Second, expected aggregation of demand is lower. Conversely, a framework committal for the purchaser but not committal for the supply side seems to make sense only in very exceptional circumstances, such as severe shortages on the market of subject matter of the arrangement.

Returning to closed frameworks that do not establish all terms – and particularly those including terms not established at all at first stage – their usefulness is beyond doubt in some circumstances. These include mainly cases where there is an objective need for late product or service customisation, or the subject matter of the arrangement or some terms

cannot be pre-determined sufficiently at first stage because the requirement is dynamic, or there is a plurality of users envisaged, with varying needs concerning the subject-matter[72]. It should however be considered that additional flexibility may come together with less efficiency or security of supply compared with frameworks establishing all terms.

Regarding committal or non-committal frameworks, previous instruments in France (i.e. the 2006CMP) and previous and actual instruments in Romania address the matter in an inadequate way, requiring all types of frameworks to be committal for purchasers. All these elements suggest that the subject requires continuing attention. Sources of inspiration could again be found in the UNCITRAL Guide to Enactment and in the older (2001/2004) versions of the French Public Procurement Code. As regards the latter, the subtle design of frameworks involved not only a gradual departure from 'traditional' purchasing but went beyond this.

Thus, frameworks involving reopening of competition did not envisage establishing a minimum or maximum aggregated amount of purchases under the arrangement in terms of quantity or value[73] (unlike frameworks without second stage competition). Indeed, in frameworks involving reopening of competition, the overall requirement is unlikely to be pre-determined in strict detail, and this could include, in many cases, that a minimum or maximum cannot be pre-established as well.

Further, it seems that the requirement for a purchaser not to purchase outside the framework in question the subject matter thereof, only applied to

[72] See UNCITRAL Chapter.
[73] Art.71(IV)&(V) of 2004CMP.

single supplier arrangements and to multiple supplier arrangements that did not involve reopening of competition[74]. At the same time, the 2004CMP did not appear to require frameworks involving reopening of competition to be committal on the demand side. Again, it could have been useful if such provisions were turned into guidance.

D.2.2.3 Closed or Open Framework?

An open framework arrangement, such as a dynamic purchasing system in the EU (and Member States) public and utility sectors[75], or an open framework agreement under the UNCITRAL Model Law, is a multiple-supplier arrangement that involves reopening of competition at call-off stage. Thus, to answer the question whether an open framework is an appropriate way to address a procurement need, a purchaser should have identified first that: (i) NTRPA is preferable over 'traditional' purchasing; and (ii) a single-supplier framework is not appropriate; and (iii) a multiple- supplier framework without reopening of competition is also not appropriate. Once the purchaser determines that a multiple-supplier arrangement involving second-stage competition is desirable, he should then consider whether this should be closed or open.

In the EU directives there is a condition applying to dynamic purchasing systems and this regards the subject-matter of the envisaged

[74] Art.71(I)(4) in relation to art.71(III) of 2004CMP.
[75] Configuration based on electronic catalogues that are then used by purchaser at call-off stage to 'develop' a 'basis' for further competition.

arrangement, which must be 'off-the-shelf' or 'commonly used' items[76], such as, say, printing paper, or stationary. A similar recommendation can be found in the UNCITRAL Guide to Enactment. However, such items can also be procured by using a closed framework arrangement in all of these systems. The requirement for the process to be completely electronic is also not a differentiator since closed framework agreements may also be conducted electronically.

Under the circumstances, one of the aspects that should be assessed is whether the relevant market segment is competitive enough so as to secure sufficient interest and participation in call-offs. If there are only a limited number of relevant suppliers it may be considered having some competition at first stage, which would mean a closed framework. On the other hand, price volatility or very dynamic markets make it necessary for terms to be set very close to the moment when a need materialises. It thus makes sense to have most (or all) competition at call-off stage. Where the requirement is particularly heterogeneous, as could be the case in multiple-user frameworks, resulting in varying terms being needed for the various orders[77] that cannot be anticipated when the framework is designed, again, an open framework might actually offer best chances of meeting such requirements.

On the other hand, and particularly where rather stable market conditions prevail in the relevant segment, it should also be considered whether the benefits of potentially wider competition at each call-off in case

[76] The language of the directives is more convoluted – see EU chapter.
[77] Such as delivery to different locations, within different time-limits, different warranty conditions, etc.

of an open framework arrangement outweighs the potential for better terms being offered in light of expected aggregation of demand, in case of a closed framework involving call-off competition. In open frameworks, the fact that newcomers may come into play at any time is likely to hamper potential collusion among framework contractors. Terms offered at call-off stage are more likely to reflect those generally available on the market, and the risk of the purchaser to remain stuck with obsolete (i.e. unfavourable) terms appears thus much lower in open frameworks. However, the administrative cost of preparing and evaluating (complete) tenders for each call-off should also be factored in.

D.2.3 Circumstances When 'Lists' May Be Appropriate

Deriving directly from our definition of a 'supplier list', such an arrangement is likely to be appropriate when it is possible to assess 'suitability' of suppliers potentially interested in some procurements (before those needs materialise), but where it is not possible, or not desirable to establish any terms at that stage. This could be the case where future procurement needs are too vague at the time of planning a supply arrangement or where market conditions could change in a way that is favourable to the purchaser. Some 'lists' may be used for similar purposes as framework arrangements. For example, dynamic purchasing systems under 2014 EU public and utilities directives, in their 'standard' configurations only provide for an assessment of 'selection criteria' at first stage. It will certainly be for the purchaser to establish, on a case-by-case basis, whether this

configuration, or 'open framework' one is appropriate in specific circumstances.

However, other types of 'supplier lists' such as a qualification system in EU utilities sector[78] are more 'generalist' in that they are not confined to 'common use' items. They also offer increased flexibility as regards both the types of requirements that a list could cover, and regarding second-stage processes to be employed. But certainly they provide for less 'convenience' and 'efficiency' compared with frameworks at call-off stage. Such arrangements could potentially be used in many situations in which framework arrangements cannot objectively be employed. Examples include cases where specifications are not available in advance, or, although some regular needs are identified in advance in general terms, they are not homogenous enough as to permit any sort of framework arrangements, including by lots. A wider interpretation of 'regular purchases' could actually support a more strategic plan and implementation of an organisation's purchases.

From this perspective, it can be noticed that 'genuine' one-off purchases (requirements), which due to their very particular features, specifications or complexity, require an entirely dedicated full-cycle purchasing process completely separate from, and independent of, any other purchases, may actually not be very numerous. At another end of the range there may be recurrent (regular) requirements of a sufficiently homogenous nature and that can be specified to a sufficient degree in advance so as to be

[78] Or pre-qualification systems for groups of contracts to be awarded over a period of time under the previous (2011) WB Guidelines.

approached by using framework arrangements. But between completely stand-alone purchases (one-off) and those that can be consistently grouped together (in frameworks), organisations or projects usually face quite numerous procurement requirements that do not necessarily fall into any other of these categories, but that could be linked in some respects, in order to streamline their acquisition to the extent possible.

D.2.4 Choosing Between a Number of Pre-existing NTRPAs

It is possible that a purchaser may have access to a number of pre-existing arrangements for the same (or very similar) items. For example, in the UK, 'generic' multiple-supplier framework agreements were extensively used[79]. These are frameworks usually established by centralised purchasing bodies that can be used by other purchasers in the covered sectors. However, users might not have been consulted or involved in the preparation of those frameworks by the bodies establishing them. In such cases a user might not even be aware of the framework(s) that he is entitled to use. Where more than one already existing framework is available for a purchaser then the question arises as to which one should be chosen.

So far, neither the regulatory instruments in the EU and reviewed Member States, nor the guidance in those systems address specifically these matters. However, in light of increasing use of "Centralised purchasing techniques"[80], particularly in Member States where a plurality of centralised

[79] Ch.V.C.2.3.3.2.1.
[80] Recital 69 of EU 2014PSD.

purchasing bodies operate, such rules or recommendations could be beneficial.

In order to ensure that purchasers are aware of the frameworks that they are entitled to use, an obligation could be introduced requiring framework 'organisers' to inform all envisaged users of their 'capacity'. Conversely (or additionally) an obligation could be introduced for purchasers (i.e. potential users) to ascertain the frameworks that they are entitled to use, by enquiring with the central purchasing bodies or any alternative means. Certainly, as discussed in Ch.V, it is preferable that the 'organiser' actually consults and involves users both in preparatory and in the execution phases[81]. Where this happens, no additional requirement for the 'organiser' to inform users (or for users to inform themselves) is necessary.

In the literature it has been pointed out that "Based on the transparency principle […] an obligation is arguably implied for the purchaser to show objective commercial grounds for choosing one particular framework, to ensure that the discretion to choose between frameworks is not abused for illegitimate reasons, such as to favour national providers"[82]. Value-for-money should also probably require objective commercial judgement when choosing among the frameworks[83]. It is just common sense for a purchaser to compare

[81] To take account of the estimated needs and monitor the execution of the envisaged purchases.
[82] S. Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet&Maxwell 2005, Reprinted 2009&2010) p.692.
[83] A 'parallel' with placing an order under the GSA schedules in the US federal system is possible on this point, although they are a significantly different type of arrangement.

its options and choose the one that best satisfies its procurement needs and offers best terms.

In some cases the 'assessment' of the frameworks that could be used may end up without a comparison *per se* being needed, for example where only one of pre-existing frameworks meets the user's needs. Where the frameworks to which a user might have access were all of the type that had already established all terms, a comparison among the terms they offer would seem straight-forward.

However, where both a framework establishing all terms as well as a framework involving reopening of competition at call-off stage appear capable to meet the user's envisaged need, *firm* terms (under the former type of framework) would need to be weighed against (some) *likely* terms[84] to be offered during the mini-competition (under the latter type). It could happen that terms already established at first stage under both types of frameworks provide, on their own, a sufficient and meaningful basis for comparison. But in many cases this is improbable, since very relevant terms such as the price, may be subject to reopening of competition. On the other hand, in some cases, the more efficient/convenient ordering 'procedure' (including the reduced administrative costs) involved by a framework which establishes all terms might in itself be a sufficient reason to opt for it.

Where two (or more) frameworks involving reopening of competition are 'assessed' a comparison among *likely* terms may need to be conducted. The matters might benefit from further investigation in relation to future

[84] I.e. those not established, or not precisely established, at first stage.

regulatory changes. Certainly, the issues discussed above do not arise in countries where only one central purchasing body operates (or none).

Options between a pre-existing framework arrangement and a pre-existing 'supplier list' type of arrangement, in systems where these coexist[85], are likely to be straight-forward, in light of the nature of the two types of arrangement. If a framework arrangement can satisfy the purchaser's envisaged need, it is probable that convenience of simply placing an order under the framework will be convincing. But if none of the available frameworks meets the user's needs he might consider using an already existing 'list' arrangement, since at least some part of a full purchasing exercise (i.e. 'suitability') had already been carried out at the time the purchaser initiates its exercise.

Another hypothesis that might arise in the context of 'generic' frameworks concerns the type of needs that users could satisfy by making a 'call-off' under a framework established by a centralised purchasing body. Namely, whether an order should cater for a 'one-off' type of need, or whether a call-off placed by a user could in fact consist in a (secondary) framework arrangement meeting a recurrent or indefinite need of the user in question[86].

In the US, under GSA schedules system, there is explicit provision for 'blanket purchasing agreements' that can be concluded by agencies with schedule contractors to cater for an agency's recurrent needs. Across the Atlantic, in France there is explicit provision that a call-off under a framework

[85] E.g. in the EU (and Member States) utilities sector.
[86] Or, possibly, of a group of purchasers among users of primary framework.

agreement involving reopening of competition could consist in a '*marché à bons de commande*' (framework agreement establishing all terms)[87]. The EU directives do not address the matter explicitly, and a number of interpretations are possible[88].

These matters go beyond the strict subject of 'generic frameworks' and are dealt with at Section F.3 below. It is worth pointing out here the complexities that might arise if a user intended to award a call-off consisting of a (secondary) framework arrangement and had available a number of (primary) frameworks to choose from. Such occurrence might not be entirely excluded and the policy toward it is at the moment unclear.

D.3 Conceptual Framework at Regulatory Level for Guiding Purchaser Decisions on Whether or Not to Establish NTRPA[89]

These decisions, including the selection among various types of NTRPA, can be influenced or driven at regulatory level mainly by two aspects. The first aspect refers to imposing an obligation onto purchasers to justify their decisions to employ NTRPA and record that decision and the reasons justifying it. This requirement could be subject to internal review (or approval)[90], to 'external' approval[91], to judicial review[92], or a combination of the above. These reflect as many nuances of how thoroughly the requirement

[87] Ch.V.C.2.4.2.2.1.
[88] See Ch.V.C.2.4.2.2.
[89] This section does not refer to options concerning the use of any pre-existing arrangements.
[90] See US system.
[91] As in WB system.
[92] As in UNCITRAL Model Law.

for an analysis of the envisaged need and relevant market conditions, as well as for justifying NTRPA decisions, is to be implemented.

The second aspect refers to providing for actual conditions for use of NTRPA, or various types thereof. These are circumstances to which an instrument relates permission (or denial) to organise NTRPA. Such circumstances may concern the characteristics of the estimated procurement need, or features of the relevant market. The two aspects may be used together or separately.

Four positions appear thus possible. First, an instrument could provide both for a requirement for decision justification and record, and for conditions. This is the case for example in the US federal system regarding (some) decisions concerning single or multiple supplier indefinite-delivery contracts, or in UNCITRAL Model Law regarding whether or not a framework agreement could be used, rather than 'traditional' purchasing.

Second, the requirement to document and justify a decision may not be accompanied by conditions provided for in the instrument. For example, this is the case of UNCITRAL Model Law in as far as decisions among various types of framework agreements are concerned[93]. Here the circumstances supporting the option selected are to be identified by the purchaser and their appropriateness is to be confirmed, or infirmed, through judicial review. Enacting states using the Model Law could however include conditions in their laws, from the circumstances recommended in the Guide to Enactment.

[93] This decision is distinct from a general decision to embark onto a framework agreement.

A third position might be to have no requirement for decision justification, but to provide for conditions. In such cases it would still be advisable for entities to keep records of decisions (even though not required), since this will help them cope with enforcement mechanisms (such as supplier review).

The fourth position is where legal instrument (hard law) provides neither for requirement for decision justification, nor for conditions. This has been the case, for example, for previous and current EU directives, and for implementing instruments in the Member States reviewed. The approach seems appropriate for the directive, in light if its role for the internal market, but it might be questionable in the Member States, particularly since it is not even supplemented by meaningful guidance on the subject.

The 2014PSD appears to preclude Member States from inclusion in their domestic instruments of additional conditions or requirements concerning the use of framework agreements. In contrast, the 2004PSD clearly allowed for such measures to be included at national level, but the Member States reviewed had not made use of this margin of discretion either.

Each procurement system can choose from the means discussed above a combination that suits its objectives. It should be noticed that - while very effective in 'driving' NTRPA decisions - the combination 'requirement to justify decision plus conditions provided for in the instrument' could result in too inflexible a mechanism, denying certain potentially legitimate uses or configurations of arrangement. An example in this connection could be offered by the older legislation in France under the 2001 and 2004CMP.

On the other hand, subjecting NTRPA decisions (and justifications) to judicial review by potential bidders[94] seems an adequate approach in most cases[95]. The review mechanism could also involve a reasonably low level of disruption to the procurement process where the decision and justification are publicly available from the initiation of the award procedure for the NTRPA, and a short time-limit for challenging is provided for.

In any event, the aspects discussed in this section should be regarded (together with other appropriate requirements) as methods to facilitate and promote the use of NTRPA in confidence, rather than denying altogether the use of certain types or configurations in light of potential risks they present. From this perspective the approach of EU 2014PSD appears seriously imbalanced. Basically, its view appears to be that frameworks must be permitted (by Member States) in all cases, whereas a 'qualification system' type of arrangement must be denied in all cases. A more balanced approach, with potential benefits, could have been to permit both types of NTRPA subject to intelligent conditions and/or other requirements.

E. Controls

Controls could be regarded as legal requirements aimed to secure an appropriate and beneficial operation of NTRPA, other than procedural

[94] As under the UNCITRAL Model Law.

[95] Current author has already suggested that consideration could be given *de lege ferenda* to requiring justification of decisions to embark on 'traditional' purchasing as well (i.e. as opposed to NTRPA). Such decision might also benefit from being subject to judicial review.

requirements *per se*, or review mechanisms. Whilst 'conditions' discussed in the preceding section drive decisions to embark onto NTRPA, controls prevail after the establishment of NTRPA. Controls seek to secure that the 'parameters' initially established for an arrangement are not substantially altered during the period of arrangement, and that certain features of an arrangement do not affect equal/fair treatment or competition.

Some of the controls are straight-forward, for example the requirement for the duration of a closed framework arrangement to be limited, and not to exceed a maximum period as provided for in an applicable regulatory instrument. The purpose of this limitation is to prevent 'market closure' as regards purchases under the framework for an indefinite or excessively long period, which would affect competition. Certainly, a purchaser should determine in each case a reasonable and appropriate duration of a closed framework, by taking into account the anticipated requirements and market features, and not use 'automatically' the maximum permitted duration.

In some systems – such as under the EU directives – it is permitted to use a longer period than the maximum period recommended by an instrument, where there is justification for this. However, others systems are stricter on this matter. The WB current regulations, for instance, provide for a maximum three years, with a possible extension of further two years (but no possibility for longer duration beyond this is envisaged). In general a maximum period of three to five years is considered to offer a reasonable balance, though in some sectors longer maximum recommended periods are

provided, for example in the EU defence sector (seven years), or EU utilities sector (eight years).

For open arrangements this control is far less relevant, since suppliers can join the arrangement at any time.

Also straight-forward are prohibitions of making (substantial) amendments to closed frameworks.

However, other controls, that could be very relevant, are more difficult to 'pin down', as they might be implicit, rather than explicit in the instruments, or arise from general principles in a particular system. 'Stage-consistency' controls fall in this category. An example is consistency amongst criteria used in a closed framework arrangement at the two stages. While some differences among the two sets of criteria appear inherent, radical discrepancies may detract from achieving the objectives of the framework. It is important that both sets of criteria 'converge' towards the particular features of the subject-matter of call-offs.

For example, selecting framework contractors for consultancy projects based on lowest price (only), followed by awarding orders under that framework using the criterion of the most economically advantageous tender (i.e. focusing on quality of proposals), may easily result into selection of framework contractors who are not particularly relevant for the actual call-offs. This is unlikely to make sense commercially. But also, where the use of inconsistent criteria means that contractors that might have been better placed to meet call-offs were not selected onto the framework arrangement, equal treatment might be breached as well.

Similar consequences can also be generated by issuing excessive orders, such as what is referred to as 'down-selection' within the US federal system: the placement of an order reducing "the group of potential vendors", for example by narrowing "the field of eligible vendors for future orders under a multiple award ID/IQ contract to a single vendor"[96]. This is one of the reasons for which a task or delivery order could be subject to a protest before the Government Accountability Office (GAO).

Indeed, down-selections call into question the number of suppliers allowed by the purchaser to become a party to the arrangement in the first place. Thus it could be regarded as a stage consistency issue, and it certainly involves an abusive operation of a closed framework arrangement. In the EU context, a similar obligation appears to apply under the requirement for framework agreements "not to be used improperly or in such a way as to prevent, restrict or distort competition"[97]. On the other hand, a particularly long or very-high value order issued toward the end of the duration of a closed arrangement that is out of proportion by comparison to usual call-offs under that arrangement, could also be an excessive call-off. It *de facto* extends the closed framework when reopening the competition to the market for those requirements should have occurred.

A stage consistency aspect also relates to securing that terms offered by framework suppliers at call-off stage are in direct relation to those offered

[96] N.B. Bleicher, W.I.Dunn, D.I. Gordon and J.L. Kang, "Accountability in Indefinite-Delivery / Indefinite Quantity Contracting: The Multifaced Work of the U.S. Government Accountability Office", (2008) *PCLJ* 37 (3) pp.375-413.
[97] Recital 61 of EU 2014 Public Sector Directive, art.51(2)3 of 2014 EU Utilities Directive, and art.29(2)6 of 2009 Defence Directive.

to access the framework. From this perspective, objective price/terms adjustment mechanisms may need to be included from the outset. It should be noticed that an adjustment mechanism appears more straight-forward to devise and implement where all terms are established during first stage of framework or some terms are subject to refining at call-off stage. The matter could be more challenging though when some terms are not established at all during first stage, since there would be no reference point for call-offs. In such cases, it might have been preferable to opt for an open framework arrangement in the first place.

Stage consistency involves many facets as was discussed in previous chapters. Devising appropriate means for it could be challenging in light of the inherent flexibility envisaged for NTRPA, but much needed if such arrangements, and in particular closed frameworks, are to achieve their intended objectives. Some inspiration could be found, *mutatis mutandis*, in the provisions of the 2011 UNCITRAL Model Law on Public Procurement and the attending Guide to Enactment. In any event, stage consistency appears to need increased attention in regulation, policy and/or guidance, and possibly further research.

F. Procedures

F.1 First-Stage Procedures: Setting Up the Arrangement

First stage procedures are determined by the type of arrangement. By the very nature of NTRPA, that of being incomplete transactions at first

stage[98], the procedures for setting up such arrangements are, inevitably, also incomplete in some respects in relation to 'traditional' purchasing.

As shown, some types and/or configurations of NTRPA are actually very close to traditional purchasing. For example, for the award of a single-supplier (closed) framework arrangement that establishes all terms (or almost all terms) very few procedural 'adjustments' are likely to be needed, compared to 'traditional' purchasing. However, the further away NTRPA depart from that position, the more different first-stage procedures are likely to be.

In the reviewed systems, generally, there is convergence that 'traditional' award procedures are used for awarding all (recognised) types of closed framework arrangements. The process usually involves some level of competition at first stage, against a common time-limit for submission of bids, followed by a competitive assessment of bids and reduction of the number of contractors to be admitted onto the arrangement, on this competitive basis.

Some additional aspects certainly need to be catered for, such as informing the market that a framework is envisaged, its characteristics, estimated quantities, second stage rules, terms that may be refined then, etc. Also, care needs to be exercised on handling the envisaged number of suppliers, including aspects of potential abuses, such as permitting a higher number than envisaged simply to favour a particular supplier, or only allowing a lower number in order to prevent a certain supplier from joining.

[98] As discussed at Section A.

Apart from such adjustments, procedurally, there are no significant differences from 'traditional' purchasing. In case of multiple-supplier frameworks, once the tender evaluation and the ranking of bids submitted as per award criteria are complete, the award goes to the appropriate number of suppliers, in the order of evaluation ranking.

It is also noteworthy that the systems reviewed provide for the possibility to use the entire range of 'traditional' award procedures when establishing a framework arrangement. Certainly, in case of award procedures only permitted in certain conditions – such as procedures involving less opened a competition or less 'transparency' – both conditions for using (a certain type of) closed framework (where applicable) and conditions for the award procedure would have to be met. The closer a framework arrangement is to a 'traditional' purchase, such as a single-supplier framework or an arrangement establishing all terms, the more amenable it is likely to be to a variety of first-stage procedures, possibly including, where justified, those not providing for full and open competition[99].

A case-by-case analysis of the procurement need and circumstances surrounding it will indicate what first-stage procedure for a closed framework arrangement is likely to be appropriate. As with 'traditional' purchases, in most cases the use of procedures providing for widest transparency and competition are likely to be beneficial for frameworks as well. Such analysis

[99] Aspect addressed in the context of 2011 UNCITRAL Model Law on Public Procurement, by C. Nicolas in "A critical evaluation of the revised UNCITRAL Model Law provisions on regulating framework agreements" (2012) *PPLR* (2) 39-40. But it applies in other systems too.

could start from those procedures, and consider the 'special' ones only where needed.

The further away NTRPA depart from traditional purchasing first-stage procedures need more significant adjustments. This is particularly the case of open arrangements (at the supply side). Certainly, catering for the possibility of suppliers to join an arrangement at any time during its duration is incongruent with having a common deadline for submission of bids by all interested suppliers and evaluating them competitively. Some characteristics of first-stage procedures for open arrangements derive from this.

First, to ensure that the arrangement remains open it is vital for the market to be made aware and kept aware of this feature throughout the arrangement duration. Thus, permanent publication of the solicitation is required for dynamic purchasing systems in the EU, and repeat publication at least annually for open framework agreements under the UNCITRAL Model Law.

Second, since no competition can take place at first stage, open arrangements can either provide just for a 'suitability' assessment of interested suppliers, or for this together with establishing some terms but not in a competitive fashion. In effect, in open arrangements applications for admission (i.e. submissions) can only be assessed by reference to the requirements stated by the purchaser in the solicitation.

Third, it is important for admission applications to be assessed within a reasonably short period of time, such as is provided for EU dynamic purchasing systems, but not for EU qualification systems, as discussed in the

EU chapter. Certainly admission criteria must be equal for all interested applicants.

Establishing terms during first stage of an open arrangement can be more nuanced. This is the case of open framework agreements under UNCITRAL Model Law or dynamic purchasing systems under EU system. Some terms in these arrangements may be included by the purchaser in the solicitation, as 'requirements' or 'conditions' for admission, in a similar way with 'qualifications' or 'selection' criteria. For example, specific minimum warranty or maintenance conditions, as specified by the purchaser, could be required for any future purchases (in addition to technical specifications).

Interested bidders must confirm/accept observing these requirements in their applications to join the arrangement. Such terms are initially established by the purchaser (as limits, or even firmly, where applicable) and then 'ratified' by suppliers upon applying for admission. Thus, the so-called 'indicative submissions'[100] should be regarded in fact just as partly indicative, since terms offered or confirmed by bidders can only be improved at call-off stage.

Where terms presented by applicants in submissions exceed the purchaser's requirements, two approaches appear possible. Certainly, any course of action would need to be clearly stated in the procurement documents for the arrangement. First, those terms could be deemed committal for the bidder but only at the level required by purchaser – as condition for being admitted onto arrangement. If for example the purchaser

[100] Art.60 of UNCITRAL Model Law.

requires that any supplies delivered under any call-offs have a warranty period of at least one year, a bidder may offer in its application a warranty period of two years. The purchaser determines that the two-year warranty period meets its one-year requirement, and retains that the bidder commits to a one-year warranty period. Thus, a bidder's submission is deemed provisional to the extent it exceeds (improves) the requirements for admission onto an open framework arrangement.

Within second approach, where terms offered by applicants for admission onto an open framework arrangement exceed those required by the purchaser, those terms *could* be deemed committal at the level offered by that bidder. Taking the same warranty period example as above, the purchaser determines that the two-year warranty period meets its one-year requirement, but retains that the bidder *may* be required to commit to two-year warranty period in call-offs. Namely, here a bidder's submission may be deemed provisional only to the extent it exceeds (improves) the terms it offered at first stage.

This approach appears to be envisaged for dynamic purchasing systems in the 2014 EU public sector and utilities directives, the option involving submission of electronic catalogues by purchasers at first stage, then the purchaser using them at call-off stage to 'constitute tenders' adapted to a particular call-off[101]. In fact, the purchaser does not 'constitute tenders', which would defeat the mere idea of competition, but prepares the basis of competition using the electronic catalogues received with a view to have

[101] Art.36(6)2 of 2014PSD and art.54(6)2 of 2014USD.

them ‘completed’ by suppliers for the purposes of the call-off in question. The technique is novel and it will be interesting to follow how it will be implemented in practice in light of securing equal treatment.

In the US federal procurement system an alternative ‘method’ of establishing terms at first stage, without a competitive exercise *per se*, can be found in GSA Schedules. Here the submission from a supplier applying for admittance is assessed against the ‘most favourable terms’ offered by that supplier to any other client of his. The terms offered to the Government must equal the ‘most favourable terms’, and evaluation process could involve a number of checks in this regard.

The approach offers clear advantages. It allows for terms to be established without the need of a common deadline for submission of bids, permitting the arrangement to be opened. The arrangement is suitable for a plurality of purchasers without the need of detailed estimates from each purchaser, since terms offered at first stage are ‘geared’ to the high *potential* of sales that a purchasing vehicle available to all US Government agencies presents. No commitment to buy is needed from any agency, so the arrangement provides for flexibility, potentially without affecting terms offered, though it seems difficult to assess whether a committal arrangement of large scale (and involving competition at first stage) could result in better terms.

The ‘success’ of GSA Schedules is ‘enabled’ by the sheer volume of the US Federal Government purchasing, capable to attract suppliers in offering their ‘most advantageous terms’ in light of potential sales, without guarantee

of sales. This could explain why a similar arrangement is not present in any of the other procurement systems subject of this research.

As regards 'supplier list' arrangements, first-stage procedures simply tend to be 'incomplete' procedures by reference to a 'traditional' award procedure. It is only the 'suitability' of applicants for certain items that is being assessed against the requirements (possibly including specifications) stated by purchaser. No terms are being established and no reduction of the number of 'suitable' candidates takes place at this stage; thus, all applicants meeting the requirements are admitted. Examples in the systems reviewed include 'qualifications systems' in the EU (and Member States) utilities sector, and EU dynamic purchasing systems in their 'standard' configuration of the 2014 EU public sector and utilities directives.

F.2 Second-Stage Procedures: Call-offs or Nearly Full Award Procedures

F.2.1 Call-off Procedures under Single Supplier Framework Arrangements

For NTRPA arrangements leaning closer to 'traditional purchasing' end of the spectrum call-off procedures tend to be straight-forward. Thus, in a single-contractor framework arrangement[102] call-offs are generated by issuing orders by the purchasers, with or without consultations with the supplier[103],

[102] Such as a framework agreement of this type under the UNCITRAL Model Law, or in the EU (including Member States), or a definite quantity or requirements contract in the US federal system.

[103] The possibility of consultations is explicitly provided for under the EU public and defence sectors directives (and implied in the utilities directive).

and in any case, according to terms and within the 'margins' set when the arrangement was established.

F.2.2 Call-off Procedures under Multiple Framework Arrangements that Establish All Terms

Moving now a little further away from traditional purchases, to multiple supplier frameworks that establish all terms (with precision) at first stage, it can be noticed that awarding call-offs based on those terms without reopening of competition has received limited attention. This applies to both regulatory instruments and guidance. In this type of framework awarding call-offs does not involve the establishment or refinement of terms, but only allocation of work among framework contractors. The terms applicable to an actual purchase will be those set at first stage.

The relationship between objectivity and equal treatment has been discussed in the EU chapter. It is useful to revisit here the implications this is likely to have for the call-off stage of frameworks establishing all terms. It is submitted that, unless compelling reasons dictate otherwise, the typical position should be for call-offs to be allocated to the supplier who ranks first (offers best value) *for the call-off in question* based on its initial tender and pre-determined evaluation criteria. If the first ranked framework supplier for the call-off in question is unable[104] to perform it then the call-off should be offered to the second ranked supplier, and so on (the 'cascading' method). Where call-offs have similar 'structure' to the overall estimation of needs it is

[104] Or simply not available, if the framework is not committal for the suppliers.

possible that the best ranked supplier at first stage also ranks best for the call-offs. If this happened throughout the duration of the framework for all call-offs, the plurality of suppliers could be called into question, since better planning at the outset might have pointed towards a single-supplier framework.

However, some parameters may 'vary' from one call-off to another during the life of a framework. For example, only some items from the overall schedule of items covered by the framework may be required in a call-off. It could be that for those specific items the original tender submitted by tenderer A at first stage provides better prices than those offered by tenderer B, even though the total price offered by tenderer B was the best of all tenders for the overall schedule of items and estimated quantities (throughout the framework), which had been used for the purposes of evaluation at first stage[105].

Unless specific quantities are established, or minimum quantities are guaranteed, *for each* of the framework contractors *individually* when the framework is set[106], aleatory methods for allocating call-offs among frameworks contractors – such as by rotation or in alphabetical order – should be avoided. The same applies to frameworks establishing a guaranteed (or minimum guaranteed) quantity under the framework, for all framework suppliers jointly, but without breaking that quantity down into specific quantities guaranteed for each framework supplier.

[105] For simplicity, this example uses the price as the only award criterion but similar situations may arise in practice where both price and non-price criteria are used.
[106] Namely, total quantities under framework for each framework contractor.

These methods, in those circumstances (i.e. lacking guaranteed quantities *for each individual supplier*) could affect value and equal treatment, as well as fail the required 'objectivity' test. They could also be easily abused, for example by manipulating quantities and issuing larger call-offs to a preferred supplier and much smaller ones to the others. Even manipulation excluded, it could easily happen that using, say, the alphabetical order method does not 'direct' the call-off to the supplier whose initial offer provides best value for the specific call-off in question.

It would be superficial to regard aleatory methods as 'objective' simply because they are publicised in advance and, in theory, they are not subject to interference in that they operate 'mechanically' in accordance with a pre-established order. Where overall quantities to be procured under the framework are not guaranteed individually for each framework contractor, aleatory methods for allocation of call-offs among them are likely to present the 'objectivity' of a lottery for the purchaser and contractors alike.

Conversely, those methods can be perfectly valid where overall quantities for each framework supplier have been established when the arrangement is set in order to fill the (minimum) guaranteed requirements. In such cases quantities guaranteed to each supplier provide controls as to the overall allocation of work and actual distribution of call-offs is neutral from both value and fair treatment viewpoints. A 'mechanical' method for distributing call-offs - such as rotation or alphabetical order - does not affect the overall quantities for each supplier, or the overall value for the purchaser under the framework.

This type of arrangements could be useful for security of supply. The purchaser could allocate overall quantities under the framework for each of the successful tenderers based on the terms in their tenders at first stage. For example, it could pre-determine in the framework procurement documents that the first ranking bidder gets 50% of the overall guaranteed quantity, the second ranked gets 30% and the third gets 20%. However, where the requirement on demand is scarce an alternative approach could be pursued. A purchaser may ask tenderers to state in their tenders (at first stage) the overall quantity they commit to supply under the framework. When evaluating offers the purchaser admits onto the framework the number of suppliers needed to cover the intended overall quantities and in the order of their ranking[107].

It is noteworthy that the call-off allocation method based on ranking of tenderers during first stage (and cascading, as necessary) could also be used to fill minimum or guaranteed quantities to each framework supplier, if allocations on this basis to each of them are limited to those guaranteed quantities. Specific attention needs to be given to the situation where an arrangement provides for *minimum* overall quantities for each framework supplier and the purchaser is entitled to make orders above those minima, once the minima for all framework suppliers have been met. Irrespective of the method used for making call-offs up to meeting individually defined minima, any additional order should be awarded to the contractor whose initial tender to enter the framework offers best terms (i.e. ranks first) as

[107] However, minimum quantities to be supplied might be considered by the purchaser during first stage as 'capacity' requirement.

applied to specific call-off[108]. This is because any maxima for each individual supplier will not be guaranteed, meaning that above minima guaranteed, using aleatory methods could result in inadequate value or could be abused, for example by favouring certain suppliers with higher orders. An alternative method for awarding orders above the minima guaranteed for each framework supplier could be by reopening competition among them. The possibility of having a framework agreement establishing all terms and under which some call-offs are awarded directly on those terms and other call-offs are awarded through reopening of competition is explicitly recognised in 2014 Public Sector Directive, subject to certain conditions.

Other situations when aleatory methods for awarding call-offs could be contemplated by a legislator or practitioner might include the need to avoid excessive/exclusive specialisation of a single source (which could affect further competition), or set-asides for SMEs or other 'horizontal' policies, where permitted, subject to required transparency, and taking care not to shelter discretionary approaches or favouritism. However, in light of their potential to affect value and of being abused, 'aleatory' methods should – as a matter of good practice - always be regarded as exceptional, and their use should require a thorough justification.

From this perspective, the silence of the 2011 UNCITRAL Model Law on public procurement seems particularly surprising, bearing in mind its rigorous approach regarding multiple-supplier frameworks involving reopening of competition. While it can be argued that, as in case of the EU directives, the

[108] Cascading should apply as well.

approach towards call-offs allocation methods without reopening of competition in frameworks establishing all terms (with precision) is implied in the objectives of the Model Law, the relevant consequences may not be immediately visible. However, the issue does not only concern the UNCITRAL Model Law and it seems to be of a more general nature. In the current author's view the matter requires increased attention and explicit addressing in legal instruments.

F.2.3 Call-off Procedures Involving a 'Competitive' Exercise, Limitations and Exceptions Therefrom, and Transparency Issues

As regards multiple-supplier frameworks that do not establish all terms (with precision) at first stage, these usually involve reopening of competition at call-off stage. That 'mini-competition' has a double purpose: to complete the transaction in the sense of setting specific terms for the call-off that were not established (precisely) at first stage in the framework arrangement; and to select the supplier to whom the call-off is awarded, with the aid of terms set or refined in the 'mini-competition'. In many cases, the choice of framework supplier whom a call-off is awarded to will be determined exclusively by the terms subject to reopening of competition and the offers submitted by framework suppliers in this regard. For example, without limitation, where the call-off award criterion is the price alone, clearly all other terms established at first stage with the framework suppliers are acceptable to the purchaser *and* irrelevant at call-off competition stage. In effect those terms will not affect the call-off competition or its outcome.

However, in cases where call-off award criteria involve a combination of price and non-price factors, two different situations may arise. First, the terms subject to reopening of competition at call-off stage are exhaustive of the terms considered in award criteria for the call-off. All other terms established at first stage with the framework contractor are acceptable to the purchaser and irrelevant at call-off competition stage. The second, more complex, situation involves that some terms established at first stage (with each framework contractor) but not subject to reopening of competition at call-off stage might still be considered, together with the terms that are subject to reopening of competition, in the evaluation of submissions at call-off stage. Thus, some of terms proposed by a framework supplier at first-stage to get admission onto the framework may also have some weighting in the award criteria for call-offs, even though those terms may not be subject to revision at call-off stage.

The latter option might be suggested by the 2014 EU Public and Utilities sectors directives for dynamic purchasing systems in the configuration involving use of electronic catalogues from which the purchaser collects information on the occasion of call-off competitions. It will be interesting to follow this potential newly recognised mechanism for awarding call-offs, which might be used for frameworks more generally. However, the situations when this method could prove useful are limited, and it may affect (real) competition at call-off stage.

Beyond the issue above, second-stage competitions are generally straight-forward from a procedural point of view. Basically, they involve

inviting all (relevant) framework suppliers to attend call-off competitions, providing for a reasonable time-limit for making call-off submissions common to all framework suppliers, and awarding the call-off based on pre-determined award criteria. The explicit procedural safeguards provided by the UNCITRAL Model Law with regard to call-off competitions should be viewed as a source of inspiration for other procurement systems or when implementing frameworks in such systems. Additional procedural safeguards could also be considered in some cases, such as a public opening of submissions, which is likely to increase trust among framework contractors that call-off awards are made correctly and transparently.

A particular attention needs to be given to transparency requirements at call-off stage. Here again the UNCITRAL Model Law offers *'state-of-the-art'* explicit provisions. First, it is important to secure that all framework suppliers are aware of any call-off competitions, and not just some of them. The 'capability' of any framework supplier for any call-off under a framework should have been pre-assessed at first stage, as a condition for their admittance onto the arrangement. A 'reassessment' of capability at call-off stage would thus be unnecessary and redundant an exercise, defeating the 'philosophy' of a NTRPA that is to carry out certain procedural steps once for all purchases under the arrangement. Such 'reassessment' could also be easily abused into discretionary exclusions from call-off competitions.

Nevertheless, there may be situations when a framework supplier (or some frameworks suppliers) is/are not capable to carry out a particular call-off despite their 'general' capacity for the framework. For example, a call-off

might be larger than the volumes estimated at first stage and this could exceed the capability of particular framework supplier. For such cases, as a procedural safeguard, it is important to ensure that the suppliers in those situations are at least informed of the intended call-off even if not invited[109]. That information needs to be issued at the same time with any invitations for the call-off so that suppliers not invited can defend their right to attend where appropriate.

Allowing a purchaser to exclude certain framework suppliers from call-off competitions without any transparency presents a high risk of misuse or abuse. It thus seems surprising that none of the EU Member States reviewed in this research have contemplated a requirement to inform all framework contractors about intended call-off competitions. Further, since erroneous or abusive exclusions from call-off competitions could affect not just best value[110] but equal treatment as well, including on nationality basis, it is equally surprising that the said requirement is not provided for under the EU directives.

It should also be noticed that even the US federal regulations – providing for increased discretion for procurement officers in devising ID/IQ ordering procedures – require, where orders (above certain thresholds) are placed using a competitive basis, that a notice concerning that order must be made "to all contractors offering the required supplies or services"[111] or "to

[109] Art.62(4)(a) of 2011 UNCITRAL Model Law on Public Procurement.
[110] Arguably, a concern mainly for Member States, and less so for regulation at EU law level.
[111] FAR16.505(b)(1)(iii)(B)*(1).*

all awardees"[112], though specific exceptions apply[113]. However, for lower value orders[114] "the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order[115]".

In exceptional circumstances only one of the framework suppliers may have the 'capacity' to perform a certain call-off. This could be where technical reasons dictate a single source order is adequate (highly specialised nature of requirements) or where the call-off is a follow-on of a previous one and interoperability with the items purchased required the use of the same supplier as for that previous order. In such cases competition would be pointless and the establishment of (outstanding) terms will inevitably have to be through negotiation. Given the 'unicity' of the possibility to purchase the requirement under the existing arrangement, the purchaser's position to negotiate could be rather weak. This could be exacerbated where a framework is committal for the purchaser, or non-committal for the supply side.

Situations like these, arising under *framework agreements*, are not dealt with specifically under the EU directives but they can arguably justify a call-off award to the 'capable' framework supplier without reopening of competition. Nonetheless, under dynamic purchasing systems, no such limitation of call-off competition is permitted since "Contracting authorities

[112] FAR16.505(b)(1)(iv)(A).
[113] As to which see below.
[114] Under simplified acquisition threshold.
[115] FAR16.505(b)(1)(ii)

shall invite all admitted participants to submit a tender for each specific procurement […]"[116].

The silence of the EU directives in regards to applicability (or otherwise) of circumstances allowing the use of the negotiated procedure without prior publication has generally been cascaded in the legal systems of the Member States reviewed. The notable exception is an explicit permission to award a call-off under a framework agreement that does not establish all terms without reopening competition for 'technical reasons' under the 2016 French procurement decrees[117].

Looking across the Atlantic, it can be noticed that FAR provides for circumstances similar to the 'technical reasons' exclusion referred to above, as justification for making awards to a specific ID/IQ contractor without consulting the others. Such circumstances include where "Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized"[118] or "The order must be issued on a sole-source basis […] because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order"[119]. Other similar situations are listed in the FAR, including a need that "is so urgent that providing a fair opportunity would result in

[116] Art.34(6)1 of 2014PSD; art.52(6)1 of 2014UD.
[117] Art.79(II)(4°)2 of 2016PD and art.Art.71(III)(4°)2 of DSD.
[118] FAR16.505(b)(2)(i)(B).
[119] FAR16.505(b)(2)(i)(C).

unacceptable delays"[120] and where "It is necessary to place an order to satisfy a minimum guarantee"[121].

At the same time it is certainly important to ensure that exceptions from order stage competitions are not misused or abused. Under the FAR this is done by providing for requirements concerning justification for such course of action, as well as the approval thereof[122]. However, the circumstances allowing for awards to a specific contractor, without considering the others, are regarded as "exceptions to the fair opportunity process"[123]. It means that a notice to all awardees concerning an intended order is not generally required where an exception to the competitive exercise is to be applied to that order. But FAR does require the publication of a notice concerning the award of an order for most cases when exception to the fair opportunity is pursued[124].

From this perspective, the fact that the 2014 EU directives offer the option not to publish any award notice for any contracts awarded under framework agreements presents significant risks[125]. Since there is no requirement to inform framework contractors about an intended call-off under a limitation of, or exception to, reopening of competition, as well as no

[120] FAR16.505(b)(2)(i)(A).
[121] FAR16.505(b)(2)(i)(D).
[122] FAR16.505(b)(2)(ii).
[123] Providing "each awardee a fair opportunity to be considered for each order exceeding $3,500" is the general rule for making orders under multiple-award contracts - FAR16.505(b)(1). "Fair opportunity" consists of different transparency and 'competition' requirements.
[124] FAR16.505(b)(2)(ii)(D).
[125] Some EU Member States have adopted this possibility.

requirement to publish a contract award notice, such awards may be completely 'below the radar' of any supplier review.

Under the UNCITRAL Model Law particular situations potentially leading to limitations of, or exceptions from, second stage competition under closed framework agreements that do not establish all terms *and* open framework agreements are not addressed explicitly. However, limitations or exceptions attributable to 'capacity' can be dealt with by using the 'transparency' option that provides for issuing invitations for intended call-offs to the framework suppliers "*then capable* of meeting the needs […] *provided that at the same time notice of the second-stage competition is given to all parties* […]so that they have the opportunity to participate in the second-stage competition"[126].

To conclude, none of the systems reviewed seems to address the matter of potential limitations of, or exceptions from, call-off competitions comprehensively. However, the UNCITRAL system and the US federal procurement system do provide for rather coherent approaches. In contrast, the EU and the reviewed Member States seem to leave these matters much to the interpretation of practitioners. The subject might benefit from further attention in the following reforms of all systems investigated. In light of such future adjustments a few suggestions are made below.

It is thus submitted that, first, the requirement to inform all framework suppliers of any intended call-offs should be introduced. This should apply both to limitations of and exceptions to competition. It needs

[126] Art.62(4)(a)(ii) of 2011 UNCITRAL Model Law on Public Procurement.

emphasising that the requirement for a notice of any intended call-off cannot be regarded as an excessive burden: in closed framework arrangements the number of framework suppliers tends to be limited, whereas open frameworks (under both the EU directives and UNCITRAL Model Law) are conducted through electronic means. However, in case of extreme urgency, consideration could be given to publishing only a call-off award notice.

Second, for legal certainty it is preferable to state in legal instruments the circumstances in which limitations and/or exceptions from competition at call-off stage are permitted. Similarly, where a legislator takes a rigid approach and does not envisage any limitations or exceptions to call-off competitions, this should also be clearly stated.

Third, a requirement for justification of any limitation or exception to call-off competition should be included in legal instruments, together with any necessary details, such as an approval process for it. Consideration could also be given to providing the justification in the notification to framework suppliers not invited to the call-off in question. A clear explanation, at an early stage, of the objective reasons why a certain framework supplier is not invited to participate, could in many cases avoid supplier challenges. On the other hand, corrective measures can be taken quickly where necessary, including by the purchaser.

F.2.4 Further Transparency Matters Attached to Framework Call-Off Procedures

Transparency at call-off stage goes beyond the matter of informing *all* framework suppliers about intended call-offs under frameworks that usually involve competition at order stage. In this respect UNCITRAL Model Law achieves a high level of 'diligence'. Additionally to the information requirement above, for this type of framework, the Model Law requires the purchaser, pursuant to evaluation of call-off submissions, to "promptly notify each supplier and contractor that presented submissions of its decision to accept the successful submission at the end of the standstill period"[127]. It follows that contract awards under second-stage competitions of framework agreements are subject to a proper debriefing of unsuccessful contractors, allowing for meaningful challenges of awards to be lodged by the latter where appropriate[128].

However, neither debriefing nor standstill period applies to awards of procurement contracts within frameworks "without second-stage competition"[129]. This approach is probably based on the idea that in case of these awards there is no other supplier/contractor to have presented submissions at second-stage[130]. Nevertheless, *all* contracts under framework

[127] Art.22(2). The requirement does not apply to awards of contracts whose "price is less than the thresholds […]" or "Where the procuring entity determines that urgent public interest considerations require the procurement to proceed without a standstill period" (Art.22(3)(b)&(c)).
[128] Both the debriefing and standstill period do not apply to lower value awards.
[129] Art.22(3)(a) of Model Law.
[130] The approach could be questionable from a 'contestability' point of view.

agreements (with or without second-stage competition)[131] are subject to a "public notice of the award of a procurement contract"[132]. Contracts whose price is less than the threshold for 'full transparency' must be included in "a cumulative notice of such awards" to be published at least yearly[133].

Thus, any contract under a framework agreement, including those under frameworks without second-stage competition, or those of low value, are subject to some 'visibility', at least post-award. Information requirements under the UNCITRAL Model Law provide for a significant degree of 'contestability' regarding call-offs within frameworks with second-stage competitions, and some degree of 'contestability' concerning call-offs within frameworks without second-stage competition.

In contrast, the provisions of the EU directives suggest some limited consistency. On the one hand, rightfully, the general policy is towards including call-offs within framework agreements and dynamic purchasing systems under the scope of the rules concerning review procedures, as provided for by 'Remedies' directives. This is appropriate since the call-offs are the actual procurement contracts, whereas the framework arrangement is, rather, a procedural stage and in any event an 'incomplete' transaction. It thus makes sense for call-offs to be subject to scrutiny, separately from and additional to, that afforded to the framework arrangement itself.

Nevertheless, the 'transparency' requirements for framework agreements (as provided for in the directives) might not always support this

[131] Just as any procurement contract, or indeed, framework agreement.
[132] Art.23(1) of Model Law.
[133] Art.23(2) of Model Law.

objective thoroughly. As shown at Section F.2.3, there is no (explicit) requirement for frameworks not establishing all terms to inform all framework suppliers of any intended call-off (competition), including those not invited to attend because they are not considered 'capable' for the call-off by the purchaser. Further, the 2014 EU public sector and utilities directives offer an option not to publish any sort of contract award notice for call-offs under framework agreements.

Where that option is pursued, call-offs under frameworks establishing all terms and call-offs awarded under an exception to reopening of competition, will not be subject to any transparency measure, and thus completely 'below the radar' for any 'supplier driven' review procedures. In these cases, the other framework contractors will not be aware that a call-off has been intended and/or awarded. This seems a peculiar approach for the directives, given that such call-offs could be of significant value, and the complete lack of transparency is likely to increase risks of discrimination, including on a nationality basis.

It is also unclear why there is a difference in regulating contract award notices in the directives among call-offs under framework agreements and those under dynamic purchasing systems. In the latter case, such notices are required either for each individual call-off or grouped quarterly. Thus, transparency through contract award notices is stronger under DPS although call-offs are less vulnerable than those under framework agreements (since in DPS all call-offs are subject to competition through inviting all suppliers admitted to the system).

In the US federal system orders under ID/IQ contracting are generally exempt from 'transparency' requirements. Some categories of orders remain uncovered by any means of transparency. Nevertheless, the FAR does afford some publicity to certain orders placed under exceptions to fair opportunity (above the simplified acquisition threshold). This is something that the EU directives may fail to do related to call-offs awarded under limitations or exceptions to second-stage reopening of competition under framework agreements.

Also, a useful transparency feature of the US federal procurement system is a database available online and dedicated to NTRPA "intended for use by multiple agencies"[134]. Thus, when considering how to approach a particular procurement requirement, an agency has the possibility to check, in a single place, whether any pre-existing procurement vehicle could be used to place an order to fill that need. It plays the role of a centralised 'repository' for all types of multiple-agency procurement vehicles.

To conclude this section, it is suggested that, unless compelling reasons dictate otherwise, procurement officers should, as a matter of good practice, afford maximum possible transparency at call-off stage of a framework arrangement. This might exceed the requirements of applicable legal instruments that, as shown, may sometimes be incomplete or inconsistent. At policy level, legislators or policy makers may like to look at how other systems have addressed certain matters, as a source of inspiration.

[134] FAR5.601. The website is www.contractdirectory.gov/contractdirectory/

In many ways, the UNCITRAL Model Law and the attending guidance could play that role, but each system can provide 'ideas' for others, as shown.

F.2.5 Mixed Call-off Procedures and 'Limited' Competitive Exercise Call-off Procedures

Some systems provide for a certain type of call-off award procedure that is determined *only* by the type of framework arrangement, and that must applied for any call-off within that framework. For example, the UNCITRAL Model Law provides that call-offs under closed framework arrangements not establishing all terms are awarded by reopening competition among (in principle) all framework suppliers, whereas call-offs under closed frameworks establishing all terms are awarded based on those terms and rules provided for in the framework agreement, without reopening competition[135].

Other configurations of framework however permit different types of call-off under the same arrangement. Thus, the 2014 EU PSD explicitly allows, under a framework agreement that sets all terms, for some call-offs to be awarded without reopening competition and others with reopening of competition[136]. This configuration allows for example to award smaller orders (up to a certain threshold) without reopening competition, which provides maximum efficiency and convenience at call-off stage; and reopen competition for larger orders in view of obtaining better terms for bulk sales.

Similarly, this 'mixed call-off procedure' configuration could be usefully implemented in frameworks that provide for a minimum (in terms of quantity

[135] Art.2(e)(iv)&(v) of Model Law.
[136] Art.33(4)(b).

or value) determined for each framework contractors individually. Up to filling those minimum guarantees any method of allocation of call-offs could be used, including aleatory ones[137]. For any call-offs above the minimum guarantees, a purchaser may consider reopening competition among framework contractors[138].

A distinct situation could arise in frameworks that do not establish all terms. At Section F.2.3 we looked at potential exceptions to call-off competitions. An addition to the circumstances which might justify such exception could be for call-offs of very low value. It could be more efficient for such call-offs to be awarded without reopening competition, for example by conducting a 'brief' consultation (negotiation) with the supplier whose terms as offered to access the arrangement (at first stage) appear to offer best terms for the call-off.

In the past such an exception had been provided for in the French Public Procurement Code for a specific type of 'framework' arrangement that normally involved reopening of competition at call-off stage[139]. A maximum value for each individual call-off under the exception had been provided, as well as a maximum permitted annual aggregated value of such call-offs. Neither the EU directives nor the UNCITRAL Model Law currently provide for exceptions for small value call-offs.

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[137] See Section F.2.2 above.

[138] Or it may continue to award call-offs without reopening competition, but not by using 'aleatory' allocation methods.

[139] Art.72(I)(4)(d)7 of 2001CMP; art.71(V)(3)(a) of 2004CMP. The exception and the specific type of framework were not carried forward in the (domestic) regulatory instruments that followed.

However, such provision does exist in the US federal procurement system for orders below $3,500, for which contracting officers are not bound to "provide each awardee a fair opportunity to be considered"[140]. For orders above this value, the FAR provides for several ranges of order size depending on which increasing degrees of transparency, competition and contestability requirements apply to the ordering procedures.

Contracting officers in the US federal system enjoy quite some discretion in designing ordering procedures, particularly regarding smaller orders, while 'full' competition among awardees under comprehensive procedural and transparency safeguards is provided for very large orders exceeding $5.5 million[141]. Order protests, other than for reasons of 'down-selections'[142] or of exceeding "the scope, period or maximum value of the contract", are only permitted for orders exceeding $10 million[143]. While providing increased flexibility, which could be appropriate for the US federal system, this approach leaves outside effective scrutiny many multiple award contract orders.

On balance, and in light of a potential 'starting point' for future reforms as regards framework arrangement call-off procedures, structuring these procedures by whether the framework establishes all terms of future purchases, or otherwise, subject to certain adjustments, seems preferable to

[140] FAR16.505(b)(1).
[141] FAR16.505(b)(iv).
[142] See Section E (and US Chapter).
[143] FAR16.505(a)(10)(i)(B). After 30 September 2016 the authority to protest such orders is maintained only for some agencies (DoD, NASA and the Coast Guard), under FAR 16.505(a)(10)(ii).

a system of various degrees of 'competitive' and transparency requirements applicable to ranges of order sizes.

Thus, for frameworks establishing all terms it probably makes sense for call-offs to be awarded on the basis of those terms and conditions provided in the framework or, in *some* circumstances, through reopening of competition. Where the framework does not establish all terms, it usually makes sense to reopen competition among all framework suppliers, subject to full procedural and transparency safeguards, to establish (or refine) those outstanding terms needed for each specific call-off. Some exceptions from call-off competitions could be provided though, such as for technical reasons, extreme urgency or very low value orders.

F.2.6 Second-Stage Procedures in 'Supplier List' Arrangements

In 'supplier list' arrangements the second-stage of the arrangement involves nearly-full 'standard' award procedures, except for 'suitability' assessment having been conducted during 'first stage'. That assessment could regard all relevant aspects of 'qualification' (capability, experience, resources, including financial, etc.), just some thereof, or it could include specifications of items whose purchase is contemplated. 'Second stage' of the arrangement then completes that assessment as needed, with the suppliers on the list who express interest in specific contracts, and submit (complete) tenders for them.

Those procedures will be conducted only with suppliers that are on the 'list', in case of 'mandatory lists' (such as qualification systems in the EU utilities sector). The intrinsic nature of such lists means that second-stage

procedures are incongruent with open tendering procedures (since these must permit any interested supplier to submit a tender, and not just those whose 'suitability' was already assessed). But 'restricted' type of procedures, 'negotiated' procedures or those involving dialogue with suppliers seem to fit a 'mandatory supplier list' arrangement. The actual choice of procedures is determined by the specific procurement system allowing for a mandatory list.

In case of optional lists though (as discussed, for example, in the context of EU official lists) any 'second stage' award procedure seems possible, including 'open tendering', since registration on that list is not compulsory as a condition for participation into certain award procedures. Thus, if a supplier not on an optional list submits a tender, the purchaser will just have to conduct both 'first-stage' and 'second-stage' together.

Second-stage procedures for awarding individual contracts are usually not 'defined' at first stage of a supplier list arrangement, but when an individual second-stage procurement process is actually initiated. Certainly, nothing prevents a purchaser from determining from the outset (when the list is initially established) the award procedure(s) that he intends to use at second-stage. However, this is unlikely to bring any benefit for any of the parties and, instead, it affects flexibility offered by the arrangement. Exceptionally, one of the arrangements reviewed establishes from the outset the procedure that is to be followed for the award of any contracts under it, i.e. dynamic purchasing system in the EU 2014 public and utility sectors, in the configuration that does not establish (at first stage) any terms for future purchases.

F.3 Intermediary Stage

Some configurations of NTRPA may involve an intermediary stage. Examples in this connection are provided by the conclusion of a blanket purchase agreement (BPA) under US GSA Schedules, or the use of a qualification system in the EU utilities sector for awarding a framework agreement. These configurations involve three successive stages towards completing individual transactions, in parallel with narrowing down and specifying certain parts of the originally estimated requirement.

As regards the second example above, a qualification system might define some classes or types of items, and establish a 'list' of suppliers interested and assessed as generally 'qualified' ('suitable') to supply. The framework agreement exercise within the qualification system would then specify in more detail the requirement and establish some terms[144]. At the same time the framework exercise could limit the number of possible suppliers in light of the purchases contemplated under the framework, and how best interested suppliers respond to the estimated requirement for the framework. Complete transactions arise only when individual contracts are placed under the framework.

Another possible scenario for arrangement involving intermediary stage is what we call 'frameworks in frameworks': a configuration where a call-off under a framework arrangement is also a (secondary) framework arrangement, rather than a 'one-off order'. Certainly, such secondary

[144] Or establish all terms, but without commitment to buy, and/or respectively sell.

framework must be consistent with the (primary) framework and subject to controls. These include for example awarding secondary frameworks only by using appropriate procedures (i.e. properly adapted from those that would be applicable to 'one-off' orders under the primary framework), precluding secondary frameworks that could affect, limit or distort competition[145], as well as appropriate procedures for awarding orders under the secondary 'framework'. The procedure conducted under a 'primary' framework for awarding a call-off consisting of a 'secondary' framework would 'act' as an 'intermediary' stage towards complete purchase transactions (i.e. orders under secondary framework).

As the US 'GSA Schedules' arrangement indicates, 'frameworks in frameworks' could be appropriate under large centralised schemes. Under this US system, there is explicit recognition and regulation of such 'secondary frameworks' aimed at filling "repetitive needs"[146], referred to as 'blanket purchase agreements' (BPA). The relatively recent development of regulations concerning (specific) procedures for orders under BPAs seems to be testimony of both the use of BPAs *and* the need to control such use. BPAs can be single or multiple-supplier arrangements, with a preference being stated in the FAR for "multiple-award BPAs"[147], as well as single or multiple-agency arrangements, subject to certain conditions[148]. Where a BPA is placed, procedures for awarding it represent an 'intermediary' stage of a purchase

[145] Or have an effect similar to a 'down-selection' (i.e. an excessive award that affects the reasonable chances and expectations of the other framework suppliers to get work under a framework).
[146] FAR 8.405-3(a)(i).
[147] FAR 8.405-3(a)(3)(i).
[148] FAR 8.405-3(a)(6).

'process' under GSA Schedules 'architecture'. 'First stage' consists in assessing applications of interested suppliers to become schedule awardees. Final stage consists in award procedures for individual orders under the BPA.

Another explicit recognition of possible 'framework in framework' configuration is provided by French procurement system. Under the French procurement decrees, a call-off under a framework agreement not establishing all terms could be a (secondary) framework agreement that does set all terms[149]. In light of particularities of call-off award procedures under the EU directives (compulsory for EU Member States) this configuration could be very useful. Where specific (recurrent) requirements can be sufficiently defined when a call-off is initiated, such 'secondary framework' presents the significant advantage that it eliminates the need for repeated competition for those recurrent needs (under the primary framework).

As discussed in the EU chapter, while the directives are silent regarding possibilities for intermediary stages (consequently, for 'frameworks in frameworks'), such call-offs are not explicitly ruled out either. It is possible to interpret the rules in the directives as permitting 'secondary frameworks' under frameworks agreements. This might apply to primary frameworks both of the type establishing all terms and of the type not establishing all terms (and it could also apply to DPS). Similarly, regarding 'secondary' frameworks these too might be of the type establishing all terms and/or of the type not establishing all terms. However, the combination 'secondary' framework not

[149] Art.79(I)2 of PD; art.71(I)2 of DD.

establishing all terms under a ‘primary’ framework establishing all terms would be illogical.

Where the interpretation referred in the preceding paragraph is contemplated, the current author emphasises the importance of appropriate conditions, controls and transparency requirements at each level of such arrangements. These need to be enhanced significantly since the consequences of misusing or abusing call-offs consisting of ‘frameworks’ could be (much) harder than those concerning ‘one-off’ orders. We have already seen that some ‘framework in framework’ configurations could make more sense only in case of multiple-purchaser ‘primary’ arrangements, and less so under single-purchaser ones.

It can also be noticed that leaving call-offs (consisting of ‘secondary’ frameworks) under ‘primary’ frameworks establishing all terms, outside the incidence of any ‘transparency’ measure, in the same way that ‘one-off’ inadvertently are under the current directives, could present a high risk of misuse or abuse. Potential negative consequence may be wider since a ‘framework’ call-off is likely to be longer term and higher value than a ‘one-off’ order. The same would apply for a ‘framework’ call-off awarded under a limitation or exception to reopening competition under a ‘primary’ framework not establishing all terms.

Appropriate decision making processes – possibly ‘driven’ by conditions included in the applicable legal instruments – as to designing and establishing a ‘primary’ arrangement that could cater for ‘secondary frameworks’ are also very important. For example, policy might provide that

such arrangements are only permitted to centralised purchasing bodies. But proper decisions are also needed at all levels (including the intermediary stage) of an arrangement like this. An unregulated 'inflation' of 'generic' framework arrangements (particularly those closed at supply side), also permitting the award of secondary 'frameworks' under them, could have undesired effects on procurement market[150], which may need further investigation.

The aspects above are just some examples of issues that should be considered when contemplating an explicit recognition of an intermediary stage under frameworks. It will be interesting to follow developments of the phenomenon of 'frameworks within frameworks' in the future, including (or even in particular) in 'non-US (federal)' environments.

G. Review, Protests, Remedies

G.1 General

The area of review procedures is particularly diverse since a lot is determined by legal and judicial traditions of each individual system examined. Consequently, this section draws on specific experiences of the various systems. It aims to identify approaches that might support an appropriate use of NTRPA, in line with their intended objectives, and areas in which review mechanisms might benefit from further improvement in future reforms.

[150] See e.g. the discussion concerning 'generic' framework agreements in the UK.

G.2 First Stage

As regards review action during first stage of NTRPA, a distinction is necessary between closed and open arrangements.

Generally, in systems of this research procedures for the award of closed framework arrangements are subject to similar review processes as the award of 'traditional' procurement contracts[151]. This is usually straightforward and appropriate though some issues may arise.

For example, in some systems there are specificities of frameworks not explicitly addressed in substantive rules concerning design and award of frameworks. Review of such issues could prove more complex, less effective, with less predictable results. In these cases, the main cause of such potentially undesired outcomes rests with the substantive rules concerning frameworks, rather than with the actual review mechanisms. The former may not provide appropriate 'ammunition' for a review exercise. Examples include, in some legal instruments, lack of conditions in which use of a framework is permitted[152], or absence of a requirement for justifying the choice of using a framework arrangement (and/or its type)[153], or both.

While the UNCITRAL Model Law affords a significant level of attention to conditions for embarking onto a framework arrangement and justifying the options pursued, enforcing these measures efficiently and effectively through challenge proceedings could be affected by an inappropriate transparency requirement. That justification could only become available to bidders (or

[151] For example the EU remedies directives, or UNCITRAL Model Law.
[152] E.g. the EU directives.
[153] Ibid.

interested bidders) after acceptance of successful submissions[154]. This would be very late from a review perspective: the only remedial option at that point, if a challenge is admitted (i.e. where pursuing a framework, or a particular type of framework, was not justified) would be to terminate the award procedure altogether or "overturn the award"[155]. However, the delayed transparency over the justification seems to be just an error in the Model Law and implementing States could choose to rectify it in their national instruments.

As regards first stage of open arrangements (frameworks or lists), two features of such arrangements have an impact on supplier review. First, there is no competitive exercise at this stage and, in effect, no competitive reduction of the number of suppliers. Second, there is no common time-limit for interested suppliers to make submission, since they can apply at any time during the life of an open arrangement.

These two features combined mean that a supplier, or interested supplier, may have less information about other suppliers or interested suppliers, than in a closed (or 'traditional') procurement exercise. In turn, this could affect to some extent efficiency of supplier review. The usual challenge rights and avenues would normally apply to the application for admission of *each* interested supplier in its relationship with the purchaser. Thus, supplier review could offer an appropriate protection against erroneous or abusive rejection of an application for admission, but might be less effective as a means to control erroneous or abusive *admissions* onto the arrangement.

[154] Arts.25(g)&64 (Model Law).
[155] Art.67(9)(f)&(g) if applicable.

In light of this and because no standstill period applies to establishing an open arrangement, or at the admission of an applicant after the arrangement has been established[156], first stage procedures under open arrangements would generally benefit from increased *ex ante* or *ex post* controls from procurement control bodies.

G.3 Second Stage

Addressing supplier review at second-stage of NTRPA needs a distinction among: closed framework arrangements, open framework arrangements, and 'supplier lists'. As regards supplier review at call-off stage under closed framework arrangements, very different, quite opposite approaches could be identified among systems reviewed. Striking a reasonable balance between procurement efficiency at call-off stage and the need for monitoring and oversight (in order to avoid misuse or abuse) affects 'remedial' action available.

It should be stressed here that the call-off stage within closed framework arrangements has tended to be less 'monitored' and therefore more vulnerable from a 'contestability' viewpoint. Possible causes include a sharp focus on efficiency at call-off stage[157], the view that some types of closed framework arrangement could be regarded as a (procurement)

[156] Conversely, a 'suspension' of operation of an open arrangement as a result of a challenge by an applicant whose admission was denied, should also be negated, in general. Procurement efficiency and effectiveness under the arrangement is probably to take priority over the harm that the claimant suffers from not being able to attend some call-offs, if its challenge is successful and its admission is thus delayed (see, e.g., UNCITRAL Guide to Enactment to the 2011 Model Law on Public Procurement, p.63, re.art.60(8) of Model Law).

[157] See US federal ID/IQ contracting.

contract[158] and thus contestability attached to its award suffices, or an insufficient adaptation of supplier review avenues applicable for 'traditional' purchasing to the specific features of framework call-off stage.

On the other hand, actual allocation of work to a supplier under most frameworks occurs when an order is placed. Namely, the actual obligations to buy and respectively to sell only materialise, with regard to a fully specified requirement, at call-off stage. It thus makes sense for call-off stage to be subject to appropriate monitoring mechanisms, of which supplier review forms a significant part.

Contestability appears generally needed and justified as regards call-off stage irrespective of whether call-off stage involves reopening of competition or otherwise. Where the award of an order affects competition conditions at first-stage, consideration should be given *de lege ferenda* to providing for some (limited) challenge avenues for tenderers whose submissions were rejected at that stage regarding such order awards.

Many hindrances to appropriate supplier review under closed frameworks arise from an inadequate provision for transparency measures or other substantive procedural requirements[159], rather than the provision for 'challenge procedures' *per se*. Another aspect that needs to be considered is the intended convenience and efficiency of ordering under (closed) frameworks, related to delivery disruption that some supplier review mechanisms cause. Consideration could thus be given to excluding small

[158] E.g. *marchés à bons de commande* (in older French instruments).
[159] Such as under EU and UNCITRAL systems, absence of an explicit provision as to the 'method' for allocating orders among framework suppliers under frameworks establishing all terms.

orders from supplier review procedures. If this course of action is pursued, awarding such orders might benefit from being supplemented with increased *ex-post* (hierarchical or, preferably, third party) monitoring. Also, an aggregated limit in terms of the value of small orders could be imposed, above which even small orders could become subject to supplier review procedures.

Alternatively (or additionally), orders up to a certain (individual) value could only be subject to certain remedial measures that cause less disruption to purchasing process, such as penalties applicable to the purchaser, damages or shortening of the duration of an awarded contract. However, a wider or full range of remedial (or interim) measures, including standstill periods, suspension of the procedure, or setting aside a concluded call-off is likely to be appropriate for larger orders comparable in size with 'traditional' procurement contracts to which such review measures would apply.

It certainly is no easy job to balance all the elements above and gear them to the features and objectives of a particular procurement system.

As regards the current stage of supplier review at call-off stage under closed framework arrangements, it can be noticed that the 2011 UNCITRAL Model Law on Public Procurement provides for a wide and thorough coverage of supplier review mechanisms related to call-offs under framework agreements. There the approach is for call-offs to be regarded as procurement contracts and, in principle, the entire range of supplier review avenues is made available for call-off stage. This is generally well supported by transparency requirements.

However, consideration could still be given to strengthening a few aspects under multiple supplier frameworks. Thus, concerning framework agreement procedures without second stage competition (namely frameworks that establish all terms), the award of call-offs is not subject to a notification of a decision to award a call-off (including relevant elements that led to the award), to be sent to all framework contractors. Also, such awards are not subject to a standstill period.

This basically leaves call-offs of any value, under frameworks establishing all terms, outside challenge mechanisms until publication of a notice of the contract award. Since such publication occurs after conclusion of call-off contract, the range of remedial actions available are inevitably limited to those applicable after entry into force of a procurement contract, and corrective measures before conclusion of the contract (in breach of an applicable law) appear excluded.

The mere fact that call-off stage does not involve competition in this type of frameworks does not appear a sufficient reason to deny 'pre-award' challenges for such call-offs, since a multiple supplier framework does not predetermine precisely the allocation of specific call-off requirements among framework contractors[160]. Such allocation takes thus place at the call-off stage and could – quite easily in the current author's view – involve breaches of an applicable law.

Similarly, call-off awards under an exception to reopening competition within frameworks not establishing all terms, also seem outside the remit of

[160] An exception to this could be provided by frameworks establishing all terms *as well as* guaranteed quantities for each framework supplier *individually*.

notifications concerning such an award decision and of standstill period. With the notable exception of an award for objective and exceptional urgency, this approach seems unjustified, and might benefit from strengthening in the future.

A second 'transparency' aspect concerns frameworks not establishing all terms and, therefore, involving reopening of competition at call-off stage. In this case, the requirement for a notification of the intention to accept a call-off stage competition submission (at the end of the applicable standstill period) only applies to the other suppliers in such competition by presenting submissions for the call-off[161]. It does not apply to suppliers who, although invited to make call-off submissions, did not attend the exercise, or who were not invited to make submissions since they were not among those deemed "then capable of meeting the needs" associated to that call-off[162]. This is recognised in the Guide to Enactment as a "vulnerable" point[163].

Indeed, consideration could be given in further reforms to requiring provision of 'standstill notice' to *all* framework suppliers, and not just those who presented submissions for the call-off competition. Even framework suppliers not invited in a specific call-off competition, or who did not attend (although invited), are likely to have an active – and in many cases justified – interest in challenging illegal awards under the framework they are a party to. However, a distinction may be made in regards to the challenge rights

[161] Arts.62(3),62(4)(d)&22(2) of Model Law.
[162] Under Art.62(4)(a) of the Model Law the purchaser is required to notify framework suppliers about any call-off competition that the latter are not invited to attend. These notifications must be issued simultaneously with any invitations sent to suppliers deemed "then capable".
[163] P.290 (explanation to art.62, point 7).

provided to different 'categories' of framework suppliers (i.e. 'recipients' of standstill notifications). Thus, the challenge rights of framework suppliers not invited could be limited – at that stage – to situations when the actual call-off award differs from the conditions that had led to the determination that certain suppliers had not been "capable" to meet the needs and therefore had not been invited to make submissions for the call-off[164]. Similarly, all framework contractors, including those not invited, or not attending a call-off, could have an interest in challenging call-offs that exceed the scope of the framework agreement.

A related, but distinct, matter concerns applicability of the standstill period to the award of any call-off involving reopening of competition and exceeding a certain threshold to be established in the procurement regulations of enacting States[165]. It might have been preferable to provide an option for enacting States, or even for purchasers, to choose among: *observing a standstill period* before conclusion of a call-off, and thereby avoiding challenges after the award of the call-off; and *contracting without observing a standstill* period subject to supplier challenge avenues permitting the "overturn" (i.e. annulment, cancellation or termination) of the awarded call-off[166].

In contrast, the EU supplier review mechanisms at the call-off stage of framework agreements (i.e. closed framework arrangements) seem more

[164] This is certainly distinct from the right to challenge the actual grounds invoked by the purchaser when deciding not to invite certain framework suppliers, where those grounds are unjustified.
[165] Art.62(4)(d) in conjunction with art.22(2)&22(3)(b) (interpreted *per a contrario*) of the Model Law.
[166] Similarly to that of the EU directives.

vulnerable and coverage less thorough. However, this is not determined by supplier review 'concept' *per se.* The 'remedies directives' do extend in principle the challenge avenues and corrective action applicable for 'traditional' procurement contracts to call-offs under framework agreements. But this is not adequately supported by transparency requirements concerning implementation of a framework agreement, as already discussed.

Nonetheless, the EU system provides flexibility as regards the application of a standstill period to call-offs awarded by reopening competition under framework agreements. Thus, Member States may provide for derogation from the application of standstill periods for call-offs under framework agreements in the public sector[167]. Where the derogation is not provided for, standstill period must apply to all call-offs (above the EU thresholds). However, the derogation has been provided for by all EU Member States reviewed in this research.

In effect, this means that the option is cascaded to purchasers in those Member States. Where standstill is not observed by a purchaser the awarded call-off is subject to ineffectiveness if above EU thresholds (and in breach of rules concerning the reopening of competition at call-off stage)[168]. Nonetheless, the purchaser can avoid the risk of ineffectiveness of a call-off by voluntarily observing a standstill period for the award of the call-off in question[169].

[167] Art.2b(c) of Directive 89/665/EEC.
[168] Ibid.
[169] Art.2d(5) of Directive 89/665/EEC.

In sharp contrast with both the UNCITRAL and EU (or Member States) supplier review provision at call-off stage of closed framework arrangements, the US federal procurement system provides for an *explicit ban* on protesting orders under ID/IQ contracting[170]. Exceptionally, such protest are permitted under FAR "[…] on the grounds that the order increases the scope, period, or maximum value of the contract", or for orders "valued in excess of $10 million"[171]. Additionally, the Government Accountability Office has also retained competence to review protests concerning orders that could be regarded as 'down selections'[172].

While this approach may be considered to meet the level of ID/IQ call-off efficiency desired (and/or needed) for US federal agencies, as well as consistent with the level of trust and capacity of US federal procurement workforce, it is not trouble free. The explicit ban on ID/IQ order protests leaves many awards outside any supplier review mechanism and the $10 million value threshold above which any order can be challenged seems particularly high.

However, the ban on order protests does not apply to orders or blanket purchase agreements (BPA) under the US GSA Schedules[173]. This leads the discussion to open arrangements. In the EU, dynamic purchasing systems also seem to benefit from more thorough a supplier review approach at call-off stage, stemming from stronger transparency requirements, as was discussed. Regarding UNCITRAL Model Law, it can be noticed that it treats

[170] FAR16.505(a)(10)(i). See US chapter.
[171] FAR16.505(a)(10)(i)(A)&(B).
[172] See Section E and US Chapter.
[173] FAR8.404(e).

second stage competitions in the same way for closed and open framework agreements[174], and this includes supplier review mechanisms as well as the requisite transparency requirements[175].

Second stage of 'supplier list' arrangements does not present particular issues as regards supplier review mechanisms. This is, amongst others, because no terms are established at first stage, to be taken into consideration when making an award at second-stage. 'Call-off' procedures are nearly 'full' traditional award procedures, among suppliers admitted on the arrangement, except for 'suitability' (or some elements of 'suitability') that had been assessed at first stage, as requirements for admission. To the extent that access onto the list (at first stage) is fair, supplier review at call-off stage under supplier list arrangements should be straight-forward and similar to that which applies to 'traditional' purchasing methods[176].

It can be concluded that second stage supplier review mechanisms under closed framework arrangements deserve particular attention.

G.4 Overlaps and Relationship between Stages

The relationship or overlap between stages of a NTRP arrangement could present, in certain circumstances, supplier review complexities. Some of these have not been contemplated (so far) in the legal instruments of the

[174] Second stage procedures are dealt with jointly under the same provisions (in art.62 of the Model Law).
[175] See arts.22,23&64-68 of Model Law.
[176] While this paragraph refers to mandatory lists, similar considerations apply from a supplier review perspective to optional lists.

procurement systems subject of this thesis, and could thus be further investigated in view of future reforms.

First category of such matters concerns closed framework arrangements and recognising the interest that unsuccessful suppliers having tendered at first-stage (and being denied entry onto the framework) could have in challenging certain types of call-offs, in particular those that exceed the scope of the framework, or otherwise affect the conditions of competition at first stage. The matter could affect all types of closed framework arrangement.

We have already shown that notifying the other framework suppliers of a call-off award decision should be considered[177]. Further, thought could also be given to extending issuance of those notifications to unsuccessful tenderers at first stage. This would strengthen oversight concerning such call-offs, since framework contractors might not be wishing to challenge call-offs exceeding the framework scope (even if they become aware of them[178]) in hope that they too could benefit from it in a future call-off, whereas clearly none of the framework contractors will be interested to challenge a call-off affecting conditions of competition at first-stage, when suppliers were selected.

Second, an aspect of overlap between stages could arise in open arrangements that may require specific attention from a supplier review perspective. It refers to situations when a call-off procedure under the

[177] See S. Arrowsmith, Ch.3 in S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* (West, 2009), p.181.
[178] Under the current instruments they may only learn of them from a contract award notice, if applicable.

arrangement is launched before a pending application for admittance onto the arrangement from a 'newcomer' is considered. In effect, this means that the 'newcomer' may be unable to attend that call-off, for example if the assessment of the application is finalised and a decision concerning admittance, or otherwise, is taken after the time-limit for making submissions for the call-off (or even too close to that time-limit). However, the matter could be better addressed by the substantive rules on time-limits for assessing applications.

The reverse situation where suppliers already a 'party' to the arrangement wish to challenge an abusive (or erroneous) decision to admit a 'newcomer', seems less problematic in terms of immediate consequences. If there are (legal) impediments preventing a supplier already admitted to challenge such a decision[179], nothing should prevent challenging the award of a call-off to the 'newcomer' (on that basis). Certainly, this implies that suppliers already admitted must be provided with relevant information concerning admittance decisions of any 'newcomers', in lack of which they are unlikely to be aware whether there is any basis for challenging.

The third aspect worth noting here, concerns an aspect of relationship between stages in the context of remedial measures that (unlike the matters discussed above) has been addressed explicitly in a legal instrument. This relates to the consequences of a declaration of ineffectiveness of a framework

[179] Or where a challenge has been lodged but it is pending resolution; such challenge should not suspend the admission decision, since this could 'facilitate' abusive challenges from suppliers already on the arrangement who will want to limit competition at call-off stage in this way.

agreement under the UK procurement regulations on contracts awarded under that framework *before* declaration of ineffectiveness[180].

Consistent with the UK approach to recognise only prospective ineffectiveness[181], and not retrospective ineffectiveness[182], call-offs awarded based on a framework agreement related to which a declaration of ineffectiveness has been made, but prior to that declaration, are not to be considered ineffective merely because of that declaration. Instead, a separate application is required for each such call-off that would be considered individually in light of its particular circumstances[183].

This seems a balanced approach and in any event clears an area of potential legal uncertainty. Among the Member States reviewed the UK is the only one that addresses this matter explicitly.

Finally, where the call-off stage of NTRPA includes an intermediary stage[184], considerations concerning review and remedial action should in principle apply *mutatis mutandis*, as appropriate to any intermediary stage.

[180] See Ch.V.C.2.5.1.
[181] I.e. effects of ineffectiveness only concern the future, and not the past.
[182] I.e. where ineffectiveness affects both the past and the future.
[183] N.180.
[184] See Section F.3.

CHAPTER VII

CONCLUSIONS

As shown in Chapter I, this research examined NTRPA as regulated in selected procurement systems, why they are regulated as they are, and assessed considerations that tend to promote or detract from fulfilment of certain objectives of the regulation of NTRPA. A common structure related to the 'core' elements of the underlying commercial process of such 'transactions' was used both for the examination of individual arrangements in each system *and* for wider comparative perspectives amongst them.

It was found that whilst all systems examined do provide for arrangements that fall under our definition of NTRPA, each case-study, and each type of arrangement therein, offers a partial and varied picture of the 'spectrum'. Approaches of individual systems are determined by their own overall objectives, but challenges are faced by all systems in 'calibrating' regulation of NTRPA to their intended objectives *and* to the inherent uncertainties or indefinite aspects of such arrangements.

Certainly, regulations alone cannot solve all problems of procurement and in particular of NTRPA where a vital part is played by market awareness (which includes market uncertainties). However, regulations may require, encourage, limit or prohibit certain practices. From this perspective, refining the 'tuning' of NTRPA regulations may be desirable from many viewpoints, including by reference to a system's own objectives, as has been pointed out throughout the previous chapters.

A comprehensive classification (taxonomy) of potential arrangements was developed (in Ch.VI.C) from over twenty types of arrangement in seven procurement systems. Its purpose is not only to 'contain' the possible configurations of NTRPA, but, more importantly, to highlight the interaction (and conditioning) between various features of an arrangement. These aspects may not be immediately evident from an existing legal instrument, in particular where it covers multiple configurations under the 'same roof'[1]. However, they are particularly relevant in choosing and implementing an appropriate configuration of NTRPA in practice, as well as in designing NTRPA policy and regulation.

On this basis, a general framework for analysis of whether the use of NTRPA would be adequate, and for choosing a desirable type or configuration of NTRPA, depending on the circumstances of the envisaged requirements and of the relevant market, has been suggested in Ch.VI.D. This is an area that can cause particular difficulty in the use of NTRPA and has tended to be neglected in (many) current systems. Additionally, in Ch.VI.D.3 a conceptual framework was outlined concerning legal means that could encourage an adequate decision making process at the purchaser's level regarding the use (or otherwise) of NTRPA and choosing an adequate type of arrangement for individual requirements.

The research also analysed (in Ch.VI.F) the problems that might arise from inadequate call-off procedures, which might 'invalidate' the outcome of the first stage of NTRPA. It was found that, in frameworks that do not

[1] E.g. framework agreements in the EU.

establish all terms for future purchases, reopening competition at call-off stage amongst all framework suppliers is usually adequate for establishing the outstanding terms and choosing the supplier to carry out the call-off in question. However, where limitations or exceptions to call-off competition may be appropriate (such as 'technical reasons', extreme urgency, occupied capacity, etc.), the permitted ones ought to be expressly specified in the relevant instrument, as well as subject to appropriate transparency.

Conversely, where all terms concerning future purchases are established at first stage of a framework, reopening competition is not usually needed (though it could useful in some circumstances). It is however important to ensure that the allocation of work amongst framework contractors based on those terms is subject to objective rules/criteria. Many of the systems reviewed are (almost) silent on what the actual method of allocation should involve.

In this connection it has been found that, in most cases it is appropriate to allocate work to the framework supplier that offers best value to the specific call-off based on the offer originally submitted by that supplier at first stage in order to be admitted onto the arrangement, and on pre-disclosed award criteria stated for call-offs. At the same time, 'aleatory' allocation methods (such as rotation of suppliers) should be used only very exceptionally, since they can affect both value and equal/fair treatment.

Inadequate transparency requirements at call-off stage could also render a framework arrangement vulnerable to misuse or abuse, and most of the systems examined appear to have afforded limited attention to this

aspect. The notable exception is provided by the UNCITRAL Model Law, which should be regarded as a standard (including in this connection). However, even this instrument makes a distinction concerning transparency requirements at call-off stage amongst frameworks involving reopening of competition and those not involving such competition that in the current author's view is unjustified.

In relation to the above, the research has also analysed (at Ch.VI.G) the balance between efficiency at call-off stage and 'contestability'. It has been found that, in general, oversight and review mechanisms are needed, though some adjustments (in comparison to the mechanisms usually available for 'traditional' purchases) might be desirable in relation to certain call-offs under frameworks. The experience of the US federal procurement indicates that very limited 'contestability' could support procurement efficiency at call-off stage (in closed frameworks) but it presents risks to fair treatment and value.

The research has also identified and discussed (mainly at Ch.VI.F.3) potential new configurations of arrangement such as certain types of 'frameworks in frameworks'. It has been found that whilst these could prove very useful devices for centralised purchasing, the risks they pose are elevated, and would thus require significant strengthening of certain requirements concerning their operation.

In light of the complexity and volume of this research project, the summary of findings/outcomes provided above presents an inherent risk of 'over-simplification' and removal of some issues from the context generating them. They have thus been presented here subject to this reservation; a

reference is made to Chapter VI for overall findings and proposals, and to system chapters for findings pertaining to individual systems. A summary of main (recent) developments of the NTRPA phenomenon in the systems examined is presented below.

Recent reforms of major public procurement systems have generally manifested a continued preference for framework arrangements over supplier list type of arrangements[2]. The 2011 UNCITRAL Model Law on Public Procurement missed the opportunity to recognise 'lists'. Similarly, the 2014 EU public sector directive did not 'import' qualification systems from the utilities sector. In effect, EU Member States too are prevented from employing such arrangements. Further, the new 2016 WB regulations do not appear to envisage any longer 'pre-qualification' for a number of contracts to be awarded in time.

As discussed, reservations towards supplier lists do not appear justified if proper regulation of such arrangements is in place. This includes, without limitation, permanent advertising as well as ensuring sufficiently effective review mechanisms (including judicial) so as to maintain the list genuinely open to newcomers throughout the duration of the arrangement, on the basis of objective criteria and equal treatment[3]. Imbalanced caution has been exercised so far with regard to recognising open supplier lists and this deprives purchasers from valuable vehicles for efficient grouping and organising of a wide range of indefinite but predicted purchasing needs.

[2] Exception to this is provided by partial 'migration' of dynamic purchasing systems in EU public and utilities sectors toward 'list' type of arrangement.

[3] Closed 'lists' (and in particular mandatory ones) should not be permitted though, since they can easily affect the benefits of real and substantive competition.

In this connection, it can be argued that the 2014 EU public sector directive offers a particularly dichotomist approach, if not a double standard as regards 'caution' in addressing NTRPA. In parallel with barring mandatory open lists, that directive may also prevent Member States from limiting – through domestic legislation – the use of frameworks to certain types or purchasers, or from providing for additional conditions and controls to their operation. At the same time, continuing limited attention has been given in the directive to a number of aspects concerning framework agreements, which could quite easily offer gaps sheltering improper or abusive use of such arrangements.

From the case studies of this thesis, it can be noticed that many types (or configurations) of arrangement are missing from one system or another. It is not suggested that all systems should permit the same types or configurations of NTRPA, or, even less so that they should be regulated in exactly the same way. Even with the increased harmonisation brought about by international trade agreements, much will continue to depend on the objectives of individual systems, institutional and human resource capacity, legal or administrative culture. Nevertheless, wide ranges of possible NTRPA are repudiated from the current systems, whereas some aspects of the recognised arrangements may benefit from increased attention in the regulation. This seems a common feature of current systems, subject to varying degrees.

The system currently providing for the widest range of NTRPA seems to be the EU utilities sector, whereas the most comprehensive and balanced

approach to 'framework' type of arrangements appears to be offered by the 2011 UNCITRAL Model Law and the accompanying guidance for implementation[4]. The US continues to offer the only centralised arrangement for regular purchases establishing terms at first stage on the basis of the supplier's most convenient terms in its previous business, rather than a competitive exercise (GSA Schedules).

More generally[5], procurement needs with some degree of regularity as well as some degree of uncertainty are a usual and frequent occurrence for many purchasers. The sheer (and increasing) volume of purchases under framework agreements in the EU or, for example, GSA Schedules in US is testimony of this. Some (rather few) types of NTRPA in the spectrum are quite similar to 'traditional procurement'. But the majority of the possible NTRPA present very specific features stemming the plurality of the uncertain or indefinite aspects involved (terms, commitment, specification), as well as from the plurality of suppliers and/or purchasers involved in the same arrangement (which can itself be definite or indefinite[6]).

In the current author's view the regulation of all these complexities requires a direct and comprehensive approach, rather than a fragmented approach based on 'traditional', 'one-off', single-agency single-contractor procurement, that is "patched" in various ways so as to cater for NTRPA[7]. The

[4] Which the current author recommends to be considered *mutatis mutandis* even in systems which are not necessarily based on the UNCITRAL system (such as EU member states).
[5] I.e. not in relation with any specific procurement system.
[6] See Ch.VI.C.3.
[7] As is pretty much the case of the current regimes (which seem to deal with NTRPA 'by way of exception', in an indirect or accessory fashion). For example, 'wrapping'

limits of adapting 'traditional' procurement to 'indefinite' purchasing have already been discussed. They range from getting stuck into inadequate concepts, such as requiring the outcome of the first stage of a framework arrangement to be a contract[8], or even a procurement contract, to difficulties in regulation arising from trying to regulate too large a range of arrangements under the same 'roof'[9], or to preventing certain configurations which may be useful in some circumstances[10].

Structuring procurement regulation in two main areas appears thus sensible: one dealing with definite or 'one-off' (traditional) purchases, and the other one dealing with indefinite or regular (non-traditional) purchasing. Focusing on the latter should facilitate appropriate consideration and development of aspects that may not be immediately visible from a 'traditional' purchasing perspective, in particular those that arise from unexpected consequences of the complexities involved by some NTRPA. Examples could include, in the case of open arrangements, consequences of overlaps between stages in terms of procedures or in terms of judicial review. Another example of an aspect which may be less immediately visible from a 'traditional' purchasing angle concerns the possibility of what we called 'frameworks within frameworks', which has not received significant developments recently[11].

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dynamic purchasing systems in the EU directives with a restricted procedure 'cover' appears somewhat of a fiction.

[8] See France, or US ID/IQ.

[9] EU framework agreements.

[10] Amongst others, mandatory lists.

[11] See Ch.VI.F.3.

Matters like these also open gates for further research. One main 'candidate' could be the potential application in various systems of 'generalist' judicial review action to areas insufficiently covered by procurement specific remedies, with a view to develop and reform the latter. Another useful subject for further research could be the use of NTRPA by centralised and joint procurement structures. In this context 'frameworks in frameworks', alternative procedures for establishing terms at first stage, choosing among different types of pre-existing NTRPA, and stage consistency could be investigated. Certainly, the scope of the current research could be expanded to other procurement systems, such as obligations under GPA or systems in other geographical areas. It will be interesting to see NTRPA in post-Brexit UK.

The last 15 years have brought significant progress in the area of NTRPA. Milestones clearly include the recognition of framework agreements in the EU 2004 public sector directive, the recognition of both closed and open framework agreements in the 2011 UNCITRAL Model Law on Public Procurement, and the review of the dynamic purchasing systems in the 2014 EU directives. Still, the current author anticipates that major reforms in the field of regular or indefinite purchasing are yet to come. This research and the approach proposed provide a contribution to achieving a balanced and open regulation in the future, to implementation of current systems and to academic understanding and analysis of the phenomenon of NTRPA.

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