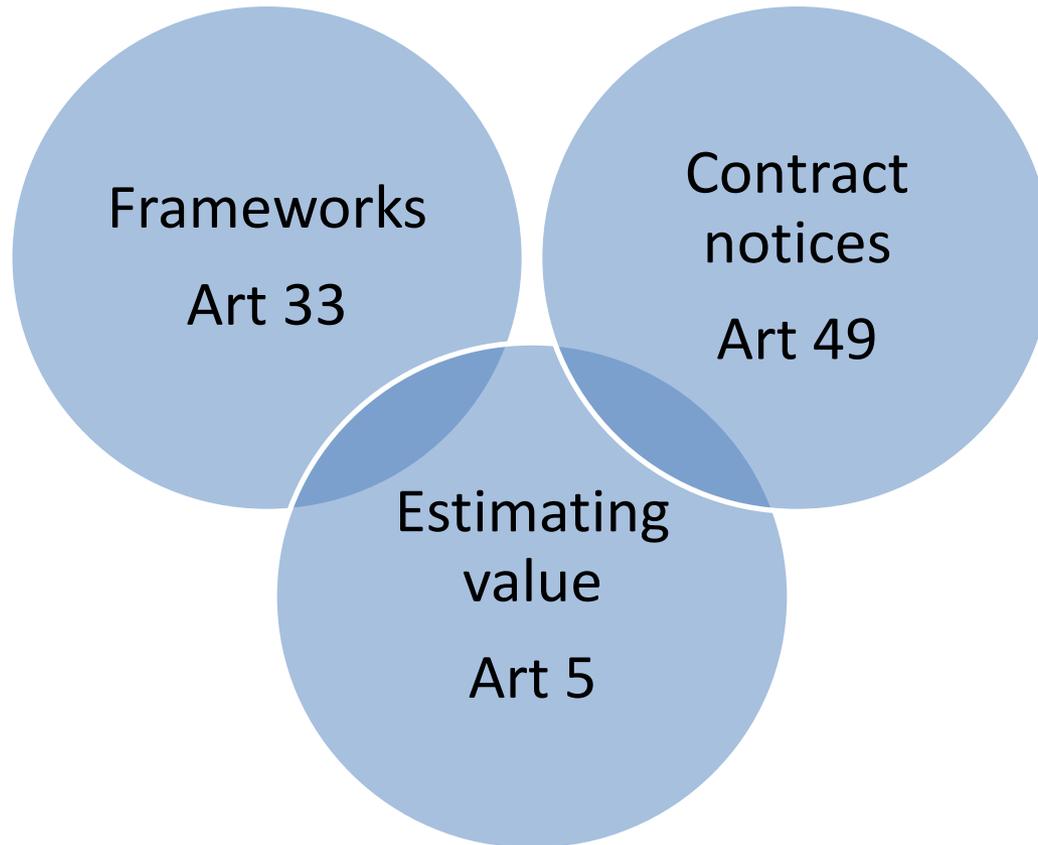


Frameworks: new EU case law and will the UK follow it?

Valentina Sloane QC
Monckton Chambers

Back to basics



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

Contract notice requirements

- Article 49 – required information in Annex V, Part C
- Estimated total order of magnitude of the contract (s)
- In the case of a framework agreement...as far as possible, indicate the value or the order of magnitude and the frequency of the contracts to be awarded

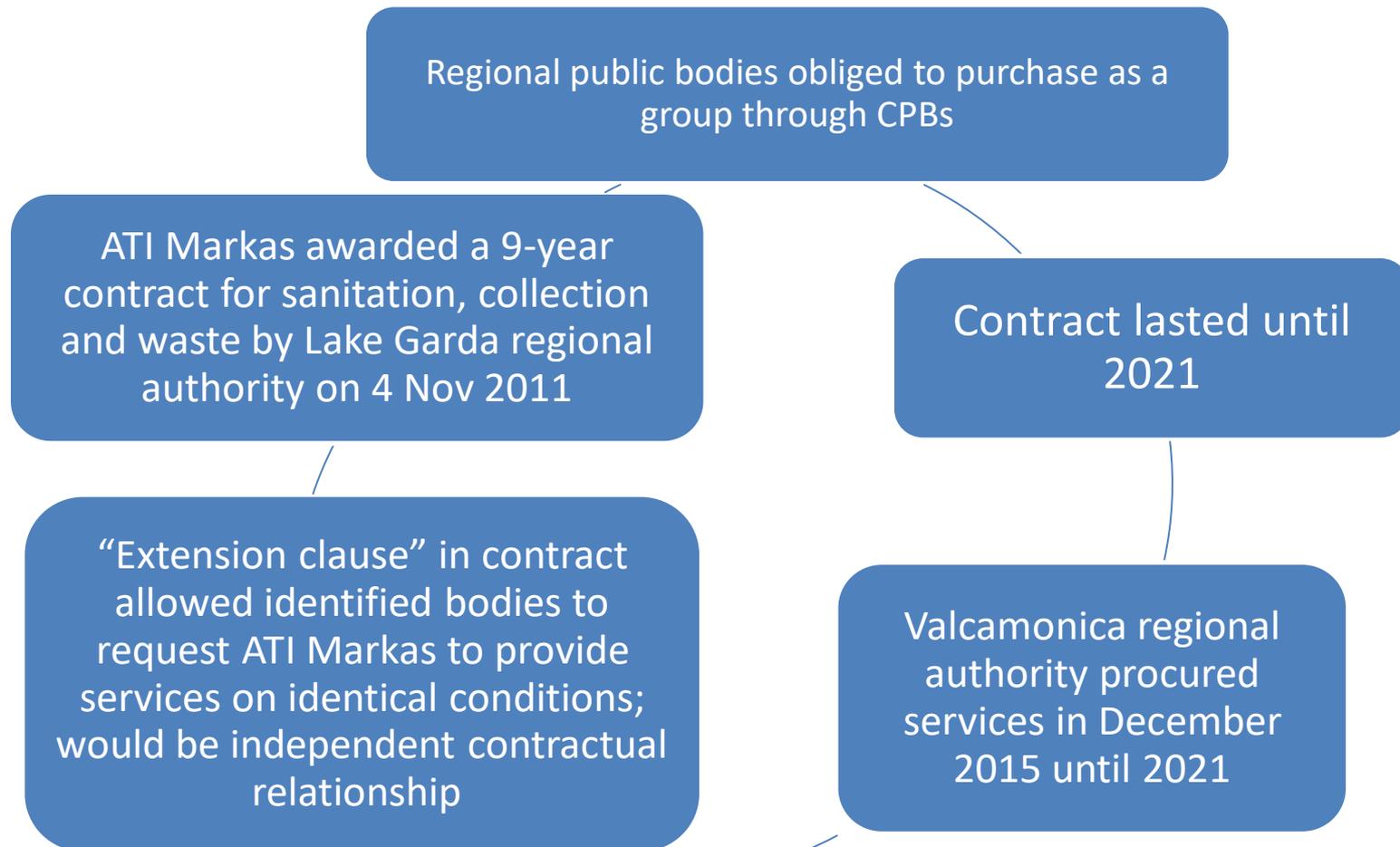
Estimating the value of the framework

- 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

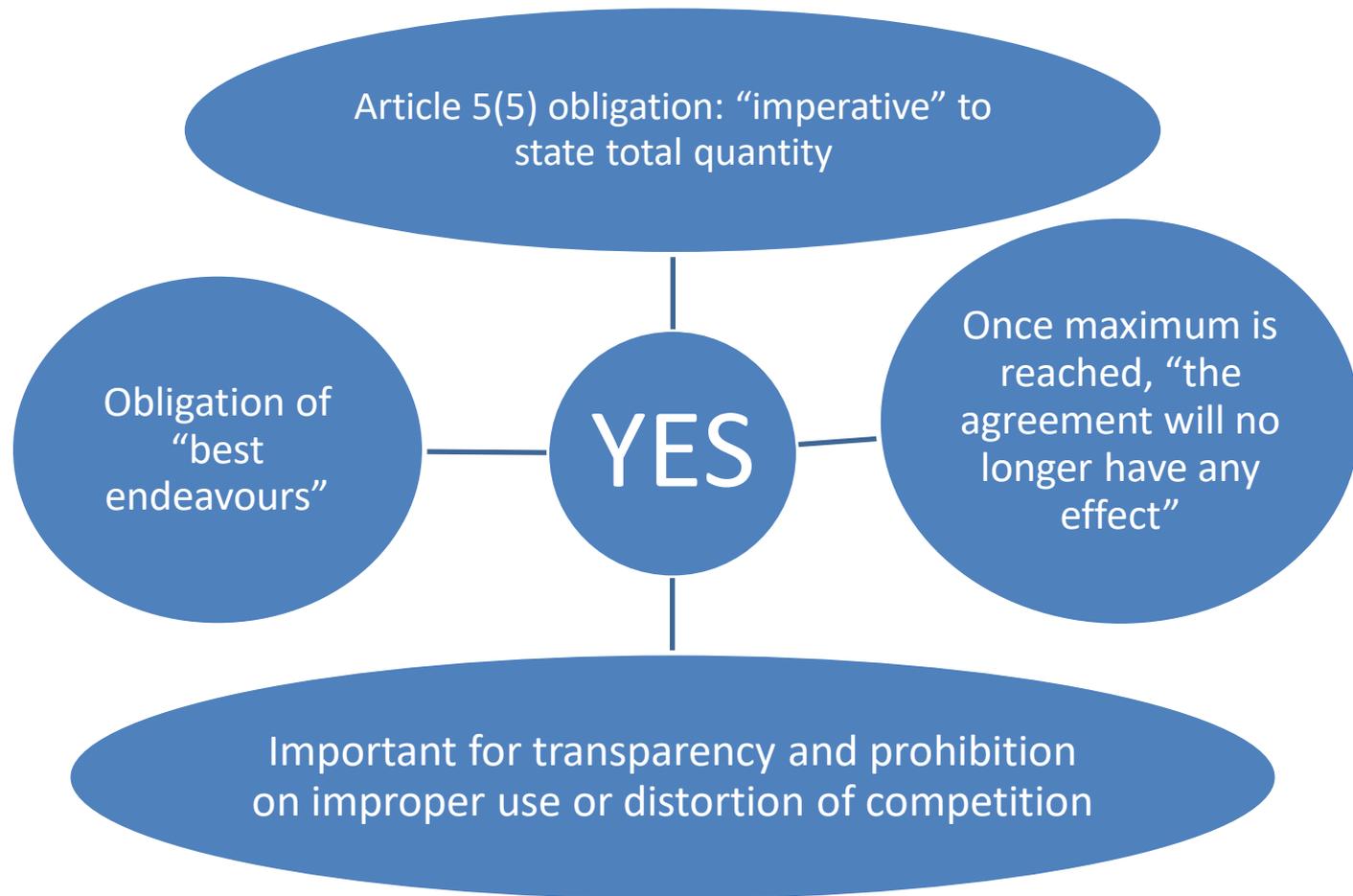
Qu 1: do the CAs need to be direct signatories to the FA?

Qu 2: do the quantities need to be determined?

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



Must maximum volume of supplies be determined from the outset of the FA?



Case C-23/20 *Simonsen & Weel*, CJEU decision of 17 June 2021



Ivar the Boneless



Case C-23/20 *Simonsen & Weel*, CJEU decision of 17 June 2021

Contract notice: 4 year FW,
single operator, Jutland + S.
Denmark as optional

Contract notice: no estimate of
likely/max value for main
contract or option

Tender documents had
estimates of expected
quantities (“the actual
consumption may prove to be
higher or lower”)

Annex with 51 different lines of
goods, with expected annual
consumption for each item and
each region

Tender documentation:

- No obligation to buy under
the FW and not exclusive
- Estimates were indicative as
operating situation might
change

Grounds of challenge and the issues

Challenge brought by an unsuccessful tenderer
FW entered into with successful tenderer

Challenge to failure to indicate
in the contract notice itself the
estimated quantity or value of
supplies

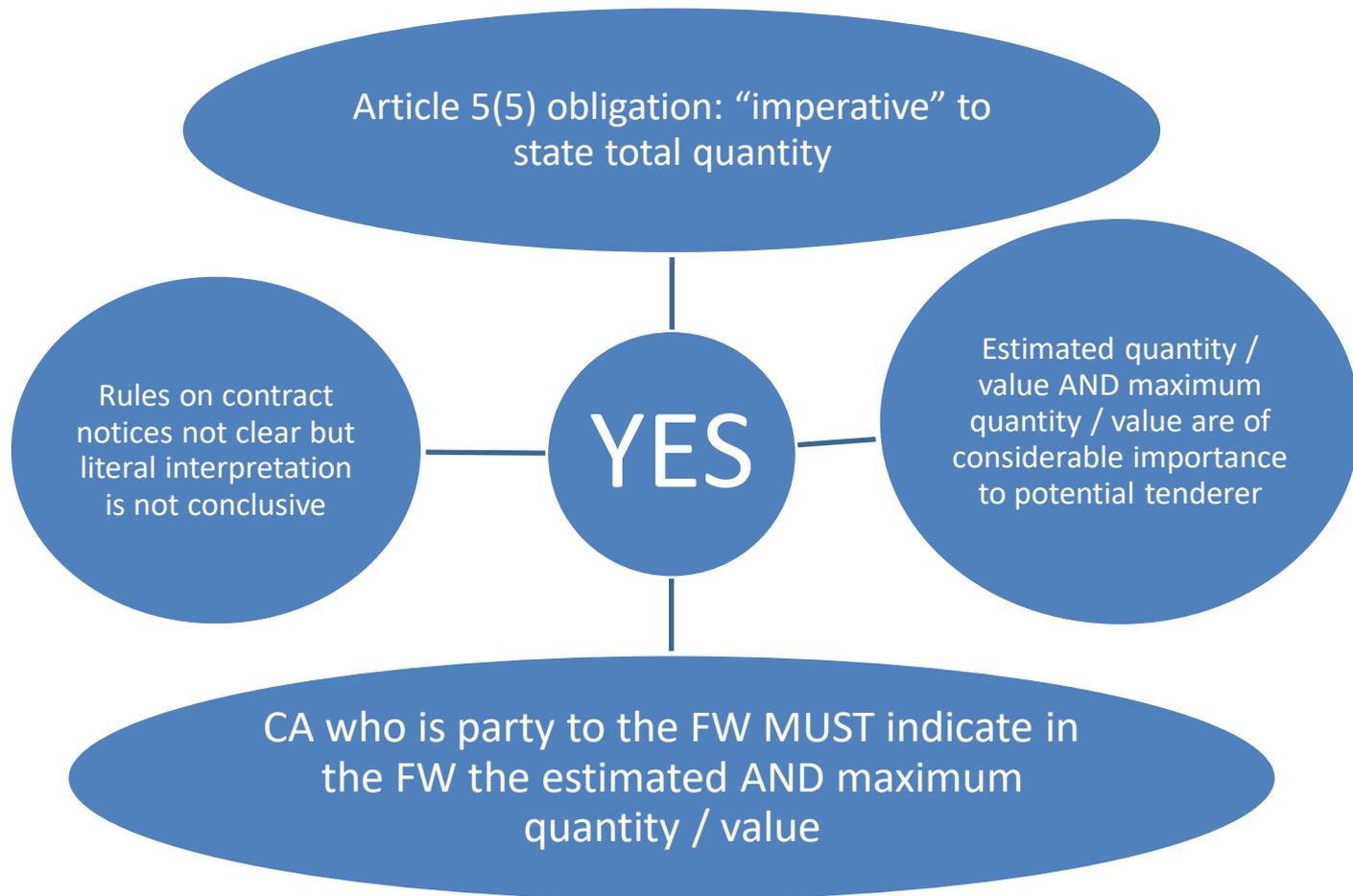
Challenge to failure to state a maximum:
estimates in the tender docs were
expressly not binding

Qu 1: does the
contract notice
need to state an
estimated value?

Qu 2: does the
maximum value
need to be
stated?

Qu 3: does a
failure mean that
there has been an
illegal direct
award which can
be annulled?

Must CA indicate the estimated AND maximum value/quantity of supplies?



CJEU observations on the obligation

FW can be amended under Art 72

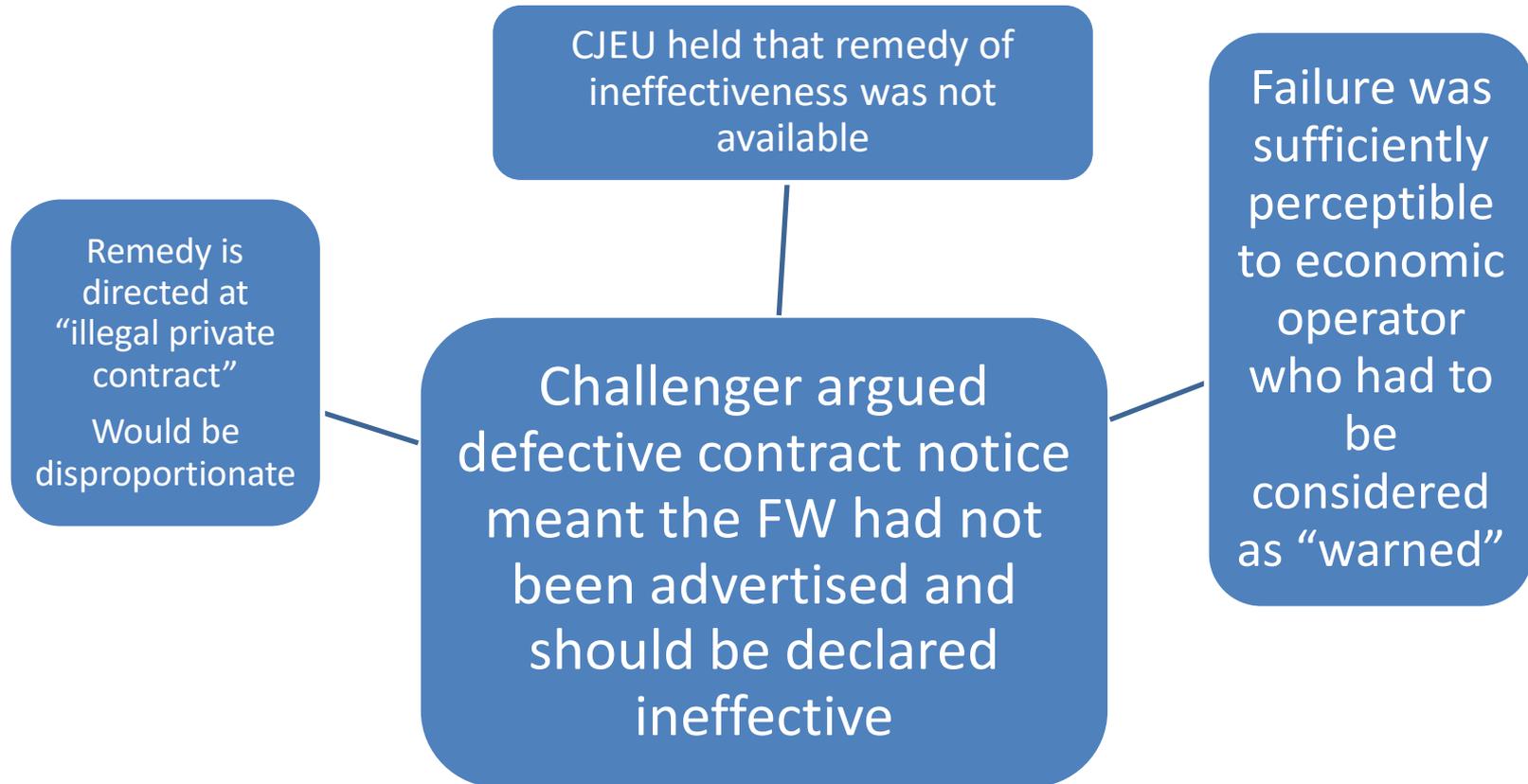
Max value can be indicated in contract notice or specs

Can be limited to global indications

CA may (but is not required) to subdivide global indications

So can specify separate estimates for CAs with option to purchase under FW

Consequences of breach



Questions left unanswered

What is the legal remedy if the limit is exceeded?

How does this apply when the FW is not single operator?

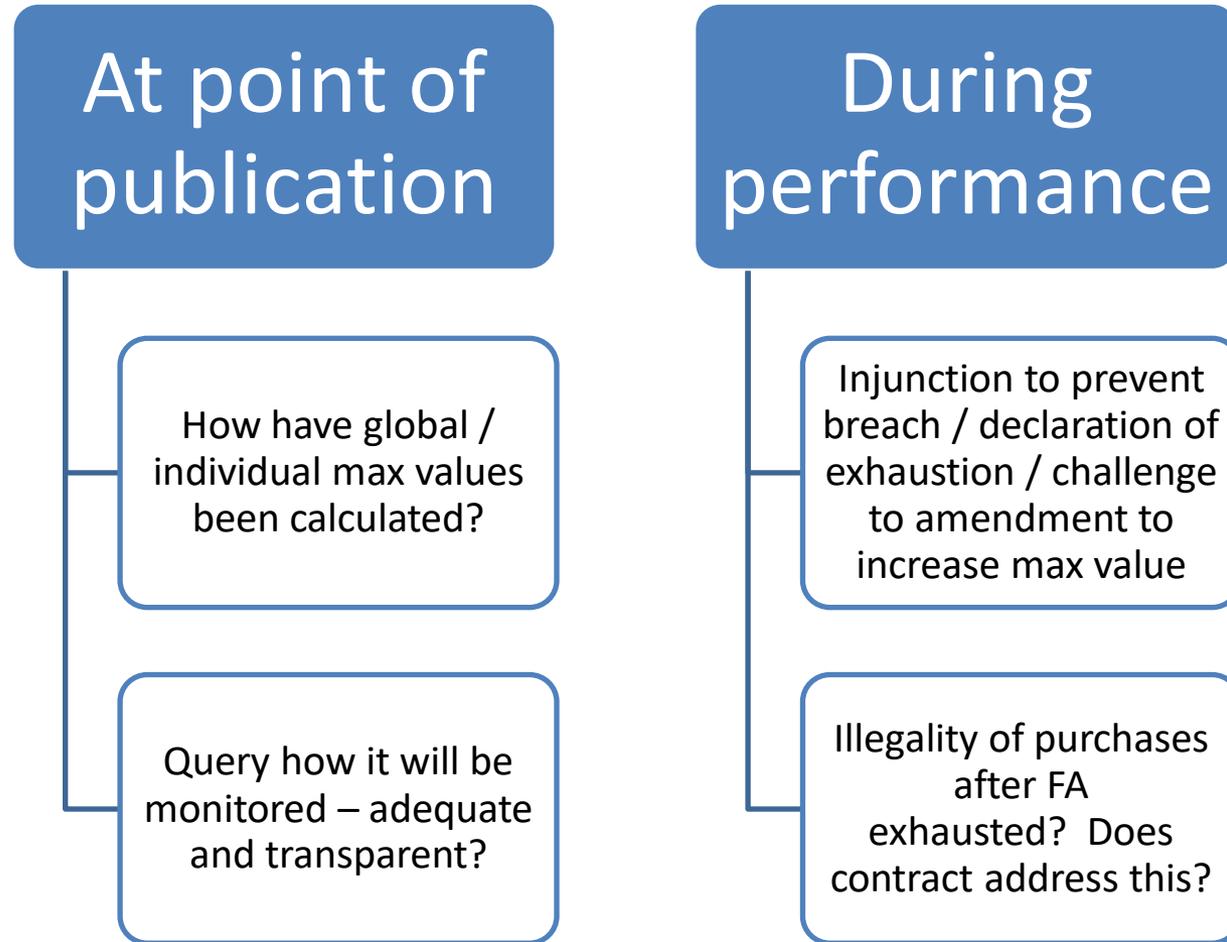
What amendments to estimated / max values will be lawful under Art 72?

How will CAs and EAs know if the global limit has been exhausted?

What limit is there on estimating the maximum? On what grounds can it be challenged?

How precise do estimates have to be? What about novel situations?

Stages and grounds of challenge



Will the UK apply this judgment?

- Useful summary of legislation and principles in judgment of Green LJ in *Lipton & Anor v BA City Flyer Ltd* [2021] EWCA Civ 45
- The meaning and effect of the measure should be determined by reference to case law of the CJEU made prior to 11 pm 31st December 2020
- The CA can depart from any retained CJEU case law or any retained general principles: see *Tunein Inc v Warner Music UK Ltd & Anor* [2021] EWCA Civ 441

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