

“Preventing Collusive Tendering in Public Markets- The Case of Framework Agreements”

Abstract:

Anti-competitive activities, like bid-rigging, undermine the main objectives at the heart of public procurement, such as value for money and efficiency in the procurement process. The magnitude of the problem in Europe is demonstrated by the frequency of scope of bid-rigging cases. As it has already been underlined in the literature, bid rigging may arise particularly in the context of framework agreements, which are constantly gaining ground in public procurement and are rather popular in Northern Europe. In light of the framework agreements’ popularity in Europe and their vulnerability to collusion, this article will identify the elements of a framework agreement that make coordination feasible and bid rigging attractive to the suppliers admitted to the framework agreement. As we will see, the temptation of suppliers to coordinate and make additional profits remains always the same, regardless of whether or not the market was competitive before the framework agreement procedure. This article will also make and discuss a number of suggestions for preventing the problem of collusion in framework agreements, with the aim of introducing new design features that will significantly reduce the scope for collusive outcomes within the procurement function.

KEYWORDS: collusion, bid-rigging, public tendering, public procurement, public market, framework agreements, framework contracts, dynamic purchasing system.

1. Introduction:

Public procurement and competition law are two distinct bases of knowledge with different concerns and priorities arising out of the choice of procurement procedures, techniques and instruments for electronic and aggregated procurement. On the one hand, the pursuit of value for money is a key concern of contracting authorities when they choose one of the procurement procedures and techniques clearly listed in the European Directive 2014/24/EU on the public sector, they design the form of the public

contract and they select a provider to carry out the public contract.¹ Apart from the value for money, the EU public procurement law is also concerned with the elimination of corrupt activities in government procurement, the accountability to the public and the fair treatment of those doing business with government.² What is more, individual contracting authorities want to keep low any complexity, administrative burdens and transaction costs and they may use procurement even as a domestic policy tool, for instance in order to support regions with high unemployment or disadvantaged national groups.³ On the other hand, the main concern of competition law is the consumer welfare, the fair competition and the deterrence of certain anti-competitive practices, such as bid rigging, which are against the interests of consumers.⁴

Anti-competitive activities, like bid-rigging, undermine the main objectives at the heart of public procurement, such as value for money and efficiency in the procurement process. The magnitude of the problem in Europe is demonstrated by the frequency of scope of bid-rigging cases. For example, in 2009 the Office of Fair Trading (“OFT”) in the United Kingdom imposed fines amounting £129.2 million on 103 construction firms in England for engaging in anticompetitive bid rigging activities on 199 tenders from 2000 to 2006.⁵ The value of the building projects affected across England was in excess of £200 million including schools, universities, hospitals, and many private projects from the construction of apartment blocks to housing refurbishments.⁶ Similarly, between February and May 2004 almost 150 Dutch construction companies reported themselves at the Netherlands Competition Authority for bid rigging activities, while in October 2004 almost 500 construction companies received a report by the

¹ Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (2nd edition, Sweet & Maxwell, 2005), para 1.04; OECD & EU “Sigma Public Procurement Brief 10- What are the Public Procurement Procedures and When Can They be Used?”, available at www.oecd-ilibrary.org/governance/what-are-the-public-procurement-procedures-and-when-can-they-be-used_5js4wzv53043-en [accessed on 17 April 2019].

² Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (2nd edition, Sweet & Maxwell, 2005), paras 1.05 and 1.06.

³ *Ibid*, para 3.04; Sue Arrowsmith, *The Law of Public and Utilities Procurement Volume 2: Regulation in the EU and the UK*, (Sweet & Maxwell, 2017), para 20.03.

⁴ Richard Whish and David Bailey, *Competition Law* (7th edition, Oxford University Press, 2012), pp 19-23.

⁵OFT “Bid Rigging in the Construction Industry in England” <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/bid_rigging_construction>accessed on 10 February 2016. See also Aris Georgopoulos “Office of Fair Trading Report: The Impact of Public Procurement on Competition” (2005)14(2) P.P.L.R.

⁶ *Ibid*.

Netherlands Competition Authority in which they were accused of violating the Competition Act.⁷ The media suggested that these malpractices robbed the taxpayer of about €0.5 billion each year.⁸ These are only illustrative examples of some of the largest cases, but they give an indication of the scale of bid-rigging practices.⁹

The principal provision to control anticompetitive behaviour by cartels (including bid-rigging behaviour) is Article 101(1) of the Treaty on the Functioning of European Union (TFEU). Article 101 TFEU prohibits any agreement or concerted practice made between undertakings (essentially every entity engaged in an economic activity)¹⁰ as well as any decision made by associations of undertakings that may affect trade between Member States and that has as its object or effect the prevention, restriction or distortion of competition within the internal market. Article 101 TFEU is only concerned with agreements, concerted practices or decisions made by associations of undertakings which may have an appreciable effect on trade between the European Member States, drawing in this way the line between areas which are covered by EU law and those which are covered by national law. Though nowadays every European Member State has a domestic equivalent to Article 101 that must be consistent with EU law, this concept is still very important because it has two implications. The first one is that national courts and national Competition Authorities must apply EU law, when trade between Member States is affected.¹¹ The second one is that national courts and national Competition Authorities cannot apply a stricter national law than EU law to agreements.¹²

⁷OECD "Guidelines for Fighting Bid Rigging in Public Procurement-Helping Governments to Obtain Best Value for Money" <<http://oecd.org/competition/cartels/42851044.pdf>>accessed on 10 October 2019, 2

⁸ André Dorée "Collusion in the Dutch Construction Industry: An Industrial Organisation Perspective" (2004)32 (2) Building Research and Information, 146-156.

⁹ Indicatively see Belgian Competition Authority "The Belgian Competition Authority Fines Several Companies for Bid-Rigging (Siemens)" 3 May 2017, e-Competitions Bulletin May 2017, Art. No 84204; Croatian Competition Authority "The Croatian High Administrative Court Fines Several Personal Protection Firms for Cartel (Sokol Marić)" 30 May 2016, e-Competitions Bulletin, May 2016, Art. No 79884; Cypriot Competition Authority "The Cypriot Competition Authority Fines Several Companies for Bid-Rigging in the Supply and Transportation of Ready-Mix Concrete Market (Mattheos Ioannou Ready Mix Concrete/C. Kythreotis Skyrodema/ Skyramix...)" 15 May 2019, e-Competitions Bulletin May 2019, Art. No 90627; Danish Competition Authority "The City Court of Hillerød Fines Two Members of the Management of a Now Dissolved Demolition Company for Bid Rigging" 11 January 2019, e-Competitions Bulletin January 2019, Art. No 89002.

¹⁰ Case 41/90, Höfner and Elser v. Macroton GmbH (1991) ECRI-1979.

¹¹ Regulation 1/2003, Article 3(1).

¹² Ibid, Article 3(2).

Article 101 TFEU is significant for public procurement, not only because it applies to purchasing behaviour but also because it regulates the behaviour of providers who participate in public procurement procedures.¹³ As it has already been underlined in the literature, bid rigging may arise particularly in the context of framework agreements¹⁴. Therefore, this article focuses on framework agreements and scrutinizes the specific procurement technique which presents a particular risk of being misused for collusion¹⁵. It is argued that there is inherent structural inefficiency in the way that the framework agreement procedure is designed and run under 2014/24/EU Directive on the public sector and so there is need to adopt design features that significantly reduce the scope for collusive outcomes, with a view to ensuring fair competition for public contracts and optimal procurement outcomes. Efficient procedures and techniques which ensure that contracting authorities obtain the best possible offer with efficient use of public funds are of crucial importance in the context of the severe budgetary constraints and economic difficulties in many EU Member States.¹⁶ The significance of designing and running the framework agreement procedure with a view to preventing the risk of collusion is even more apparent if one takes into account that framework agreements are constantly gaining ground in public procurement. Their use since 2006 has been increasing at an average 18 per cent per year.¹⁷ These procurement techniques are rather

¹³ Sue Arrosmith *The Law of Public and Utilities Procurement Volume 1: Regulation in the EU and UK* (Sweet & Maxwell, 2014), para. 4-117; Stefan Weishaar, *Cartels, Competition and Public Procurement: Law and Economic Approaches to Bid Rigging* (Edward Elgar, 2013); John Temple Lang “Subsidiarity and Public Purchasing: Who should apply Competition Law to Collusive Tendering and How Should They Do It?” (1998)4(1) E.P.L. 55; Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP, 2004),115–118; Gian Luigi Albano, Paolo Buccirossi, Giancarlo Spagnolo and Matteo Zanza, “Preventing collusion in procurement” in N. Dimitri, G. Piga and G. Spagnolo (eds), *Handbook of Procurement* (CUP, 2006) 347; Robert D. Anderson and William Kovacic, “Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets” (2009) 18 P.P.L.R 67.

¹⁴ Sue Arrosmith *The Law of Public and Utilities Procurement Volume 1: Regulation in the EU and UK* (Sweet & Maxwell, 2014), para. 4-117; Peter Arden “Legal regulation of multi-provider framework agreements and the potential for bid rigging: a perspective from the UK local government construction sector” (2013) 22 P.P.L.R. 165.

¹⁵ G. L. Albano and C. Nicholas “Description, Taxonomy and Motivations for Using Framework Agreements” in Gian Luigi and Caroline Nicholas (eds), *The Law and Economics of Framework Agreements-Designing Flexible Solutions for Public Procurement* (Cambridge University Press, 2016), p.186.

¹⁶ European Commission “Green Paper on the Modernisation of EU Public Procurement Policy Towards a More Efficient European Procurement Market, Brussels 27.2011”, COM (2011)15 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0015&from=EN> [accessed on 10 February 2019], p. 3.

¹⁷ PwC, London Economics and Ecorys for the European Commission “Public Procurement in Europe- Cost and Effectiveness” (2011), available at

popular in Northern Europe, while a growth has been noticed in large procurers such as France and Spain.¹⁸ Indicatively, “from 2006 to 2009 the use of framework contracts has increased by almost a factor of four” and “in 2009 over 25.000 framework contracts amounted to about one seventh of the value of all contracts published in the Official Journal of the European Union”.¹⁹

In light of the framework agreements’ popularity in Europe and their vulnerability to collusion in some particular circumstances, as it will be thoroughly explained hereinafter, this article will identify all these elements of a framework agreement that make coordination feasible and bid rigging attractive to the suppliers admitted to the framework agreement. As we will see after analysing the pro-collusive features of framework agreements, the temptation of suppliers to coordinate and make additional profits remains always the same, regardless of whether or not the market was rather competitive before the framework agreement procedure. Therefore, this article will make and discuss a number of suggestions for preventing the problem of collusion in framework agreements, with the aim of introducing new design features that will significantly reduce the scope for collusive outcomes within the procurement function. Sanctions and enforcement measures undertaken by competition authorities where collusion is detected are topics that fall outside the remit of this article. Hence, the paper is structured as follows. Section 2 explains the current law that applies to framework agreements and describes the main forms of a framework agreement. Section 3 identifies and analyses the bid rigging issues that arise from the design of a framework agreement and the way that its procedure runs. In section 4, unique points are raised and policy-oriented suggestions are made in order to prevent anti-competitive practices in the context of framework agreement procedures. Section 5 brings the article to a close with some concluding remarks.

2. Description of the applicable law and the main forms of a framework agreement

<https://ukmin.lrv.lt/uploads/ukmin/documents/files/Studija%20d%C4%97l%20kainos%20ir%20efektyvumo%20vie%C5%A1uosiuose%20pirkimuose.pdf> [accessed on 17 April 2019], p.5.

¹⁸ Ibid.

¹⁹ European Commission “Evaluation Report-Impact and Effectiveness of EU Public Procurement Legislation, Part 1” (2011), available at <http://ec.europa.eu/transparency/regdoc/rep/2/2011/EN/SEC-2011-853-F1-EN-MAIN-PART-1.PDF> [accessed on 17 April 2019], p. 8.

The old Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts was the first legislative document that authorised and regulated the use of framework agreements in the EU as a flexible tool for aggregated procurement. Yet, they are not necessarily a general procurement tool, since they are designed for particular types of procurement products. According to Article 1, paragraph 5 of this old Directive, which is the same as Article 33, paragraph 1 of the current Directive, framework agreement 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.

The term of a framework agreement shall not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement”.

Framework agreements were introduced in order to enable contracting authorities to achieve administrative and price efficiencies. In this way, the award of multiple contracts by a single contracting authority or by a central purchasing body²⁰ (“CPB”), which is usually organised as a government agency or as a limited non-profit company and acts for or on behalf of several contracting authorities, is possible without having to repeat the same or similar tendering processes but by establishing an approved list of suppliers that have been enrolled in the framework.²¹ At the same time, contracting authorities’ buying power gets greater.²² By strengthening their buying power, contracting authorities have the opportunity to pool skills and expertise as well as to share the risks and costs that arise in a procurement process.²³

²⁰ OECD “Centralised Purchasing Systems in the European Union- SIGMA Papers No. 47”, available at www.oecd-ilibrary.org/governance/centralised-purchasing-systems-in-the-european-union_5kgkgqv703xw-en [accessed on 17 April 2019].

²¹ R. Canavan “Public Procurement and Frameworks” in Christopher Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar Publishing 2016), 119; M. Andrecka “Clarification or Missed Opportunity? The Provision on Framework Agreements in the 2014 Directive” in G. Skovgaard Ølykke and A. Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing 2016), 216.

²²The fact that contracting authorities have buying power does not mean that they necessarily have market power as competition lawyers might understand it.

²³ Andrecka (fn 21), 217.

Here is an example framework with two agreements:

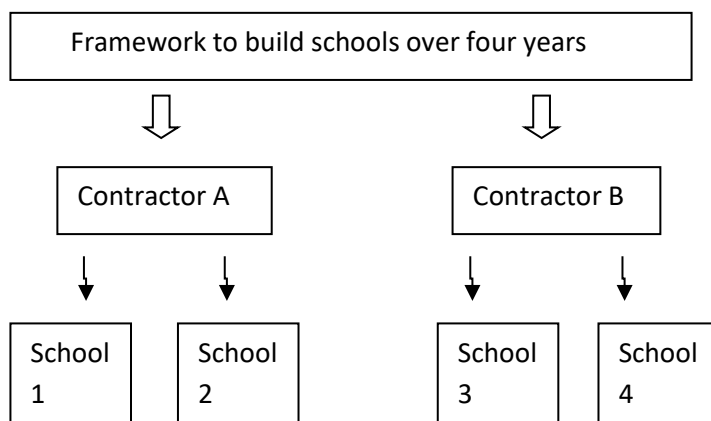


Figure 1*

After the enactment of Directive 2014/24/EU on the public sector, further flexibility has been noticed in the already satisfactory provisions of the old Directive regarding framework agreements. The most important changes made were firstly the mandatory implementation of the rules on framework agreements which used to be voluntary for the Member States and secondly the fact that contracting authorities can choose to apply more than one type of procedure in order to award the public contract. According to Recital 61 of the current Directive:

“Contracting authorities should be allowed to obtain specific works, supplies or services that are covered by the framework agreement, either by requiring them from one of the economic operators, determined in accordance with objective criteria and on the terms already set out, or by awarding a specific contract for the works, supplies or services concerned following a mini-competition among the economic operators parties to the framework agreement”.

Framework agreements are mainly used for repeat purchases of relatively standard and simple goods, like office and simple information and communication technology (ICT) supplies or services, such as maintenance contracts.²⁴ Apart from the off the shelf

* The figure was taken from the website Constructing Excellence “What is a Framework?” available at <http://constructingexcellence.org.uk/tools/frameworkingtoolkit/what-is-a-framework/> [accessed on 17 April 2019].

²⁴ G. L. Albano and C. Nicholas “Description, Taxonomy and Motivations for Using Framework Agreements” in Gian Luigi and Caroline Nicholas (eds), *The Law and Economics of Framework Agreements-Designing Flexible Solutions for Public Procurement* (Cambridge University Press, 2016), p.5.

supplies and relatively straightforward services markets, framework agreements may be of much wider beneficial application. Indicatively, it shall be mentioned that they may be useful in emergencies and other urgent situations as well as in the case of “specialised items requiring a dedicated production line and/or items that need to be tailored to the needs of the procuring entity, where the need is identified but the time for their request is still unknown”.²⁵ Framework agreements are also used in relatively concentrated markets where repeat procurement is appropriate, though this is not very common. This kind of markets may regard fuel supplies, airline or car rental services, regional janitorial, consulting or advisory services.²⁶ An illustrative example is the National Fuels framework agreement in the UK which constitutes a “one-stop-shop for all fuels and associated services without the need to trawl through a number of frameworks across multiple professional buying organisations”.²⁷

The standard steps that are usually taken in a framework agreement procedure are the following ones²⁸:

- (a) an invitation to economic operators to participate in the procedure, which describes the procurement entity’s needs, the terms as well as the conditions of the procurement
- (b) the selection of one or more suppliers which was made after the assessment of the economic operators’ qualifications and responses
- (c) the procurement entity enters into a framework agreement with the selected supplier(s)
- (d) placing orders with the selected supplier(s) as soon as a particular need arises.

The first three steps-invitation to participate in the procedure, selection of supplier(s) and entrance into a framework agreement with the selected supplier(s)- constitute the first stage of the procedure. The fourth step -placing orders with the selected

²⁵ Ibid, p.5, 28.

²⁶ Ibid, 187, 217.

²⁷ Crown Commercial Service “National Fuels” available at <https://ccs-agreements.cabinetoffice.gov.uk/contracts/rm3801> [accessed on 17 April 2019].

²⁸ G. L. Albano and C. Nicholas “Description, Taxonomy and Motivations for Using Framework Agreements” in G. L. and C. Nicholas (eds), *The Law and Economics of Framework Agreements- Designing Flexible Solutions for Public Procurement* (Cambridge University Press, 2016), p. 13.

supplier(s)- constitutes the second stage of the framework agreement procedure.²⁹ When the procurement entity establishes all the terms and conditions of a framework agreement at the first stage, so that no further arrangements with the supplier(s) may be subsequently needed, this class of framework agreement is known as a “*framework contract*”.³⁰

Framework contracts take the form of arrangements with one supplier and they are concluded either when the purchase order for the required goods or services is issued or when the relevant purchase order is accepted, without needing to run a second round of competition among potential suppliers³¹. As all the forms of a framework agreement, framework contracts are a closed system, in a sense that neither new contracting authorities nor new suppliers can be added to it during its lifetime.³² The use of framework contracts is quite restricted as there is need to identify at the outset those procuring entities able to apply them, without enabling any other procuring entities to use them.³³

The second form of a framework agreement is based on two rounds of competition among suppliers, both at the first and at the second stage of the framework agreement procedure. This form of framework agreements involves more than one supplier, , meaning that the procurement entity is able to enter into a framework agreement with only two economic operators, even if other admissible tenders were also submitted.³⁴

Below, there is a diagram that explains further what has been said so far:

²⁹ Ibid.

³⁰ Ibid, 16-17.

³¹Ibid; S. Arrowsmith “An Assessment of the New Legislative Package on Public Procurement” (2004)41 Common Market Law Review, p.1293.

³² 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 P.P.L.R, 202.

³³ Albano and Nicholas (fn 15), 17.

³⁴ Risvig Hamer (fn 32), 202.

* The figure was taken from the website Office of Government Commerce (OGC) “OGC Guidance on Framework Agreements in the Procurement Regulations September, 2008, available at http://webarchive.nationalarchives.gov.uk/20100519202848/http://www.ogc.gov.uk/documents/OGC_Guidance_on_Framework_AgreementsSept_08.pdf [accessed on 17 April 2019].

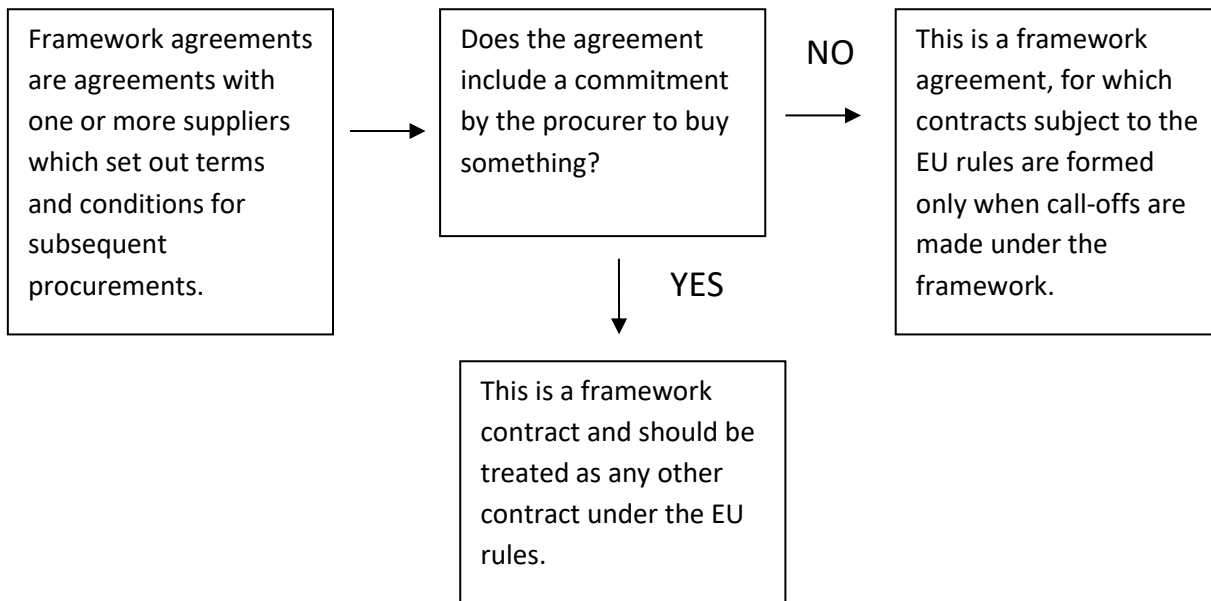


Figure 2*

At the first stage of the procedure, only part of the framework agreement’s terms and conditions are laid down so that a secondary competition or a “mini-tender” phase be indispensable in order to identify the suppliers with which the procuring entity will finally conclude the public contract.³⁵ This means that until the second stage of the procedure, no awardees are identified but only a limited number of suppliers which have the best offers to enter into a framework agreement with the procuring entity. The reason for such an award procedure is that sometimes a procuring entity is not in a position to know beforehand the quantity, nature or timing of its requirements over a period of time and so it prefers to define these parameters later on, as soon as the need arises.³⁶ This is a *stricto sensu* framework agreement and it is a closed system, as already explained above.³⁷

Apart from the aforementioned type of award procedure, in this form of framework agreement the procuring entity has also the right to choose whether specific works,

³⁵ Article 33, paragraph 4, (c) of the new Directive.

³⁶ Albano and Nicholas (fn 15), 4.

³⁷ European Commission, Directorate General Internal Market and Services “Explanatory Note-Framework Agreements-Classic Directive” (2005) available at <<http://ec.europa.eu/geninfo/query/resultaction.jsp?QueryText=Explanatory+Note%3A+Framework+Agreements+%E2%80%93+Classic+Directive&sbtSearch=Search&swlang=en>> [accessed on 17 April 2019].

supplies or services shall be acquired following a reopening of competition or directly on the terms already set out in the framework agreement.³⁸ The possibility for the *stricto sensu* framework agreement to contain both types of award procedures was first discussed in case law in both Denmark and Sweden³⁹ before Directive 2014/24/EU clarified this point. This flexibility given to procuring entities is particularly significant in case of a CPB which has to deal with many contracting authorities having different needs as well as with public contracts of various complexity and value.⁴⁰ Below, there is a diagram which outlines the types of the award procedure in case of *stricto sensu* framework agreements:

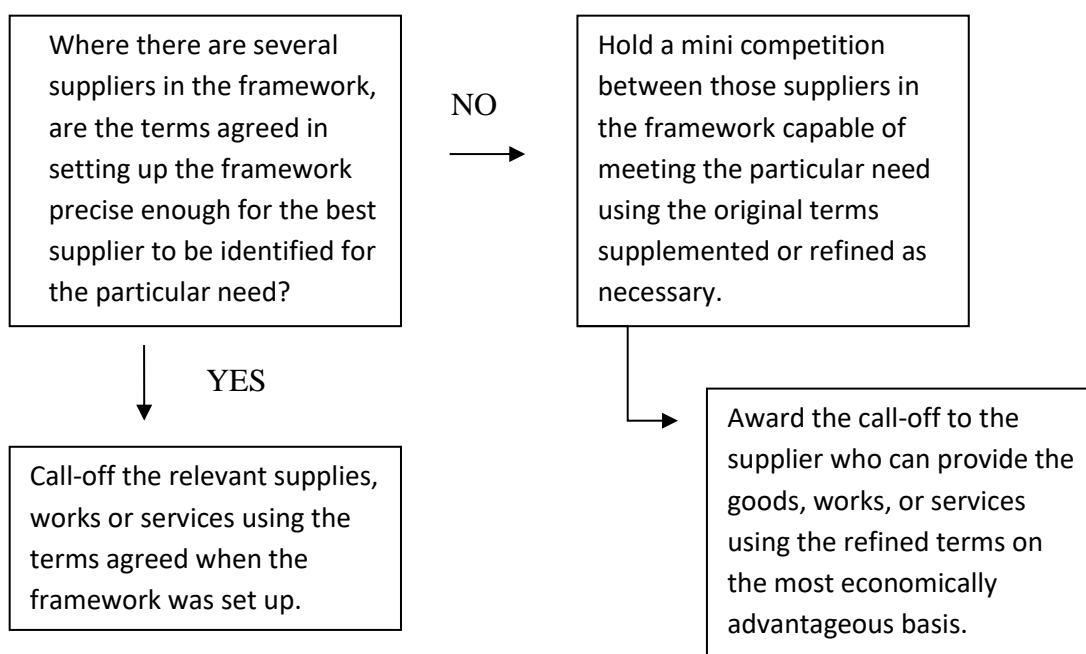


Figure 3*

The third form that a framework agreement can take differs from the others in that it is an open system, allowing new suppliers to become parties to it after its conclusion.⁴¹ Like the *stricto sensu* framework agreement, not all terms and conditions are

³⁸ Article 33, paragraph 4, (b) of the new Directive.

³⁹ Risvig Hamer (fn 32).

⁴⁰ Ibid, 203.

* The figure was taken from the website Office of Government Commerce (OGC) "OGC Guidance on Framework Agreements in the Procurement Regulations September, 2008" <http://webarchive.nationalarchives.gov.uk/20100519202848/http://www.ogc.gov.uk/documents/OGC_Guidance_on_Framework_AgreementsSept_08.pdf> accessed on 17 April 2019.

⁴¹ Albano and Nicholas (fn 15), 19.

determined beforehand, so that a second round of competition may be necessary. This form of framework agreement is called by Directive 2014/24/EU “*dynamic purchasing system*”. It is recognised as the most successful type of procedure as far as the attraction of bidders is concerned, because of the “fluid nature of the participants”.⁴² It is a completely electronically based process for commonly used purchases which are easily available on the market.⁴³ It takes place as a form of the restricted procedure and its use is rather rare, though it has more than doubled since 2007.⁴⁴

3. The pro-collusive features of framework agreements

The Closed Nature of Framework Agreements

The first bid rigging concern deals with the “closed” system of the two forms of framework agreements, meaning the framework contract and the *stricto sensu* framework agreement. As already explained, in both cases it is impossible for new tenderers to take part in the process and enter into the agreement after its conclusion, as orders are placed by reference solely to the tenders submitted by the suppliers to gain access to the framework. This automatically creates a high barrier to entry, which limits the market for the subject matter of the framework agreement at issue, since outside competitors are excluded from it for the whole duration of the framework agreement.⁴⁵ These circumstances are common and known to economic operators every time the procurement technique of framework agreement is used. Consequently, the firms that enter into such an agreement are aware in advance of their interdependence as well as of the fact that no matter what, their number and composition will remain fixed throughout the duration of the framework agreement. An illustrative example of a bidding ring that was facilitated by the limited number of competitors in the tenders of a three year framework agreement is the Arro, Caverion and Pettersen bid rigging cartel in Norway.⁴⁶ The three aforementioned undertakings had a three year framework

⁴² PwC, London Economics and Ecorys for the European Commission (fn 17), 95. See also R. Canavan (fn 21), 124.

⁴³ PwC, London Economics and Ecorys for the European Commission (fn 17), 23.

⁴⁴ *Ibid*, 24 and 38. See also R. Bickerstaff “E-Procurement Under The New EU Procurement Directives” (2014) (3) PPLR, 144.

⁴⁵ Albano and Nicholas (fn 15), 187; See also I. Herrera Anchustegui “Centralizing Public Procurement and Competitiveness in Directive 2014/24” (July 2015) < <https://dx.doi.org/10.2139/ssrn.2633445>> accessed on 17 April 2019.

⁴⁶ Norwegian Competition Authority “Undertakings Fined Millions for Bid Rigging” (October 2015) < <https://konkurransetilsynet.no/undertakings-fined-millions-for-bid-rigging/?lang=en>> accessed on 10

agreement with Vestre Viken hospital trust, a health enterprise in the Drammen area, and they were the only permitted bidders in limited tenders for electrical services.⁴⁷ This means that whenever this hospital trust required electrical services, only these three pre-qualified firms were invited to bid for the contracts. After the Competition Authority in Norway proceeded to an unplanned on-site inspection to investigate potential breaches of competition law⁴⁸, it was discovered that these three firms participated in collusive bidding by allocating contracts between themselves, whilst the relevant contracting authority was under the impression that the bidding was competitive.⁴⁹ As a result, the bid riggers could offer any price to the health enterprise in the knowledge that the winning undertaking would not be outbid.⁵⁰ As the Director General of the Norwegian Competition Authority, Mrs. Christine B. Meyer, characteristically stated “This case shows that limiting the number of competitors in tenders may facilitate cartels”⁵¹. The recognised interdependence and the high barriers to entry/expansion are the necessary preconditions for an oligopolistic market.⁵² In an oligopolistic market, the supply side is concentrated in the hands of relatively few firms and for this reason the danger of bid rigging is apparent.⁵³ Likewise, in a closed framework agreement the market can be characterised as static and oligopolistic⁵⁴,

October 2019. See also OECD Competition Committee “Annual Report on Competition Policy Developments in Norway, 2014”, available at www.konkurransetilsynet.no/globalassets/filer/publikasjoner/oecd-bidrag/2015/annual-report---norway---2014---daf-comp-ar201547-eng.pdf [accessed on 17 April 2019], p. 8.

⁴⁷ Ibid.

⁴⁸ In terms of competition law, this kind of investigation is called “dawn raid”.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Norwegian Competition Authority “Undertakings Fined Millions for Bid Rigging” (October 2015) <<https://konkurransetilsynet.no/undertakings-fined-millions-for-bid-rigging/?lang=en>> accessed on 10 October 2019.

⁵² OECD “Policy Roundtables-Oligopoly” (1999), available at: www.oecd.org/daf/competition/1920526.pdf [accessed on 17 April 2019], p.20.

⁵³ Joe S. Bain, *Industrial Organisation* (John Wiley 1968),462-463; George J. Stigler “A Theory of Oligopoly” (1964)72(1) *The Journal of Political Economy*, 44, 51-56; Edward Hastings Chamberlin, *The Theory of Monopolistic Competition: A Re-Oriented of the Theory of Value* (Cambridge Mass: Harvard University Press, 1966), 46-51; Slightly different approach by Demsetz and Weiss who argue accordingly that collusion accompanied by superior performance is facilitated by market concentration and that besides concentration, there are also many other variables conducive to collusion, see Harold Demsetz, *The Market Concentration Doctrine-An Examination of Evidence and A Discussion of Policy* (AEI-Hoover Policy Studies, 1973), 20 and Leonard W. Weiss “The Structure-Conduct- Performance Paradigm and Antitrust”(1979)127(4)*University of Pennsylvania Law Review*, 1118.

⁵⁴ Framework agreements may establish an oligopoly in the sense that the use of long-term framework agreements and the absence of second-stage competition might be seen as partitioning off or insulating part of the demand in the market, reducing in this way the area in which competitive forces can apply. Whether this creates anti-competitive structure in the market will also depend upon the proportion of the market that the particular public buyer has in the market.

“erecting a protective ring around those few vendors that hold standing agreements with the Government”⁵⁵. This is particularly true as in practice, the average number of suppliers with whom a multi-provider framework is concluded is 4.4.⁵⁶ “Once firms are aware of their interdependence they cannot be expected or easily compelled to ignore that in deciding their competitive behaviour”.⁵⁷ This is because coordination becomes feasible in view of the small number of market players that will be known to each other, assuming normal transparency mechanisms apply.

A number of potential obstacles facilitate collusion between firms being in a framework agreement. First of all, it is practically difficult for a contracting authority to address to new contractors outside the framework agreement, for an improved value for money, in case there are great discrepancies between the prices required by the potential framework suppliers and the relevant market prices. By holding a new tendering procedure together with a new OJ advertisement in case the contracting authority does not agree with the prices stated in the mini competition by the framework suppliers, it is like undermining the administrative convenience at which framework agreements primarily aimed as a procurement technique. It demands a lot of time and money to use again a new procedure for seeking new tenders from the open market outside the framework agreement. At the end of the day, this may be even more costly and burdensome for the public sector than the high prices paid to framework suppliers. The only way for a contracting authority to ask for changes to the prices submitted for the original framework, without a new procurement procedure, is when there is a provision in the framework agreement for a price revision clause.⁵⁸ The exercise of such a clause can involve even the substitution of a supplier.⁵⁹ However, the drafting of such a clause must be “clear, precise and unequivocal” and it shall state “the scope and nature of possible modifications or options as well as the conditions under which they may be

⁵⁵ C. R. Yukins “Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting” (2008)37(3) Public Contract Law Journal, p. 557

⁵⁶ PwC, London Economics and Ecorys for the European Commission (fn 17), p. 146, fn 109.

⁵⁷ *ibid*, 19; See also D. Yao and S. S. DeSanti “Game Theory and the Legal Analysis of Tacit Collusion” (1993)38(1) The Antitrust Bulletin, p. 117.

⁵⁸ Article 72, para 1(a) of Directive 2014/24/EU; S. Treumer “Contract Changes and the Duty to Retender under the New EU Public Procurement Directive” (2014)3 Public Procurement Law Review; See also *Denfleet International Ltd v. NHS Purchasing and Supply Agency and others* (2005) EWHC 55 (Admin).

⁵⁹ Local Government Association “Changes to Contracts” available at: www.local.gov.uk/national-procurement-strategy/pcr-toolkit-2015/what-improvements-can-we-make-way-we-buy/changes [accessed on 17 April 2019].

used”.⁶⁰ Otherwise, there is always the risk that the contracting parties may interpret the clause differently, without agreeing about whether there are indeed changes of circumstances that justify a revision of the price. In such a case, the relevant contract term may be submitted to arbitration or jurisdiction which is a quite costly and time-consuming procedure for public sector. Moreover, the inclusion of price revision clauses may bring additional costs to procurement entities because usually a form of retainer must be paid to a framework supplier in order for him to remain capable to deliver at all times under the framework agreement, despite the risk of fluctuations in the market.⁶¹ Additionally, there are cases where despite the inclusion of a price revision clause, a supplier under a framework agreement is *de facto* in a position of control and so he is able to dictate the price anyway. Indicatively, this may happen when “only one supplier under the framework agreement is prepared to meet a particular call-off”.⁶²

The repercussions of the high barriers to entry that the closed system of framework agreements creates are rather remarkable when framework agreement procedures are used in markets where many SMEs are found. This is something particularly common because SMEs are frequently involved in framework agreement procedures, as most SMEs are active in the service sector, especially in wholesale and retail trade, hotel and restaurant businesses, communications and business services and construction, while they are increasingly present in technology-intensive industries, such as information and communications technology and biotechnology.⁶³ As already explained in the previous section, simple services are one of the sectors for which framework agreements are particularly suitable. Therefore, the framework agreements’ closed system blocks access to the contracting authority’s demand as well as the SMEs’ participation in meeting that demand.

Homogeneity among Procurement Contracts and Price-Driven Competition at the Call-Off Stage

⁶⁰ Article 72, para 1(a) of Directive 2014/24/EU.

⁶¹ Canavan (fn 8), p. 145.

⁶² *ibid.*

⁶³ OECD “Policy Brief-Small and Medium-Sized Enterprises: Local Strength, Global Reach” (June 2000) available at: www.oecd.org/cfe/leed/1918307.pdf [accessed on 17 April 2019].

As already explained above, framework agreements *stricto sensu* are relatively complete, in the sense that a second round of competition is needed, while all technical dimensions of the product or service are laid down in the master contract at the first stage of the procedure. This means that the only remaining variable is the quantity to be purchased at the call-off stage. The number of quality dimensions that have to be identified at the outset is not the same in all cases and this depends mostly on whether the relevant products/services require customization and alignment to specific needs and market conditions.⁶⁴ The European legislation belongs to those systems that allocate a large amount of the overall effort in the first round of competition, so that only a small number of suppliers enter into the framework agreement and the competition of the second stage may be as limited as possible.⁶⁵ Specifically, according to Article 33, paragraph 2 of the new Directive

“Contracts based on a framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement...”

This means that the customization and alignment of products/services under the framework agreement is kept as low as possible. Additionally, some of the most experienced central purchasing agencies in European Member States such as Crown Commercial Service in the United Kingdom, BBG in Austria, SKI in Denmark and Hansel in Finland provide for most of the contractual terms and conditions at the outset.⁶⁶

The establishment of most of the contractual terms and conditions in the framework agreement and the fact that under no circumstances should substantial modifications be made, in spite of the reopening of competition, connotes that call-off contracts will be homogenous and they will vary only little from each other as far as quality and technical characteristics are concerned.⁶⁷ Products that do not differ in terms of an intrinsic attribute (quality) do not present product differentiations.⁶⁸ Product differentiations can

⁶⁴ OECD “Manual for Framework Agreements” (2014) available at: www.oecd.org/gov/ethics/manual-framework-agreements.pdf [accessed on 17 April 2019], p. 12.

⁶⁵ Albano and Nicholas (fn 15), 18.

⁶⁶ Ibid, 70.

⁶⁷ Ibid, 196.

⁶⁸ G. L. Albano, P. Buccirossi, G. Spagnolo and M. Zanza “Preventing Collusion in Procurement” in N. Dimitri, G. Piga and G. Spagnolo (eds), *Handbook of Procurement* (Cambridge University Press 2006), 356-57.

be assimilated to cost asymmetries, meaning that firms with product differentiations do not share the same production costs. This is because “a firm that offers a better quality is situated as if it were enjoying a cost advantage” and so it is more efficient than the other firms.⁶⁹ In case of call-off contracts under a framework agreement this means that in the absence of product differentiations, potential suppliers participating in the second round of competition do not differ in production costs and so they will find themselves bidding in a cost symmetric environment.⁷⁰ Cost symmetry is deemed to enhance collusion because the problem of agreeing to a common pricing policy can be easily overcome.⁷¹ As a result, competition at the second stage of the framework agreement procedure will be primarily price-driven and if the potential suppliers want to collude, it will be rather easy for them to agree on a common pricing policy. This is in the nature of framework agreements, as product and service homogeneity play a central role when it comes to the framework agreements’ ability to effectively aggregate demand.⁷² In any other case, the mission of the framework agreement as a flexible tool for aggregated procurement is not successfully accomplished.

Duration of Framework Agreements

The general principle is that framework agreements shall not exceed four years (Article 33, paragraph 1 of Directive 2014/24/EU). However, the length of framework agreements may be exceeded in exceptional cases duly justified. Recital 62 of Directive 2014/24/EU clarifies that such cases may arise where economic operators need to dispose of equipment the amortization period of which is longer than four years and which must be available at any time over the entire duration of the framework agreement. Regarding the individual contracts based on a framework agreement, they may be longer than the framework agreement itself, taking into account the time needed for their performance, the maintenance of equipment and the training of staff to perform the contract (Recital 62).

⁶⁹ Ibid.

⁷⁰ Albano and Nicholas (fn 15), 197.

⁷¹ Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright and Jean Tirole “The Economics of Tacit Collusion- Final Report for DG Competition, European Commission, March 2003” <https://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf> accessed on 13 October 2019, p. 35-36; See also Jeanine Miklos-Thal “Optimal Collusion Under Cost Asymmetry” (2011)46(1) Economic Theory, p. 99-125.

⁷² OECD, *Public Procurement in Chile: Policy Options for Efficient and Inclusive Framework Agreements* (OECD Public Governance Reviews, OECD Publishing, Paris, 2017), p. 34.

Despite the above clarification, there is still uncertainty about how much longer than four years framework agreements may be extended and how long the call-off contracts may last.⁷³ The fact that in practice framework contracts' duration may be seven years or more gives additional meaning to this concern. Indicatively, the Council of the European Union has recently concluded six framework contracts whose duration ranges from seven to ten years, after using the exception clause contemplated in Recital 62 of Directive 2014/24/EU.⁷⁴ This is also the case for contracts regarding buildings.⁷⁵

The greater the duration of framework agreements, the higher the number of call-offs for the subsequent conclusion of individual contracts.⁷⁶ Indicatively, it has been shown that on average the number of call-offs over the lifetime of a framework agreement is 15.⁷⁷ This means that the framework's awardees get the opportunity to interact frequently through the life of the framework and so be tempted to collude instead of competing with each other. After all, four years give firms sufficient time to make their collusive arrangements in an oligopolistic market such as this one, where the supply side is concentrated in the hands of few framework awardees. In order to deal with this concern, it could be suggested to minimise the number of call-offs so that potential suppliers' interaction and opportunities to collude may be limited. This would potentially be a good solution if the number of call-offs did not determine the cost of a framework agreement. Specifically, it has been proved that "where a framework is used to satisfy only a small number of call-offs, the cost of the framework is higher than the cost of running separate competitions".⁷⁸ Hence, it would not make sense for a procuring entity to conclude a framework agreement for satisfying a small number of call-offs, as this would be costly for it.

In addition to the above, frequently interacting suppliers in a market static and narrow for four years, such as the one under a framework agreement, have the opportunity to gain a lot of information about their competitors, regarding their technologies, costs

⁷³ Andrecka (fn 21), 228.

⁷⁴ European Court of Auditors (ECA) "Special Report- The EU Institutions Can Do More to Facilitate Access to Their Public Procurement" available at: www.eca.europa.eu/Lists/ECADocuments/SR16_17/SR_PROCUREMENT_EN.pdf [accessed on 17 April 2019], p. 33.

⁷⁵ Ibid, 64.

⁷⁶ Albano and Nicholas (fn 15), 194.

⁷⁷ PwC, London Economics and Ecorys for the European Commission (fn 17), 85.

⁷⁸ PwC, London Economics and Ecorys for the European Commission (fn 17), 147.

and production advantages. This enables parallel conduct⁷⁹ among them without being necessary to collude explicitly. Parallel behaviour falls within the scope of Article 101 TFEU only if the undertakings' behaviour cannot be explained otherwise than by concertation, considering the nature of the products, the size and number of undertakings as well as the volume of the market.⁸⁰ Indeed, the big number of second-stage competitions/ call-offs throughout the duration of the framework agreement may constitute a good occasion to send signals through prices to each other.

Another parameter that raises collusion concerns is that the duration of framework agreements, especially when they are repeated in a market because they are deemed to be particularly suitable and appropriate for it, may be a disincentive for new entrants and competitors outside the framework agreement to enter or remain accordingly in this market. The longer framework agreements are, the easier outside competitors may quit the relevant market because they cannot afford for four or more years to stay excluded from the market, particularly where the procuring entity is a dominant buyer or the use of framework is obligatory/repeated, as already noted above.⁸¹ Another reason is that competitors outside the framework agreement may be afraid of the incumbency advantages enjoyed by the framework awardees in case of a new framework agreement in the future. This results in the concentration⁸² or even cartelization of the market, since a slowly evolving market does not attract new entrants but it protects the incumbent firms, which feel free to collude in the absence of maverick firms⁸³ to undercut their cartel.

4. Recommendations:

Guidelines at EU level about when framework agreements should be used & how contracting authorities' decisions can be questioned

⁷⁹ Every undertaking is free to react intelligently to market forces and alter its course of action, taking into account in so doing the present or foreseeable conduct of its competitors.

⁸⁰ Wood Pulp OJ (1985) L 85/1, (1985) 3 CMLR 474.

⁸¹ In the same way, long-term supply agreements in private sector by dominant firms can foreclose the market.

⁸² In a concentrated market there is a small group of competitors.

⁸³ Maverick firm is "a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition". See the United States Department of Justice and Federal Trade Commission "Horizontal Merger Guidelines" <www.justice.gov/atr/horizontal-merger-guidelines-08192010#2f> accessed on 13 October 2019.

In view of the aforementioned pro-collusive features that framework agreements have, there is need for procuring entities to be extremely cautious when they take the decision to utilize the procurement technique of framework agreement.

The necessity for cautiousness becomes obvious as soon as someone realizes that there is no provision under the current Directive about whether and how the relevant decision of a contracting authority can be questioned nor is there any provision about the procurement officers' accountability. This point has also been made by Professor Sue Arrowsmith who underlines that the older Directive 2004/18/EC does not define how frameworks should be used but it is up to each Member State to achieve their regulatory goals.⁸⁴ Since then, the discretion given to Member States has been the same. What is more, an empirical study has shown that the contracting authorities' perception of the risk of collusion is quite limited⁸⁵ and so we should not take for granted that procurement officers will apply measures at the planning stage of a framework agreement in order to address collusion. Under such circumstances, it is suggested that the European Commission should give some guidance about how framework agreements should be used by each Member State and it should contemplate under what circumstances the relevant decisions of contracting authorities can be questioned, how and by whom. The definition of the market as well as a basic survey whether the market for the subject matter of a particular framework agreement is vulnerable to collusion either at the first or at the second stage of the procedure would be a good starting point before procurement officers decide to use and design this procurement technique.

Yet, market studies and market definition may prove a demanding and costly task for the procurer. For this reason, it is good practice for contracting authorities to consider each time whether the costs of doing such a market study may offset or even outweigh the gains derived from the tender. A possible way to avoid such scenarios is the close cooperation of contracting authorities with the relevant national Competition Authorities that have expertise and experience. Moreover, in a static competitive environment that does not change rapidly in terms of price structure, cost structure, technology or geographic market structure, there is no need to proceed each time to a

⁸⁴ S. Arrowsmith (ed), *Public Procurement Regulation in the 21st Century: Reform of the UNCITRAL Model Law on Procurement* (St Paul, Thomson-West, 2009), p.15-16.

⁸⁵ Office of Fair Trading "Assessing the Impact of Public Sector Procurement on Competition" (2004) <http://webarchive.nationalarchives.gov.uk/20140402182823/http://www.oft.gov.uk/shared_oftr/ports/comp_policy/oft742a.pdf>accessed on 17 April 2019.

market study or a market definition afresh, as a simple update with less transaction costs may suffice. This is particularly true in case of framework agreements, which are mainly used for repeat purchases of relatively standard and simple goods and they are criticized for being “insufficiently responsive in practice to technological change and dynamic markets”⁸⁶.

Asymmetry between number of suppliers and number of call-offs

Depending on the conclusions drawn after such a survey, the relevant contracting authorities should act accordingly. This means that if the nature of the market is indeed susceptible to collusion, like in case of construction and road infrastructure, construction and maintenance industry, the design of the framework agreements procedures should be adjusted to the need to avoid the facilitation of collusion and to enhance competition. Indicatively, it is recommended that the contracting authorities should ensure a degree of asymmetry between the number of suppliers and the number of call-offs so that any colluding framework awardees may find it difficult to coordinate and share the pie between them. This is a recommendation borrowed from the literature regarding the division of contracts into lots. Since “the sequence of call-offs could, in principle, be assimilated with a public contract split into several lots”⁸⁷, the prescription of the economic theory that the number of lots should be smaller than the expected number of participants may apply to the framework agreement call-offs as well. In practice, the average number of suppliers with whom a multi-provider framework is concluded is 4.4.⁸⁸ So, before determining the number of call-offs, it is good for the relevant procurement officers to make themselves aware of this empirical evidence and determine accordingly the number of call-offs.

Adjustment of the contracts’ value to the framework awardees’ level of symmetry or asymmetry

Apart from the number of call-offs in the context of a framework agreement, it is also the value of the contracts awarded at the call-off stage that enhances or decreases the risk of collusion between the framework awardees. Symmetric suppliers, meaning firms that have similar bargaining power, are more vulnerable to making collusive

⁸⁶ Albano and Nicholas (fn 15), 166, 173.

⁸⁷ Albano and Nicholas (fn 15) p. 193.

⁸⁸ PwC, London Economics and Ecorys for the European Commission (fn 17), p. 146.

agreements between them when the contracts awarded at the call-off stage are similarly valued, because it is easier for them to allocate the contracts between them.⁸⁹ The same applies to asymmetric suppliers when the contracts awarded at the call-off stage are differently valued. For this reason, the relevant contracting authorities are recommended to adjust the value of the contracts awarded at the second stage of the framework agreement to the level of symmetry or asymmetry that the framework awardees have as far as their bargaining power is concerned. When the framework suppliers are symmetric, the value of the contracts to be awarded at the second stage of the framework agreement should be different from each other, while in case of asymmetric framework suppliers, the value of the contracts should be similar to each other. Yet, this requires that contracting authorities have a lot of market knowledge. For this reason, as already suggested above, contracting authorities should cooperate closely with the relevant national Competition Authorities that have relevant expertise and experience. This suggestion, nevertheless, does not answer the question who is going to pay for the collection of such data regarding the market and the market players at issue. Therefore, it should be noted that not all of these suggestions may be suitable for smaller procuring bodies, due to the high cost that the gathering of such information comes with.

Use of the Most Economically Advantageous Tender (MEAT) criterion

In the same vein, instead of using the lowest price as the only criterion for the award of public contracts under a framework agreement, contracting authorities are recommended to opt for the price-quality ratio version allowed under the most economically advantageous tender (“MEAT”) criterion.⁹⁰ By asking from suppliers technical requirements that ensure a specific standard of quality for the products/services procured, it is like introducing product differentiation, which increases the asymmetry between firms, as their production costs will differ. Under such circumstances, as already explained above, the formation of collusive schemes between firms is much more difficult. This is particularly true in case of framework agreements having two stages of competition for awarding procurement contracts. This is because suppliers at the first stage of competition get a specific technical score which

⁸⁹ Albano and Nicholas (fn 15), 205.

⁹⁰ Article 67, para 2 of Directive 2014/24/EU.

renders them “score-heterogeneous” before the second-stage competition takes place.⁹¹ Therefore, even if they are symmetric in terms of their bargaining power, it is rather hard for them to agree on a mutually beneficial collusive scheme, as bidders with a technical score higher than the others will have a cost advantage over the others and for this reason they may not want to join a bidding ring. But even if they do so, they have always the incentive to deviate and win the public contract for themselves.

Variation of the call-off methods

Life of bid riggers can become even more difficult in a framework agreement if, in addition to the measures recommended above, contracting authorities vary the call-off methods used for awarding the public procurement contract. This is a suggestion made by several academics and professionals in the public procurement sector with the aim of creating an unstable environment for prospective collusive bidders under a framework agreement, as the surprise effect when adopting a call-off method which is not known to framework agreement awardees beforehand, hinders their plans to allocate the forthcoming contract opportunities between them.⁹² According to the explanatory note of the European Commission, one way of choosing between different economic operators is the “cascade method, i.e. firstly contracting the economic operator whose tender for the award of a framework agreement establishing all the terms (framework contract) was considered the best and turning to the second one where the first one is not capable of or interested in providing the goods, services or works in question”.⁹³ Nevertheless, this method tends to concentrate public contracts in the hands of the highest-ranked supplier. Apart from the “cascade” method, contracting authorities are able to use other methods of direct award of call-off contracts, such as rotation between suppliers, percentage allocation or random selection.⁹⁴

⁹¹ Albano and Nicholas (fn 15), 197.

⁹² S. Arrowsmith and C. Nicholas, *Regulating Framework Agreements under the UNCITRAL Model Law*, chapter 2, in Sue Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* (Eagan, MN: West, 2009); 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, 177-8; Procurement Lawyers’ Association “The Use of Framework Agreements in Public Procurement” available at: www.procurementlawyers.org.uk/wp-content/uploads/2017/07/PLA_Paper-on-Frameworks.pdf [accessed on 17 April 2019], p. 35-36.

⁹³ European Commission “Explanatory Note-Framework Agreements-Classic Directive” (CC/2005/03_rev 1 of 14.7.2005) found in the “Older Guidance” section of the “europa” website.

⁹⁴ Procurement Lawyers’ Association (fn 92), 35.

Openness to new entrants

Another parameter that needs further consideration on behalf of the European legislator is the closed nature of framework agreements which prohibits the participation of economic operators that were not parties to it from the outset. The literature has identified that the closed system of framework agreements can create a cartelised market once the first stage is completed.⁹⁵ Therefore, suggestions have been made to find a mechanism, such as dynamic purchasing systems, that enables a level of new entrants during the life of a framework agreement⁹⁶, so as to prevent any incumbency advantage that weakens competition and to increase the instability of any collusive scheme. A suggestion like this, raises concerns in respect of transaction costs and the firms' incentive to enter into a framework agreement in the first place, if they know that new joiners are to be expected. Nevertheless, the openness to new joiners will not be a limiting factor as long as the awardees in the framework agreement have the possibility to improve their offers at any time during the period that the framework agreement is in operation. This already applies in many dynamic purchasing systems, which permit suppliers to improve their offers at any time during the period when the framework agreement is in operation.⁹⁷ Regarding the transaction costs, indeed this is a factor that preoccupies policy makers when considering the above suggestion. For this reason, I recommend that a level of new entrants should be allowed when bidding for call-offs at the second stage, only if the following conditions are met cumulatively:

- a) there is divergence of the prices asked by the bidders admitted to the framework agreement at the first stage of the procedure, when the framework agreement is concluded and when the need arises; and

⁹⁵ Albano and Nicholas (fn 15), 179; G.L. Albano, P. Buccirossi, G. Spagnolo and M. Zanza "Preventing Collusion in Procurement" in N. Dimitri, G. Piga and G. Spagnolo (eds), *Handbook of Procurement* (Cambridge University Press 2006), 351; A. Sanchez-Graells, *Public Procurement and the EU Competition Rules* (Oxford Hart, 2015, 2nd ed), 298-299.

⁹⁶ 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, 177.

⁹⁷ Albano and Nicholas (fn 15),20. This type of framework agreements are commonly encountered outside the European Union.

- b) there is discrepancy between the prices required by the awardees in the framework agreement and the prices asked by the suppliers in the market outside the framework agreement.

If the divergence of the prices asked at the first stage of the procedure and when the need arises is due to market shocks or demand fluctuations, then the prices asked by the suppliers in the market outside the framework agreement will also change. So, market prices are a reliable benchmark before deciding whether the divergence of prices asked by the framework awardees is justified or not.

As already underlined above, in case of price discrepancies it is exceptionally costly, time consuming and difficult for the contracting authority to hold a wholly new tendering procedure together with a new OJ advertisement in order to seek improved value for money from new contractors, outside the framework agreement. By introducing in the current Directive a provision for new entrants at the second-stage competition when the aforementioned conditions are met and by giving the possibility to framework awardees to improve their offers, the administrative convenience at which framework agreements mainly aimed is secured, while the anti-competitive potential, that the closed nature of framework agreements has, is mitigated. In the meantime, such a provision serves as an incentive for framework awardees to keep their prices at or below the commercial prices at the call-off stage, when the need arises, otherwise cut-throat competition will take place with the involvement of new entrants in the framework agreement market. The entry of outsiders to the second stage of the framework agreement under the circumstances described above should be allowed to any economic operator that satisfies the relevant selection criteria, so there will be a pre-qualification stage for the new entrants, during which the framework awardees will also have the time to think and change/improve their bids.

Wider scope of legal standing in review procedures

The risk of collusion at the second stage of framework agreements can further be decreased if the framework awardees that were not selected to deliver the call-off contract as well as the economic operators in the market outside the framework agreement are able to challenge the call-offs or awards of procurement contracts under the framework agreement. This is partly impossible under the current Procurement

Remedies Directive 2007/66/EC which contemplates in its Recital, paragraph (17) as well as in its Article 3, paragraph 3 that:

“A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement”.

In other words, the aforementioned provision does not grant legal standing to tenderers who are not participants in the contract award procedure. The situation is not much better when it comes to contracting authorities to institute a review procedure. CJEU clarified in *Simvoulio* case that the legal standing granted to aggrieved private parties bringing a claim does not necessarily extend to the contracting authorities, but the Member States are not prevented from including contracting authorities within the class of persons to whom the review procedures are available.⁹⁸ In view of the above, it could be argued that the legal regime, as it currently is, does not entirely favour the challenge of procurement contracts concluded at the second stage of a framework agreement, which, as already underlined, suffers from a limited market and a certain level of lock out. Only the suppliers that have entered into a framework agreement with the procuring entity can request a review of the procedure or file a complaint. For this reason, it could be suggested that as an exception to the general rule of review procedures concerning the award of public contracts, special provisions should apply in the case of framework agreements, where the risk of collusion is eminent. Specifically, it could be recommended that *legal standing shall be granted to any economic operator entitled to tender for the award of procurement contracts under a framework agreement* (emphasis added). This could be an additional deterrent to collusive agreements between framework awardees and an extra reassurance that the public contracts under the framework agreement are awarded to the best competing tenderers without giving leeway to any suspicions regarding the legality of the procurement process. This is a suggestion that the European Commission had also made in the past regarding the overall *locus standi* to bring proceedings under the Procurement Remedies Directive.⁹⁹

⁹⁸ Case 570/08 *Simvoulio Apokhetefseon Lefkosias v Anatheoritiki Arhi Prosforon*, ECLI:EU:C:2010:621, paras 35-6; Folkert Wilman, *Private Enforcement of EU Law Before National Courts-The EU Legislative Framework* (Edward Elgar, 2015), 90-1.

⁹⁹ Wilman (fn 77), 90.

However, the Council managed to insert the restrictive wording that applies till now¹⁰⁰, so as not to “jeopardise” the procedural law of the various Member States which provided for a “legitimate interest” in the outcome of the award procedure as a requirement to bring legal proceedings.¹⁰¹ Despite the fact that the Council’s approach was adopted, still some Member States contemplate that associations or bodies not acting as economic operators are eligible to start a review procedure.¹⁰²

A wide scope for legal standing, like this one and like the one suggested above, raises concerns that framework agreements will become less attractive to contracting authorities. This may be so because in this way the interest of economic operators (and even associations/ bodies that do not act as economic operators) in ensuring the effectiveness of public procurement law will not be evenly balanced with contracting authorities’ interest in limiting frivolous litigation and meeting their needs as soon as possible. This argument makes sense, especially if someone takes also into account that the most frequent type of remedy is set aside decisions, followed at distance by interim measures and the removal of discriminatory specifications.¹⁰³ For this reason, , it could further be recommended that in case of a request for review of the procedure by economic operators outside the framework agreement, there should not be an automatic suspension of the procurement procedure. The contracting authority should be able to ask each time the review body for a permission to continue the procurement procedure. In some countries, like Germany, this is possible and even the public contract can be concluded during the review proceedings if the negative consequences of the automatic suspension outweigh its benefits.¹⁰⁴ Regarding the costs to a contracting authority that has to defend a review case, this will not be a major problem because so far the

¹⁰⁰ “The review procedures are available... at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement”, Article 3, para. 3, Directive 2007/66/EC.

¹⁰¹ Ibid. See also Commission, Proposal for Utilities Remedies Directive 92/13, COM (90) 297, p. 17; Commission, Communication on the Council’s position on the Proposal for Public Sector Remedies Directive 89/665, SEC (89) 1196, p. 7; Council, Common Position on the Amended Proposal for a Council Directive on the Co-ordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts, doc. 7834/89 ADD1, p. 7.

¹⁰² Commission “Report on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as Modified by Directive 2007/66/EC, Concerning Review Procedures in the Area of Public Procurement”, COM (2017) 28 final, p. 4.

¹⁰³ *ibid*, p.5.

¹⁰⁴ OECD “Integrity in Public Procurement- Good Practice from A to Z” available at: www.oecd.org/development/effectiveness/38588964.pdf [on 26 February 2018], p. 113.

Commission has reported that this kind of costs as well as the costs of suppliers to bring forward a review case vary widely across the EU and account for only 0.4%-0.6% of the contract value.¹⁰⁵ Yet, this suggestion has still weaknesses, as it may be hard for the economic operators outside the market of the framework agreement to learn about the conclusion of collusive agreements between the framework awardees and collect evidence that would allow them a challenge. In view of this evidential hurdle, the only way that this suggestion would work is to use the review procedure initiated by the economic operators outside the framework agreement by way of interlocutory procedure before or after the conclusion of the call-off contract. This would enable economic operators outside the framework agreement to seek a review with the relevant contracting authority before or after the conclusion of the call-off contract with the aim of correcting the alleged infringement, but without being able to refer to the competent review body and set aside the relevant contract.

Use of performance or functional specifications

Last but not least, it should not be forgotten that in case of framework agreements, collusion is an inherent risk, and so contracting authorities should work hard to enhance competition and market access. This can be done, for instance by trying to express their needs in technical and functional terms, instead of detailed *ad hoc* specifications. According to Recital (74) of the 2014/24/EU Directive on the public sector, the technical specifications drawn up by public purchasers need to allow public procurement to be open to competition and so they should be drafted in a way that avoids artificially narrowing down competition through requirements that favour a specific economic operator. In this attempt, an anti-formalistic approach was adopted by the current Directive, which provides for the use of performance or functional specifications instead of detailed *ad hoc* specifications and references to standards that may be unfamiliar or inaccessible to providers.¹⁰⁶ As a result of this new functional approach, article 42, paragraph 4 contemplates that:

¹⁰⁵ Commission “Report on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as Modified by Directive 2007/66/EC, Concerning Review Procedures in the Area of Public Procurement”, COM (2017) 28 final, p. 6.

¹⁰⁶ S. Arrowsmith “*The Law of Public and Utilities Procurement: Regulation in the EU and UK*”, (2nd edn, Sweet & Maxwell, 2005), p. 1147.

“Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words “or equivalent”.

Indeed, the ability of contracting authorities to stipulate less prescriptive requirements in terms of outputs and functionality descriptions promotes competition by attracting to the procurement process the maximum possible number of bidders, such as suppliers of substitute products.¹⁰⁷ Yet, the shift towards performance-based specifications¹⁰⁸ at the bidding and evaluation stage may give rise to some other competition law challenges. The first challenge regards the low number of bidders that performance-based specifications may attract. Performance-based specifications are generally “innovative and unfamiliar procurement models”, in the sense that their success presupposes the full understanding by the relevant public procurers of their own needs as well as of the problem to be addressed.¹⁰⁹ Due to their nature, it is quite easy for contracting authorities to fail either to understand what the market has to offer or to articulate clearly and with sufficient details their needs to the market.¹¹⁰ This miscommunication as well as the fact that some public procurers are ill-informed, often results in a low number of bidders and consequently in failure in maintaining the desired competitive tension in the procurement process.¹¹¹ When the supply side is

¹⁰⁷ OECD “Fighting Bid Rigging in Public Procurement- Report on Implementing the OECD Recommendation” (2016) available at: www.oecd.org/competition/Fighting-bid-rigging-in-public-procurement-2016-implementation-report.pdf [accessed on 17 April 2019]. See A. Sanchez Graells, *Public Procurement and the EU Competition Rules* (2nd edn, Hart Publishing 2015), p. 328.

¹⁰⁸ “Performance-based specifications describe a desired performance level or performance target to be achieved, but do not make specific demands on how that level/target is reached. Instead of prescribing the need in terms of inputs, it is described in terms of outputs.” See L. Turley, M. Hug Silva, S. Benson and C. Dominguez for International Institute for Sustainable Development “Performance Based Specifications- Exploring When They Work and Why” (2014) available at: www.iisd.org/sites/default/files/publications/performance-based-specifications-exploring-when-they-work-and-why.pdf [accessed on 17 April 2019], p. 3.

¹⁰⁹ Turley, Hug Silva, Benson and Dominguez (fn 107), p. 37-38.

¹¹⁰ Ibid.

¹¹¹ Turley, Hug Silva, Benson and Dominguez (fn 107), p. 37-38.

concentrated in the hands of relatively few firms, the danger of bid rigging is apparent in the market.¹¹²

The second challenge deals with the interrelation of performance-based specifications with the preliminary market consultations. The transition towards performance-based specifications presupposes a close link with the market consultation process¹¹³ because contracting authorities need to collect suggestions by market in order to define performance indicators and be able later to monitor the work of the supplier and the quality of the offered service.¹¹⁴ Yet, the conduct of preliminary market consultations is not properly and adequately regulated by the current Directive 2014/24/EU on the public sector in terms of maintaining effective competition. The direct engagement of contracting authorities with market operators in the context of market dialogue raises bid rigging concerns where the opportunities for potential suppliers to meet are numerous and the collusion between public officers and undertakings enables the sustainability of any bidding rings that already exist. As a consequence, the formulation and drafting of performance-based specifications with the help of market operators that usually have an interest in the eventual contract or even are involved in anti-competitive activities such as bid rigging, is rather risky. The risk here is that the performance-based specifications will be unduly influenced by such market operators in order to exclude from the subsequent competition in the tender process all those undertakings that are not members of their bidding rings or any new entrants that will not have the capacity and scope to meet these artificially high performance standards that the contracting authority was made to set.

¹¹² J. S. Bain, *Industrial Organisation* (John Wiley 1968), p.462-463; G. J. Stigler "A Theory of Oligopoly" (1964)72(1) *The Journal of Political Economy*, 44, 51-56; E. Hastings Chamberlin, *The Theory of Monopolistic Competition: A Re-Orientation of the Theory of Value* (Cambridge Mass: Harvard University Press, 1966), 46-51; Slightly different approach by Demsetz and Weiss who argue accordingly that collusion accompanied by superior performance is facilitated by market concentration and that besides concentration, there are also many other variables conducive to collusion, see H. Demsetz, *The Market Concentration Doctrine-An Examination of Evidence and A Discussion of Policy* (AEI-Hoover Policy Studies, 1973), p.20 and L. W. Weiss "The Structure-Conduct- Performance Paradigm and Antitrust"(1979)127(4)*University of Pennsylvania Law Review*, p. 1118.

¹¹³ L. Turley-International Institute for Sustainable Development "Moving Towards Performance-Based Specifications in Public Procurement" (2013) available at: www.iisd.org/sites/default/files/publications/specs_public_procurement.pdf [accessed on 17 April 2019].

¹¹⁴ Sustainable Technology for Older People-Get Organised "Overview Open Market Consultation" available at: http://stopandgoproject.eu/wp-content/uploads/2017/04/STOPandGO_OMC_Report_v1.2.pdf [accessed on 17 April 2019].

Market operators swift towards performance-based specifications, as in this way they are given the space to draw on their expertise in products and markets and to innovate.¹¹⁵ Due to the technical and financial expertise demanded each time to formulate and draft the performance-based specifications, contracting authorities are susceptible to this kind of manipulation by setting unduly burdensome performance standards that sustain bidding rings in the relevant market. Additionally, the fact that “specifications based on outputs and functionality descriptions are more prone to relative and subjective judgments”¹¹⁶ means that only with difficulty will contracting authorities be able to check each time whether these technical specifications have the effect of creating unjustified obstacles to the opening up of public procurement to competition or not. The propensity of performance-based specifications for subjective judgments also enables corrupted procurement officers to exercise their discretion in a partial manner, in order to inhibit fair competition and favour bid rigging schemes.¹¹⁷

5. Concluding Remarks

This paper has undertaken a comprehensive critical review of framework agreements. An outline of this procurement technique, along with a systematic outline of the current Procurement Directive 2014/24/EU, has shown that there are some provisions relevant to the framework agreement that can either favour or help make bid rigging and parallel conduct sustainable. Hence, the framework agreements, as procurement techniques, are not the best possible toolkit for preventing primarily bid rigging and secondly parallel conduct, as procurers should seek to adjust them in order to prevent these anti-competitive practices. This conclusion raised further the question what legislative and soft law instruments are needed. Hence, policy-oriented suggestions were made in this article. Regarding the bid rigging concerns that arise in framework agreements, there should be some guidance about how frameworks should be used by each Member State as well as provision about how the relevant decisions of contracting authorities could be questioned. It is also suggested that procurement officers should investigate each

¹¹⁵ Turley-International Institute for Sustainable Development (fn 113), p. 4-5; Turley, Hug Silva, Benson and Dominguez (fn 107), p. 7.

¹¹⁶ Turley, Hug Silva, Benson and Dominguez (fn 107), p. 11.

¹¹⁷ Mihály Fazekas, István János Tóth, Lawrence Peter King “An Objective Corruption Risk Index Using Public Procurement Data” (2016)22 European Journal on Criminal Policy & Research, p. 21-22.

time the vulnerability to collusion of the market for a particular framework agreement either at the first or at the second stage of the procedure. For this reason, the close collaboration of procurement officers with national Competition Authorities is recommended. A degree of asymmetry between suppliers and call-offs was also recommended in order to hamper the coordination of any colluding framework awardees. Again, the close cooperation with the national Competition Authorities is needed in order to make this suggestion work. However, not all of these suggestions may be suitable for smaller procuring bodies, due to the high cost of obtaining such information and data. Even the cooperation with national Competition Authorities may not yield particular improvement, as there is still the question who is going to pay for the collection of such information regarding the market and the market players at issue.

Similarly, the value of the contracts awarded at the second stage of the framework agreement should be adjusted to the level of symmetry between the framework awardees. The asymmetry between suppliers is also ensured by applying the MEAT criterion for the award of public contracts, as suppliers with different technical scores from each other at the first stage of competition agree less easily on a mutually beneficial bidding ring at the second stage of competition. Additionally, it is suggested the use by contracting authorities of various call-off methods for awarding public procurement contracts, such as the cascade method, rotation between suppliers, the percentage allocation or random selection. The surprise effect when adopting a call-off method which is unknown to framework agreement awardees beforehand hinders their plans to allocate the forthcoming contract opportunities between them.

On the closed nature of framework agreements, which creates a high barrier to entry for the whole duration of the framework agreement, the openness of framework agreements to new joiners is suggested. Yet, the openness to new tenderers might be a disincentive for firms to enter into a framework agreement. Therefore, it was further suggested that the awardees in the framework agreement should be able to improve their offers any time the framework agreement is in operation, and if the following conditions are met cumulatively:

- a) there is divergence of the prices asked by the bidders admitted to the framework agreement at the first stage of the procedure, when the framework agreement is concluded and when the need arises; and

- b) there is discrepancy between the prices required by the awardees in the framework agreement and the prices asked by the suppliers in the market outside the framework agreement.

In order to further reduce the risk of collusion at the second stage of framework agreements, it could be argued that legal standing shall be granted to any economic operator entitled to tender for the award of procurement contracts under a framework agreement. Nevertheless, this suggestion has several weaknesses, among which the evidential hurdle that economic operators outside the market of the framework agreement face, when it comes to learn about the conclusion of collusive agreements between the framework awardees and collect evidence that would allow them a challenge. The only way to make this suggestion be realistic would be to use the review procedure initiated by the economic operators outside the framework agreement by way of interlocutory procedure before or after the conclusion of the call-off contract.

Finally, the article made the point that the shift towards performance-based specifications may discourage many economic operators from bidding because of their innovative nature which is still unknown to the majority of undertakings. In a concentrated market with a narrow field of competition such as this one, the effectiveness of collusion rises. The situation may be further deteriorated due to the inevitable interrelation of performance-based specifications with the preliminary market consultations, whose conduct is not properly and adequately regulated by the current Procurement Directive in terms of maintaining effective competition.