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PART I

Competitive dialogue in the EU

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Competitive dialogue in EU law: a critical review

SUE ARROWSMITH AND STEEN TREUMER

1. Introduction

Competitive dialogue is a relatively novel award procedure in EU procurement law, which was introduced in 2004¹ as part of a major overhaul of the EU's procurement regime.² Its purpose is to provide a suitable method for awarding the 'complex' contracts that have become increasingly important throughout the EU – for example, contracts for infrastructure projects, transport networks and major information technology systems. These are significant not only because of the high level of government expenditure that is often involved, but also because of their importance in securing effective public services and infrastructure. A suitable legal regime for awarding such contracts is therefore of great importance. Prior to 2004, some stakeholders considered that the existing award procedures in EU law were either inadequate for all complex contracts or – in the case of the flexible negotiated procedure – insufficiently available; and competitive dialogue was introduced to fill this gap.

The main aim of this book is to provide a critical examination of the legal regime on competitive dialogue, in light of its objective of providing a procedure for complex contracts across the diverse Member States of the EU.³ This will involve considering both the

¹ In Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114 ('Public Sector Directive').

² See generally S. Arrowsmith, 'An Assessment of the New Legislative Package on Public Procurement' (2004) 41 *Common Market Law Review* 1.

³ For further legal analysis in English, see S. Arrowsmith, *The Law of Public and Utilities Procurement* (2nd edn, London: Sweet & Maxwell, 2005), Ch. 10; P. Trepte, *Public Procurement in the EU: A Practitioner's Guide* (Oxford University Press, 2007), pp. 404–9 and 445–53; M. Burnett (with M. Oder), *Competitive Dialogue – A Practical Guide* (European Institute of Public Administration, 2009); S. Treumer, 'Competitive Dialogue' (2004) 13 *Public Procurement Law Review* 178; S. Treumer, 'The Field of

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legal rules at EU level and the way in which those rules have been implemented and applied at national level, the latter being essential for a full perspective on the EU rules themselves. At EU level we are concerned, in particular, to explain the key features of the legal rules; to identify areas of legal uncertainty; to evaluate possible interpretations; and to highlight any problems with the rules. This information should be of value to those who operate the rules in practice throughout the EU. Through this analysis the book also, significantly, aims to contribute towards the sound future development of the rules on competitive dialogue, both at EU level and in its implementation in national law and practice – whether that be through legislative change, judicial development, government guidance or simply application by contracting authorities. Further, as well as providing an analysis of the specific subject of competitive dialogue, this work also offers an interesting case study of the way in which EU public procurement law has been received in national law and practice, and has influenced, and been influenced by, national approaches to regulating public procurement. It should be emphasised, however, that the book does not elucidate all aspects of practice of competitive dialogue or serve as a comprehensive practical guide to the procedure:⁴ it considers questions of practice only to the extent that these are relevant to the legal critique.

Application of Competitive Dialogue' (2006) 15 *Public Procurement Law Review* 307; A. Brown, 'The Impact of the New Directive on Large Infrastructure Projects: Competitive Dialogue or Better the Devil You Know?' (2004) 13 *Public Procurement Law Review* 160; M. Burnett, 'Conducting Competitive Dialogue for PPP Projects – Towards an Optimal Approach?' (2009) 4 *European Public Private Partnership Law Review* 190; M. Burnett, 'Developing a Complexity Test for the Use of Competitive Dialogue for PPP Contracts' (2010) 4 *European Public Private Partnership Law Review* (2010) 215; P. Delelis, 'The Competitive Dialogue' (2007) 3 *Revue du Trésor* 279; M. Farley, 'Directive 2004/18/EC and the Competitive Dialogue Procedure: A Case Study on the Application of the Competitive Dialogue Procedure to NHS LIFT' (2007) 2 *European Public Private Partnership Law Review* 60; C. Kennedy-Loest, 'What Can Be Done at the Preferred Bidder Stage in Competitive Dialogue?' (2006) 15 *Public Procurement Law Review* 316; A. Rubach-Larsen, 'Competitive Dialogue', Ch. 5 in R. Nielsen and S. Treumer (eds.), *The New EU Public Procurement Directives* (Copenhagen: DJØF Publishing, 2005), p. 67; S. Verschuur, 'Competitive Dialogue and the Scope for Discussion after Tenders and Before Selecting the Preferred Bidder – What Is Fine-Tuning Etc.?' (2006) 15 *Public Procurement Law Review* 327.

⁴ For practical guidance and proposals, see, in particular, Burnett, *Competitive Dialogue*, n. 3 above, and the guidance issued by national governments referred to in other chapters of this volume, in particular Ch. 3 (UK) and Ch. 12 (Netherlands).

The book draws on several empirical studies. First, several studies not published elsewhere have been conducted by, or under the supervision of, the editors, that look in detail at the practical operation of the legal rules in the first few years. These studies, covering the UK, Denmark, Spain and Portugal, have examined the way in which the legal rules ‘in the books’ have been applied and interpreted in practice by those responsible for operating and/or advising on competitive dialogue – mainly lawyers, procurement practitioners and policy-makers – and also the perceptions which those stakeholders have of the applicable legal rules. This information is also supplemented, both for some of these Member States and some others, with information from other empirical studies, mostly from national governments; such studies are available, in particular, for the Netherlands and UK. In addition, the editors commissioned a detailed statistical analysis of the use of competitive dialogue in several Member States which shows, in particular, the precise types of projects for which the procedure has been used; and the results of this are presented in Chapter 2. A more detailed methodology for some of these studies as well as their key findings is described in the relevant chapters.

In this first chapter we present a detailed analysis and critique of the EU rules and some reflections on their implementation and application at national level. This analysis draws throughout on the more detailed analysis of Member State systems that are provided in the later chapters, as well as on other published information on the procedure.

As already mentioned, Chapter 2 offers a statistical analysis of the use of competitive dialogue in several Member States, looking in detail at the precise type of projects for which the procedure is used, and also the kinds of contracting authorities that use the procedure.

The remaining chapters then present a detailed analysis of the experience of selected Member States, which informs the analysis in the current chapter. These cover the UK (Chapter 3), France (Chapter 4), Germany (Chapter 5), Denmark (Chapter 6), Portugal (Chapter 7), Spain (Chapter 8), Poland (Chapter 9), Lithuania (Chapter 10), Italy (Chapter 11) and the Netherlands (Chapter 12). In each case the relevant chapter examines the way in which the EU rules have been transposed into national legislation; national jurisprudence – although this is currently quite limited; and any soft law in the form of guidance. As noted above, for some Member States this doctrinal information is supplemented also by empirical evidence on the operation of the procedure, in particular regarding the application and interpretation of the legal

provisions. These chapters have been written to a common template to allow for comparison across a number of key themes, and the organisation of these chapters is paralleled in the structure of the EU-wide analysis in the current chapter. The Member States chapters differ significantly in length, however, reflecting factors such as the extent of the hard and soft law that exists, the actual extent of use of competitive dialogue and – in particular – the extent of empirical information available.

The choice of Member States for study in these individual country chapters was influenced by several considerations.

First, it was considered essential to include France and the UK, since they are by far the most significant users of competitive dialogue in terms of absolute numbers, as well as two of the five largest EU states by population. It was also considered appropriate to include the other three of the five largest Member States, Germany, Italy and Spain, in order to cover a significant proportion of the EU. At the same time, it was necessary to provide a perspective from some smaller Member States, and this has been done by including, in particular, Lithuania and Denmark. It was also considered useful to include a perspective from states which, whilst they have made the procedure available, have used it little in practice: this is the case with Portugal and Lithuania.

It was decided also to include some Member States which have only relatively recently been subject to EU law, and some that have only recently made the transition from centralised to market economies. Both of these situations throw up special problems that might not be experienced elsewhere, such as limited expertise in EU law and limited experience of operating competitive public procurement procedures on both the demand and supply side. Lithuania and Poland (both of which acceded to the EU in 2004) fall into both these categories.

It was desirable also to study both states that have a long tradition of legal rules of public procurement – the case with most of the countries in the sample (and indeed the EU generally) – and states whose procurement law is limited largely to that required by EU membership, as with the UK and Denmark, to examine whether this tradition is reflected in the approach to competitive dialogue. The sample also includes countries with a Civil Law tradition, including those with a separate system of administrative courts (such as France and Italy), and the Common Law jurisdiction of the UK.

Finally, it was decided at a late stage to add a chapter on the Netherlands. This was because significant information became available in that

state on the practical application of the procedure, which could make a valuable contribution to the study.⁵

The analysis of the ten selected Member States appears likely to give a reasonably broad picture of competitive dialogue in the EU that highlights many key issues raised by the regulatory regime without excessive duplication or an unduly lengthy analysis. Nevertheless, given that the book covers in depth only ten of twenty-seven Member States, it clearly does not present a comprehensive picture and needs to be read with this limitation in mind.

The present chapter begins, in section 2, with the relevant background. This covers: the EU procurement rules in general; the approach to complex procurement prior to competitive dialogue; the reasons for introducing the new procedure and the legislative history; and a brief overview of the key rules. Section 3 then explains the extent to which the new procedure has been introduced into the legal systems of Member States and the manner in which this has been done, and also offers reflections on the implications of this for the relationship between EU and national procurement law and the development of a harmonised approach.

Section 4 then looks in detail at the scope of competitive dialogue, and in particular at the conditions for its use. In this section we make a number of concrete proposals regarding the interpretation of the procedure which should serve to ensure that the procedure is available and used as intended to give flexibility to Member States. In addition, this section also considers the use of a competitive dialogue-type of procedure for contracts *outside* the Directive.

Section 5 then looks at the operation of the different phases of the procedure. After a brief introduction this section considers in turn preparation and planning (5.2), confidentiality requirements (5.3), advertising (5.4), the selection phase (5.5), the dialogue phase (5.6), the final tender phase (5.7), the 'preferred bidder' phase (5.8) and the issue of payments to participants (5.9). In these sections we again consider both the legal rules at EU level and their application at national level, and make some proposals for addressing the issues that arise in interpreting the EU rules.

⁵ The empirical studies initiated by the authors for the UK, Denmark, Spain and Portugal were undertaken for the purpose of the project, rather than these states being included – as with the Netherlands – *because* of the availability of information.

Section 6 concludes by reviewing the key areas of concern and uncertainty that we identify in our detailed study of the legal rules and our proposals for interpretation. It will be argued that in addressing these areas a balanced approach is needed that takes account of the principles of proportionality and competition as well as considerations of equal treatment and transparency; and that further guidance from the European Commission which reflects this balanced approach would be useful for the future development and use of competitive dialogue.

2. Background: the EU procurement rules, complex procurement prior to competitive dialogue and the introduction of competitive dialogue

2.1. *The EU procurement rules*

Competitive dialogue is one of the contract award procedures provided for in the main Directive governing public sector procurement in the EU, namely, Directive 2004/18/EC ('Public Sector Directive'). This Directive regulates the award of major contracts by public bodies in the EU with the aim of ensuring a level playing field in competition for public procurement as part of the EU's internal market. The Treaty on the Functioning of the European Union (TFEU) itself prohibits discrimination in public procurement and also certain other restrictions on access to government markets through, in particular, Article 34 TFEU on free movement of goods, Article 49 on freedom of establishment, and Article 56 on freedom to provide services, all of which apply to public procurement as well as to the government's regulatory activity.⁶ However, these provisions were considered insufficient alone to open procurement markets; in particular, it was considered necessary also to require transparent award procedures so that public bodies could not conceal discriminatory behaviour under a cloak of discretion. Thus, through Directives dating back to 1970,⁷ the EU has regulated public contract procedures to ensure transparency.⁸ Under these Directives covered authorities must use specified procedures, which generally involve, *inter alia*, a competition publicised in the *Official Journal of the European Union* (OJEU), and use pre-disclosed selection and award criteria. The Directives also contain other provisions to

⁶ See further Arrowsmith, n. 3 above, Ch. 4; Trepte, n. 3 above, pp. 3–27.

⁷ For a historical account, see Arrowsmith, n. 3 above, Ch. 3.

⁸ For details, see Arrowsmith, n. 3 above; and Trepte, n. 3 above.

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improve market access such as minimum time limits for key phases of tendering procedures, and rules on drafting specifications to remove obstacles to participation.

The current Public Sector Directive 2004/18 is the main Directive for public sector bodies. It applies to the state (for example, government departments), regional and local authorities, and also ‘bodies governed by public law’ – a term defined to include all other bodies that are mainly financed or appointed by other public bodies or are subject to supervision by them⁹ (for example, state-financed universities). These bodies are collectively referred to as ‘contracting authorities’. It applies only to contracts above certain financial thresholds set – in light of the Directive’s objective of opening up markets to trade – to identify contracts that are of interest to tenderers from other Member States. For 2010–11, the main thresholds were €4,845,000 for all works contracts, €125,000 for the supply and services contracts of central/federal bodies, and €193,000 for the supply and services contracts of other authorities.¹⁰

Subject to a few exclusions all works, supply and services contracts above the thresholds are regulated. However, contracts for some types of services (‘Part B’ services) are not covered by the full rules but are subject only to very limited obligations, notably those on technical specifications.¹¹ It was decided to make this distinction when services were first brought into the regime in 1992 because of the novelty and sensitivity of regulating services in some Member States. Services were selected for full regulation on the basis of the potential scope for cross-border trade, potential savings, and the availability of information. Services covered by the full rules are specified in Annex IIA and include, for example, services relating to the maintenance of vehicles and refuse collection, as well as professional services such as accountancy, IT services, and consultancy; all those not listed, which includes, for example, legal services, medical services and many social services, escape this full regulation.

It is important also to mention that the Directive does not fully regulate concessions – that is, arrangements under which the economic operator is remunerated not by the contracting authority but by third parties, and takes the economic risk involved in the activity.¹² In this

⁹ Directive 2004/18, Art. 1(9).

¹⁰ Directive 2004/18, Art. 7, as amended by Commission Regulation 1177/2009 [2009] OJ L314/64.

¹¹ See Directive 2004/18, Arts. 20–21.

¹² Directive 2004/18, Art. 1(3); and Case C-382/05, *Commission v. Italy* [2007] ECR I-6657.

respect, works concessions are subject merely to an obligation to advertise the arrangement and to give a minimum time for response,¹³ whilst services concessions are wholly excluded from the Directive.¹⁴

Whilst many important contracts are thus outside the Directive, it is important to note that advertising obligations, as well as certain other transparency requirements, may apply under the TFEU itself. This is because the CJEU has interpreted the Treaty's free movement provisions not merely as prohibiting discrimination and certain other 'negative' restrictions on access to public markets, but also as implying a positive principle of transparency to support non-discrimination.¹⁵ However, it can be noted that the CJEU now appears to be adopting a relatively cautious approach towards imposing procedural requirements for these contracts excluded from the Directive.¹⁶ This Treaty obligation is relevant for present purposes in that a number of the contracts excluded wholly or in part from the Directive's rules, in particular as concessions or Part B contracts, are particularly complex contracts of a kind for which competitive dialogue might be suitable. Whilst the procedure is not formally relevant for these contracts, nothing precludes states from adopting a procedure of a similar kind to award them, including to satisfy transparency obligations of the Treaty, and, as we will see below, this has in fact happened in some cases.¹⁷

For those contracts that *are* covered by its full regime, the Public Sector Directive requires contracts to be awarded by one of a number of specified procedures.

The position prior to the introduction of competitive dialogue was that contracting authorities were generally required to use one of two procedures, which Member States may allow for any type of procurement without conditions. One is the open procedure, a formal

¹³ Directive 2004/18, Arts. 56–61. ¹⁴ Directive 2004/18, Art. 17.

¹⁵ Case C-324/98, *Telaustria v. Telekom Austria and Herold Business Data* [2000] ECR I-10745. For a recent review, see A. Brown, 'EU Primary Law Requirements in Practice: Advertising, Procedures and Remedies for Public Contracts outside the Procurement Directives' (2010) 19 *Public Procurement Law Review* 169; and, for the European Commission's views, see Commission, *Commission Communication on the Community law applicable to contract awards not or not fully subject to the provision of the Public Procurement Directives* (hereinafter 'Communication on non-covered contracts') [2006] OJ C179/2.

¹⁶ Case C-95/10, *Strong Segurança SA v. Município de Sintra*, judgment of 17 March 2011; Case C-226/09, *Commission v. Ireland*, judgment of 18 November 2010.

¹⁷ Section 4.6.2 below.