

**THE HIGH COURT**

**COMMERCIAL**

**[2020/432/JR]**

**BETWEEN**

**WORD PERFECT TRANSLATION SERVICES LIMITED**

**APPLICANT**

**AND**

**THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM**

**RESPONDENT**

**JUDGMENT OF Mr. Justice Twomey delivered on the 24<sup>th</sup> day of February, 2022**

**SUMMARY**

1. This is a case in which there is a challenge by the applicant (“Word Perfect”) to the tender process for the purchase by public sector bodies of interpretation services in languages other than Irish (the “2020 Framework”). As a result of the institution of these proceedings, the State has stalled the tender process.

2. The tender was issued by the Office of Government Procurement (“OGP”), which operates under the Minister for Public Expenditure and Reform (the “Minister”). The interpretation services were due to be supplied to various public sector bodies such as An Garda

Síochána, the Courts Service, the HSE etc. In these circumstances, the respondent will be referred to as the “State”.

3. Word Perfect is challenging the 2020 Framework on two grounds.

(i) **The procurement should not be divided into lots**

4. First, it alleges that the proposed division of the procurement into lots is unlawful. This relates to the fact that the procurement of interpretation services in this case is divided into four lots which are roughly equal in value (up to €5 million each), i.e. Lot 1 (the Courts Service), Lot 2 (An Garda Síochána), Lot 3 (the Department of Justice and Equality, the Legal Aid Board and the Department of Employment Affairs and Social Protection) and Lot 4 (various other public bodies).

5. Word Perfect claims that this division into lots is unlawful because Article 46.1 of the relevant directive (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 (the “Procurement Directive”) provides for ‘*a contract*’, and not ‘contracts’, to be divided into lots.

6. Word Perfect relies on the fact that, despite this wording, the title of the tender document in this case is:

“Four Single Supplier Framework **Contracts** for the provision of Interpretation Services (excluding Irish Language Services)” (Emphasis added).

7. Applying what Word Perfect accepts is a ‘technical’ argument, it goes on to claim that the Minister is not allowed to divide the procurement of interpretation services into lots as it involves ‘contracts’ rather than a ‘contract’, and so the 2020 Framework is unlawful.

8. In these proceedings, this is referred to as the ‘division into lots’ claim.

(ii) **Restricting tenderers to one lot is unlawful?**

9. The second claim relates to the fact that the 2020 Framework provides that while tenderers can submit tenders for any or all of Lots 1 to 4, a tenderer is limited to being awarded

one lot. This is achieved by requiring tenderers to confirm their lot preference ranking, in respect of each lot for which they have tendered. Where a tender is identified as the most economically advantageous tender ('MEAT') in respect of a particular lot and the tenderer has indicated that this is its first lot preference, then that tenderer will be awarded that lot. If the tenderer happened to be the MEAT for another lot also, then this lot would be awarded to the next most economically advantageous tender.

10. Word Perfect claims that the terms of the 2020 Framework which limit successful tenderers to one of the four lots in this way, and thus which limit a successful tenderer to 25% of the public sector market for these interpretation services, is unlawful on the grounds, *inter alia*, that the division of a market in this way by the State is anti-competitive.

11. This is referred to as the 'one-lot rule' claim in these proceedings.

#### **The context in which the challenge is brought**

12. The backdrop to Word Perfect's challenge is that the existing framework (the "2015 Framework") for the supply of interpretation services to the public sector has no limit on the market share which a successful tenderer might obtain. Under the 2015 Framework, Word Perfect was the second biggest supplier of interpretation services to the State, the biggest being Translation.ie.

13. Word Perfect and Translation.ie were the only firms to obtain State contracts for interpretation services under the 2015 Framework. Accordingly, Word Perfect (which has a turnover of €867,000 and so is a Small and Medium-sized Enterprise ("SME")) could be said therefore to have a particular interest in challenging any decision which might limit its future share of the market.

14. However, the State's interests are different. It has outlined that its objective, in having a division into lots and in having a 'one lot rule', is to, *inter alia*, facilitate the participation by SMEs in tenders for State work, and by SMEs it means not just Word Perfect and

Translation.ie, but numerous SMEs. The State has also outlined that another objective in having the disputed terms in the tender documentation is to ensure that at the end of the four-year term of the 2020 Framework, the State would not be left with just one or two suppliers of interpretation services which are bidding for State contracts at that stage, bearing in mind that only two suppliers obtained contracts under the 2015 Framework.

15. For the reasons set out below, this Court finds that the ‘division into lots’ claim is not sustainable and that the ‘one lot rule’ claim is also not sustainable. In reaching this decision, this Court rejected, *inter alia*, the notion that the State is guilty of bias towards Word Perfect, in drafting tender documents in a manner which seeks to avoid legal challenges from Word Perfect, which it described as ‘*litigious*’.

16. In particular, it is this Court’s view that not only does it not amount to bias for the State to seek to draft State tenders to avoid legal challenges from Word Perfect, or any other supplier, but that it is a laudable objective of a State entity, when pursuing its activities to do so in a fashion which seeks to minimise future litigation costs (which can be a very significant cost to the taxpayer) and thereby to minimise the need for the over-stretched court resources to be expended unnecessarily.

## **BACKGROUND**

17. It is common case that the public sector accounts for over 90% of the demand for interpretation services in the State, with the private sector therefore making up a very small part of the market.

18. The OGP, in finalising the 2020 Framework, modified the 2015 Framework because of concerns expressed by stakeholders regarding how the 2015 Framework had operated. In this regard, the OGP undertook the following consultation, research and analysis.

### **Analysis of the interpretation services market undertaken by the State**

19. Mr. Randal MacDonnell, the Category Manager in the OGP, provided affidavit evidence that the following steps were undertaken:

- First, a Project Initiation Document was prepared by Mr. MacDonnell in 2019 to address issues within the 2015 Framework.
- Actions were then undertaken by Mr. MacDonnell and his team to review the market size, contract duration, and structure of the framework. This review was broad in scope and examined similar framework agreements in the UK and EU. In the review process, different prospective contracting authorities were consulted for their views also.
- A meeting was held with key framework users in 2019, where the composition of a sourcing team, an overview of current arrangements and the business case for a successive framework was discussed.
- A Request for Information for the Provision of Translation and Interpretation Services (RFI) was then designed, pursuant to which information was sought from suppliers in the market.
- The Customer Servicing Group (CSG) (which included members of An Garda Síochána, the Courts Service, the Department of Employment Affairs and Social Protection, the Legal Aid Board and the Department of Justice as key stakeholders) were requested to sign off and approve the publication of the RFI. They also had the opportunity to review the RFI.
- There were further discussions with individual members of the CSG in relation to specific requirements of the new framework.
- The RFI closed on the 26<sup>th</sup> July, 2019 with 12 valid submissions from suppliers of language services and an analysis report on the results was prepared. The report was then sent to CSG members and discussions were held regarding the report and the themes identified in the report.

- A meeting was also held with the Irish Translators’ and Interpreters’ Association (ITIA), to help understand the market from their perspective.
- On 1<sup>st</sup> October, 2019, there was another face to face CSG meeting to discuss the RFI analysis and the proposed structure of the next framework – the 2020 Framework.
- The OGP again contacted the ITIA for informal discussions to gain an understanding of how the market was operating from their perspective.
- A draft Request for Tenders was sent to the CSG for review and feedback and suggested amendments.
- A third CSG meeting was held in January 2020 to discuss the draft Request for Tenders and to address specific elements that required finetuning.
- The final document prepared was the Interpretation Services Sourcing Strategy (the “Sourcing Document”), which sets out the objectives of the new framework, to which reference will now be made.

**20.** The concerns which arose from the foregoing consultation, research and analysis were addressed in the objectives of the new 2020 Framework, which were outlined in the Sourcing Document. At page 2 they are stated to be:

*“Project objectives:*

- *To provide a viable framework where PSB’s [Public Service Bodies] can access interpretation services through a user friendly process with limited cause for legal challenges, while meeting the client’s requirements.*
- *Determine how best to meet client needs for interpretation services in an unregulated market*
- *Consider multiple solutions that will best deliver a solution that is fit for purpose*
- *Reduce administrative burden on clients & OGP*
- *Develop “ease of use” [Framework] that will encourage submissions from the market*

- *Bring quality to forefront of service delivery*
- *Develop an innovative solution that meets the requirements of different clients across the sectors*
- *Minimise the risk of legal challenges to the 2<sup>nd</sup> Generation [Framework] and subsequent drawdowns.”*

**21.** As noted in the Sourcing Document at pp. 7 and 10, the mini-competitions under the 2015 Framework Agreement were historically for 12 months and these had been subject to legal challenge. The OGP reached the conclusion, after all the above processes were carried out, that, *inter alia*, quality was an issue in the 2015 Tender, and a workable solution to this issue was to provide for four-year contracts, as it was felt that there would be more focus on quality when suppliers had four yearlong contracts. It was felt that longer period contracts allowed supplier/purchaser relationships to develop and suppliers to better understand purchasers’ requirements.

**22.** Evidence was also provided that the aim of the 2020 Framework was to generate quality back into service delivery by dispensing with the use of mini-competitions based on cost only, which was the system under the 2015 Framework and had led to two suppliers, Word Perfect and Translation.ie, dominating the market. Evidence was provided that dispensing with mini-competitions would also reduce the administrative burden for the public sector bodies which, under the 2020 Framework, would have the supplier allocated by means of the combination of the division into lots and the ‘one lot rule’.

**23.** Evidence was also provided that the objective was to put the onus on Framework clients (i.e. the public body entities contracting for the interpretation services) to conduct proactive contract management for the duration of contracts under the framework and to develop stronger supplier relationships between them and members of the Framework (i.e. the suppliers). The aim of the new Framework from the State’s perspective was to improve quality in service

delivery through offering longer term contracts to successful tenderers without using subsequent mini-competitions based on cost only. In this regard, the Sourcing Document notes at p. 11 that one of the conclusions from the meetings with the key clients (i.e. the public service bodies purchasing the services) was that the ‘*main interpretation service providers in the marketplace provide a very poor service*’ and that there was ‘*[v]ery poor level of interpreter language proficiency*’.

24. At p. 14 of the Sourcing Document, the recommendations of the OGP are set out and it is noted in this context that:

*“[Framework] client’s feedback stated that a key issue was the lack of quality in the interpretation services provided and the litigious nature of a [Framework] member when MEAT [most economically advantageous tender] criteria used in subsequent mini competitions. The aim of this proposal is to endeavour to generate quality back into the service delivery through offering longer term contracts to potential successful tenderers without the utilisation of subsequent mini competitions based on [MEAT] or cost only.”*

25. The Sourcing Document then proceeds to set out the advantages of the 2020 Framework, with its division into lots and ‘one lot rule’, at p. 14 in the following terms:

**“Potential Pro’s:**

- To generate 4 unique suppliers (lots 1-4) (10/14 compliant – SME friendly)
- It is envisaged a longer contract duration (Lots 1-4) will provide opportunities for [Framework] clients and tenderers to develop a business relationship and relevant matrices to manage the contract.
- FW clients can dictate rise in quality through contract management by building relationships with the supplier and their key language interpreters.



- Possible opportunity for tenderers to keep their interpreters (minimise turnover), leads to reduced costs, better morale and develop staff interpretation skills.
- Potential 4 year contract will allow successful tenderer(s) to plan long term and develop relationship with their client.
- No mini competitions, therefore reducing the risk of legal challenge and reducing the administrative burden of mini competitions. Mini Competitions have proven to be unsuitable in this market.”

It is also relevant to note that Mr. MacDonnell provided sworn evidence that the decision regarding the design of the 2020 Framework was ‘*one of prospective commercial policy*’ and so it seems clear that the State, when designing the 2020 Framework Agreement, was looking not just at say the market for interpretation services in 2021, but it seems also the potential market in 2024 and beyond.

26. Evidence was also provided that the design of the lot structure was to facilitate competition, motivated by a desire to provide a viable framework where public service bodies can access interpretation services through a user-friendly process with limited cause for legal challenges.

27. The Sourcing Document also provided data from a Business Intelligence report based on the spend on interpretation services (and translation services) of €9.26 million in 2015-2017 with a split as follows:

Translation.ie	€4.98 million
Word Perfect	€3.52 million
Context Language Translating	€760,000
Access Translations	€500,000.

**The previous tender process under the 2015 Framework**

28. The format of the 2015 Framework was one in which suppliers were invited to compete to be admitted to the Framework and thereafter contracts were awarded by means of mini-competitions between the successful members of the Framework. Admission to the framework was done on the basis of MEAT, which takes account of price and quality.

29. Three suppliers were successful in being admitted to the 2015 Framework and work was allocated to those who qualified on the basis of mini-competitions. In most instances these mini-competitions were based on price only. In relation to the 10 contracts which were allocated by various public sector bodies pursuant to the 2015 Framework, these were all allocated to just two of the successful tenderers, i.e. Word Perfect and Translation.ie.

30. A third supplier (“Supplier X”) qualified for the 2015 Framework, but it did not win any of the ten contracts and it advised the OGP in its replies to the RFI, which followed the 2015 Framework, that it was considering exiting the market because of the apparent cost saving sought by the State. The reply reads:

“The procurement processes developed and rolled out by the OGP at the request of the Department of Finance and Public Expenditure with concomitant target cost saving thresholds have led to a situation where community interpreting services in particular have become unsustainable. The contracting processes and the resulting fee structure are leading to an accelerating erosion of the pool of suitably qualified and experienced interpreters. This company is reviewing the deteriorating situation and will consider withdrawing from this market should this trend continue.” (Emphasis added)

31. It is relevant to note that it was possible for public contracts for interpretation services to be allocated outside the terms of the 2015 Framework, as it was open to public sector bodies to award contracts by means of separate tender processes. This was done in many cases, since only 23.8% of public sector interpretation services supplied during the relevant period were

done pursuant to the 2015 Framework (and therefore allocated to Word Perfect and Translation.ie alone), with the balance of 76.2% of public sector interpretation services being allocated outside the 2015 Framework and therefore available to all suppliers in the market, and not just the three successful tenderers under the 2015 Framework.

32. In this context, it is also relevant to bear in mind that the market for interpretation services in Ireland is overwhelmingly a public sector market, since less than 10% of the market for interpretation services is purchased by private sector entities.

33. A similar non-exclusive approach is taken in the 2020 Framework since it is possible for public sector bodies to seek interpretation services outside that Framework and so from all suppliers (in addition to the successful tenderers under the 2020 Framework). However, it remains to be observed that, by addressing the concerns expressed by the public sector bodies regarding the 2015 Framework, the OGP hopes that the 2020 Framework will be used in more than 23.8% of cases in the future.

#### **The suppliers of interpretation services**

34. Expert evidence was provided by Mr. Patrick Massey (“Mr. Massey”) on behalf of Word Perfect and by Dr. Kevin Hannigan (“Dr. Hannigan”) on behalf of the State regarding the market and the claims that the 2020 Framework is anti-competitive.

35. It is not disputed that Word Perfect has the second largest share of the public sector market for interpretation services, as a result of, *inter alia*, it being successful in tendering for State work under the 2015 Framework. Translation.ie, which is also an SME, has the largest share. Mr. Agim Gashi of Word Perfect provided sworn evidence of his estimate of the market share being that Translation.ie and Word Perfect had a share of up to 75% of the market, i.e. Translation.ie with a share of 35-45% and Word Perfect with a share of 30%.

36. Against this background it is relevant to bear in mind that Word Perfect and Translation.ie were the only two firms to be awarded public contracts for interpretation services pursuant to the 2015 Framework.

37. There are a number of other SMEs based in Ireland who provide interpretation services and so are expected to be interested in providing the interpretation services required by the State under the 2020 Framework. As previously noted, 12 valid responses were submitted to the RFI in advance of the completion of the terms of the 2020 Framework. Under the terms of the 2020 Framework, there is a minimum turnover of €750,000 for each of the previous three years, required of suppliers, and a number of the suppliers who replied to the RFI fall below this turnover threshold (based on the answers to the RFI). Accordingly, the State anticipates that consortia of these smaller SMEs will be formed to bid. Both Translation.ie and Word Perfect exceed the turnover threshold.

38. There are also two foreign firms, one in the US and one in the UK (which has two branches in Ireland), both of which replied to the RFI and so it seems reasonable to conclude that they are *prima facie* interested in providing interpretation services to the State.

39. Against this backdrop, Mr. Massey is of the view that 4-6 firms are likely to tender for the four lots, while Dr. Hannigan is of the view that 8-9 firms are likely to tender for the four lots.

40. One of the reasons that Mr. Massey suggested that the number of tenderers might be closer to four than six was because he pointed out that the US company answered the RFI before the 'one lot rule' had been publicised as a term of the Request for Tenders. He felt that the fact that the US company was now going to be restricted to 25%, rather than 100%, of the market for the four-year life of the 2020 Framework made it less likely that the US company would tender, *albeit* that he accepted that he could not speak for that company.

41. As implicitly acknowledged by Mr. Massey, this appears to this Court to amount to speculation and so this Court does not believe that one can use this as a basis for saying that there will only be four tenderers in the 2020 Framework. This is particularly so when, what seems to this Court to be, an equally arguable point was made by Dr. Hannigan, namely that a guarantee of getting 25% of a market worth up to €5 million over four years was an attractive proposition for a US company, as it gave it a toehold in the European market.

42. This background regarding the current suppliers in the market and the likely number of tenderers is relevant to one of Word Perfect's substantive claims in this case, namely the argument regarding the alleged unlawfulness of the 2020 Framework, which is based on Word Perfect's view that there might only be four tenderers for four lots and so it is anti-competitive to have a 'one lot rule' for those four lots as it would reduce competition and encourage collusion.

43. However, before considering this claim, it is necessary to first consider Word Perfect's claim that the 'division into lots' in the first place is unlawful, since if one cannot have a division into lots, one cannot have a 'one lot rule'.

44. It is also important to note at this juncture that Word Perfect relies on several grounds of complaint in relation to its 'one lot rule' claim in its written submissions and its oral submissions. Each of these have been fully taken into account by this Court. However, in reliance on the approach taken by Finlay Geoghegan J. in *Flynn v Breccia* [2017] IECA 74 at para. 32, this Court does not propose to refer in this judgment to each and every ground or indeed set them out, even though they have all been carefully considered. What follows is this Court's identification of the primary issues to be resolved by this Court in these proceedings.

**A. DIVISION OF CONTRACTS INTO LOTS IS UNLAWFUL?**

45. One of the main claims made by Word Perfect in this case is its claim that, as a matter of strict interpretation of the Procurement Directive, it is not possible for the State to divide

four contracts into four separate lots. Word Perfect alleges that this is happening in this case since the very title of the 2020 Framework Agreement is:

“**Four** Single Supplier Framework **Contracts** for the provision of Interpretation Services (excluding Irish Language Services)”. (Emphasis added)

46. In claiming that this is unlawful, Word Perfect relies in particular on the wording of Article 46.1 which states:

“Contracting authorities may decide to award *a contract* in the form of separate lots and may determine the size and subject-matter of such lots.” (Emphasis added)

47. It is not disputed by the State that the Framework does provide for the procurement to be divided into lots, as noted earlier, but the State does not accept that in this case there is a division of four ‘contracts’ into four lots or that there is a breach of Article 46.1

#### **The use of the word ‘contract’ in Article 46.1**

48. Word Perfect relies on the use of the singular, i.e. ‘*a contract*’ in Article 46.1 to support its claim that what the State is doing in the 2020 Framework is unlawful.

49. While Word Perfect describes this argument regarding the illegality of the 2020 Framework as a technical point, it nonetheless claims that this is a clear and serious breach of Article 46.

50. In considering this claim, it is common case that Article 46.1 must be interpreted in light of its ‘*wording, context and objectives*’ (per Advocate General Kokott in Case C-278/05 *Robins v. Secretary for State for Work and Pensions* E.C.R [2007] I-01053 (Opinion para. 34)). Accordingly, the word ‘*contract*’ in that Article is not interpreted in isolation, but it must be interpreted in the context in which it is used and in the light of the objectives of the Directive.

51. In this regard, it is clear, from the terms of the Recitals and the terms of the Directive itself, that one of the main objectives of the Procurement Directive is that public procurement

should be structured so as to facilitate competition and to facilitate SMEs participating in State contracts. Reference is made at paragraph 128 below to a comprehensive list of the relevant recitals in this regard, but for example the very first recital, Recital 1, states in the context of competition that:

“However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that [...] **public procurement is opened up to competition.**” (Emphasis added)

**52.** As regards the participation of SMEs in public contracts, the next recital, Recital 2 states:

“the public procurement rules adopted pursuant to [the previous Procurement Directive] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the **participation of small and medium-sized enterprises (SMEs) in public procurement**”. (Emphasis added)

**53.** More specifically, the Directive itself, in Article 46, provides for the division of public procurement into lots, and it is clear from the first paragraph of Recital 78 that this is done in order to facilitate the participation of SMEs in public procurement, since that Recital states:

“Public procurement should be adapted **to the needs of SMEs**. Contracting authorities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled ‘European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts’, providing guidance on how they may apply the public procurement framework **in a way that facilitates SME participation. To that end** and to enhance competition, contracting authorities should in particular be encouraged to **divide large contracts into lots**. Such division could be done on a quantitative basis, making the size of the individual

contracts **better correspond to the capacity of SMEs**, or on a qualitative basis, in accordance with the different trades and specialisations involved, to **adapt the content of the individual contracts more closely to the specialised sectors of SMEs** or in accordance with different subsequent project phases.” (Emphasis added)

54. Indeed, so strong is this objective of facilitating SME participation in public procurement, that the decision to divide procurement into lots, which is for the purpose of facilitating SME participation, is expressly stated not to be subject to ‘*administrative or judicial supervision*’. The relevant recital, Recital 78, in its second paragraph, states:

“The contracting authority should have a duty to consider the appropriateness of dividing contracts into lots while remaining free to decide autonomously on the basis of any reason it deems relevant, **without being subject to administrative or judicial supervision.**” (Emphasis added)

55. Recital 79 similarly provides, *inter alia*, that:

“Where contracts are divided into lots, contracting authorities should, for instance in order to **preserve competition** or to ensure **reliability of supply**, be allowed to limit the number of lots for which an economic operator may tender; they should also be allowed to limit the number of lots that may be awarded to any one tenderer.” (Emphasis added)

56. The importance of this objective (of dividing procurement into lots so as to facilitate SME participation and competition) is underlined further by the fact that it is not the *division* of a procurement into lots that needs to be explained by the contracting authority, when finalising the terms of the tender, but rather it is the *failure to divide* into lots that needs to be explained. This is because the second paragraph of Article 46.1 states:



“Contracting authorities shall, except in respect of contracts whose division has been made mandatory pursuant to paragraph 4 of this Article, provide an indication of the main reasons **for their decision not to subdivide into lots**, which shall be included in the procurement documents or the individual report referred to in Article 84.”

57. To summarise, in the interests of facilitating SME participation, reliability of supply and competition in the award of public contracts, the default position is that procurement should be divided into lots.

**Word Perfect’s claim that the division into lots is unlawful**

58. It is important to bear in mind that it is against the foregoing default position that Word Perfect makes the technical argument that, in this case, the division into lots is unlawful. It claims that the use of the word ‘contract’ in the singular in Article 46.1, combined with the fact that the State described this tender as ‘Four Single Supplier Framework *Contracts*’ in the title of the Framework document, prevents the State from dividing the procurement of interpretation services, in this case, into lots. This interpretation will now be considered.

**Is the division into lots in breach of Article 46.1?**

59. It seems clear to this Court that such an interpretation runs contrary to the overall objective of the Procurement Directive, which, as noted above, is to make every possible effort to have procurement divided into lots in order to facilitate the participation of SMEs in the tender process.

60. Furthermore, it seems to this Court that Word Perfect face a more fundamental objection to their proposed interpretation of ‘*contract*’ in Article 46.1, even if it were to be interpreted as being limited to a single ‘contract’.

61. This is the fact that while it is true that the expression used to describe the Framework Agreement is ‘*Four Single Supplier Framework Contracts*’, it must be borne in mind that this

is the *form* of the tender. However, when one looks at the *substance* of the tender it seems clear to this Court that one is not, in fact, dealing with four separate contracts that are being divided into lots, as claimed by Word Perfect.

**62.** In this regard, first it is relevant to note that Article 46.1, which contains the term ‘*contract*’ in the singular, is contained in Section 1 of Chapter III of the Directive, which is headed ‘Preparation’. It is clearly dealing with matters which are preparatory to the finalisation of a tender and it is not dealing with a situation where a contract has come into being. The other articles in Section 1 are also clearly preparatory in nature, e.g. Article 40, which is the first article in that section, deals with ‘*Preliminary market consultations*’, while Article 42 deals with ‘*Technical specifications*’ for the tender document.

**63.** It seems to this Court to be clear that there is no contract in existence, when the contracting authority is preparing the tenders. The fact that the State happened to have described this Tender as ‘Four Single Supplier Framework Contracts’ does not therefore mean that at the time when the State decided to set out the procurement in separate lots, pursuant to Article 46.1 during the ‘preparation’ phase, that there were in fact four contracts in existence which the State then separated into lots.

**64.** It seems clear to this Court that there were no contracts in existence as a matter of contract law, and no evidence has been provided of any such contracts, whether four or any other number.

**65.** Crucially in this regard, the terms of the 2020 Framework make clear that a contract only comes into existence as part of the procurement process when a document is signed by the relevant parties. Para. D of the Request for Tenders states (at p. 103):

“Unless and until a NASF [as Notification to Activate Services Form] is executed and served in accordance with this Clause 23 by a Framework Client, discussions, submissions and negotiations between a Framework Client and the Contractor

regarding the provision of the Services by the Contractor **shall be treated as non-contractual and shall not create binding obligations on the parties**. Upon execution by the Contractor of the NASF, the Contractor shall comply with all obligations under the Framework Contract and the Confidentiality Agreement for the benefit of the Framework Client as if reference to the Client in the Framework Contract and the Confidentiality Agreement were references to the Framework Client and, for these purposes, the NASF, the Framework Contract and the Confidentiality Agreement shall together constitute the “Client Contract”.” (Emphasis added)

66. It seems clear therefore that what is meant by the term ‘*contract*’ in Article 46.1, when it is interpreted in light of its context and the objectives of the Directive is a prospective procurement, which may be divided into lots, and not a binding contract, since one is at the preparatory stage of the tender process, when there is no such contract, as is clear from Para D.

67. For all these reasons, this Court rejects Word Perfect’s claim that the 2020 Framework Agreement is unlawful because it breaches Article 46.1.

### **Breach of legitimate expectations**

68. Finally, in the context of the division into lots claim, Word Perfect also alleges that there was a breach by the State of Word Perfect’s legitimate expectations. This is based on the fact that the State had published a *Public Procurement Guidelines for Goods and Services* in January 2019 which provided at para. 32 that:

“Depending upon requirements, framework agreements **can** be divided into lots on the basis of geography, specialism and/or value”. (Emphasis added)

The Guidelines go on to state at p. 82:

“A public procurement **contract** can be sub-divided into a number of separate lots. The sub-division of a contract into lots can be based on geography [...]” (Emphasis added)

69. On this basis, Word Perfect submits that the 2019 Guidelines clearly represented that a contract (i.e. singular) can be subdivided into lots and they rely upon this provision to claim that not only was there a breach of Article 46.1 by dividing ‘*Four Single Supplier Framework Contracts*’ into lots, there is also a breach of Word Perfect’s legitimate expectations in this regard.

70. First, this provision is permissive, and not mandatory, as it simply provides that a contract *can* be divided into lots. This cannot therefore be a basis for a legitimate expectation, in this Court’s view, that more than one contract would not be divided into lots. Secondly and in any event, this Court has already concluded that there has not been a division of ‘contracts’ into lots, so that even if there was such a legitimate expectation, it has not been breached.

#### **Burden of proof regarding the claims that the ‘one lot rule’ is unlawful**

71. Before considering the remaining issue, i.e. the ‘one lot rule’ claim, which, unlike the ‘division into lots’ claim, does not involve a straight-forward interpretation by this Court of the wording of the Procurement Direct, it is relevant to refer to the burden of proof in this case.

72. The general approach in civil litigation is that *he who asserts must prove* (see e.g. *Wicklow County Council v. Fortune* [2012] IEHC 406 at para. 19 per Hogan J.), and so as a general rule the applicant or plaintiff in civil proceedings has the burden of proving the allegations which it has brought to court. Word Perfect relies however on the case of Case C-148/15 *Deutsche Parkinson* ECLI:EU:C:2016:776 to support its claim that the onus is on the State to justify the alleged breach of the principles of free competition, equality and proportionality. Accordingly, it claims that the onus is on the State to identify the legitimate aim being pursued by the State, that the steps taken by the State were appropriate to attain its objective and that those steps do not go beyond what is necessary to achieve same. Thus, it is Word Perfect’s claim that the onus is on the State to justify the ‘one lot rule’ as not breaching principles of free competition, equality and proportionality in this way.

73. However, the *Deutsche Parkinson* case involved a breach of the fundamental freedom of the free movement of goods under Article 34 of the Treaty on the Functioning of the EU (“TFEU”), where reliance was placed on the grounds of public health which are listed in Article 36 to try to justify a derogation from this provision. Therefore, that case was one where any restriction on the free movement of the goods is *prima facie* unlawful, unless justified by a Member State on the grounds set out in Article 36.

74. What is at issue here is very different. This is because Article 46 of the Procurement Directive does not provide that there cannot be a limit on the number of lots awarded to a supplier, comparable to the prohibition on any restriction to the free movement of goods in Article 34 of the TFEU.

75. On the contrary, Article 46 expressly provides for such limits on the number of lots to be awarded to one tenderer. Since a ‘one lot rule’ is at its core a ‘*limit on the number of lots that may be awarded to one tenderer*’, in the words of the Directive, it is something that is *prima facie* permitted by Article 46.

76. Nonetheless, Word Perfect claims that the ‘one lot rule’ is unlawful as a breach of free competition, equality and proportionality, which it is perfectly entitled to do. However, this is very far removed from the situation in *Deutsche Parkinson*. This is not a case where limiting the number of lots being awarded to one tenderer is expressly prohibited. On the contrary, limitations on the number of lots to be awarded is permitted and so the *Deutsche Parkinson* case is of no assistance to Word Perfect.

77. Indeed, a case which is very similar to this case, namely *Copymoore v. Commissioner of Public Works in Ireland* [2016] IEHC 709, makes it quite clear that the onus is on the applicant as the party challenging the legality of the tender process to prove its case. That was a case in which the applicants challenged the legality of a multi-supplier framework agreement for the supply of printers. It involved a claim that the turnover requirement and technical criteria

in the Request for Tenders for the printers were unlawful on the grounds of proportionality or equality. It is clear from para. 159 of his judgment that McDermott J. held that the applicants had not discharged the burden of proof upon them in this regard. Similarly, at para. 174 of the judgment, it is clear that the applicants had failed to discharge the burden upon them to establish that the terms of the framework agreement in that case distorted competition.

78. For the foregoing reasons, it seems clear to this Court that there is no reason why the normal rule that *he who asserts must prove* does not also apply in this case. This Court will now consider the various claims made by Word Perfect that the ‘one lot rule’ is unlawful, bearing in mind that the onus is on Word Perfect to prove those claims.

**B. THE ‘ONE-LOT RULE’ LIMITS THE NUMBER OF TENDERERS?**

79. Word Perfect claims that the high turnover requirement, combined with the division into four lots/‘one lot rule’, will distort competition and increase the chance of collusion. This is because its expert, Mr. Massey, claims that there may only be four tenderers for the four lots and so the tenderers will have no incentive to put in competitive bids. In his Report he claims that the ‘one lot rule’ incentivises would be tenderers to ‘*compete less aggressively*’ for contracts and that it ‘*facilitates collusion*’.

80. As noted earlier, this Court does not accept Mr. Massey’s speculation that there will be only four tenderers.

81. The inference from the evidence of Word Perfect and Mr. Massey seems to be that without the ‘one lot rule’, more international tenderers would try to enter the Irish market, thereby making the process more competitive and advantaging the public bodies that use the Request for Tenders (under the 2020 Framework).

82. However, as pointed out by the State, in the 2015 Framework, which did not contain the ‘one lot rule’, there were not a large numbers of tenderers in the market and only three were admitted onto the framework. Accordingly, the notion, that if the State was to omit the ‘one lot

rule', this would increase the number of suppliers in the market, is not supported by evidence, in this Court's view.

83. However, of more relevance to Mr. Massey's claim that there may be only four tenderers and so the tender process may not be competitive if there is a 'one lot rule', is the fact that the key issue in ensuring that a tender process is competitive is, not the *actual number* of tenderers who will tender, whether that be 4-6 or 8-9, but it is that the competitors in the tender process are *not aware* of the number of other competitors.

84. Once this is the case, it is clear from the expert evidence that there will be competition, as tenderers will put their best foot forward as they will not wish to miss out on a tender because they were beaten by another tender or tenderers (whether that is only one, or several, tenders which were better than its tender).

85. Crucially, there was no evidence provided to this Court that a tenderer in the 2020 Framework will ever be sure about the precise number of tenderers. It seems to this Court that the only way in which such a tenderer could be sure is if it contacted every single supplier in the market and sought commitments from them that they would not submit a bid, which of course is highly unlikely to happen, since it is almost certain to amount to an offence under competition law.

86. Since this Court cannot be certain (just like all the tenderers) as to how many suppliers will seek to tender for the 2020 Framework, whether that be 4 or 9, this Court rejects the claim that the 'one lot rule' (combined with the turnover requirement) leads to the likelihood of there being only four tenderers and so to an unlawful distortion of competition or indeed to a risk of collusion, greater than that which otherwise exists.

### **Preferring one expert's opinion over another**

87. At this juncture, it is appropriate to refer to this Court's approach to the conflicting evidence of the two experts on the key claims in this case. The fact that this Court is being

presented with directly divergent views (i.e. that the ‘one lot rule’ is pro-competitive according to the State/Dr. Hannigan and anti-competitive according to Word Perfect/Mr. Massey), is not a surprise. Unfortunately, it is a common feature of experts in litigation, regardless of their speciality, that their views will accord with those of their clients who are paying them (as noted by O’Donnell J. in *Hanrahan v. Minister for Agriculture, Fisheries and Food* [2017] IESC 66, referenced below).

88. Obviously, this can reduce, in some cases, the value of ‘independent’ expert reports, although it is important to emphasise that this is a comment on human nature and the interest of clients in only engaging experts who support their view. It is certainly not a comment on the undoubted expertise of Mr. Massey or Dr. Hannigan, as this Court found them both to be very professional.

89. This point was made by both the Supreme Court and Court of Appeal regarding expert witnesses. In the Court of Appeal case of *Byrne v. Ardenheath Company Ltd & Anor.* [2017] IECA 293, Irvine J., as she then was, commented on the opinions of expert witnesses, at para. 31 that:

“their opinions all too often appeared to **correspond too favourably with the interests of the parties** who retained them.” (Emphasis added)

90. O’Donnell J., as he then was, in a similar context in the Supreme Court case of *Hanrahan v. Minister for Agriculture, Fisheries and Food* [2017] IESC 66 stated at para. 4 that:

“I do not wish to criticise the individuals who gave evidence in this case, since this was a difficult case and in any event the ‘high ball – low ball’ approach which occurred here is only an example of a more widespread phenomenon. However, **it is surely not coincidental that it was the independent expert on behalf of the plaintiff whose opinion was that the damages were extremely substantial,** and the expert on behalf



of the defendant who considered that in effect there was no loss at all.” (Emphasis added)

91. It seems clear that the point being made in both these cases is not that the professionals involved (or their clients) were acting *mala fides*, but rather that the reason that it is no coincidence that expert evidence in court always seems to support the party engaging the expert, is simply because it is human nature to act in one’s own financial interests and this can often occur subconsciously.

92. Of particular relevance in circumstances such as here where there is one ‘black’ view and one ‘white’ view (or one ‘high ball’ and one ‘low ball’), is the fact that the burden of proof is on one side, rather than the other. This is particularly so, since the comments of the Supreme Court and the Court of Appeal would lead any court to exercise caution when considering expert opinions, where a party to the litigation is the paying customer of the expert.

93. In this case, the burden is upon Mr. Massey to have his evidence preferred to the evidence of Dr. Hannigan. Accordingly, where both experts’ views are equally plausible or where there is a concern that the ‘independent’ expert evidence corresponds too favourably with the client’s view, this Court may not in fact have to engage in a difficult choice of which evidence is to be preferred in relation to the various claims made by them.

94. This is because if the Court is of the view that the subjective views of both experts are equally plausible or difficult to choose between because of the high ball/low ball approach adopted, but that Mr. Massey has failed to discharge the onus upon him to have the Court prefer the key claims in his evidence over those of Dr. Hannigan, then this will decide the case.

95. So for instance, this Court has already referenced the two equally plausible claims from the experts that the *restriction* of a supplier to a 25% share of the market in Mr. Massey’s view (or a *guarantee* of a 25% share of the market to a supplier, in Dr. Hannigan’s view), which is available to a US based firm, will discourage, in Mr. Massey’s view (but encourage in Dr.

Hannigan’s view), that firm to tender. Since the burden of proof is on Mr. Massey, this Court does not, as it did not in that example, have to conclude that it prefers Dr. Hannigan’s view over Mr. Massey’s or *vice-versa*, since it is sufficient to conclude that Mr. Massey has failed to discharge the burden upon him.

96. With this in mind regarding the expert evidence, this Court will consider the claim in these proceedings, namely that the ‘one lot rule’ is unlawful.

C. **‘ONE LOT RULE’ BREACHES REGULATION 18 OF THE REGULATIONS?**

97. The next substantive claim made by Word Perfect is that the ‘one lot rule’ breaches Article 18 of the Procurement Directive. The second paragraph of Article 18.1 of the Procurement Directive provides that:

“The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of **artificially narrowing competition**. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the **intention of unduly favouring or disadvantaging** certain economic operators.” (Emphasis added)

98. The Procurement Directive was transposed into Irish law by Regulation 18 of the S.I. No. 284/2016 European Union (Award of Public Authority Contracts) Regulations 2016, (the “Procurement Regulations”). Regulation 18(2) states:

“The design of a procurement shall not be made with the intention of excluding it from the scope of these Regulations or of artificially narrowing competition.”

99. Regulation 18(3) states:

“For the purposes of paragraph (2), competition shall be considered to be artificially narrowed where the design of a procurement is made with the **intention of unduly favouring or disadvantaging** certain economic operators.” (Emphasis added)

**100.** Word Perfect relies on these provisions to contend that the Request for Tenders in this case is narrowing competition as it is unduly favouring other suppliers and disadvantaging Word Perfect. This claim appears to be based on the fact that Word Perfect was awarded 30% of the contracts allocated under the 2015 Framework, but it is now being limited to 25% of the contracts which will be allocated under the 2020 Framework. On this basis, it submits that the very purpose of the ‘one lot rule’ is to disadvantage the two SMEs with the largest market share (namely, Translation.ie and Word Perfect).

**101.** It is important to note that there are two limiting words in Regulation 18(3), the first is ‘*intention*’ and the second is ‘*unduly*’. Thus, it appears to this Court to be clear that, if the requirements that a contracting authority puts in a tender have the *effect* of *favouring* one tenderer over another, they are only unlawful if they *unduly* favour certain tenderers and if they are inserted with the *intention* of so doing.

**102.** This makes sense, since for example, consider if the State were to seek tenders for an important State security project from translation companies for say mandarin translators who had to have on their team mother tongue mandarin speakers (as distinct from say interpreters who had learned mandarin in Ireland or even lived in China). If only one of the suppliers in the market satisfied this condition, then it could be argued that this term breaches Regulation 18, as it was made with the *effect* of *favouring* that supplier and disadvantaging the other suppliers.

**103.** However, it seems to this Court that a term in a Request for Tenders, such as this one regarding mandarin speakers, which happens to favour one supplier over another supplier does not breach Regulation 18, unless it was intended to unduly favour/disadvantage a supplier.

**104.** Otherwise, many terms which a contracting authority might wish to have in its Request for Tenders, for good commercial or other reasons, will, as illustrated by this example, have the effect of favouring/disadvantaging one supplier and would lead to a breach of the Regulations. There are a myriad of needs which a State body has, which might only be satisfied

by certain suppliers, and so a term specifying those needs will favour them over other suppliers in the market. It seems to this Court that the insertion of those needs into a Request for Tenders will only be unlawful where they are *intended to unduly* favour one supplier over another (e.g. if the Tender, for no objective reason, wanted the tenderers to have a head office in say a county beginning with the letter ‘T’).

**105.** Accordingly, it seems to this Court that if the terms of a Request for Tenders were to be struck down as unlawful simply because their effect, as distinct from their intention, is to favour one supplier over another it would be very difficult for a contracting authority to set out its business needs in accordance with its legitimate interests.

**106.** For this reason, it seems clear to this Court that a term in a Request for Tenders will only fall foul of Regulation 18 if it is inserted in that document with the *intention of unduly* favouring one supplier over another, and not where its *effect* is to unduly favour other suppliers, as claimed by Word Perfect.

**107.** In this case it is clear that there is no such intention attaching to the ‘one lot rule’, since evidence has been provided that the ‘one lot rule’ was introduced with the objective of facilitating SMEs generally (and not just Word Perfect) to participate in the tender process for interpretation services and also with the objective of ensuring that when the 2020 Framework expires that there would be more than just one or two suppliers of interpretation services in the market.

**108.** This is because, as previously noted, the State, having consulted and researched the issue, concluded that quality was an issue and that four-year contracts for suppliers enabled suppliers to build up a good business relationship with the relevant public body and that this was part of the solution to preserving competition and facilitating SME participation. Accordingly, the State concluded that ‘one lot rule’ would prevent one or two businesses

winning all of the four year contracts under the Framework and thereby seek to ensure that there would be more than just one or two suppliers at the end of the Framework.

109. On this basis this Court rejects the suggestion that the ‘one lot rule’ breaches Regulation 18.

**D. ‘ONE LOT RULE’ DISTORTS COMPETITION GENERALLY**

110. It appears to this Court that the allegation that the ‘one lot rule’ unlawfully distorts competition is the key claim made by Word Perfect in these proceedings and that it is made in a number of guises. For example, it is present in the claim that the ‘one-lot rule’, combined with the turnover requirement, limits the number of tenderers and so distorts competition (already considered). It is also present in the claim that the ‘one lot rule’ breaches Regulation 18 by artificially narrowing competition by intentionally and unduly favouring/disadvantaging certain suppliers (already considered).

111. However, the claim that the ‘one lot rule’ unlawfully distorts competition is also behind various other grounds relied upon by Word Perfect which will now be considered under this heading of the distortion of competition generally.

**The ‘one-lot rule’ means that it is possible that the MEAT may not be awarded the contract**

112. Mr. Massey claims that the ‘one lot rule’ unlawfully distorts competition because, as previously noted, the MEAT might not be awarded for one or more of the four lots, e.g. in a situation where Word Perfect was the MEAT for all four lots, it would only be awarded one of them, rather than all of them.

**The ‘one-lot rule’ distorts competition by segmenting the market**

113. A related claim is made by Word Perfect that the ‘one-lot rule’ unlawfully distorts competition by segmenting the market for public sector interpretation services, i.e. by dividing it into four by ensuring that no one supplier can have more than one lot.

**'One-lot rule' distorts competition by preventing a supplier from building market share**

114. Similarly, Word Perfect claims that the 'one lot rule' will have a negative impact on the market as a whole, as suppliers will not be able to build their market share or grow their business, as they are limited to 25% of the public sector market for interpretation services.

**Member's States' obligation not to undermine competition rules**

115. A related point is also made by Word Perfect that, as the 'one lot rule' allegedly unlawfully distorts competition, Word Perfect claims that it amounts to a breach of the State's duty of sincere cooperation, in light of Article 4(3) of the Treaty on European Union ("TEU") and Article 101 of the TFEU.

116. However, it seems to this Court that there is no unlawful distortion of competition in these various guises for the following reasons.

**(i) The current share of the market allegedly subject to 'distortion' of competition**

117. First, Word Perfect claims that it is an unlawful distortion of competition for the State to divide the market for interpretation services into four roughly equal segments which must be allocated to four separate suppliers, by the use of the 'one lot rule'. This market segmentation will result, according to Word Perfect, in the prospect of the amount of business that is available to a successful tenderer being dramatically reduced. This is because as well as a successful tenderer being guaranteed one of the lots (or 25% of the market), it is also the case that such a tenderer is not entitled to any more of the market and so Word Perfect submits that *'if one is limited to 25% of the market, they are shut out of the other 75%'*.

118. First, in considering this claim, it should be observed that the Request for Tenders is not exclusive, and framework clients (i.e. public sector bodies buying the services) are not forced to seek suppliers under the Framework, as they can purchase interpretation services by putting contracts out to tender outside the Framework.

**119.** In this regard, only 23.8% of the market for public sector interpretation services was awarded under the 2015 Framework, with the vast majority (76.2%) being awarded *outside* the Framework and thus available to be won by Word Perfect and all other suppliers.

**120.** Therefore, this is not a case where Word Perfect, if it wins one of the lots (and thus 25% of the contracts allocated under the 2020 Framework), is *per se* locked out of 75% of the market as whole. Rather Word Perfect is only limited to 25% of the market that falls within the terms of the Framework and which is *not* put up for tender outside the Framework (which in recent times was only 23.8% of that market).

**121.** Thus, while this factor is not determinative in this Court's decision, it is nonetheless relevant that in considering Word Perfect's claim that the State is distorting competition in the market by having a 'one lot rule' and that Word Perfect is being '*shut out of the other 75%*' of the market, the market in question is not the market for public sector interpretation services as a whole. Rather the market, it is being shut out of, is that part of the market which is allocated under the Framework, and which in recent years was only 23.8% of the market as a whole (*albeit* that the State hopes that there will be an increased use of the 2020 Framework than the use that was made of the 2015 Framework).

**(ii) Article 46.2 permits competition distortion by permitting market segmentation**

**122.** Secondly, it is not disputed by the State that the 'one lot rule' will distort competition in the market for interpretation services, since if a supplier is awarded one lot, it will not then be able to be awarded any of the other lots. This is clearly a distortion of competition, since it prevents a supplier, who has, say, been awarded Lot 1 (assuming this is the one it indicated was its preference), from competing for Lot 2.

**123.** However, Article 46.2 expressly provides that the contracting authority, and thus the OGP, may limit the number of lots that may be awarded. Article 46.2 states:

“Contracting authorities may, **even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer**, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest.” (Emphasis added)

**124.** Thus, it is crucial to note that the Procurement Directive expressly provides not only that contracting authorities may allocate contracts into lots but it also allows contracting authorities to limit the number of lots that may be awarded to one tenderer. The State relies on these provisions in Article 46.2 to justify the ‘one lot rule’. It contends that because Article 46.2 makes provision for a contracting authority to limit the number of lots which can be won, the structure adopted in the Request for Tenders is lawful. It therefore claims that there cannot be an *unlawful* distortion of competition as alleged by Word Perfect, for the simple reason that the limiting of lots to tenderers is expressly permitted by Article 46.2.

**125.** In this regard, it is to be noted that in Article 46.2 the expression ‘*even where tenders may be submitted for several or all lots*’ is inserted as the precursor to the provision allowing for a limit on the number of lots that may be awarded to one tenderer. For this reason the Article seems to be expressly contemplating the precise situation which arises in this case, i.e. where tenderers may submit tenders for several or all lots, but are not awarded all of them and so of necessity the tenderers having to express a preference for some or more of the lots, which is exactly what happened in this case. In so doing, these tenderers are then excluded from the rest of the lots, or some of the market, to use Word Perfect’s expression. Yet this is the very thing about which Word Perfect complains, even though it is permitted by the Article 46.2.

**126.** It is also relevant to note that to the extent that Word Perfect argues in these proceedings that the market segmentation, which is expressly permitted by Article 46.2, breaches the TFEU or the TEU, it then follows that it is Article 46.2 of the Directive which contravenes the TFEU



or the TEU, in which case Word Perfect would have to argue that Article 46.2 is invalid, which is not being claimed in these proceedings.

(iii) **Recitals of the Procurement Directive support distortion of competition**

127. Thirdly, in addition to the Articles of the Directive, support can also be found from the Recitals to the Procurement Directive for the view that the distortion of competition produced by the ‘one lot rule’ in this case is not unlawful.

128. There are numerous implicit and explicit references to the fact that the aim of the Procurement Directive is to provide for the participation of SMEs, and thus more than one SME, in State contracts and to facilitate competition between those SMEs for those contracts.

So, to take these in turn:

Recital 1:

“However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and **public procurement is opened up to competition.**”

Recital 2:

“[T]he public procurement rules [contained in the previous Procurement Directive] should be revised and modernised in order to increase the efficiency of public spending, **facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement.**”

Recital 59:

“However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and **competition, as well as market access opportunities for SMEs.**”

Recital 61:

“Contracting authorities should be given **additional flexibility** when procuring under framework agreements, which are concluded with **more than one economic operator and which set out all the terms.**”

“Framework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition.”

Recital 69:

“Centralised purchasing techniques are increasingly used in most Member States.[...] In view of the large volumes purchased, such techniques may **help increase competition** and should help to professionalise public purchasing.”

Recital 78:

“Public procurement should be **adapted to the needs of SMEs**. Contracting authorities **should be encouraged** to make use of [...] the ‘European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts’, providing guidance on how they may apply the public procurement framework in a way that **facilitates SME participation**. To that end and to enhance competition, contracting authorities should in particular be **encouraged to divide large contracts into lots**.

[...]

The size and subject-matter of the lots should be **determined freely by the contracting authority**[...] The contracting authority **should have a duty to consider the appropriateness of dividing contracts into lots** while remaining free to decide autonomously on the **basis of any reason it deems relevant, without being subject to administrative or judicial supervision**. Where the contracting authority decides

that it would **not be appropriate to divide the contract into lots**, the individual report or the procurement documents should contain an indication of the main reasons for the contracting authority's choice. Such reasons could for instance be that the contracting authority finds that such division could **risk restricting competition**, or risk rendering the execution of the contract excessively technically difficult or expensive

[...]

Member States should **remain free to go further** in their efforts to facilitate the involvement of SMEs in the public procurement market, by extending the scope of the obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting authorities to provide a justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory under certain conditions.”

Recital 79:

“Where contracts are divided into lots, contracting authorities should, for instance in order to **preserve competition** or to ensure **reliability of supply**, be allowed to limit the number of **lots for which an economic operator may tender; they should also be allowed to limit the number of lots that may be awarded to any one tenderer.**”

(Emphasis added)

“However, the **objective of facilitating greater access to public procurement by SMEs** might be hampered if contracting authorities would be **obliged to award the contract lot by lot** even where this would entail having to accept substantially less advantageous solutions compared to an award grouping several or all of the lots.”

Recital 124:

“Given the **potential of SMEs for job creation**, growth and innovation **it is important to encourage their participation in public procurement**, both through appropriate provisions in this directive as well as through **initiatives at the national level**. The new provisions provided for in this Directive should contribute towards an improvement of the level of success, by which is understood **the share of SMEs in the total value of contracts awarded**.” (Emphasis added in all recitals)

**129.** It is impossible to read these recitals to the Procurement Directive without being struck by the absolute and very clear objective of the EU legislature to do everything possible to facilitate the participation of SMEs in the process for the awarding of public contracts, to increase their share of the total value of the contracts awarded and to increase competition amongst SMEs for those contracts.

**130.** In particular, the recitals make it clear that contracting authorities have a ‘*duty*’ (Recital 78) to consider division into lots and that they should have as much freedom as possible with the absence of judicial supervision (Recital 78) in pursuing this division. Indeed, ‘*additional flexibility*’ (Recital 61) should be given to contracting authorities where they are procuring goods/services under framework agreements which are concluded with more than one economic operator, which is the case here.

**131.** It is clear from the Recitals and the Directive itself that one of the key ways to achieving all these aims is the division of procurement into lots, since this is the default position (see Article 46.1 and Recital 78).

**132.** The contracting authorities are also encouraged to ‘*go further*’ in relation to the use of lots (Recital 78) and in relation to those lots, specific provision is made in Article 46.2 and Recital 79 for limiting the number of lots for which a supplier may tender and for limiting the number of lots to be awarded to any one tenderer. Since Word Perfect’s key claim is that what the State has done distorts competition and so is unlawful, it is important to note that limiting

the number of lots for which a supplier *may tender* and limiting the number of lots which may be *awarded* to a tenderer are clearly anti-competitive measures, but yet they are explicitly permitted in the interests of achieving, *inter alia*, greater SME participation in public contracts.

**133.** In this context, it is also relevant to note that although the State in this case could have relied upon this wording in Article 46.2 to have a provision which would be *prima facie* more restrictive of competition (i.e. limiting the number of lots for which a supplier may *tender* under Recital 79), this restriction was not inserted in the 2020 Framework by the State, as the suppliers are permitted to tender for *all* lots.

**134.** In summary, it seems to this Court that there are numerous and explicit references in the Directive to, in effect, doing everything possible to facilitate SME participation by the use of lots, including the restriction of the number of lots being awarded to tenderers. In these circumstances, it is difficult, in this Court's view, not to conclude that the approach taken by the State, in this case, is precisely the type of means, envisaged by the EU legislature, which should be taken by a contracting authority to seek to facilitate market access opportunities for SMEs (including, but crucially not limited to, Word Perfect and indeed Translation.ie).

**But what about fact that 'one lot rule' may prevent MEAT being awarded contract?**

**135.** Nonetheless, the substance of Word Perfect's complaint about the 'one lot rule' is that it does not award the contract to the MEAT. Word Perfect appear to be claiming therefore that each lot should be awarded on the basis of MEAT. One way in which this would be achieved is if the contracts were awarded on a 'lot by lot' basis.

**136.** However, it is relevant to note the express provisions in Article 46.2 permitting the contracting authority to limit the number of lots that are awarded to one tenderer. By its very nature, this means that if that tenderer is the MEAT for more than one contract, then the MEAT will *not* be awarded for one contract.

137. It seems clear to this Court therefore, that Article 46.2 specifically permits a situation in which the MEAT will *not* be awarded the contract, because it seems (on the basis of the Recitals, in particular) the EU legislature regarded the objective of facilitating SME participation, ensuring that there was reliability of supply and sufficient competition between suppliers as superseding the notion (which appears to be implicit in Word Perfect’s submissions) that the MEAT should invariably be awarded the contract.

138. In addition, it is relevant to note that Recital 79 also specifically recognises that awarding contracts ‘lot by lot’ might hamper the objective of facilitating greater access to public procurement by SMEs:

“However, the **objective of facilitating greater access to public procurement by SMEs** might be hampered if contracting authorities would be **obliged to award the contract lot by lot** even where this would entail having to accept substantially less advantageous solutions compared to an award grouping several or all of the lots.”

139. In this instance, and bearing in mind that awarding contracts lot by lot (which would facilitate contracts being awarded on the basis of MEAT) may, in the words of Recital 79, *hamper* SME’s access to public contracts, the State has decided *not* to award contracts on the basis of ‘lot by lot’ in accordance with MEAT, in the interests of facilitating greater access of SMEs to public contracts.

140. Instead of ‘lot by lot’, which under the 2015 Framework led to two SMEs winning all the contracts, the State is ensuring that four separate SMEs will have contracts from the State for the supply of interpretation services and are thereby seeking to ensure competition in future years. For these reasons, this Court does not accept Word Perfect’s claim that the failure to award every lot on the basis of MEAT, whether on a ‘lot by lot’ basis or otherwise, renders the Request for Tenders unlawful.

**But is limiting a tenderer to 25% so distortive of competition as to be unlawful?**

**141.** While the State might be entitled to provide that one tenderer could not win all four lots, as a result of the express wording of Article 46.2, Word Perfect claims that restricting a tenderer to just being able to win one out of four lots, is so distortive of competition as to be unlawful.

**142.** In support of this claim, it says that this level of distortion or segmentation of the market would, if it were carried out by an ‘undertaking’ (as per Articles 101 and 102 TFEU), be considered to be a hardcore restriction of competition, since it involves, in essence, a carve up of the market for interpretation services using rules of public procurement.

**143.** In this regard, Word Perfect recognises that the OGP, as a State entity, is not an undertaking, and therefore that it is not directly subject to competition law rules in the same manner as an undertaking. However, it claims that the distortion of competition caused by the ‘one lot rule’ is a breach by the OGP of the more general and fundamental principle of free competition, which this Court must ensure is observed.

**144.** However, Word Perfect cannot get away from the fact that, while market segmentation might well be a hardcore restriction of competition if carried out by an undertaking, the OGP is not an undertaking and so this comparison is not applicable.

**145.** Furthermore, in this instance, one is not concerned with suppliers of a service seeking to carve up the market, but rather the complete contrary position, where it is the purchaser of services who is deciding that it wishes to allocate its business for the purchase of services to four separate suppliers, in the interests of ensuring, *inter alia*, that there will be sufficient suppliers in four years’ time, when the 2020 Framework is due to expire.

**146.** A situation, as here, in which the State/a purchaser has provided evidence that it designed the Request for Tenders with the intention of encouraging market participation, is very different from a situation where sellers are colluding together to exclude others from the market.

**147.** In this regard, evidence was provided to this Court that the Request for Tenders was designed in particular to ensure that there would be more than just one or two suppliers at the end of the 2020 Framework, and so to facilitate competition, and is thus consistent with the Procurement Directive and so in this Court's view is not in breach of the principle of free competition or indeed Article 101 TFEU.

**148.** However more significantly, as already noted, while market segmentation might be regarded as a hardcore restriction of competition if carried out by undertakings, Article 46.2 explicitly makes clear that market segmentation is expressly permitted (since market segmentation is an automatic consequence of limiting the number of lots which a tenderer may be awarded).

**149.** Accordingly, even if there was a breach of Article 101 and 102 TFEU, which is not accepted, then it is Article 46 itself that breaches Article 101 and 102 TFEU, since the type of market segmentation provided for in the Request for Tenders is consistent with the terms of this Article. In these circumstances, Word Perfect would have to argue that Article 46 itself is invalid, which is not being claimed in these proceedings.

**150.** For these reasons, this Court rejects Word Perfect's claim that the 'one lot rule' amounts to a breach of a fundamental principle of competition law.

**151.** More generally, it is claimed by Word Perfect that there are other means in which the State might achieve its objectives regarding ensuring reliability of supply, greater SME participation and more competition, but as is clear from the Directive, the State should be given additional flexibility when procuring under framework agreements (Recital 61) and freedom from judicial supervision in relation to '*any reason it deems relevant*', *albeit* in relation to the division of contracts into lots (Recital 78). However, more significantly, this Court has not been persuaded that Mr. Massey/Word Perfect have discharged the burden of proof upon them to



establish that there is anything unlawful in the manner chosen by the State to achieve these objectives.

(iv) **The objective of the ‘one lot rule’ supports this distortion of competition**

152. Fourthly, the State’s objective in introducing the ‘one lot rule’ also provides support for the view that the distortion of competition, which it is accepted arises from the use of the ‘one lot rule’ in this case, is not unlawful.

153. In this regard, the State views Article 46.2 as a mechanism to facilitate there being four suppliers who gain work under the new Framework, so as to seek to ensure that there will be sufficient competition amongst suppliers in four years’ time. Evidence was provided that unless something was done regarding ‘reliability of supply’ and opening the market ‘up to competition’, it was feared on the part of the State that all suppliers, bar one or two, could be gone from the market. Mr. Massey gave oral evidence that the more bidders in a tender the better it is for competition. Dr. Hannigan gave evidence that only having two suppliers, and therefore two competitors, in the market was unstable and that a mechanism, such as the ‘one lot rule’, allowed for more sustainable competition.

154. In this respect, Dr. Hannigan also gave evidence that the ‘one lot rule’, instead of distorting competition, will maintain sustainable competition in the market and that by having four suppliers fully engaged in the 2020 Framework, unlike the two in the 2015 Framework, there would be real competition now and in the next framework, which would also play an indirect role in improving quality. He opined that if the 2020 Framework for interpretation services was developed *without* the ‘one lot rule’, and if it was more successful than the 2015 Framework, in the sense of say 75% (rather than 23.8%) of the contracts being allocated under the Framework to the two suppliers which had obtained all the contracts under the 2015 Framework, then those two businesses would be in a very strong position, as they will have had the benefit of a four year relationship with a public body.

**155.** His evidence was that those two suppliers would have a massive advantage over everyone else and they could dominate the market or could cause other suppliers, without the benefit of dealing with public bodies over a four-year period, to recoil from dealing with public bodies within the framework. In his view, it is therefore necessary to introduce the ‘one lot rule’ now, to prevent these circumstances arising in the future.

**156.** Mr. Massey’s evidence was that the one lot rule distorts competition and that there would be ample tenderers in 2024. The burden is on Word Perfect and Mr. Massey to persuade this Court that his evidence should be preferred to that of Dr. Hannigan’s. While both experts’ views were in many respects plausible, this Court was not persuaded that Mr. Massey’s evidence should be preferred to that of Dr. Hannigan’s and reference has already been made to the approach of this Court to expert evidence in light of the Supreme Court’s and the Court of Appeal’s judgments on this topic.

**Preventing a supplier from building its market share?**

**157.** Finally as regards Word Perfect’s claim that the ‘one lot rule’ prevents suppliers from being able to build their market share or grow their business, it is relevant to note that there is no *de facto* limit on Word Perfect to 25% of the market for public contracts for interpretation services, since as previously noted, under the previous tender process, 76.2% of public contracts for interpretation services were awarded outside the Framework. If the situation were to be the same under the 2020 Framework a supplier would still have the possibility of growing its market share to 82.15% of the market for public sector contracts (as explained at para. 165 below).

**158.** Secondly and more significantly, the entitlement of the State to limit a supplier’s share of the market is inherently recognised by the terms of Article 46.2 which explicitly permits a cap on the number of lots awarded to one tenderer and therefore a limit on the ambitions of a

tenderer to win all the contracts in the market. Accordingly, it seems to this Court that any restriction on a supplier from building its market share is expressly permitted by Article 46.2.

**E. OTHER CLAIMS REGARDING THE ‘ONE LOT RULE’**

**159.** In addition to its claims that the ‘one lot rule’ distorts competition, Word Perfect also claims that it is unlawful on other grounds.

**‘One lot rule’ breaches equal treatment and discrimination**

**160.** Word Perfect claims that the ‘one lot rule’ breaches the principle of equal treatment. In this regard, it is not disputed that contracting authorities are bound to apply principles of equal treatment in all public procurement decisions they make, since it is a general principle of EU law. In addition, equal treatment is provided for under the Procurement Directive in Article 18(1) which states:

“Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.”

**161.** Word Perfect claims that arbitrary distinctions are being made between SMEs, in that SMEs with a smaller market share than say, Word Perfect, and so who might not be able to provide a service if it were allocated *more than 25%* of the market, are being favoured over companies such as Word Perfect, which have the capacity to deliver interpretation services to over 25% of the relevant market (but who are nonetheless being restricted to 25%).

**162.** Word Perfect also claims that it amounts to unequal treatment for one SME (Word Perfect) to be penalised for being competitive, while say another supplier such as Supplier X is being favoured, because it has represented to the State in the RFI that it finds the market to be ‘*unsustainable*’ and that it is ‘*reviewing the deteriorating situation and will consider withdrawing from this market should this trend continue.*’ However, this Court does not accept that this amounts to unequal treatment.

**163.** First, as a general point, it is to be observed that all tenderers are being treated equally as they are all subject to the ‘one lot rule’.

**164.** Secondly and more importantly, evidence was provided that Word Perfect and Translation.ie account for up to 75% of the total market (under the 2015 Framework alone, Word Perfect accounted for 30% of the 10 contracts awarded under the 2015 Framework, i.e. seven were awarded to Translation.ie and three were awarded to Word Perfect, with none awarded to Supplier X). Therefore, to the extent that Word Perfect complains that it will no longer be able to get 30% (or indeed more) of the contracts allocated, under the 2020 Framework, than it got under the 2015 Framework, this arises from a legitimate objective of the purchaser of the interpretation services in seeking to facilitate SMEs generally, in participating in the public tender process (and not just facilitating Word Perfect), and the legitimate objective of the purchaser of interpretation services in wishing to ensure that in four years’ time, on the expiry of the 2020 Framework, there will be more than one or two suppliers who are tendering for State interpretation services.

**165.** Thirdly, it must be remembered that if the same percentage of contracts (23.8%) which were allocated under the 2015 Framework, were also to be allocated under the 2020 Framework, then Word Perfect would retain the possibility of winning up to 82.15% of the public contracts awarded by the State for interpretation services both inside and outside the framework i.e. 25% of 23.8% (being 5.95% of the overall public sector market allocated inside the Framework) and no limit on how much of the 76.2% of public work is awarded by the State *outside* the framework (i.e. 76.2% plus 5.95% = 82.15%).

**166.** Word Perfect’s argument that it, as a large supplier, is being treated the same as a small supplier, and therefore unequally, must be seen in the context of the possibility, at least, of a large supplier like Word Perfect still being able to corner a large share of overall market (both inside and outside the Framework).

167. Obviously, if, as hoped by the State, the public bodies opt to use the 2020 Framework more than the 2015 Framework, then more than 23.8% of contracts will be allocated under the 2020 Framework, and so there will be a consequent reduction, from 82.15%, of the total value of the market that would be available to be won by one supplier (such as Word Perfect), both inside and outside the Framework.

168. Fourthly, the form of inequality/discrimination that appears to be at issue is that suppliers of different sizes (i.e. different capacities to provide interpretation services) are being treated the same. This is because a firm such as Word Perfect, which appears to have the capacity to supply all of the lots on offer, is being treated the same as a firm which might have the capacity to supply only one lot. However, in so far as this could be considered discrimination, it is, in this Court's view, a permissible form of discrimination under the express terms of Article 46.2 which provides that contracting authorities may '*limit the number of lots that may be awarded to one tenderer*'. This is because the EU legislature, when drafting this Article, could not have assumed, in this Court's view, that all suppliers for public contracts were going to be of the same size, since such an outcome would be likely, if it were to happen, to be a statistical aberration. It follows therefore that it is inherent in the terms of this Article, which permits limiting lots to one tenderer, that it permits a restriction on a supplier growing his market share to an unlimited degree, and thereby permits treating suppliers that are *different* (on grounds of size/capacity) in the *same* manner.

169. If the EU legislature had wished to limit the number of lots awarded to one tenderer, in circumstances where only the tenderers with the same capacity/size had the same limit, then it seems to this Court that it could have stated that expressly, particularly since it must be taken as a given that in the vast majority of tenders, the tenderers will not be the same or the same size.

**'One lot rule' breaches principle of proportionality**

**170.** Word Perfect also claims that the ‘one lot rule’ breaches the principle of proportionality because by limiting a supplier to only one of the four lots, or 25% of the market, it limits suppliers too much in terms of their access to that market.

**171.** In view of the State’s legitimate objective in seeking to ensure that in four years’ time there would be more than one or two suppliers of interpretation services to the State, it seems to this Court that the division of the contracts allocated *under* the 2020 Framework into four lots, rather than any other number of lots, is not disproportionate.

**172.** This is because first, one is dealing with the market where historically 76.2% of contracts were allocated *outside* the Framework, so one is potentially dealing with only a small proportion of the public sector market for interpretation services being subject to the ‘one lot rule’.

**173.** Secondly, and more significantly, ensuring that there are at least four suppliers of interpretation services to the State is not, in this Court’s view, disproportionate. One is not dealing with the State seeking to ensure that there are, say, 10 suppliers of interpretation services in four years’ time, by dividing the procurement into 10 lots and guaranteeing each supplier one lot. Rather, the State’s legitimate concern is that there would be more than one or two suppliers of interpretation services in four years’ time. This Court cannot see how, by providing for four, rather than say three lots, that the actions of the State could be said to be disproportionate in this regard.

**174.** Furthermore, as in the *Copymoore* case the onus is on Word Perfect to establish that the principle of proportionality has been breached in this case. While Mr. Massey has expressed the view that there were other ways in which the State could have achieved its aim of, *inter alia*, facilitating SME participation and ensuring long-term competition in the interpretation services market, he did not conduct a survey of the market like the State did, nor did he survey the purchasers to find out their needs. In all these circumstances, Word Perfect has failed to

satisfy this Court that his opinion should be preferred, and that the steps taken by the State were disproportionate.

**‘One lot rule’ was inserted because of State’s bias against ‘litigious’ Word Perfect?**

175. Word Perfect also contends there was bias in the design of the Request for Tenders. It claims that the ‘one lot rule’ was introduced by the State because of a bias in the OGP against Word Perfect because of Word Perfect’s alleged litigious nature. On this basis, Word Perfect claims that the State breached the principle that a decision-making authority must disregard any irrelevant or illegitimate factors when making its decision (per Finlay CJ. in *P & F Sharpe Ltd v. Dublin City and County Manager* [1989] IR 701 at p. 717 – 718).

176. In this regard, Word Perfect claims that there is a perception of bias on the part of the OGP because of the comment in the Sourcing Strategy at p. 14 that there was a member of the 2015 Framework which had a ‘litigious nature’:

“FW client’s feedback stated that the key issue was the lack of quality in the interpretation services provided and the litigious nature of a FW member when MEAT criteria used in subsequent mini competitions.”

177. It seems to this Court that this statement clearly applied to Word Perfect, since it has been submitted on behalf of the State that Word Perfect has brought at least five challenges to other State tenders and this has not been disputed by Word Perfect. Indeed, Word Perfect rely on the fact that this comment refers to it, to claim that its alleged litigious nature should play no part in the State’s decision regarding the terms of the Request for Tenders.

178. In considering Word Perfect’s complaint, first, it is to be noted that the statement about the litigious nature of Word Perfect is clearly simply a statement of fact since it is not unreasonable for the member of the OGP team to describe as litigious (in the sense of willing, or not being afraid, to litigate) a person that initiates at least five sets of proceedings challenging the State over separate tenders. Thus, this Court has no issue with the State describing Word

Perfect as litigious and this Court did not understand Word Perfect to be claiming that this comment on the part of the OGP did not refer to it.

**179.** Secondly, and crucially, it seems to this Court that there is nothing illegitimate about the State designing its tender process in a manner that seeks to avoid legal slip-ups and in particular that seeks to save taxpayers' funds being expended unnecessarily in litigation. Indeed, this Court would put the matter further and say that it would be imprudent of the State if it were *not* to take account of previous litigation regarding processes that had been challenged (whether by Word Perfect or any other party) in designing subsequent tender processes. In this regard, in other proceedings, by coincidence involving Word Perfect (and so evidence of some of Word Perfect's previous litigation), it was noted that there is a public interest in preserving public funds – see *Word Perfect v. Minister for Public Expenditure and Reform* [2021] IECA at para.76 and 89 per Barniville J, which references, at para. 155 similar comments by McDonald J. in *Word Perfect v. Minister for Public Expenditure and Reform* (Unreported, High Court, 21<sup>st</sup> September, 2021).

**180.** For this reason, this Court sees no basis for Word Perfect's claim that the State has inserted the 'one lot rule' because of bias towards Word Perfect, when it seems clear to this Court that it is a perfectly legitimate objective for the framers of a tender process to take account of previous litigation in framing the terms of subsequent tender processes and in order to avoid future litigation costs.

**181.** Furthermore, it is important to bear in mind that we are dealing with a purchaser of services issuing a tender for same. The Request for Tenders therefore is not an adjudicative process but rather a 'commercial' decision (*albeit* by a not for profit State entity using taxpayers' funds) on the part of a purchaser who is seeking certain services. As is clear from the judgment of McKechnie J. in *Greenstar v. Dublin City Council* [2013] 3 I.R 510 at para.



45, an allegation of bias/favouritism against a tribunal or court is very different from such a claim in the context of other decisions, such as a decision to purchase interpretation services:

“Decisions taken on policy issues are distinct and different from decisions of courts, tribunals, or quasi-tribunals. I would, in this regards, agree with the comments of De Smith in ‘*Judicial Review (6<sup>th</sup> Ed.)*’ (2007), where the author states at p. 530:

‘The normal standards of impartiality applied in an adjudicative setting cannot meaningfully be applied to a body entitled to initiate a proposal and then to decide whether to proceed with it in the face of objections....It would be inappropriate for the courts to insist on... maintaining the lofty detachment required by a judicial officer determining a *lis inter partes*’

Nonetheless, this does not mean that, when coming to a conclusion on a matter where there is a statutory requirement to consult those affected that, in the face of trenchant, legitimate opposition, the decision-maker may bulldoze through a decision without regard to such, and regardless of what relevant evidence it has before it.”

**182.** Clearly, the insertion of the ‘one lot rule’ in the Request for Tenders was not done as part of an adjudicative process by a quasi-tribunal but rather it was a decision made for policy reasons (to seek to ensure, *inter alia*, that there would be less likelihood of a successful legal challenge) and there is no question of the OGP being required to adopt a ‘lofty detachment’ or indifference to the likelihood of some of the suppliers challenging the tender process – yet this is implicit in Word Perfect’s claim that the State was wrong to have any regard to the risk of future litigation.

**183.** Accordingly, this allegation of bias is not only rejected, but it is this Court’s view that it is a laudable objective of a State entity, such as the OGP, when pursuing its activities to do

so in a fashion which seeks to minimise future litigation costs (which can be a very significant cost to the taxpayer).

### **One lot rule' breaches freedom to provide services**

**184.** Word Perfect also claims that the 'one lot rule' breaches the freedom to provide services under Article 56 of the TFEU as it makes it less attractive for suppliers to provide those services, by limiting them to 25% of the market for State contracts for interpretation services.

**185.** This Court does not accept that the fact that the State chooses not to buy as much of a supplier's interpretation services as that supplier would like, amounts to a violation of that supplier's freedom to provide services.

**186.** This is because, as previously noted, the express right in Article 46.2 of the State/purchaser of services to '*limit the number of lots that may be awarded to one tender*' implicitly restricts the rights of the supplier, on the other side of this supply relationship, to supply his services to the State. As such this amounts to an inherent restriction on the freedom to supply services contained in, and permitted by, Article 46.2.

### **Breach of Article 37**

**187.** Word Perfect also claims that the division into lots is unlawful, since it is not expressly permitted by Article 37, which is the provision in the Directive dealing with the entitlement of central purchasing bodies, such as the OGP, to use framework agreements to acquire supplies.

Article 37 states:

“Member States may also provide that contracting authorities may acquire works, supplies and services by using contracts awarded by a central purchasing body, by using dynamic purchasing systems operated by a central purchasing body or, to the extent set out in the second subparagraph of Article 33 (2), by using a framework agreement

concluded by a central purchasing body offering the centralised purchasing activity referred to in point (b) of point (14) of Article 2 (1)”

**188.** Word Perfect claims that, as Article 46 is the article that permits the division of procurement into lots, and it is not expressly stated to apply to procurement by a central purchasing body, the OGP is not permitted to segregate the market by the use of lots, as it has done in this case, and that this amounts to a breach of Article 37.

**189.** This Court is not persuaded by that argument. First, there is nothing in Article 37 or elsewhere in the Directive which prevents a central purchasing body from dividing procurement into lots. Secondly, as previously noted, the whole focus of the Directive is that the division into lots is the default position for procurement in order to facilitate, *inter alia*, SME participation and preserving competition. It is difficult to see therefore, why, as a matter of policy, there would be an intention on the part of the EU legislature *not* to facilitate SME participation where the procurement is done by a central purchasing body. Indeed, if it was intended that the division into lots is unlawful (and SME participation should not be facilitated), if a central purchasing body was doing the procurement, then this would have been easy to state.

**190.** In these circumstances, this Court rejects the claim that the procurement in this case is a breach of Article 37.

## **CONCLUSION**

**191.** For all the foregoing reasons, this Court rejects Word Perfect’s claim that the ‘division into lots’ aspect or the ‘one lot rule’ aspect of the tender for interpretation services in this case, is unlawful.

**192.** This Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time, with the terms of any draft agreed court order to be provided to the Registrar. In case it is necessary for this

Court to deal with final orders, this case will be provisionally put in for mention one week from the date of delivery of this judgment, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).