



Public Procurement Conference

Centralization and new trends

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Modification of a Framework Agreement

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Introduction

- Comparative law research on Centralization of Public procurement in EU
Book on CPBs (2021)
FAs now under investigation

Comparative Law Method

- Like CPBs, also FAs are not a creation of EU law
- FAs were used by Member States before introduction in Procurement directives
- European legal space



Index

1. Is a FA a contract?
2. Does it matter for modification rules?
3. What is the applicable law for modification in general?
4. What is the applicable law for modification of a FA?
5. What is the applicable law for the modification of a contract based on a FA?
6. The need for comparative law.



1. Is a FA a contract?

- Explanatory Note on FA issued by the EU Commission (2005) distinguishes – purely for explanatory purposes - between
 - Framework Contracts – all terms are established
 - Framework Agreements – not all terms are established
- The difference consists in different binding constraint
 - E.g. Letter of Intent vs Preliminary contract
- But the Explanatory note recognizes that the legal force of FAs depends on **national law**



1. Is a FA a contract?

- Comparative law shows that «contract» has no uniform definition in Member States
- Donation is a contract in French law but not in English law
- The same for FA: it can be a contract or not, depending on national law, not on EU law
- Theory of European legal space



1. Is a FA a contract?

- Remedies directive (89/665), art. 1.1, can suggest a possible solution under EU law:
 - «Contracts within the meaning of this Directive include public contracts, **framework agreements**, public works concessions and dynamic purchasing systems»
- CJEU, in the EPIC case (C-274/21), confirms that a FA with a single economic operator **is a contract** for the purpose of art. 2 a 2 (standstill period)
- But what about FA with more than one economic operator?



2. Does it matter?

- Even if FAs were already used by Member States before the Procurement Directives (recital 60 Directive 2014/24)
- Uniform regulation under 2004 and 2014 Directives have created an **original legal institution**, subject to EU Law (like, e.g., the «body covered by public law»)
- In particular, the **modification regime** set by Procurement directives is self sufficient
- It can disregard the qualification of FA as a contract, because art. 72 defines itself as also applicable to FAs



3. What is the applicable law for modification in general?

- Dual level system
 - Modification of FAs: art 72 Directive 2014/24
 - Modification of contracts based on FAs: art. 33, par 2, last phrase Directive 2014/24: *no substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in par 3 (single economic operator)*
- Art. 72 not applicable to contracts based on FAs?



4. What is the applicable law for modification of a FA?

- In art. 72, FA is always equated with public procurement contracts **except:**
 - Par 1, last period - duty to notify modification to the Commission;
 - Par 2 – de minimis rule – but FA is again mentioned in par 2, last period (alteration of the overall nature of the contract)
- Just a drafting mistake?



4. What is the applicable law for modification of a FA?

- Is art. 72 fully applicable?
 - Review clauses, additional works, services and supplies, unforeseeable circumstances: are they compatible with Fas structure «to establish the terms governing contracts to be awarded»?
 - What if the FA is not fully used? Selection criteria required much higher than effective use (par. 4A-substantial modification);
 - Par 5: if a new procurement procedure shall be required and the FA is terminated (art. 73.1)- what happens to contracts based on Fas?



4. What is the applicable law for modification of a FA?

- Are there additional limitation beyond those of art. 72?
 - The four years term can be extended only under art. 33, par. 1 (exceptional cases, duly justified)?
 - Modification of contracting authorities and economic operators is forbidden under art. 33par 2 or admissible under art. 72, par. 1D?
 - Modification of CA: how precise has to be the «reference to a given category» (recital 60)? Is it admissible, e.g., «all interested CAs»?



5. What is the applicable law for modification of a contract based on a FA?

- *Art. 33.2: no substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in par 3 (single economic operator)*
- Substantial modification: same definition as in art. 72 par. 4?
- What about modifications under art. 72 par. 1 and 2, which refer to modification of contracts? Are they applicable?



5. What is the applicable law for modification of a contract based on a FA?

- Is it necessary to modify **first** the FA and **then** the contract based on it?
 - If FA with single economic operator – more easy
 - If FA with more than one economic operator – conflicting interests of other economic operators
 - Without reopening competition
 - With reopening competition



6. The need for comparative law

- Only 3 CJEU decisions on art. 33 Directive 2014/24
- Need to create a European *Ius Commune* on this issue with national case law and practice
- Any help is very much welcome

THANKS!