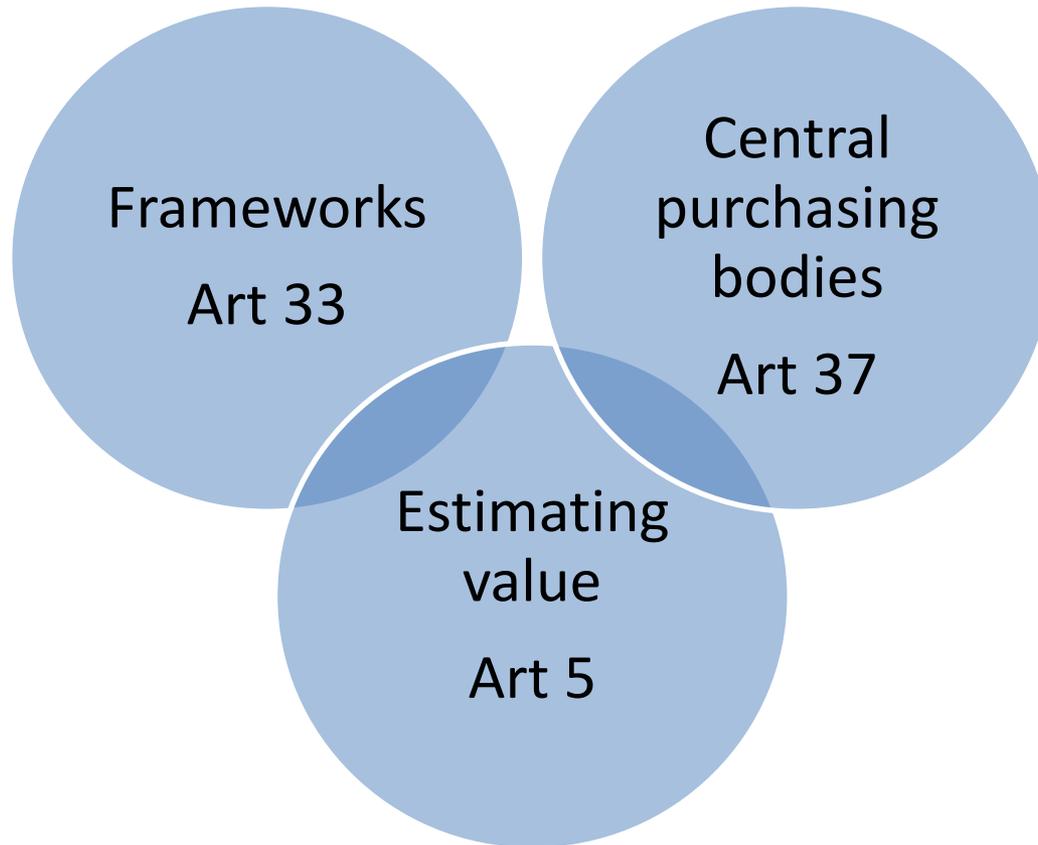


**Frameworks:  
Case C-216/17 *Autorità  
Garante della Concorrenza e del  
Mercato***

Valentina Sloane QC  
Monckton Chambers

# Back to basics



# Background to frameworks and CPBs

- Long-standing Commission concerns about adverse effects on competition: Commission Communication COM (1998) 143 final, 3 November 1998
- European Commission Press Release, Public Procurement: Commission refers United Kingdom to Court IP/00/813, 13 July 2000
- Explicitly allowed in 2004 EU procurement legislation
- Note recital 59 to Directive 2014/24

## Rules for frameworks in Art 33

Limited duration: 4 years  
Note recital 62

Identification of  
CAs: note recital  
60

No new economic  
operators: note  
recital 60

Framework should set out  
clearly how the EAs will be  
chosen for call-offs

Should be non-  
obligatory: note  
recital 61

No “improper use” or  
distortion of competition

# Identifying who can use the framework

- Article 33(2): FA 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.
- Recital 60: CAs who are parties to a FA should be clearly indicated by name or other reference, e.g. within a **clearly delimited geographical area**. Should be possible for the CAs to be “*easily and unequivocally identified*”.
- If CPB uses a register of CAs, it should **identify the date** from which a CA is entitled use the FA
- Recital 67: A CPB acting as an intermediary may conduct the relevant award procedures **autonomously, without detailed instructions** from the contracting authorities concerned

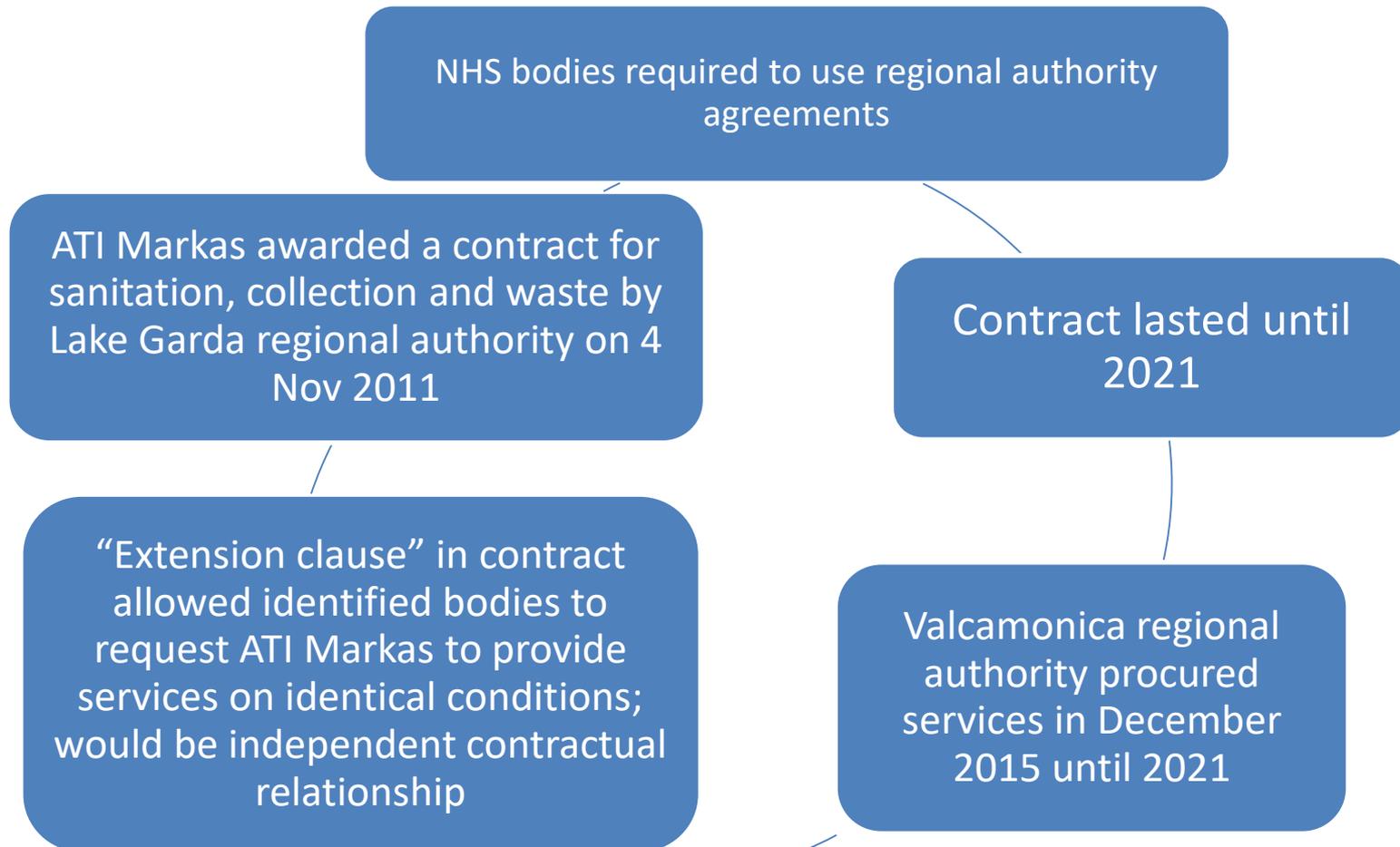
## Estimating the value of the framework

- Article 5(5): With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.

# Case C-216/17 *Autorità Garante della Concorrenza e del Mercato*



# Case C-216/17 *Autorità Garante della Concorrenza e del Mercato*



# Grounds of challenge and the issues

Challenge brought by (1) incumbent supplier and (2) the Competition and Markets Authority of Italy

Challenge to “framework”  
AND “extension contract”

Breach of  
procurement  
AND competition  
law

Qu 1: do the CAs  
need to be direct  
signatories to the  
FA?

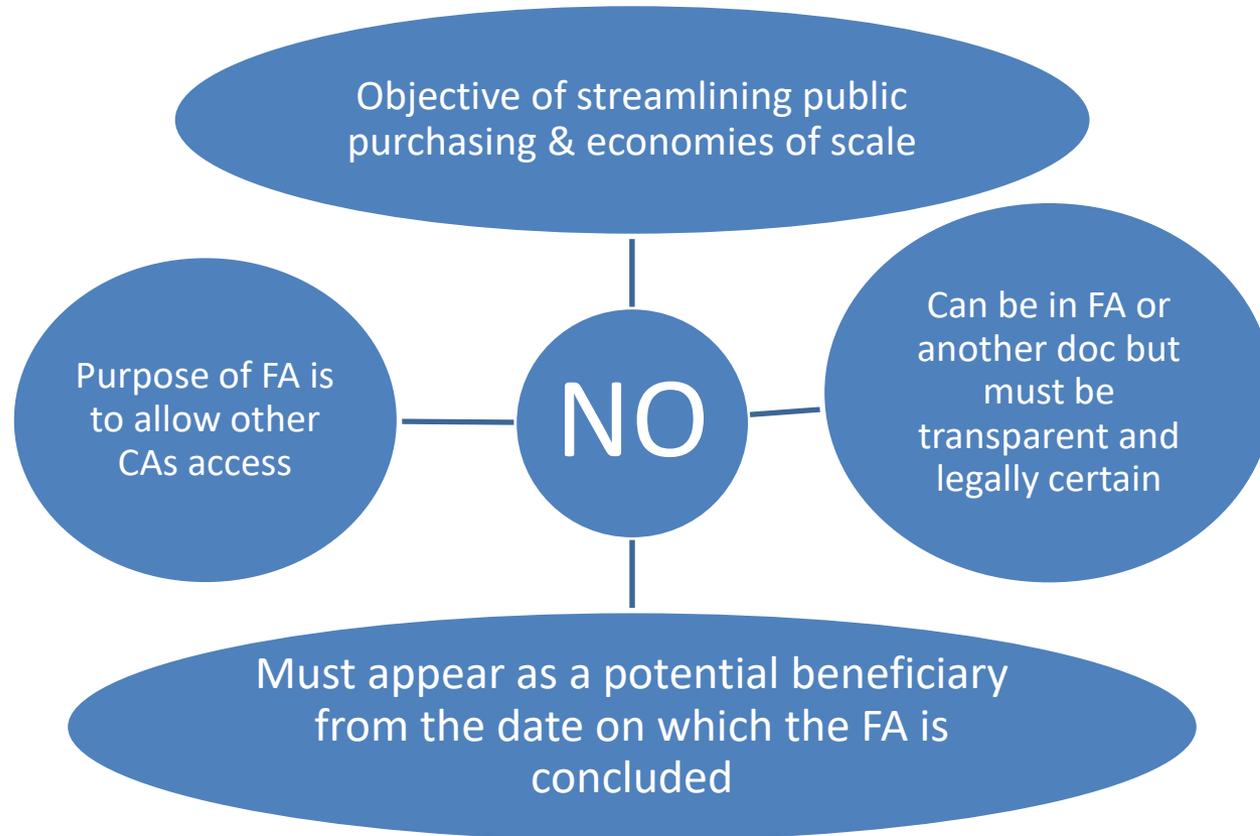
Qu 2: do the  
quantities need to  
be specified?

The unasked qu: is  
this even a FA,  
particularly given  
the duration?

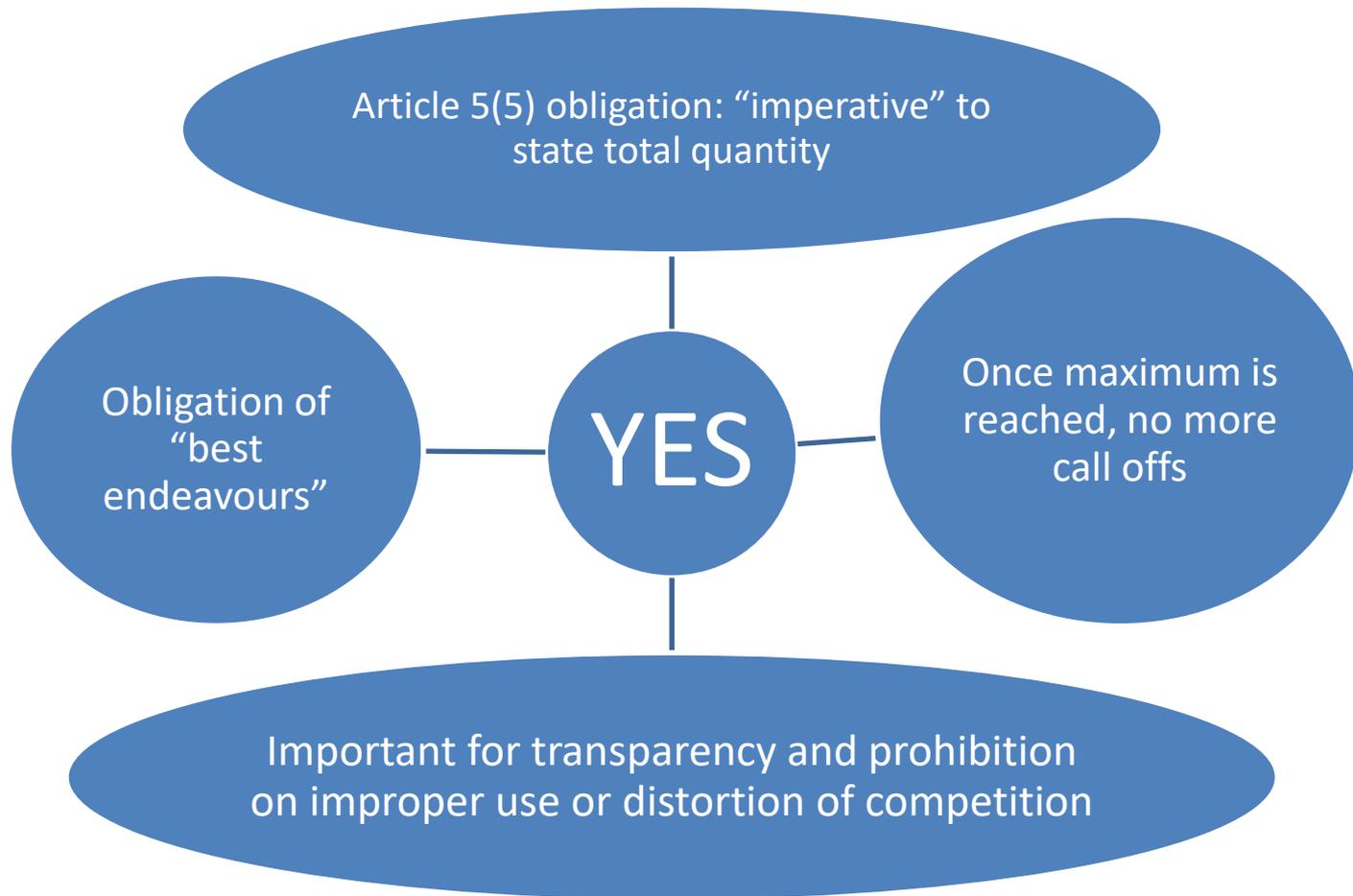
## Was it a valid FA?

- **Might be able to rely on Article 33(1):** 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*
- **Consequence of breach:** cannot be ruled out that would be valid FA for the first 4 years “and expires at the end of that period”

# Do the CAs need to be direct parties to the FA?



# Must all quantities be identified?



# Possible problems with FA parties and value

- Insufficient identification of CAs
- Invalid or excessively vague estimate of value
- Breach of transparency – problem for *RWIND* to formulate bid, particularly pricing
- If estimate is excessive, could wrongly deter EAs, particularly SMEs; note Art 58 selection criteria – turnover linked to value of FA
- Permitted modifications linked to value: Art 72

# Challenge on grounds of competition

- Recital 61: Framework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition
- Contrast Art 18(1) higher threshold
- Does challenger need to meet competition law principles?
- Swedish cases: successful challenges to FAs which are too long or too large

# Splitting into lots

- Limit on number of lots which can be won by a single EA can be beneficial for SMEs and reduces foreclosing effect
- Be aware of unintended restrictive consequences
- Repercussions for challenge; cascade effect if one wrong award

# Getting the target right

- *Medicure Ltd v The Minister for the Cabinet Office* [2015] EWHC 1854 (TCC): “*If (and there is no evidence of it) the FA is being improperly used, it could only be improperly used by the customers under the individual call-off contracts. There is nothing to say that the defendant is in any way involved with any improper use, let alone orchestrating or condoning it*”
- Article 37(2) on division of responsibility and liability
- Transparency problem for EAs outside FA: exclusion from Article 50(2) requirement to publish contract award notice; note reg 108 and Contracts Finder obligation

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