



INSIGHT

ANTITRUST AND COOPSERVICE: PROCUREMENT AGGREGATION IS A SERIOUS THING (ADJUDICATING TOO)

MANUEL PELÁEZ MURAS*

ABSTRACT: *Anitrust and Coopservice* (judgment of 19 December 2018, case C-216/17) is a peculiar product of the Court of Justice. It is one of a kind in aggregate procurement, a subfield of public procurement that has remained virtually untouched by the Court. A number of very helpful and reasonable directions can be drawn from this judgment with respect to the duration and quantification of framework agreements as well as the identification of the authorities entitled to use them in the case of framework agreements concluded jointly by several authorities. At the same time, it is not a model of adjudication, incurring in some inaccuracies, obvious mistakes, and even unkindness to the referring national court. This surely makes it more enjoyable to read and comment. The present *Insight* shows the *slips of the Court*, while highlighting the main directions that can be extracted *vis-à-vis* the operation of framework agreements and joint contracts.

KEYWORDS: public procurement – joint procurement – framework agreements – judicial dialogue – estimated value – principle of transparency.

I. INTRODUCTION

On 19 December 2018 the Court of Justice issued *Antitrust and Coopservice*, to our best knowledge its only judgment addressing the legal limits on joint procurement and framework agreements so far.¹

* Lawyer, LL.M. Eur, PhD candidate, Public Procurement Senior Expert in *Banco de España*. Counsel of the Government of Castilla-La Mancha and the National Securities Markets Commission (on leave), mpmuras@gmail.com. The views expressed are mine and do not necessarily represent the views of any of those institutions. I wish to express my gratitude to *Banco de España* and *Banque Centrale du Luxembourg*, which gave me the opportunity to visit the Eurosystem Procurement Office (EPCO, BCL) this year. An early antecedent of this *Insight* was presented before three brave voluntaries from the Law Doctoral School of *Université du Luxembourg* and a captive audience of public procurement experts from EPCO and its member central banks. Thanks to all of them for their patience and valuable input. Many thanks to the anonymous reviewers for their useful observations too.

¹ Court of Justice, judgment of 19 December 2018, case C-216/17, *Antitrust and Coopervice v. Azienda Socio-Sanitaria Territoriale della Valcamonica et al* (hereinafter, *Antitrust and Coopservice* or *Antitrust*).

This judgment can easily become unnoticed amid the extensive jurisprudence produced by the Court in public procurement. It could even be disregarded as a low-profile case, not being a judgment of the Grand Chamber and, at first sight, the findings may seem not so revolutionary. Besides, the Court leaves unsolved important aspects, commits a few obvious mistakes and is unnecessarily rude with the referring court.

Yet, for all its faults, *Antitrust and Coopservice* is fairly important.

On the one hand, there is hardly any EU caselaw on framework agreements and joint procurement, *Antitrust and Coopservice* standing as one of a kind. Most of the judgments in which a framework agreement or some form of joint procurement is involved address general questions that are also present in non-aggregate procurement. Quite a lot of disputes concerning frameworks have been brought to the Court, but the judgments would have been the same irrespective of the contract being a framework agreement or a “normal”, stand-alone contract.² The same applies to joint procurement cases, which appear to be scarcer.³

On the other hand, the errors committed by the Court do not affect the operative part and other conclusions, which are very reasonable and may curb certain understandings that are too careless or too flexible vis-à-vis the limits applicable to framework agreements and joint procurement. In particular, their maximum duration and the provision of accurate and comprehensive estimates on the value and/or the quantity to be purchased, which should operate as a ceiling for the specific contracts awarded under the framework.

All in all, this judgment delivers the message that *procurement aggregation is a serious thing* that should be handled with due care and awareness of the principle of transparency. Account taken of the errors committed... *adjudicating too*.

The present *Insight* is structured as follows. First, we will give basic insight on the background of the case, briefing on the principle of transparency in public procurement (section II) and some rules governing framework agreements (section III). Section IV presents the details of the case at the national stage. From Section V onwards we dwell on the judgment, drawing its main directions and signalling some mistakes. Section X summarises our main conclusions.

² Indeed, there is more than one decision related to framework agreements, contrary to what the referring court indicated (point 4.4 of the Order of *Consiglio di Stato* of 11 April 2017, No 1690, appeal 9816/2016). The few cases that do address specificities of frameworks add little value nowadays to the current regulation. E.g., definition and estimated value of frameworks (Court of Justice: judgment of 4 May 1995, case C-79/94, *Commission v. Greece*, para. 15; judgment of 29 November 2007, case C-119/06, *Commission v. Italy*, paras 43 and 55).

³ A search limited to the procurement of the institutions shows that, as of 15 June 2019, the Court of Justice of the European Union had issued 129 decisions containing the words *accord-cadre*, *contrat-cadre* or *convention-cadre*, whereas only 42 decisions included the words *conjointe* or *interinstitutionnelle*. Only the judgment of the General Court of 17 January 2019, case T-117/17, *Proximus v. Council*, has specific interest for joint procurement (para. 98).

II. THE PRINCIPLE OF TRANSPARENCY IN PUBLIC PROCUREMENT

II.1. TRANSPARENCY BEFORE THE AWARD OF CONTRACTS

Public procurement is based on certain fundamental principles, of which one of the most important is surely transparency.⁴

In practical terms, transparency comes down to giving the economic operators the possibility to apply for a contract, typically via an open call for offers.

Further, it is required to provide clear and sufficient *ex ante* information about the contract and the rules applicable to the award, so the economic operators are able to decide whether to apply and prepare good offers accordingly.

Transparency also serves to level the playing field mitigating *de facto* advantages enjoyed by national undertakings and incumbent operators, who might have easier or privileged access to information about the procurement. In *Succhi di Frutta*, the Court remarked how transparency is a corollary of equality, aimed at precluding any risk of favouritism or arbitrariness.⁵

II.2. *EX POST* REQUIREMENTS STEMMING FROM TRANSPARENCY

After the contract is awarded, the principle of transparency requires that the main features of the contract as were advertised do not change substantially.

In *Pressetext* the Court held that, to ensure transparency and equal treatment, material amendments to public contracts should be regarded as new contracts, so a new tender, normally open for competition, would have been due, instead of a direct award to the incumbent contractor.⁶ Contract amendments qualify as material if they extend the scope of the contract considerably or introduce conditions which would have allowed for the admission of different tenderers or offers.

⁴ Art. 18, para. 1, 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, enshrines transparency, together with equality, non-discrimination, proportionality and competition as the principles of procurement. Art. 2 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004, on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts mentions equality, non-discrimination and transparency only. (Hereinafter reference will be made to the 2004 Directive and/or the 2014 Directive. Where a mention of “the Directive” or “the directives” is done, it is implied there is no material difference between them.) Some landmark cases on transparency are Court of Justice: judgment of 25 April 1996, case C-87/94, *Commission v. Belgium (Walloon Buses)*, and judgment of 7 December 2000, case C-324/98, *Teleaustria*. Transparency is a “central plank” with a “prominent place” in public procurement (I. GEORGIEVA, *Using Transparency Against Corruption in Public Procurement: A Comparative Analysis of the Transparency Rules and their Failure to Combat Corruption*, Cham: Springer, 2017, pp. 5 and 8).

⁵ Italics added. Court of Justice, judgment of 29 April 2004, case C-496/99 P, *Commission v. CAS Succhi di Frutta SpA*, para. 111.

⁶ Court of Justice, judgment of 19 June 2008, case C-454/06, *Pressetext*, para. 34.

Putting it simply, an authority advertising the purchase of 200 computers should not amend the contract to acquire 2,000 computers. Many firms could refrain from participating in the award finding the announced scale not feasible or not appealing enough, but would be willing to supply the final volume. The same applies vice versa: advertising an over-dimensioned contract is likely to exclude operators incapable of executing an extensive service but capable of performing the final, reduced contract.

III. FRAMEWORK AGREEMENTS

Framework agreements are very used in joint procurement – i.e., procurement carried out for the benefit of more than one purchaser. They can accommodate multiple needs in different times and places with flexibility and expeditiousness.

*A 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.”*⁷

Therefore, frameworks involve a *two-stage procedure*:

- 1) A fully-fledged procurement procedure to award the framework agreement.
- 2) The “call-offs” or derivative procedures run to award the contracts based on the framework, which are simpler, because they are conducted only with the awardee(s) of the framework under looser procedural requirements.

Frameworks are *closed systems* in which no new authority or economic operator may enter into: “Those procedures may be applied only between those contracting authorities clearly identified for this purpose in the call for competition or the invitation to confirm interest and those economic operators party to the framework agreement as concluded”.⁸

Framework agreements may last *four years as maximum*, except a longer duration is duly justified. This limit shows the concern that frameworks result in abusive outcomes, as no other contractual type is subject to time constraints.⁹ The Legislator is so concerned that it has even warned that *framework agreements should not be used in a way that prevent, restrict or distort competition*.¹⁰

⁷ Italics added. Art. 33, para. 1, Directive 2014/24. Art. 1, para. 5, Directive 2004/18.

⁸ Art. 33, para. 2, 2014 Directive.

⁹ With a single exception: additional deliveries awarded to the original contractor by negotiated procedure without publication (Art. 32, para. 3, let. b).

¹⁰ Recital 61 2014 Directive. Art. 32, para. 2, 2004 Directive. While a framework is in force, the services included in its scope will normally be procured through that framework, instead of through open, competitive procedures, benefitting the parties to it solely. Further concerns relate to the risk of collusion in the call-offs (A. SÁNCHEZ GRAELLS, *Public Procurement and the EU Competition Rules*, Oxford: Hart Publishing, 2015, p. 231). Possibly, the recurrent nature of further contracts and the limited number of participants can facilitate bid-rigging.

With regards to *quantification*, an estimation of the overall economic value of the framework agreements is necessary in any case to determine the law applicable, since frameworks whose value is below the thresholds of Art. 4 of the Directive fall outside its scope. Under Art. 5, para. 5, thereof, the estimated value of a framework shall be the maximum estimated value of all the specific contracts envisaged for its total term. It is obvious that to determine the estimated value of the contracts it is necessary to know the volume of services that may be procured under those contracts.

Further, a basic claim is that an authority intending to award a framework should communicate its breadth to the potential tenderers. The precise terms of this elemental duty are dissimilar in the Directives:

1) The 2004 Directive required to advertise the quantities *and* the estimated value of the framework and, as far as possible, the value and frequency of the specific contracts to be awarded.¹¹

2) The current Directive requires to announce the quantity and appears to make optional the advertising of the value. The quantity *or* the value of the contracts based on the framework should be provided as far as possible.¹²

IV. THE CASE IN THE NATIONAL STAGE

IV.1. THE CONTRACT CONCLUDED BY GARDA AND ITS EXTENSION TO VALCAMONICA

In 2011 a healthcare body in Garda, Lombardy awarded a sanitation contract to a grouping named Markas-Zanetti for *nine years* including an *extension clause* by which other health authorities could request the contractor to apply the same terms. The contractor was free to accept. However, *the contract quantified only the services that would be requested by Garda*.

Four years later, another healthcare body based in Valcamonica, which had a similar contract close to expire with Coopservice did not renew that contract and used the extension clause in Garda's contract.

¹¹ Annex VII A, point 6, first indent, let. a), b) and c) requires announcing the "extent" of the works or the "quantity" of the products or services. Third indent in let. a) and b) and second indent in let. c) require indicating "the estimated total value [...] for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded".

¹² Annex V, part C, point 7, 2014 Directive is equivalent to the former Directive ("nature and extent of works, nature and quantity or value of supplies, nature and extent of services"), whereas point 8 thereof requires to provide the *estimated total order of magnitude* of the contract. According to point 10 let. a) contract notices should also include "as far as possible, [an] indication of value or order of magnitude and frequency of contracts to be awarded" under frameworks.

IV.2. THE FIRST-INSTANCE JUDGMENT

Coopservice challenged such extension before the administrative Court of Lombardy.

The Italian competition authority filed another appeal.¹³

For the claimants the extension was illegal because the contract lacked a maximum ceiling for the volumes or values that the beneficiaries could acquire and this allowed an indefinite number of direct awards for unspecified values.

Firstly, the Court acknowledged that a “reasonable” ceiling for the overall contract should be established to comply with the principles of transparency, non-discrimination and proportionality. Thus, establishing only the estimated quantities to be purchased by Garda would not suffice. However, it was found that *the ceiling was implicit* in this contract and an implicit ceiling should be enough, because it qualified as a framework agreement. (Frameworks are required to establish the quantity envisaged *where appropriate*.)¹⁴ The Court argued that the extension clause was meant to be useful, so it should cover services in a quantity enough to meet the needs of the beneficiaries. Those needs must amount to the services acquired through contracts in place. The beneficiaries were clearly listed in the tender documentation, so the tenderers could learn of those contracts and needs easily.¹⁵

IV.3. THE APPEAL BEFORE *CONSIGLIO DI STATO* AND THE REFERRAL TO THE COURT OF JUSTICE

Both claimants appealed the first-instance ruling before *Consiglio di Stato*, the supreme administrative court in Italy.

The Council of State was less enthusiastic about the extension clause. Significantly, it had declared it null in a previous case, finding, *inter alia*, that the contract was not a framework agreement.¹⁶ Surely that is why Markas suggested to request a preliminary ruling, a suggestion that was accepted.

In essence, *Consiglio di Stato* referred the following two questions:

- 1) Can a single authority conclude (sign) a framework agreement on its own behalf and on behalf of other authorities?
- 2) Can the quantity of services that may be required by those other authorities be
 - a) undetermined, or
 - b) determined only by reference to their usual needs?

¹³ Prior to the appeal, it sought a voluntary remedy by request dated 25 February 2016, ref. AS1271, www.agcm.it.

¹⁴ Art. 33, para. 1, 2014 Directive. Art. 1, para. 5, 2004 Directive.

¹⁵ Administrative Court of Lombardy, Brescia, judgment of 7 November 2016, appeal 195/2016, paras 11-20.

¹⁶ Though issued by a section different than the one in charge of the appeals filed by Coopservice and Antitrust: Consiglio di Stato, third section, Judgment of 20 October 2016, appeal 4742/2016.

Several unclarities and deficiencies in the referral may have contributed to deteriorate the response of the Court of Justice. Overall, it seems fuzzy and excessively long – 27 pages, the recommendation being to stick to 10.¹⁷

It all came down to finding the appropriate interpretation of the rules governing the questions disputed, but *Consiglio di Stato* submitted a seemingly uncontentious issue¹⁸ and elaborated extensively on points that were mostly superfluous in the case, such as the definition of contracting authority and the nature of the healthcare bodies.¹⁹

At a given point, it even suggested that the incompatibility of the Italian laws with the Union legal order by permitting unquantified framework agreements, a claim inconsistent with its previous judgment and the rest of the referral.²⁰

V. FIRST SLIP OF THE COURT OF JUSTICE: THE (INEXISTENT) DEFECTIVE TRANSPPOSITION OF THE DIRECTIVE

Despite some sloppiness in the referral, the most resounding errors in *Antitrust and Coopservice* seem attributable to the Court of Justice (with some help from the AG).

The judgment states that Art. 59 of the Italian Public Contracts Code 2006 omitted to transpose the fourth and fifth subparagraphs of Art. 32, para. 2, of the 2004 Directive.²¹

However, a basic search shows that this observation is unfounded. Both provisions were faithfully transposed from the outset in the very same Art. 59, paras 9 and 10.²²

VI. ADMISSIBILITY OF THE PRELIMINARY QUESTIONS: IS IT REALLY A FRAMEWORK, DESPITE IT LASTS NINE YEARS? EQUIVOCAL CONCEPTIONS AND AN UNNECESSARY REPRIMAND FROM THE COURT

Some parties requested the questions to be declared inadmissible because, *inter alia*, the contract was concluded for nine years, while the maximum duration of frameworks is four years. Therefore, such contract should not be classified as a framework agreement and the interpretation of the provisions governing frameworks was irrelevant.

Of course, this is faulty reasoning. The fact that a contract pertaining to a category does not comply with a rule applicable to such category does not imply that the contract does not belong to that category. It may rather be unlawful, and the legal regime

¹⁷ Court of Justice, Recommendations in relation to the initiation of preliminary ruling proceedings (2018/C 257/01), para. 15. eur-lex.europa.eu.

¹⁸ See section VIII below.

¹⁹ The request dedicates to this purpose 1,249 out of 6,304 words (almost a 20%). Referral order, cit., points 1.3-1.5, 2.16-2.18, 3.1-3.4 and 3.9-3.13.

²⁰ Referral order, cit., point 4.1.

²¹ *Antitrust and Coopservice*, cit., para 13.

²² See www.normattiva.it.

of the category does not become irrelevant for ruling on the validity of the said contract, but the opposite.

The Court of Justice requested from *Consiglio di Stato* clarifications on why it had classified the contract as a framework agreement despite its duration. *Consiglio di Stato* gave back the following arguments:²³

1) It had to classify the contract as a framework because the parties did. The Italian courts cannot raise on their own motion irregularities, save for defects causing absolute nullity, a narrow category in which the transgression of the duration limit does not fit.²⁴

2) Even if it could examine the legal consequences of the agreement lasting nine years, such duration could be covered by the derogation in Art. 32, para. 2, of the 2004 Directive, since the agreement aimed at guaranteeing the functioning of hospitals.²⁵

3) Otherwise, it could be a framework agreement meeting all the elements of the European model except duration.²⁶

Surprisingly, the Court of Justice reprimanded severely *Consiglio di Stato* for failing to set out the reasons why the contract could be covered by the said derogation, a failure that would amount to a breach of the Rules of Procedure.²⁷ However, for all we know, *Consiglio di Stato* was never inquired about such reasons,²⁸ despite which, it did put them out.²⁹

This reaction is all the more surprising because the Court of Justice ultimately found that the excessive duration of the framework was irrelevant for admission:

“[I]t has not been established that a public contract, such as the initial contract, cannot be classified as a framework agreement’ within the meaning of Article 1(5) and the fourth subparagraph of Article 32(2) of Directive 2004/18 simply on the basis that its term was greater than four years and the contracting authority has failed duly to justify why the term exceeds that limit. In a situation such as that in the main proceedings, it cannot be ruled out, in particular, that a contract such as the initial contract constitutes a valid

²³ Order of 19 February 2018, No 1056, appeal 9816/2016.

²⁴ Under Art. 21 *septies* of the Italian Law of 7 August 1990, No 241, administrative acts shall be null where 1) they lack essential elements, 2) were issued with absolute lack of competence or 3) breach *res judicata*. It seems self-evident that a framework agreement lasting more than four years does not carry any of those vices.

²⁵ *Antitrust and Coopservice*, cit., para. 27.

²⁶ *Ibid.*, para. 27, second subpara.

²⁷ *Ibid.*, para. 36.

²⁸ *Ibid.*, para. 32. Opinion of AG Campos Sánchez Bordona, delivered on 3 October 2018, case C-216/17, *Antitrust and Coopservice*, para. 47. Reply of *Consiglio di Stato*, cit., para. 23.

²⁹ Of course, one can possibly disagree with the substance of *Consiglio di Stato's* arguments (or its form: 16 pages of which only the last three address the nature of the contract!), but there are better ways to show disagreement.... Perhaps the annoyance of the Court had other causes. It is funny to note how AG Campos Sánchez-Bordona commences his opinion reporting that the *Consiglio di Stato* “*once again* seeks a preliminary ruling from the Court of Justice on the interpretation of Directive 2004/18/EC” (italics added).

framework agreement within the meaning of the latter provision during the first four years of its application and expires at the end of that period.”³⁰

Diplomatic considerations aside, the main teaching we may draw is that *the duration of framework agreements matters*. Vague or unspecific justifications, such as the connection with an essential service, do not suffice to go beyond four years and failure to comply with such limit can deprive the framework of effects or render it invalid.³¹

VII. THE DIRECTIVE APPLICABLE *RATIONE TEMPORIS*

Consiglio di Stato asked about the appropriate interpretation of both 2004 and 2014 Directives pointing out that the national laws applicable implemented the former, but they remained in force after the latter had been approved. Of course, the date a new Directive is approved is irrelevant, insofar as such Directive have not been transposed into national law or the term established for the transposition have not expired yet.³²

Indeed, the Court of Justice finds applicable the 2004 Directive. It is a settled doctrine that the relevant time to determine the applicable directive is that when the contracting authority decides definitively the type of procedure to be followed and whether it is necessary a prior call for tenders. This interpretation is aimed at guaranteeing legal certainty throughout all the procedure and the execution of the subsequent contract.³³ In this case, the qualifying date was sometime in year 2011, when Desenzano must have launched the procedure to award the framework agreement.³⁴ Thus, the Directive of 2004 applies.

An interesting, implicit clarification is that, for the Court of Justice, only the date of the initial procedure to award the framework matters to determine the law applicable. The dates of the call-offs are irrelevant, because the extension to Valcamonica is not even mentioned.

VIII. CAN A CONTRACTING AUTHORITY SIGN A FRAMEWORK ON BEHALF OF ITSELF AND OTHER AUTHORITIES?

It is strange that *Consiglio di Stato* submitted this question.

³⁰ *Antitrust and Coopservice*, cit., para. 42.

³¹ The Court suggests, with inconclusive language, that such inefficacy could appear after the first four years (para. 42). The AG seems to support *ext tunc* forms of inefficacy/invalidity (paras 53-54, footnote 24).

³² Legislative Decree no. 50 of 18 April 2016 implemented the 2014 Directive.

³³ Court of Justice: judgment of 5 October 2000, case C-337-98, *Commission v. France*, paras 37-42; judgment of 3 October 2019, case C-285/18, *Kauno miesto savivaldybė*.

³⁴ A slight mistake could be attributed to the Court when applying this doctrine with reference to the award of the contract by Desenzano by Decree of 4 November 2011 (para. 45), when the decision about the type of procedure to award the framework was adopted long before, obviously. However, it is also obvious that in this case both the award and such decision must have fallen under the temporal scope of the 2004 Directive.

The judgment of first instance does not show a trace of contentiousness thereto and *Consiglio di Stato* itself found uncontroversial that a single authority can sign a joint framework agreement pursuant to the general rules on representation.³⁵ Furthermore, *Consiglio di Stato* does not clarify why it thinks that the Union law may not permit the same, save implicitly, by citing in the question Art. 32 of the 2004 Directive, whose para. 2 provides for that call-offs “may be applied only between the contracting authorities and the economic operators *originally party to the framework agreement*”.³⁶

Of course, the answer of the Court of Justice is positive. Currently the question has lost interest, as the 2014 Directive expressly allows that any contracting authority that has been “clearly identified for this purpose in the call for competition or the invitation to confirm interest” uses the agreement.³⁷

The question gives rise to another mistake of the Court of Justice. Once stated that the authorities entitled to use a framework agreement should be clearly identified, so the requirements as to advertising, legal certainty and transparency are complied with, it contradictorily claimed that the identification can appear in a tender document *or in the framework agreement itself*,³⁸ that is, in the final contractual document signed with the awardee(s) of the framework.³⁹ Actually, not providing this information until the award of the framework hardly complies with the principle of transparency. Such understanding is incompatible with the wording of the current Directive.⁴⁰

IX. SHOULD THE QUANTITY THAT MAY BE REQUIRED BY THE POTENTIAL USERS OF THE AGREEMENT BE DETERMINED?

The second question was more interesting.

Consiglio di Stato asked if the Directive allows that the quantity of services that may be required by the authorities that did not sign the agreement may be

- 1) undetermined or
- 2) determined by reference to their usual needs.

³⁵ Referral order, cit., point 2.13.

³⁶ Italics added.

³⁷ Art. 33, para. 2, second subpara, 2014 Directive. It is still an unclear question, though, to which extent the identification of a contracting authority as beneficiary should be based on a real intent to use the agreement (S. ARROWSMITH, *The Law of Public and Utilities Procurement*, London: Sweet & Maxwell, 2014, p. 600) and whether newcomers not mentioned upfront could join the framework afterwards under certain circumstances (see UK Office of Government Commerce, Action Note 16/10, of 8 September 2010, *Need to ensure that bodies permitted to use frameworks are adequately identified and clarification is issued if necessary*, para. 17, webarchive.nationalarchives.gov.uk).

³⁸ *Antitrust and Coopservice*, cit., para. 56, operative part. Opinion of AG Campos Sánchez Bordona, *Antitrust and Coopservice*, para. 72.

³⁹ Art. 1, para. 5, 2004 Directive; Art. 33, para. 1, 2014 Directive.

⁴⁰ Art. 33, para. 2, 2014 Directive.

The answer seemed complicated, because a legal provision, appears to make the indication of quantities, at least, not absolutely mandatory: only *where appropriate*.⁴¹

IX.1. SEVEN ARGUMENTS FOR QUANTIFICATION

In the view of the Court it cannot be accepted that the phrase “where appropriate” means that an indication of the quantity of the services covered by the framework is optional.⁴²

In essence, the Court provides five arguments for mandatory quantification, which are presented in a condensed fashion, with frequent implicit understandings and apodictic language. Our summary and reconstruction thereof follow:

1) *Quantification is necessary to estimate the value of the framework.* The maximum volume must be determined from the outset, as follows from the provisions regulating the estimated value of framework agreements (an estimation that would be unfeasible in the absence of a quantity; you cannot estimate how much money you may spend if you do not know how much service you may require).⁴³

Further, it follows from the regulation of contract notices that stating the total quantity covered by a framework is imperative, while breaking down that quantity into each of the specific contracts is due on a best-endeavours basis only.⁴⁴

2) *The advertised quantity limits the overall usage of the framework agreement.* Under Art. 32, contracts based on a framework agreement must be awarded within the limits of the terms laid down in the agreement, what implies that once the total quantity is reached, the framework agreement cannot be used anymore (so the quantity should be established in the framework).⁴⁵

Non sequitur aside,⁴⁶ it is fantastic that *Antitrust* has found that the contracts based on a framework are limited by the estimates laid down in the agreement, as it appears that certain jurisdictions may not be following such an obvious claim.⁴⁷

3) *Principle of transparency.* The principle of transparency requires that all the conditions and rules of the procedure are drawn up clearly in the contract notice or tender

⁴¹ The definition of frameworks: Art. 1, para. 5, 2004 Directive; Art. 33, para. 1, 2014 Directive.

⁴² *Antitrust and Coopservice*, cit., para. 58.

⁴³ The reasoning in brackets seems implied in para. 60 of *Antitrust and Coopservice*, cit.

⁴⁴ *Ibid.*

⁴⁵ *Antitrust and Coopservice*, cit., para. 61. The text in brackets is implied. The Court mentions frameworks concluded with a single economic operator as regulated by Art. 32 para. 3, 2014 Directive. However, the reasoning is applicable to multi-provider agreements, whose based contracts must be awarded under the terms of the framework too (Art. 32, para. 4).

⁴⁶ There is no logical necessary relation between the framework establishing the terms under which further contracts must be awarded and such terms including necessarily a maximum quantity.

⁴⁷ This is the case of Spain, where the streamline understanding in the Public Administration seems to be that the estimated value of framework agreements is not a ceiling but only an estimation, so it can be exceeded. See, *inter alia*, *Junta Consultiva de Contratación Pública del Estado*, Opinion 17/12, of 20 November 2012 www.hacienda.gob.es.

specifications. The said principle would be affected if the framework agreement did not set out the total quantity covered. Transparency is all the more important in framework agreements, as contracting authorities are not bound to send a notice of the results for each derivative contract.⁴⁸

4) *Avoid the bypassing of the Directive.* Not determining a comprehensive quantity would allow to artificially elude the application of the Directive if, as a consequence, the value of the frameworks fell under the economical thresholds defining its scope.⁴⁹

5) *Principle of competition.* The requirement to state an overall quantity is a manifestation of the prohibition to use framework agreements in a way that distorts, restricts or prevents competition.⁵⁰ (Indeed, competition would be severely impaired if a low-value framework turned into a lot of derivative contracts amounting much more than advertised initially.)

IX.2. TWO ARGUMENTS FOR EXPRESS QUANTIFICATION

Finally, two reasons are provided to reject that the quantification is made by reference to the usual needs of the contracting authorities:

1) *Equal treatment.* Even if a reference to the ordinary needs of the contracting authorities is informative enough for national operators, it cannot be assumed that it would be the same for the operators established in another Member State.⁵¹

2) *(In the case) it is not hard to give an overall quantity.* If it is so easy that the economic operators find out those ordinary needs, then it should be easy to establish such quantity “in the framework agreement itself” (*sic!*) or in another published document.⁵²

X. CONCLUSIONS

As we said at the beginning, *Antitrust and Coopservice* delivers reasonable directions to handle framework agreements and joint procurement with care and respect for the legal limits. However, several questions remain obscure and further orientations are

⁴⁸ *Antitrust and Coopservice*, cit., paras 63-65.

⁴⁹ *Ibid.*, para. 66.

⁵⁰ *Ibid.*, para. 69.

⁵¹ *Ibid.*, para. 67.

⁵² *Ibid.*, para. 68. The Court, and the AG (para. 81), commit the same mistake again. The overall estimated quantity (or value) is needed in the contract notice or other document available from the outset, so the tenderers know what they are applying for! Of course, this is without prejudice to the framework agreement *repeating* such quantity. Under certain conditions the estimated quantity could be specified or *updated* in the framework in accordance with the terms of the tender and the winning offers. (E.g., a tender could be launched to award a framework to the tenderers which offer the best-quality and/or maximum number of items for a fixed value that the contracting authority is willing to spend. In this case, the estimated quantity announced could be incremented when awarding or signing the framework, insofar as such tender conditions were advertised transparently).

needed to operationalise such directions in the day-to-day practice of contracting authorities. Whereas a comprehensive guidance would exceed the limits of a work like this, what follows is just a basic sketch summarising the main conclusions that can be drawn from the foregoing:

1) Duration matters. Incompliance with the legal limits on framework agreement duration, including the absence of a proper justification to exceed such limits, if applicable, can stop the effects of the agreement or make it invalid.

2) The Directive applicable to the award of the framework agreement applies to the award of the derivative contracts too.

3) The potential users of a framework agreement should be identified from the outset.

4) It is mandatory to establish and, where applicable, advertise the total quantity of services that may be requested under a framework agreement.

5) It is not mandatory, but best endeavours should be used, in order to establish and, where applicable, advertise the frequency and value of the derivative contracts (and, arguably, the identity of the contracting authority awarding/using such contracts in the case of joint framework agreements).

6) Reasonably, a similar obligation of means applies as to the accuracy of the estimated quantities and values.⁵³

7) The estimated value and/or the estimated quantity of the framework agreement as a whole shall limit the sum of the specific contracts based on such agreement.⁵⁴

⁵³ Indeed, this does not mean absolute accuracy. In fact, "some uncertainty over the volume of use is inherent to many framework agreements and the very reason for them": S. ARROSMITH, *The Law of Public*, cit., p. 1121. Also, one of the most advantageous characteristics of framework agreements is the retainment of the freedom to buy outside the framework, where it is more favourable at the time of the call-off (M. ANDRECKA, *Framework Agreements, EU Procurement Laws and the Practice*, in *Procurement Law Journal*, 2015, 2, p. 133), so, even if the initial estimations were solid, this does not mean they will match reality necessarily. At any rate, "some meaningful level of accuracy" is required (R. CANAVAN, *Public Procurement and Frameworks*, in C. BOVIS (ed.), *Research Handbook on EU Public Procurement Law*. Cheltenham: Elgar, 2016, p. 135-136). To that end, strict internal processes informed by reliable data relating to the current and past trends in demands for and usage of products and services are key (*ibid.*). What in no way would be admissible is that "central purchasers are unaware of the exact needs of the contracting authorities", and even that "at times the centralized framework agreements are established without consultation with the end-users contracting authorities": M. ANDRECKA, *Framework agreements*, cit., p. 138 and 142.

⁵⁴ Without prejudice to modifications, where feasible. See Art. 72 2014 Directive. With respect to the estimated value, the findings as to the volume of services seem applicable to the estimated value at least in part, with the qualification that under the 2014 Directive the indication of the estimated value in contract notices is optional. In para. 66, the Court requires the indication of "quantity and *maximum amount* of services". In the Romance language versions, the expression in italics refers clearly to the economic value (*montant maximaux, import massimi, importe máximo, valoarea maximă, montante máximo*).

