

***THE INFLUENCE OF RECENT DEVELOPMENTS IN EU PROCUREMENT LAW ON THE
PROCUREMENT REGULATION OF MEMBER STATES: A CASE STUDY OF THE UK, THE
NETHERLANDS AND FRANCE***

Sylvia de Mars, BA, LLM

**Thesis submitted to the University of Nottingham
for the degree of Doctor of Philosophy**

DECEMBER 2010

Abstract

Since 1993, the European Union has dramatically increased the scope and volume of its procurement regulation; particular increases have been made in terms of the procurement procedures made available, and the obligations that national contracting authorities have in light of EU law. This thesis examines the influence that recent developments in EU public procurement law have had on national procurement regulation in the UK, the Netherlands, and France.

To assess this influence, three 'case study' areas were selected for investigation: the new procurement procedure 'competitive dialogue', made available for the procurement of complex contracts; the ability to repeat purchase using 'framework agreements', recently made available for purchasing in non-utilities sectors; and the Court of Justice's use of 'general principles of equal treatment and transparency', which has created new obligations for national contracting authorities.

The thesis found that, in the areas examined, the influence of EU secondary legislation is substantial and—in two of the three countries examined—also plays a visible role in national regulation where EU law is not mandatory. The Court of Justice jurisprudence evaluated has had its most significant impact on the national judiciary: courts were found to reinforce the Court's judgments in all countries. Soft law issued by the European Commission had little perceivable influence on the formal legal regulation of the Member States examined, but may have influenced approaches taken to guidance or legislation more generally.

The thesis also observed that harmonization of national laws, despite not being an objective of the EU rules, has increased in recent years—but even now, national differences (usually reflective of historical approaches taken to procurement regulation) are visible in those areas where the EU rules are optional, rather than mandatory.

Acknowledgements

While there are many people who have supported me while writing this thesis, it would not exist at all if not for the supervision I have received from Professor Sue Arrowsmith. Her passion for public procurement, and the research she has conducted in this field, have inspired me for the past three years and will continue to do so. I thank her profusely for her patience, encouragement and exceptionally diligent provision of feedback; I was very fortunate to have such an excellent supervisor, and I shall miss working with her on a daily basis now that I have left Nottingham.

I would be remiss to not thank the two institutions that funded me for the duration of my thesis; the Arts and Humanities Research Council saw potential in my research proposal and have very generously paid for my tuition fees, while the University of Nottingham's School of Law has, even more generously, kept me clothed, fed and caffeinated.

I also cannot thank my parents enough, for having supported me both financially and emotionally in all the years leading up to my PhD; without their encouragement in starting my 'England adventure', I would not be here today. Similar gratitude goes out to my PhD friends, as well as those fortunate souls who were not *also* engaged in PhD writing: thank you for reminding me that there was more to the world than research.

Lastly, for volunteering to proofread a 300 page legal thesis; for cooking most of the meals and doing most of the cleaning; and especially for putting up with my frequent bouts of PhD-related self-doubt, stress, exhaustion and grumpiness, my love and gratitude goes out to Laura.

This is to declare that the following is the result of the author's own work.

This thesis is 99982 words in length.

It is my intention that the research in the thesis is current as of 30 September 2010.

TABLE OF CONTENTS

Abstract.....	i
Acknowledgements	ii
Table of Contents	iv
1. INTRODUCTION	1
1.1 Background.....	1
1.2 Research Questions	3
1.3 Contributions of the Project	4
1.3.1 National Responses to EU Procurement Regulation	4
1.3.2 EU Policy Development.....	5
1.3.3 The Wider Influence of EU Law on National Law	6
1.3.3.1 Implementation Studies.....	6
1.3.3.2 Voluntary Application.....	7
1.4 Method	7
1.5 Methodology	9
2. THE EU'S PUBLIC PROCUREMENT RULES	13
2.1 Overview of EU Public Procurement Regulation.....	13
2.1.1 Introduction	13
2.1.2 The Reasons and Competences for Regulating Procurement in the EU	13
2.1.2.1 Tensions between EU Procurement Regulation and National Procurement Regulation.....	14
2.1.3 The TFEU: Baseline Standards.....	15
2.1.4 The Directives	17
2.1.4.1 What is Implementation?.....	18
2.1.4.1.1 Formally Implementing EU Procurement Directives: Two Methods	19
2.1.4.1.2 Advantages and Drawbacks of Implementation by Transposition	20
2.1.4.1.3 Advantages and Drawbacks of Implementation by Reference.....	20
2.1.4.2 Interpretation of EU Directives	21
2.1.4.3 The First Procurement Directives	21
2.1.4.4 Amendments Leading up to 1993.....	23
2.1.4.5 Changes in Law since 1993: the 2004 Directives	26
2.1.5 The CJ's and the Commission's Contributions	28
2.1.5.1 Jurisprudence	28
2.1.5.2 Soft Law	30
2.1.6 Conclusions	31
2.2 Case Study 1: Competitive Dialogue.....	32
2.2.1 Introduction	32
2.2.2 Legislative History & Purpose	32
2.2.3 National Implementation of Competitive Dialogue: Implementation Choices Available.....	34
2.2.4 Competitive Dialogue in the Directive: Rules on Availability	35
2.2.5 Legal Uncertainties in the Competitive Dialogue Procedure.....	36
2.2.6 Conclusions	39
2.3 Case Study 2: Framework Agreements	40
2.3.1 Introduction	40
2.3.2 What is a Framework?.....	40
2.3.3 Types of Framework Arrangements: a General Taxonomy applicable to the Old Directives ..	41
2.3.4 Framework Arrangements under the 2004 Directive	45
2.3.4.1 National Implementation Choices	45
2.3.4.2 Awarding & Using Framework Agreements under the 2004 Directive.....	46

2.3.4.3 Legal Uncertainty in the Directive's Provisions on Framework Agreements.....	48
2.3.4 Conclusions	50
2.4 Case Study 3: The General Principles of Equal Treatment and Transparency	52
2.4.1 Introduction	52
2.4.2 The General Principles under the Directive	52
2.4.3 The General Principles under the TFEU	56
2.4.3.1 Transparency & Advertising Obligations.....	57
2.4.3.2 Other Cases on the General Principles outside of the Directives	60
2.4.3.3 The Commission's Interpretative Communication	62
2.4.4 Conclusions	64
3. PUBLIC PROCUREMENT IN THE UNITED KINGDOM.....	65
3.1 The Development of UK Public Procurement Regulation.....	65
3.1.1 Introduction	65
3.1.2 UK Procurement Regulation in the 1970s and 1980s.....	65
3.1.2.1 Central Government.....	66
3.1.2.2 Local Government.....	68
3.1.2.3 Early Regulation: Conclusions.....	69
3.1.3 1991 and Onwards.....	70
3.1.3.1 Implementation of the EU Rules	70
3.1.3.2 Local Government Procurement Policy in the 1990s.....	72
3.1.3.3 Central Government Procurement: Changes in the 1990s	73
3.1.3.4 Other Laws Affecting Public Procurement: An Overview.....	74
3.1.4 2006 Onwards	76
3.1.4.1 Legislation.....	76
3.1.4.2 Guidance	77
3.1.4.3 Jurisprudence	78
3.1.5 Conclusions.....	79
3.2 Competitive Dialogue in the UK.....	81
3.2.1 Introduction	81
3.2.2 Legislation.....	81
3.2.3 Jurisprudence.....	82
3.2.4 Guidance	82
3.2.4.1 Availability: Relationship to Negotiated Procedure	83
3.2.4.2 Availability: Competitive Dialogue versus the Open/Restricted Procedure	84
3.2.4.3 Use: Successive Tendering & Elimination.....	86
3.2.4.4 Use: Number of Final Tender Participants	87
3.2.4.5 Use: Completeness of Final Offers.....	87
3.2.4.6 Use: The Preferred Bidder	90
3.2.4.7 Use: Reserve Bidders?.....	92
3.2.4.8 General Guidance: Confidentiality.....	93
3.2.4.9 General Guidance: Payment of Bid Costs.....	94
3.2.5 Conclusions.....	95
3.3 Framework Agreements in the UK.....	96
3.3.1 Introduction	96
3.3.2 Framework Agreements prior to the 2006 Regulations.....	96
3.3.2.1 Legislation	96
3.3.2.2 Guidance.....	97
3.3.2.3 Jurisprudence	100
3.3.2.4 Prior to 2006: Conclusions.....	101
3.3.3 Framework Agreements under the 2006 Regulations.....	101

3.3.3.1 Legislation	101
3.3.3.2 OGC Guidance	102
3.3.3.2.1 Thresholds: Multi-User Frameworks	103
3.3.3.2.2 Advertising: Identifying the Framework Parties	103
3.3.3.2.3 Selection of Framework Suppliers: Price as Award Criteria	104
3.3.3.2.4 Multi-Supplier Frameworks: Award Criteria for Call-Offs	104
3.3.3.2.5 Mini-Competitions: Weightings of Award Criteria	105
3.3.3.2.6 Information Requirements	106
3.3.3.2.7 Guidance: Conclusions	106
3.3.3.3 Jurisprudence	107
3.3.4 Conclusions	109
3.4 The General Principles of Transparency and Equal Treatment in the UK	111
3.4.1 Introduction	111
3.4.2 Contracts Covered by the Directives	111
3.4.2.1 Legislation	111
3.4.2.2 Guidance	111
3.4.2.3 Jurisprudence	113
3.4.2.4 Contracts covered by the Directives: Conclusions	115
3.4.3 Contracts Not Covered by the Directives	116
3.4.3.1 Legislation	116
3.4.3.2 Guidance	116
3.4.3.3 Jurisprudence	118
3.4.3.4 The Scottish Approach to the Telaustria Jurisprudence	120
3.4.3.5 Contracts Not Covered by the Directives: Conclusions	121
3.4.4 Conclusions	121
4. PUBLIC PROCUREMENT IN THE NETHERLANDS	123
4.1 Developments in Dutch Public Procurement Regulation	123
4.1.1 Introduction	123
4.1.2 Prior to the 1970s	123
4.1.3 The 1970s	124
4.1.3.1 Criticism of the BAW and the Walapuli	126
4.1.3.2 Criticism of the UAR 1972	128
4.1.4 The 1980s	129
4.1.5 The 1990s	130
4.1.6 The Early 2000s	132
4.1.7 The Current Regime	134
4.1.8 Current Legislative Initiatives	135
4.1.9 Guidance	136
4.1.10 Conclusions	137
4.2 Competitive Dialogue in the Netherlands	139
4.2.1 Introduction	139
4.2.2 Legislation: BAO	139
4.2.2.1 General Comments	139
4.2.2.2 Scope	139
4.2.2.3 Procedural Issues	141
4.2.3 Legislation: ARW 2005	141
4.2.3.1 General Comments	141
4.2.3.2 Scope	142
4.2.3.3 Procedural Issues	143
4.2.4 Policy Rules (Beleidsregels 2005; Wet WTZ)	145
4.2.4.1 General Comments	145

4.2.4.2 Scope.....	145
4.2.5 Jurisprudence.....	146
4.2.6 Guidance.....	147
4.2.7 Rules for Contracts Not Covered by the Directives?.....	148
4.2.8 Conclusions.....	149
4.3 Framework Agreements in the Netherlands	150
4.3.1 Introduction.....	150
4.3.2 Framework Agreements Prior to 2004.....	150
4.3.2.1 Clarification on Legal Position of Framework Agreements.....	150
4.3.2.2 Academic Writing on the Position of Framework Agreements.....	151
4.3.2.3 Jurisprudence.....	152
4.3.3 Framework Agreements since 2004.....	154
4.3.3.1 Legislation: BAO.....	154
4.3.3.1.1 Availability.....	154
4.3.3.1.2 Mandatory or not?.....	155
4.3.3.1.3 Procedural Rules: Single-Supplier Frameworks.....	155
4.3.3.1.4 Procedural Rules: Multi-Supplier Frameworks.....	156
4.3.3.1.5 BAO: Conclusions.....	157
4.3.3.2 Guidance: BAO Explanatory Note.....	157
4.3.3.3 Legislation: ARW 2005.....	157
4.3.3.3.1 Availability.....	157
4.3.3.3.2 Single Supplier Frameworks.....	158
4.3.3.3.3 Multi-Supplier Frameworks.....	159
4.3.3.3.4 The Alcatel Standstill.....	160
4.3.3.3.5 ARW: Conclusions.....	161
4.3.3.4 Policy Rules.....	161
4.3.4 Guidance.....	162
4.3.5 Jurisprudence.....	163
4.3.6 Conclusions.....	163
4.4 The General Principles of Equal Treatment and Transparency in the Netherlands ...	165
4.4.1 Introduction.....	165
4.4.2 Contracts Covered by the Directives.....	165
4.4.2.1 Legislation: BAO.....	165
4.4.2.2 Legislation: ARW 2005.....	166
4.4.2.3 Jurisprudence.....	166
4.4.2.3.1 Selection Criteria.....	167
4.4.2.3.2 Award Criteria.....	167
4.4.2.3.3 Other Issues.....	168
4.4.2.3.4 Summary.....	169
4.4.2.4 Guidance.....	170
4.4.2.5 Contracts Covered by the Directives: Conclusions.....	170
4.4.3 Contracts not Covered by the Directives.....	170
4.4.3.1 Legislation: BAO.....	170
4.4.3.2 Legislation: ARW 2005.....	172
4.4.3.2.1 Approach.....	172
4.4.3.2.2 The Underhanded Procedure.....	174
4.4.3.2.3 Works Concessions.....	175
4.4.3.3 Jurisprudence.....	176
4.4.3.4 The Two Proposed New Procurement Laws.....	178
4.4.3.5 Guidance.....	179
4.4.4 Conclusions.....	180

5. PUBLIC PROCUREMENT IN FRANCE.....	181
5.1 France: Developments in French Procurement Regulation.....	181
5.1.1 Introduction	181
5.1.2 History: 1833 – 1964.....	181
5.1.3 1964: CMP #1	183
5.1.4 2001: CMP #2	186
5.1.5 2004: CMP #3	187
5.1.6 2006: CMP #4 and Current Developments.....	188
5.1.7 Guidance.....	190
5.1.8 Jurisprudence.....	191
5.1.9 Conclusions.....	192
5.2 Competitive Dialogue in France	193
5.2.1 Introduction	193
5.2.2 Background: la procédure de l'appel d'offres sur performances	193
5.2.3 Legislation.....	195
5.2.3.1 contracts covered by the CMP that are covered by the Directives	195
5.2.3.1.1 Definition	196
5.2.3.1.2 Procedure	196
5.2.3.1.3 Additions.....	196
5.2.3.2 contracts covered by the CMP that are not covered by the Directives	198
5.2.3.3 CMP: Conclusions.....	199
5.2.3.4 contracts not covered by the CMP.....	200
5.2.3.4.1 Bodies covered by Ordonnance 2005-649	200
5.2.3.4.2 Ordonnance 2004-559 on PPP: Le "Dialogue"	200
5.2.3.5 Legislation: Conclusions.....	201
5.2.4 Guidance	202
5.2.4.1 MinEFE Website	202
5.2.4.2 Bercy Colloc.....	204
5.2.4.3 Other.....	204
5.2.4.4 Guidance: Conclusions	205
5.2.5 Jurisprudence.....	205
5.2.6 Conclusions	207
5.3 Framework Agreements in France.....	208
5.3.1 Introduction	208
5.3.2 Framework Agreements Prior to 2006.....	208
5.3.2.1 CMP 1964.....	208
5.3.2.2 CMP 2001-2004.....	210
5.3.2.2.1 Single Supplier Frameworks.....	210
5.3.2.2.2 Multi-Supplier Frameworks.....	212
5.3.2.2.3 Multi-User Frameworks.....	214
5.3.2.3 Pre-2006 Legislation: Summary.....	216
5.3.2.4 Guidance.....	216
5.3.2.5 Jurisprudence	217
5.3.2.6 Prior to 2006: Conclusions.....	218
5.3.3 Framework Agreements Since 2006.....	219
5.3.3.1 Legislation	219
5.3.3.1.1 CMP 2006 & Ordonnance 2005-649	219
5.3.3.1.2 Marchés à bons de commande in 2006.....	220
5.3.3.1.3 Marchés à tranches conditionnelles in 2006.....	221
5.3.3.1.4 Accords-Cadre in 2006.....	222
5.3.3.1.5 Grouped Contracts.....	223
5.3.3.1.6 Legislation: Conclusions	223
5.3.3.2 Guidance.....	223

5.3.3.3 Jurisprudence	225
5.3.3.4 Post-2006 Regulation: Conclusions	225
5.4 The General Principles of Equal Treatment and Transparency in France	227
5.4.1 Introduction	227
5.4.2 Contracts Covered by the Directives	227
5.4.2.1 Legislation	227
5.4.2.1.1 CMP 1964 Prior to 1992	227
5.4.2.1.2 Post-1992 Developments in the CMP 1964	228
5.4.2.1.3 CMP 2001 & 2004	229
5.4.2.1.3.1 Article 1, Paragraph 2: the Principles	229
5.4.2.1.3.2 Transparency Requirements in 2001/2004	231
5.4.2.1.3.3 Equal Treatment Requirements	231
5.4.2.1.4 CMP 2006 & Ordonnance 2005-649	232
5.4.2.2 Guidance	233
5.4.2.3 Jurisprudence	234
5.4.2.4 Contracts Covered by the Directives: Conclusions	237
5.4.3 Contracts Not Covered by the Directives	237
5.4.3.1 Legislation	237
5.4.3.1.1 CMP 1964 in 2001	237
5.4.3.1.2 CMP 2001	239
5.4.3.1.3 CMP 2004	240
5.4.3.1.4 Contracts not Covered by the CMP	242
5.4.3.1.5 CMP 2006	242
5.4.3.1.5.1 Recent Changes: The Lowest Threshold	243
5.4.3.1.5.2 Recent Changes: Buyer Profiles	243
5.4.3.1.6 Legislation: Conclusions	244
5.4.3.2 Guidance	245
5.4.3.2.1 CMP 'Manuels'	245
5.4.3.2.2 Additional Guidance	245
5.4.3.3 Jurisprudence	248
5.4.4 Conclusion	250
6. DISCUSSION OF FINDINGS	251
6.1 Nature and Extent of Implementation of the Detailed Obligations in the Directives	251
6.1.1 Nature & Extent of Implementation of Competitive Dialogue	252
6.1.1.1 Contracts Covered by the Directives	252
6.1.1.2 Contracts not Covered by the Directives	253
6.1.1.3 Summary: the Influence of EU Law	256
6.1.2 Nature & Extent of Implementation of Framework Agreements	257
6.1.2.1 Summary: the Influence of EU Law	259
6.1.3 Conclusions	260
6.2 The Influence of Less Certain Obligations	261
6.2.1 The General Principles in the Directives	262
6.2.2 The General Principles in the TFEU	264
6.3 The Role EU Plays Law in Areas without Specific EU Law Obligations	268
6.4. The Relative Role Played by Different EU Instruments	271
6.4.1 The Role of Directives	271
6.4.2 The Role of CJ Jurisprudence	272
6.4.3 The Role of Soft Law	273
6.5 Harmonization of Procurement Rules	276
6.6 Conclusions	279
SELECT BIBLIOGRAPHY	281

1. INTRODUCTION

1.1 Background

The EU¹ directives on public procurement regulate the award procedures for major public contracts in Member States in order to prevent discrimination against suppliers and products from other EU Member States, and to implement a degree of transparency that will make this discrimination difficult to conceal. The Member States are individually responsible for implementing the EU directives and abiding by any relevant European legal rulings, but baseline standards are identical for all countries.

With the introduction of the EU public procurement directives in the 1970s, Member States were obliged to change their national procurement rules. However, because the legislation set only minimum standards and allowed supplementary regulation by Member States², and because certain contracts were not regulated at all, there was substantial scope for Member States to implement the directives in a way that matched—rather than ended—their traditions in regulating public procurement. In addition, flexibility was enhanced in practice by the fact that the EU rules were uncertain. The amount of regulation present at the national level, and the source of that regulation, varied between Member States.

Twice in relatively recent history, in the 1990s and 2004, the European Union has supplied its Member States with detailed new legislative packages on public procurement law. As new legislation has been adopted, the obligations on Member States have become more detailed and, in many respects, reduced the flexibility available.³ Further, the scope for Member States' discretion has been reduced by i) strict judicial interpretation of the legislation at Court of Justice (CJ) level ii) the development of general principles of equal treatment and transparency (first by the CJ, later written into the legislation), that supplement the written rules and iii) the extension

¹ For simplicity, the abbreviation "EU" will be used consistently in this thesis, replacing the earlier "EC" (European Community).

² Case C-31/87 *Gebroeders Beentjes BV v Netherlands* [1988] ECR 4635

³ Sue Arrowsmith, "The Past and Future Evolution of EC Procurement Law: from Framework to Common Code?" (2006) 35 PCLJ 337

of EU procurement regulation into new areas that were excluded from the directives. Particular examples of the latter expansion are the CJ's *Telaustria*⁴ decision, which ruled that contracts outside of the directives had transparency obligations under the Treaty on the Functioning of the European Union (TFEU), and its decision in *Commission v. Spain*⁵, which determined that Article 346 TFEU did not automatically exempt 'hard' defence procurement from the Treaty or the directives.

The procurement directives, when correctly implemented and followed, entail a certain degree of uniformity in procurement rules across the EU. Greater uniformity may promote trade in that suppliers find it easier to operate in markets that are regulated by similar rules; the attainment of a degree of uniformity for this reason is in fact the rationale behind the UNCITRAL Model Law on Procurement, which provides a model to be used in regulating procurement systems that is used by many developing countries.⁶ However, in contrast with UNCITRAL, achieving uniformity in procedures is not per se an objective of the EU rules—this is merely a consequence of the implementation of minimum transparency standards. It is doubtful whether the EU has legal competence to regulate procurement merely to achieve uniformity—there is no general power under the TFEU to impose harmonized EU regulation on Member States economic systems for the sake of uniformity.⁷

January 2006 was the implementation deadline for the most recent set of EU directives on the subject of public procurement (2004/17/EC on the utilities sector and 2004/18/EC on the public sector).⁸ At the time of writing, nearly all Member States have implemented the rules in the directives.⁹

⁴ Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria and Herold Business Data AG* [2000] ECR I-10745

⁵ Case C-414/97 *Commission v Spain* [1999] ECR I-10745

⁶ For an introduction to the UNCITRAL model law on procurement, see R. Hunja, "The UNCITRAL Model Law on Procurement of Goods, Construction and Services and Its Impact on Procurement Reform", Chapter 5 in S. Arrowsmith and A. Davies, *Public Procurement: Global Revolution* (Kluwer: The Hague, 1998); and, on recent developments, see S. Arrowsmith (ed), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* (West: Eagan 2009).

⁷ Case C-376/98 *Commission v Germany* [1998] ECR I-8419

⁸ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1 and Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114

⁹ See, for a summary of the EU Member States' current procurement regimes Hans-Joachim Priess (ed.), "Getting the Deal Through: Public Procurement" (2009) <<http://www.gettingthedealthrough.com>> (last accessed 1 November 2010)

1.2 Research Questions

The aim of this thesis (the research question) is to examine the manner and extent to which EU regulation of procurement has influenced the regulation of public procurement in Member States, including the extent to which this has led to a more uniform approach in the Member States. This will involve looking at:

- i) the nature and extent of formal legal implementation of the detailed obligations in the directives;
- ii) the regulatory response in Member States to the less specific and more uncertain obligations imposed by:
 - a) the TFEU, as developed by the CJ in *Telaustria* and related rulings
 - b) the general principles of transparency and equal treatment, where their detailed requirements have not yet been spelled out by the CJ;
- iii) the influence of EU rules in areas not strictly covered by EU obligations.

There are examples of situations in which EU law has influenced domestic regulation even when this is not required—for example, where Member States have followed the directives even for procurement that is not covered by those directives. The thesis will explore the scope and nature of such phenomena.

In addressing the question the thesis will explore such issues as:

- a) the extent of divergences in interpreting the EU rules in national regulatory instruments in different Member States;
- b) the influence of EU-level soft law—in the form of European Commission (Commission) guidance—both in transposing the EU rules and in influencing the approaches taken in areas outside the EU rules;

- c) the relative impact of obligations imposed in secondary legislation and those developed through case law;
- d) the extent to which transposition of EU law is affected by national procurement 'traditions' (for example, the existence of prior national rules on the subject in question).

The study will commence with assessing the state of national legislation prior to extensive EU regulation in public procurement. This will provide insight both into any pre-existing 'traditional national approach' to regulating public procurement and into what the effect of EU regulation has been in these systems. The setup of the thesis does not, however, require looking back further than the 1970s as the purpose of the thesis is *not* to provide a historical overview of national procurement legislation.

It should be noted that there has already been extensive work assessing the transposition of the 1993 EU procurement directives (see section 1.3.1), and so this will be briefly discussed to illustrate that there has been a progressive increase of EU-level regulation affecting the Member States. The analysis in this thesis, however, will focus on the most recent law produced by the European Union: recent decisions by the CJ, the 2004 Public Sector Directive, and recent materials issued by the Commission.

1.3 Contributions of the Project

1.3.1 National Responses to EU Procurement Regulation

The study will, first, enhance understanding of national responses to EU procurement regulation, building on earlier studies that cover aspects of this subject.¹⁰ The present study, however, approaches the question of national response from a different angle than previously done work,

¹⁰ For instance: J.M. Fernandez-Martin, *The EC Public Procurement Rules: A Critical Analysis* (Oxford University Press, Oxford 1996), from a comparative perspective dealing with the remedies sector in 1993; S. Arrowsmith, "An Evaluation of the Legal Techniques for Implementing the Public Procurement Directives", Chapter 24 in P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (Kluwer: London 1998) dealing with methods of implementation; and S. Arrowsmith (ed. and co-author), "EC Measures on Public Procurement and their Implementation in the Fifteen Member States" (1996), prepared for EuroStrategy Consultants, for the European Commission (January 1997), dealing with implementation in Member States.

and has distinctively new developments at a European level to consider. Specifically, since previous comparative work analyzing national transposition has been conducted, there have been major legislative changes as well as a judicial extension of regulation into new areas. Moreover, the EU public procurement 'environment' has generally changed greatly since the 1990s, and now includes an enhanced awareness and enforcement of the legal rules as well as a very prominent role for soft law. This has a consequence that the specific questions that will be dealt with in comparative analysis are automatically different from those discussed in earlier studies—for instance, procedures such as competitive dialogue did not exist at the time similar work was conducted.

There have already been several texts covering the content of the new EU directives in detail, but there has thus far not been significant analysis of Member State responses to the new legal developments in the EU from a comparative perspective. This study thus moves beyond a survey of current national laws on public procurement—which has been done for most Member States¹¹—and instead focuses on how (and which) EU developments have affected national regimes.

1.3.2 EU Policy Development

The study will also be of immediate value for EU policy makers in providing information on the transposition process. It will enhance understanding of the impact of different techniques of regulation, which will be relevant to future EU initiatives for dealing with areas that are currently partly outside the directives (such as public-private partnerships and low-value procurement). Specifically, by examining different EU law sources as well as three Member States that have historically had different approaches to regulating public procurement law (see section 1.5), the study will explore if a single regulatory choice can have different impacts in different Member States. Findings along these lines will help the EU shape not only the content but also the form of its procurement policy.

¹¹ See, for instance, S. Arrowsmith, "Implementation of the New EC Procurement Directives and the *Alcatel* Ruling in England and Wales and Northern Ireland: a Review of the New Legislation and Guidance" (2006) 15 PPLR 86 on the United Kingdom; E. Pijnacker Hordijk, G. W. van de Bend and J. F. van Nouhuys, *Aanbestedingsrecht* (4^e druk) (Sdu: Den Haag 2009) on the Netherlands.

1.3.3 The Wider Influence of EU Law on National Law

The thesis generally aims to discover the extent to which recent changes to EU procurement law have influenced national procurement regulation. The concept of 'influence' is not intended to be measured, but rather is used to describe situations in which a national legislator or national judge opts to use an EU-originating rule to either replace a national rule or to create a rule where none existed before. Two general types of 'influence' will thus be discussed in this thesis:

- Situations where EU law *has* to be applied, ie, "implementation studies"
- Situations where EU law does *not* have to be applied, ie, "voluntary application"

1.3.3.1 Implementation Studies

Various EU directives—recently, environmental law directives¹², but also directives on freedom of movement of persons¹³ and taxation¹⁴—have been the subject of implementation studies, which in part aim to describe how a European law has been transposed into national law.¹⁵ This thesis will be a valuable contribution to the study of formal-legal implementation of EU law, by examining very specific parts of EU law sources and their national transposition in detail. It will particularly build understanding of the transposition process of EU procurement directives, and the role specific pieces of Commission soft law play in domestic procurement regimes.

1.3.3.2 Voluntary Application

This specific study of procurement will also contribute to the broader picture of how Member States respond to EU obligations and the impact that EU regulation has on national regulation and policies, especially when this is not mandated. To illustrate what is meant by the voluntary

¹² See, for instance, R. Beunen, W. van der Knaap, and G. Biesbroek, "Implementation and Integration of EU Environmental Directives: Experiences from the Netherlands" (2009) 19(1) EPG 57, and A. Ross, H. Nass and C. Reid, "The Implementation of EU Environmental Law in Scotland" (2009) EdinLR 224.

¹³ See A. Hunter, "Family members: an analysis of the implementation of the Citizens Directive in UK law" (2007) 21(3) JIANL 191

¹⁴ See J. Englisch and A. Schutze, "The implementation of the EC Parent Subsidiary Directive in Germany - recent developments and unresolved issues" (2005) 45(11) EuroTax 2005 488.

¹⁵ General studies into the nature of directives and what the concept of 'implementation' of European law entails are less prevalent; the only current academic text in this field is S. Prechal, *Directives in EC Law* (OUP: Oxford 2006).

application of EU law, it is useful to consider how EU law has influenced national administrative law even in areas where EU law plays no mandatory role; here, it has been observed that the national judiciary in particular has embraced EU-law concepts (such as the principle of proportionality, or the principle of legitimate expectations) in deciding cases outside of the ambit of EU law, creating a more European-like national regulatory regime.¹⁶

1.4 Method

The research aims to answer the above research question through a doctrinal legal approach, examining the hard and soft law regulatory responses to EU procurement legislation in three EU Member States. A doctrinal approach was selected based on the aim of the research question, which is not to evaluate the effectiveness of any particular piece of EU legislation, but rather to gain insight into the overall changes that have taken place in the formal rules of hard and soft law in national legal systems as a consequence of increased EU-level regulation. A doctrinal approach allows for a concrete analysis of the laws of the countries that will be examined.

Traditional doctrinal research may not necessarily incorporate soft law into the analysis, but this is crucial in the area of public procurement as hard law is only one element of the legal material that the EU has produced in recent years. Jurisprudence of the CJ has always played an important role in the interpretation of that hard law, but in recent years, the Commission has also begun issuing guidance on EU directives and on CJ rulings.

To illustrate the role EU soft law is capable of playing at the national level, it can first be observed that several of the Commission's positions have been adopted by the CJ and thus been 'made' into law—an example of this occurring in the field of procurement is the Commission's argument that the principle of equal treatment applies to the Treaty as well.¹⁷ Examples of the CJ following the

¹⁶ See, on how EU administrative principles have affected administrative law in a variety of Member States, J. Schwarze (ed), *Administrative Law under European Influence: on the Convergence of the administrative laws of the EU Member States* (Sweet & Maxwell: London 1996). See also J. H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing: Groningen 2007).

¹⁷ This is controversial, as the Commission (in its *Interpretative Communication on Concessions Under Community Law* [2000] OJ C121/2) actually refers to the equal treatment principle and related case law based on the *directives*.

Commission's perspective can be found in other areas of law as well.¹⁸ In light of these occurrences, Member States may give more weight to Commission guidance than its non-binding nature technically requires.¹⁹

On the other hand, there are also instances of the CJ not following the Commission's guidance; a key procurement example of the CJ developing a different approach can be found in *Concordia Bus Finland*²⁰, where the CJ indicated that environmental considerations *could* be used to establish award criteria, overruling previous Commission guidance which indicated this would not be possible.²¹ Instances where the Commission's guidance is not followed by the CJ are also of interest to Member States—this may, in fact, persuade them to take a cautious approach to adopting the Commission's perspective in their national laws.

Thirdly, it must be remembered that the Commission is the institution that can start proceedings before the CJ against Member States when it considers that they have violated EU law²².

Commission guidance offers Member States an indication of what it will consider a violation or not, and may persuade them to legislate in line with Commission suggestions. Member States may also opt to follow (parts of) Commission guidance for other reasons, such as it being an appropriate or useful starting point for developing national policy on an issue if no such policy exists yet.

Given that the Commission's soft law can thus influence the national legal order, it is appropriate to define the EU soft law examined in this thesis as "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may

Nonetheless, the CJ in a recent case (Case C-410/04, *ANAV v. Comune di Bari* [2006] ECR I-3401) supported the Commission's view that the equal treatment principle applies to the Treaty as well.

¹⁸ See, for instance, Case C-194/94 *CIA Security International v Signalson and Securitel* [1996] ECR I-2201, discussed in L. Senden, *Soft Law in European Community Law* (Hart: Oxford 2004), p. 345.

¹⁹ Senden in fact states that "the transposition of and compliance with Community soft law by the national legislature may in certain cases definitely be worthwhile and prevent damage"; *ibid.*

²⁰ Case C-513/99 *Concordia Bus Finland v. Helsinki* [2002] ECR I-7213.

²¹ For a discussion, see P. Kunzlik, "The Procurement of 'Green' Energy", Chapter 9 in S. Arrowsmith and P. Kunzlik, *Social and Environmental Considerations in Public Procurement: New Directives and New Directions* (CUP: Cambridge 2009), at p. 388-389.

²² As Senden discusses, the idea that the Commission will use its own interpretations as the basis for proceedings is not hypothetical; an explicit example is Case C-290/94 *Commission v Greece* [1996] ECR I-3285, wherein the Commission brought infringement proceedings against Greece for (in essence) not following the Commission's interpretation of ex Article 48(4) of the EEC Treaty. Other examples are cited in Senden (n 18), p. 345-346, note 71.

have certain (indirect) legal effects..."²³ It is these legal effects that will be examined in Chapters 3-5.

A reliance on national policy documents (such as explanatory memoranda to legislation) may go beyond the scope of what is traditionally considered 'doctrinal'. However, given the political nature of the transposition process, it is extremely necessary to consider these kinds of materials in this thesis—differences in transposition may remain completely inexplicable unless the relative political processes underlying the transposition process are examined as well. This type of approach can be classified as 'doctrinal-plus', and will result in a more robust understanding of the law examined than a strict doctrinal approach would.

Lastly, background discussions will be conducted with policy makers where necessary, in order to allow the author to gain a better understanding of the history of a particular piece of national legislation or guidance.

1.5 Methodology

The research question will be answered by an examination of three EU Member States as 'case studies' of the transposition phenomenon.

The three Member States that will be examined in answering this research question are the United Kingdom, the Netherlands and France. These three countries were selected because they provide an interesting mixture of regulatory approaches. France has a history of legislating beyond the scope of the procurement directives and therefore has to consider how to integrate EU legal rules with existing national rules. The United Kingdom has a tradition of regulating procurement using a 'soft law' approach, only implementing in law the exact rules in the directives and dealing with other aspects of procurement regulation through guidance and policy. The Netherlands, like the UK, has generally only legislated where required by the directives, but ongoing proposals to revise the national procurement legislation indicate an

²³ Senden (n 18), p. 112.

interest in expanding regulation to procurement not covered by the directives. The Netherlands thus appears to be moving towards a system closer to that of France, and will act as an interesting comparator in light of the other two countries.

The chosen countries also provide examples of both common law and civil law systems.

The three countries were selected from amongst those countries that could provide the appropriate mix on the basis that the author has the language skills to study them. New Member States (joining the EU after 1993) were not included since the study will be confined to considering the issues from the perspective of Member States with longstanding involvement in implementing EU procurement rules; to include the different perspective of new Member States would broaden the study beyond what is possible within the confines of a PhD. It would also not be possible with the author's language skills.

In these three countries, the study examines transposition in two respects:

The first is transposition of the detailed procedural rules in the 2004 directives. The main focus of the thesis will be on the Public Sector Directive (2004/18/EC); the thesis does not aim to examine the Utilities Directive (2004/17/EC), as it is expected that transposition approaches between the two directives will be similar. Where substantial differences do exist—either in transposition, or in the development of case law or national/Commission guidance—these will be discussed.

The study considers a number of key areas in which the 2004 directive makes important changes or clarifications to the law:

- i) the competitive dialogue procedure (an entirely new procedure, which will demonstrate how Member States respond to legislation in areas where no previous legislation exists);

- ii) framework agreements (the rules on which regulate possibilities that probably already existed under the old directives, with the aim of providing both legal certainty over their use and regulatory controls; this will demonstrate how Member States respond to changes in pre-existing (both national and European) legislation);
- iii) the general principles of equal treatment and transparency (which have now been made explicit in the directives, after earlier CJ rulings that applied them to the directives; examining these will demonstrate how Member States respond to clarifications and changes to existing European norms that were primarily developed outside of legislation).

These case studies permit an observation of Member States' responses to specific new requirements, both in terms of implementing their obligations in law (for example, the extent of implementation and differences in interpretation) and in terms of the influence of EU norms on areas outside EU regulation, such as below-threshold contracts. Wherever appropriate, an analysis of both hard law and soft law responses to these issues will be considered.

The second area of regulation that will be examined will be the CJ's jurisprudence on contracts not covered by the directive. Specifically, it will be examined how the subject countries have responded to the ruling in *Telaustria* indicating the existence of previously unacknowledged obligations in the Treaty to follow transparency rules in awarding below-threshold contracts, services concessions and certain other contracts outside the directives. *Telaustria* provides an opportunity to compare responses to "regulatory" decisions of the CJ with responses to explicit legislation, and to consider the role of soft law (both at the EU and the national level, as a 'response') which has been prominent in this area. It also provides an opportunity to study the extent to which the Member States have drawn on rules contained in detailed EU secondary legislation, first, to regulate areas that were previously considered outside EU law and, secondly—since *Telaustria*—to implement their uncertain obligations in these areas.

The study will be confined to considering transposition through the adoption of national regulatory rules, covering those in legislation, in jurisprudence and in soft law form such as governmental guidance to contracting authorities.

The contracting authorities that will be considered in this thesis will be central government departments. Local government authorities are, in the cases of the UK and the Netherlands, not subject to uniform regulation where the EU directives do not apply, meaning that sub-central, regional, and local authorities have all constructed individual public procurement policies. A brief examination of UK practice revealed that there are no consistent approaches in place outside of regulation (in the form of standardized 'standing orders'). Assessing the procurement policies in place for a great number of individual contracting authorities proved beyond the scope of the thesis. It is further unlikely that this type of analysis would have contributed generally to the research questions asked in the thesis, as individual examples of policies rather than overall trends in regulation would have to be cited as evidence of EU law influence. For these reasons, non-central government authorities were excluded from the present study.

It should be emphasized that in the three Member States examined, central government departments are subject to all national procurement legislation²⁴, and most national guidance produced is addressed to central government purchasers. Examining central government alone will thus permit a substantial analysis of the national regulation in place in the subject countries.

The study examines the primary sources of these regulatory rules (ie, legislation and guidance), relevant background documents (such as explanatory memoranda to legislation) and legal literature. It will also examine judicial interpretation of the rules, both at a European and at a national level, as part of the 'transposition' process. It will not, however, involve analysis of the application of the rules in individual procurements. This would detract from the focus of the thesis, which deals with national transposition of the rules—not any subsequent compliance with them.

²⁴ The exceptions being specific rules addressed to local government only; however, these only exist in France, and are identical to the rules applicable to central government (see section 5.1).

2. THE EU'S PUBLIC PROCUREMENT RULES

2.1 Overview of EU Public Procurement Regulation

2.1.1 Introduction

This section of the thesis will highlight important changes to the extent and manner in which the EU has regulated public procurement since the 1970s, with a focus on the changes that have taken place since 1993.

The material in section 2.1 serves to highlight first of all the growth EU procurement regulation has seen since 1993, and secondly, how different EU legal materials have played a role in its development. It aims to provide a general understanding of the EU's regulatory goals and approach, and is complementary to the more detailed discussions of specific procedures and principles discussed in subsequent sections of this chapter.

2.1.2 The Reasons and Competences for Regulating Procurement in the EU

The starting point of any discussion of EU regulatory practice regarding public procurement—generally, the purchase of goods, works or services by a public body from the private sector²⁵—is analyzing what place it has in the EU and why it is regulated in the first place.

The European Economic Community (EEC) was established to eliminate discriminatory trade barriers between its Member States, achieved through the abolition of quotas, tariffs, and other restrictive practices.²⁶ The EEC Treaty²⁷ (now TFEU²⁸) therefore dealt with the abolition of discriminatory economic practices in a very general sense, but nonetheless had as a consequence

²⁵ For general discussion, see S. Arrowsmith, *The Law of Public and Utilities Procurement* (2nd edition) (Sweet & Maxwell: London 2005); P. Trepte, *Public Procurement in the EU: A Practitioner's Guide* (OUP: Oxford 2007); P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Procurement Regulation* (OUP: Oxford 2004); C. Bovis, *EU Public Procurement Law* (Edward Elgar: Cheltenham 2008); F. Weiss, *Public Procurement in European Community Law* (The Athlone Press: London 1993).

²⁶ This principle is upheld, as indicated by the preamble of the TFEU, which calls among other things for “the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition.”

²⁷ Treaty Establishing the European Economic Community (25 March 1957) 298 UNTS 11

²⁸ Consolidated version of the Treaty on the Functioning of the European Union (30 March 2010) OJ 2010/C 83/47

that public procurement practices of Member States were subjected to non-discrimination clauses, as part of the wider goal of opening up the 'internal market'.

To this day, the TFEU remains the primary source of public procurement legislation in the EU as well as the basis for all secondary legislation,²⁹ which has been adopted under the EU's powers to legislate in support of opening up the internal market.³⁰ The historical purpose of EU procurement regulation is thus to prevent restrictions on intra-market trade. This 'trade-based ideology' frequently clashes with the desires of Member State governments in their public purchasing, as will be discussed next.

2.1.2.1 Tensions between EU Procurement Regulation and National Procurement Regulation

In many national jurisdictions, even where EU law does not mandate regulation, public procurement is a regulated activity. There are several reasons for this; for one, the government may regulate so as to achieve better value for public money. Another common reason for regulating public procurement is to set aside certain contracts to pursue social policy aims, such as limiting unemployment in specific regions of the country.³¹

Prior to the development of extensive EU legislation on public procurement, many national governments used public spending as a means of promoting social policy objectives, even at the expense of cost-effective purchasing. More recently, public procurement has been considered one of the methods through which environmental policy goals can be achieved—however, national legislation promoting 'green' buying is not necessarily compatible with EU legislation aimed primarily at opening up trade through increased competition.³²

²⁹ For general information about EU law, see P. Craig and G. de Burca, *EU Law: Text, Cases and Materials* (4th edition) (OUP: Oxford 2008).

³⁰ See primarily the old Article 95 EC, under which the 2004 directives were adopted, which refers explicitly to the power to adopt secondary legislation in support of the 'establishment [or] functioning of the common market'.

³¹ For more information, see S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (Kluwer: The Hague 2000), Ch.2.

³² This study does not deal with the EU regulatory regime's scope for social and environmental policy objectives; for more information on these, see, inter alia, Arrowsmith and Kunzlik (n 21); Christopher McCrudden, *Buying Social Justice: equality, government procurement and legal change* (OUP: Oxford 2007); Arrowsmith 2005 (n 25), Ch. 19 and the literature cited there; J.-M. Fernandez-Martin and O. Stehmann, "Product Market Integration v. Regional Cohesion in the Community" (1991) 16 ELRev 216; R.C. Tobler, "Encore: 'Women's Clauses' in Public Procurement under Community Law" (2000) 25 ELRev 618.

There are thus differences between what the EU can do in the field of regulating public procurement, and what national governments may want to pursue. In practice, there can be overlaps between the EU trade-based approach to legislating public procurement and value-for-money approaches as outlined above; for instance, increasing competition is likely to be a goal of both.³³ However, this overlap is not seen with regard to social policy considerations, for which there has traditionally been very little room in the EU regulatory regime.³⁴ It is therefore important to remember that EU initiatives in the field of public procurement are based on provisions in the TFEU aimed at opening up the internal market to trade—and the goals of national governments are not always going to be compatible with the EU's regulatory aims.

2.1.3 The TFEU: Baseline Standards

Before secondary legislation in the field of public procurement was issued, the EEC Treaty (now TFEU) was the sole source of EU procurement regulation. However, there has only ever been one explicit mention of public procurement in the EEC Treaty and its later successors, dealing with investment by the Community in non-Member countries that enjoy special relations with Member States.³⁵ The effect of this provision is limited; instead, it is the general rules on free movement—inter alia, prohibiting discrimination on grounds of nationality—that govern public procurement in Member States. These provisions have *direct effect* in Member States, meaning that they do not have to be implemented in national legal systems in order to be enforceable in national courts.³⁶

³³ See Arrowsmith 2005 (n 25), p. 171.

³⁴ For a general discussion of EU competences, see Craig and de Burca (n 29), Ch. 3; it should be noted also that in the 2004 Directives, the scope for social policy considerations appears to have (controversially) increased. For a discussion see Arrowsmith and Kunzlik (n 21); J. Arnould, "Secondary Policies in Public Procurement: the Innovations of the New Directives" (2004) 13 PPLR 187; Kunzlik 2009 (n 21); S. Arrowsmith, "An Assessment of the New Legislative Package on Public Procurement" (2004) 41 CMLRev 1277 at 1315-1322.

³⁵ Article 199(4) TFEU, aimed at non-discriminatory tendering for the financing of projects in 'overseas associates' of Member States.

³⁶ For more information on 'direct effect', see Craig and de Burca (n 29), Ch. 5.

The provisions of the TFEU contain *negative* obligations, which prescribe what contracting authorities *cannot* do when awarding contracts. There are three provisions of particular relevance for public procurement: Article 34 TFEU, Article 49 TFEU, and Article 56 TFEU.³⁷

Article 34 TFEU deals with freedom of movement of goods. It prohibits measures that result in restrictions on the import of goods from other Member States; this includes public procurement measures which discriminate against products from other Member States. Article 34 deals with direct discrimination—ie, measures that openly encourage purchasing from national markets only³⁸—and measures that are discriminatory in their effect (ie, which have as their end result the favouring of domestic products).

Moreover, Article 34 applies to non-discriminatory measures that affect trade if they are measures relating to the characteristics of the product being procured. To illustrate, in the *Unix*³⁹ case, the CJ indicated that the fact that restrictive specifications did not differentiate between domestic and foreign products did not matter; an undue restriction on trade that is non-discriminatory will also be caught by Article 34, unless justified.⁴⁰

Article 56 TFEU aims to open up the market in a Member State for nationals of a different Member States who want to provide services there, while operating from their home Member State. This covers both temporary travel abroad in order to provide the services and providing those services from their home States. The effect of Article 56 in public procurement is to prevent public authorities from discriminating against firms operating in another Member State when awarding services contracts. Examples of violations of Article 56 are acts such as reserving contracts for domestic service providers, or subjecting foreign suppliers to more onerous qualification criteria.

³⁷ Using public procurement as a disguised form of state aid is also prohibited under the TFEU, where (with few exceptions) state aid is prohibited in general terms. [For a discussion see Arrowsmith 2005 (n 25), Chapter 4.]

³⁸ Case 21/88, *Du Pont de Nemours Italiana SpA v. Unita Sanitaria Locale No. 2 Di Carrara* [1991] 3 CMLR 25.

³⁹ Case C-359/93, *Commission v. Netherlands* [1995] ECR I-157

⁴⁰ See the TFEU Articles cited at (n 43).

Recently, the CJ has indicated that even measures that do not discriminate between domestic and foreign suppliers but simply restrict access to the market in a disproportionate manner without justification are also caught by Article 56.⁴¹

Article 49 TFEU prohibits restrictions on the movement of persons from one Member State to another in order to permanently set up business there—a process referred to as ‘establishing’. Both measures that a) restrict the process of establishment itself and b) restrict ‘established’ firms’ access to public contracts are caught by Article 49.⁴²

It is important to note that Articles 34, 49 and 56 all have corresponding derogation articles (namely, 36, 51-52, and 62) which allow for an exemption from the free movement articles in certain circumstances, such as where public morality or public safety justifies it. However, “such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”, indicating exemptions are subject to scrutiny by the CJ.⁴³

Moreover, there is a specific exemption in Article 346 TFEU for the purchase of ‘hard’ defence equipment such as missiles and tanks. This is not merely an exemption from one of the free movement principles, but rather from the TFEU as a whole. Article 346(1) states that Member States may take “measures they consider necessary for their essential security interests” when producing or trading in hard defence equipment. The meaning of this provision has only recently been addressed by the CJ (see section 2.1.5.1).

2.1.4 The Directives

In the 1970s, the approach to public procurement in the EU changed. It was recognized that the negative provisions in the Treaty could not effectively open up public procurement markets in Member States, as they had no influence on national administrative practice and general

⁴¹ See Case C-234/03, *Contse v Insulad* [2005] ECR I-9315.

⁴² Arrowsmith 2005 (n 25), p. 210.

⁴³ An example of how the CJ may examine an Article 36 exemption in practice is Case C-252/01 *Commission v. Belgium* [2003] ECR I-11859, on public security.

procurement policies that, as interpreted at that time, were not discriminatory in practice.⁴⁴

Member States were free to pursue their own policies, meaning there were different time limits, advertising obligations, qualification criteria, and so forth, in every single Member State. Even though discrimination was forbidden, it was impossible to see whether or not any discrimination was taking place in Member States.

The Commission realized that the only expedient way in which to advance policy so as to overcome these obstacles and create the transparency necessary to detect discrimination was through positive measures, in the form of directives.⁴⁵

We will first briefly consider how EU directives interact with national law, as that interaction will be re-examined in light of the specific approaches taken to procurement regulation in the UK, the Netherlands and France (section 2.1.4.1 and 2.1.4.2). After this, we will consider the EU's procurement directives and how these have changed over time (section 2.1.4.3 onwards).

2.2.4.1 What is Implementation?

EU directives have to be implemented into the national legal order (Article 288 TFEU). Generally, implementation refers to the manner in which EU legislation is made a part of national 'law'.

However, it has been argued that the implementation process does not stop at the point when a national rule mimics an EU rule: implementation also depends on how the national rule is applied in practice by either practitioners or the judiciary.⁴⁶ The following overview deals with 'implementation' in the former, formal legal sense; however, the role the judiciary may play in completing the implementation process will be considered in Chapter 3-5.

The obligation to 'implement' requires the creation of national rules that effectively secure the objectives of a given directive.⁴⁷ In public procurement, the rules of the procurement directives

⁴⁴ Fernandez-Martin (n 10), p. 10.

⁴⁵ A perspective that it upheld at later dates; see, for instance, Commission, *Public Supply Contracts. Conclusions and Perspectives*. COM (84) 717 at 4.

⁴⁶ Prechal (n 15), p. 78 onwards.

⁴⁷ On implementation techniques in public procurement, see Arrowsmith 1998 (n 10).

extend rights to third parties (ie, tenderers). The fact that such rights are extended means that the only correct form of implementation is one that provides legal rights of enforcement within the national legal system. To secure these enforcement rights, normally legislation has to be adopted, unless the national legislation in place already adequately protects the rights in question.

We will see that some jurisdictions formerly implemented the procurement directives using administrative circulars (see section 3.1.2 on the UK); as these have no binding or enforceable consequences, they are not an adequate measure of implementation.⁴⁸

2.2.4.1.1 Formally Implementing EU Procurement Directives: Two Methods

There are two possible implementation techniques that meet the requirement of enforceability in the national legal order: implementation by *transposition* or by *reference*.⁴⁹

Implementation by reference, until recently used in the Netherlands and Denmark, is the simpler method of implementation. This technique involves enacting national legislation that 'refers' the reader to the directive, stating that the rules therein need to be followed. Detailed obligations are only found in the directives themselves. It is only an appropriate method of implementation where the rules in a directive are sufficiently clear and precise so as to trigger direct effect; however, this is generally accepted to be the case for the public procurement directives.⁵⁰

The more complex method of implementation is implementation by *transposition* into the national legal order. The particular form that this can take varies; one form of transposition, used in the UK, involves 'copy-pasting' a directive's content into a piece of national legislation. However, an alternative approach to transposition (taken by France) involves including the obligations of the directive into a pre-existing national legal order.

⁴⁸ Case 239/85, *Commission v Belgium* [1986] ECR-3645; Case C-59/89, *Commission v Germany* [1991] ECR I-2607.

⁴⁹ Arrowsmith 1998 (n 10), p. 496-497.

⁵⁰ *Ibid.*

2.1.4.1.2 Advantages and Drawbacks of Implementation by Transposition

There are many potential advantages to implementing by transposition. It has been recognized that through transposition, ambiguous language of the directive can be clarified; the European (procurement) rules can be coordinated with any coexisting national (procurement) rules (applying to contracts not covered by the EU rules); and accessibility to the EU rules can be improved in a variety of ways (including increased awareness and understanding, translating 'European' language to 'national' language, and improving the presentation of the rules).⁵¹

However, there are also risks attached to most of the noted advantages. First of all, adjusting EU legislation to a national regulatory regime is complex. There is a risk of erroneous transposition; if clarification of the directive's language is pursued, there is always a possibility that changes made are invalid or inadequate in pursuing the directive's goals.⁵² Implementation by transposition thus requires a careful approach to be successful.

2.1.4.1.3 Advantages and Drawbacks of Implementation by Reference

The above problems do not normally arise from implementation by reference; however, there are also significantly fewer advantages to implementing in this way. When implementing by reference *stricto sensu*, it is not possible to clarify any points in the directive that are unclear; the EU rules are not integrated with any existing domestic legislation; and the EU rules may not be perceived as or experienced as 'as accessible' as corresponding national rules would be.⁵³

However, the advantages of implementation by transposition may also be greatly exaggerated.

The extent to which Member States do attempt to clarify the wording of the directives or actually successfully integrate national and European procurement rules has been questioned⁵⁴; section 5.1 of this thesis will add to that discussion when considering France's historic difficulties with implementing the EU rules. Implementation by reference, on the other hand, is a 'safe' method of

⁵¹ Ibid, p. 498 onwards.

⁵² Ibid, p. 506.

⁵³ Ibid, p. 508 onwards.

⁵⁴ Ibid, p. 500.

implementation; there are thus understandable reasons as to why the Netherlands, for instance, opted to implement the public procurement directives by reference until 2004 (see section 4.1).

2.1.4.2 Interpretation of EU directives

Where a directive is transposed into national law, the national courts may have to consider the appropriateness of national implementing measures, and may have to compare these to the original EU directives the national laws are based on.

EU law has brought with it a specific interpretation problem for national courts. In assessing national implementation that *implements EU law*, the judiciary is required to interpret all national provisions in a manner that is usually referred to as 'conforming with' EU law.⁵⁵

The incorporation of EU law into national regimes has thus resulted in courts relying heavily on an EU-focused teleological approach: for our purposes, in reconciling the differences between national procurement rules and their EU directive origins, the national judge will have to consider the directive's purpose. We will see that the Netherlands and France have made changes to the wording of the procurement directives when implementing them—but a *conforming* interpretation with EU law would generally result in these changes having no practical effect (see, in particular, Chapter 4 on the Netherlands.)

2.1.4.3 The First Procurement directives

In the 1970s, the Commission issued two directives regulating public procurement of works (Directive 71/305) and supplies (Directive 77/62).⁵⁶ A primary objective of the directives was to

⁵⁵ See Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891; there are some limits to this requirement, see Craig and de Burca (n 29), p. 287 onwards.

⁵⁶ Council Directive 71/305 of 21 July 1977 concerning the co-ordination of procedures for the award of public works contracts (OJ 1971 L185); Council Directive 77/62/EEC of 21 December 1976 co-ordinating procedures for the award of public supply contracts (OJ 1977 L13/1). It is worth noting that these were preceded by two General Programmes on public procurement, discussing problems and the Commission's goals, and several so-called 'liberalization' Directives aimed at stopping the most obvious violations of the Treaty. These are discussed in detail in Weiss (n 25), p. 29-39.

establish transparent procurement procedures.⁵⁷ However, any attempt to harmonize national legislation was cautious, as the directives themselves (in Article 2 of both directives) indicated that national procurement measures were to remain generally applicable insofar as they did not breach the provisions of the directives.

The limited way in which the directives attempted to harmonize policy is demonstrated by what the directives covered. Firstly, they did not regulate beyond the award of the contract. Moreover, the directives introduced 'threshold values' meaning that their rules would only apply to contracts above a certain monetary worth.⁵⁸ There were also significant exclusions in the directives: they did not apply to any utilities.⁵⁹ Other types of contracts, such as concession agreements, were also excluded from the first set of directives.⁶⁰

The directives did introduce three European 'methods' of procurement: the open procedure, the restricted procedure, and the (not generally available) 'single tendering' procedure (now referred to as the 'negotiated' procedure'). As is true today, the negotiated procedure was only available under very strict grounds listed in the directives and any direct award without competition was subject to high scrutiny by the CJ.⁶¹

The directives also introduced two new positive rules: first, the obligation to advertise European-wide for contracts through the Official Journal of the European Union (OJEU), and secondly, the obligation to use objective criteria when selecting qualifying firms and 'winning' tenders. These positive rules still exist in the 2004 directives, and have not changed extensively since the 1970s.

⁵⁷ See the preambles of Directives 77/62 and 71/305.

⁵⁸ Article 5 of Directive 77/62 and Article 7 of Directive 71/305.

⁵⁹ Fernandez-Martin (n 10), p. 15, has argued that the utilities were likely excluded in the first instance because of a difficult political climate at the time, in which Member States were not willing to compromise their control over the utilities sector; the official reason (given in the directive's preamble) related to differing legal status of utility companies in different Member States, meaning that regulation would apply unequally in different Member States.

⁶⁰ See Weiss (n 25), p. 45.

⁶¹ Articles 6a-6h of Directive 77/62 and Articles 9a-9h of Directive 71/305. On strict application, it can be noted that the CJ has never accepted a justification of the use of direct award: see, for instance, Case 199/85 *Commission v. Italy* [1987] ECR 1039 and Case C-24/91 *Commission v. Spain* [1992] ECR I-1989.

Fernandez-Martin has described the first EU procurement directives as a half-way approach between interventionism and minimalism in the field of national procurement regulation.⁶² All policy not discussed in the directives remained at the discretion of Member States. At the same time, new regulation on advertising, qualification, and award obligations indicates the beginnings of an interventionist policy.

2.1.4.4 Amendments Leading up to 1993

In the early 1980s, the Commission found that its procurement regulatory efforts were largely unsuccessful. It was due to report on the effects of the directives to the European Council in 1980. This report was delayed until 1984, as the Commission had difficulties obtaining the information it needed to actually write the report in question, which dealt mostly with the operation of the 1977 Supplies Directive.⁶³ The findings of the report indicated what the problems with EU policy were perceived to be.

First of all, the Commission found that there was no consistency to approach in implementation among Member States; some, such as the UK, even implemented the directives as a form of administrative guidance rather than as law. The Commission's findings criticized the Member States for failing to implement the directives correctly, resulting in very little practical impact in opening up the internal market.⁶⁴

The findings also criticized that the directives failed to cover important sectors—such as the utilities—and were ambiguous in many respects. The thresholds set in the original directives were determined to be too high, and far too many contracts were not regulated. However, it is arguable that the real problem was that there were no rules on aggregation of related contracts and so contracts were 'split' to avoid the thresholds; this explanation is supported by later legislative changes, in which the thresholds for supplies contracts were not substantially altered, but aggregation has become strictly regulated.

⁶² Fernandez Martin (n 10), p. 14.

⁶³ See Commission, *Communication to the Council on public supply contracts* COM(1984)747 final.

⁶⁴ For a discussion see Weiss (n 25), p. 73.

Public authorities were criticized for failing to comply with the obligations to advertise contracts in the OJEU, to hold some form of open or restricted competition, and to set objective qualification criteria. The consequence of limited compliance was that 'buying national' continued in many of the Member States.⁶⁵

The Commission thus concluded that further action was needed: application of the existing directives had to be improved somehow; the existing directives had to be modified so as to prevent abuse through interpretation; and lastly, regulation had to be extended into non-regulated sectors such as the utilities.

The Commission's findings were supplemented two years later by a similar study of cross-border trade in public procurement⁶⁶, and very shortly thereafter, the Cecchini report was published, one section of which was devoted to the costs of non-international public procurement.⁶⁷

Though heavily criticized because it deals mostly with speculative losses that stem from failing to open up the common market, these two reports on the ineffectiveness of the 1970s directives provided the impetus for greater European action in the area of public procurement.⁶⁸

The Commission planned extensive legislative changes as part of its wider '1992 Common Market' strategy. Firstly, the original works and supplies directives were expanded upon, producing the *additional* Directive 88/295 on Supplies and Directive 89/440 on Works.⁶⁹

These two directives codified CJ decisions on which bodies were public authorities for the purpose of applicable EU law. The applicability thresholds were also amended, in particular with regard to works, where the existing threshold was deemed too low to take into account the cost of most works projects. Other pre-existing rules were tightened; for instance, the use of

⁶⁵ Ibid, p. 74.

⁶⁶ Commission, *Public Procurement in the Community* COM(1986)375.

⁶⁷ Commission, "The Cost of non-Europe in Public Sector Procurement" in *The Cost of Non-Europe*, Basic Findings, vol. 5/a and vol. 5/b, study carried out by WS Atkins Management Consultants (Luxembourg, 1988).

⁶⁸ See, for instance, A. Cox, "Implementing the 1992 Public Procurement Policy: Public and Private Obstacles to the Creation of the Single European Market" (1992) 1 PPLR 139; see also Weiss (n 25), p. 12, citing other criticisms.

⁶⁹ Directive 88/295 (amending Directive 77/62) [1988] OJ L127/1, and Directive 89/440 (amending Directive 71/305) [1989] OJ L210/1; the amendments, however, were not consolidated into a new directive and instead the original directive and their amending directives had to be read side by side (see Fernandez-Martin (n 10), p. 27).

procedures other than the open or restricted procedure—such as the negotiated procedure without advertising—had to be justified and was limitedly available. A new obligation for public authorities to inform losing tenders as to why they lost the contract, and to generally advertise in the OJ what the results of any competition were, was also included.

In 1993, the existing works and supplies directives were consolidated into Directives 93/36 on Supplies and 93/37 on Works; these replaced the previous legislative rules and realigned provisions in the 1970s and 1980s directives so as to create a more uniform legal regime.⁷⁰

Changes to the regime did not stop with amending the existing directives, however; the Commission determined that a directive in the field of services was also needed. The Services Directive (92/50)⁷¹ was in most respects identical to the works and supplies directives, with the exception that it divided services into two categories: Part A and Part B services. Part B services, such as hairdressing and legal services, were subject to a more flexible regime, which was justified by the reasoning that they were less likely to be subject to cross-border interest.⁷²

A second major innovation was the introduction of a Remedies Directive⁷³. As observed in the Commission's evaluations in 1984 and 1986, compliance with the European rules was poor, and a lack of redress available was determined to be one of the reasons why public authorities essentially 'got away' with not applying the rules. The Remedies Directive set out to assure tenderers that they would be able to get recourse in national courts in the event that the procurement rules were not followed. It provided for the types of remedies that were to be available to bidders (interim measures, setting aside of unlawful decisions, and damages) and indicated what types of procedures and forums had to be available in Member States for the proper enforcement of public procurement rules.

⁷⁰ Council Directive 93/36 coordinating procedures for the award of public supply contracts [1993] OJ L199/1 and Council Directive 93/37 coordinating procedures for the award of public works contracts [1993] OJ L199/54. See Fernandez-Martin (n 10), p. 28.

⁷¹ Council Directive 92/50 relating to the coordination of procedures for the award of public service contracts [1992] OJ L209/1.

⁷² These services are listed in Annex I B to the directive; see also, Article 9 of the directive.

⁷³ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33.

Lastly, the public procurement regulatory regime was extended into the utilities sector.⁷⁴ Its incorporation occurred in two stages; first, in 1990⁷⁵, through a directive regulating works and supply contracts issued by public utilities, and secondly, in 1993, via a consolidated Utilities Directive that also incorporated services.⁷⁶ In 1992, a separate remedies directive (the Utilities Remedies Directive⁷⁷) was introduced for the utilities sector.⁷⁸ It has been noted that, although a step forward, the Utilities Directive was too flexible to curtail national buying policies to any great extent—the positive obligations in the directive are limited to publication of notices in the OJ and informing the Commission of the award process and decision.⁷⁹

2.1.4.5 Changes in Law since 1993: the 2004 Directives

Though regulation in the field of public procurement experienced significant growth in the late 1980s and the early 1990s, it became clear at the end of the 1990s that the implemented changes were still not sufficient. The Commission itself, in the 1990s, observed three shortcomings: lack of modernity, lack of flexibility, and lack of clarity.⁸⁰

With regards to lack of modernity, the legislative changes introduced in the 1990s failed to take account of technological changes in the 1990s: new developments such as electronic procurement were not addressed.⁸¹

Lack of flexibility was a criticism geared particularly at the severe restrictions placed on the negotiated procedure in the 1980s. Other complex contracts, not qualifying for the use of the negotiated procedures, had to be tendered through the open or restricted procedures, which call for detailed specifications in the contract notice. In practice, this led to difficulties for public

⁷⁴ Fernandez-Martin (n 10), p. 32; Weiss (n 25), p. 118-120; Arrowsmith 2005 (n 25), section 3.24.

⁷⁵ Council Directive 90/531 [1990] OJ L297/1.

⁷⁶ Council Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sector [1994] OJ L82/40.

⁷⁷ Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L76/14.

⁷⁸ For a discussion, see L. Gormley, "The New System of Remedies in Procurement by the Utilities" (1992) 1 PPLR 259.

⁷⁹ Fernandez-Martin (n 10), p. 33.

⁸⁰ Commission, *Public Procurement in the European Union: Exploring the Way Forward* COM(1996)583

⁸¹ M. Larsen, "The New EU Public Procurement Directives", Chapter 1 in Treumer and Nielsen (n 34), p. 11-12.

authorities when tendering certain complex contracts, and legal change was deemed necessary to prevent authorities from simply breaching the directives' rules.⁸²

Lastly, the provisions of the 1993 consolidated directives remained confusing. Several types of purchasing—such as purchasing through framework agreements, or in-house purchasing—were simply not addressed adequately.⁸³

These three criticisms led to the repeal of the 1993 consolidated directives, and in 2004, two new directives were issued. Rather than separating directives on works, supplies, and services, one general directive on Public Sector Contracts was produced. The 1993 Utilities Directive was replaced with an updated 2004 version as well.⁸⁴

The 2004 directives are substantially different from the 1993 directives in a number of respects, and respond directly to the criticisms launched at the 1993 directives.⁸⁵ A new procedure was introduced so as to increase flexibility; e-procurement was incorporated into the new directives; and an attempt was made to clarify existing obligations both through simplification and elaboration. Both framework agreements and in-house contracts are now expressly mentioned in the directives.⁸⁶ Lastly, general principles of public procurement such as equal treatment and transparency have now explicitly included in the directives—this is a development that can be traced to CJ interpretation of general statements concerning transparency and non-discrimination in the recitals of earlier directives.⁸⁷

⁸² Ibid, p. 12.

⁸³ Ibid, p. 11.

⁸⁴ Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1 and Directive 2004/18/EC of the European Parliament and the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

⁸⁵ For a general discussion see Arrowsmith 2004 (n 34).

⁸⁶ See section 2.3.4 on framework agreements.

⁸⁷ See, for instance, Recital 2 of Directive 71/305. The principles of equal treatment and transparency can now be found in Article 2 of Directive 2004/18/EC and Article 10 of Directive 2004/17/EC.

Since 2004, the Commission has pursued even more procurement legislation; a new Remedies Directive was due for implementation at the end of 2009⁸⁸, and a new directive on defence procurement has been adopted and will need to be implemented by 2011.⁸⁹ Most recently, the Commission has launched a consultation regarding the possibility of amending the current legislative provisions applicable to concessions, which may result in even more EU procurement legislation.⁹⁰

2.1.5 The CJ's and the Commission's Contributions

So far, the discussion of the development of EU public procurement law has been limited to a discussion of legislation; this is not a question of oversight. Prior to the late 1990s, there was little revolutionary jurisprudence nor important guidance issued in the field of public procurement. However, in the years since 1996 especially, there has been a vast increase in both.

2.1.5.1 Jurisprudence

Recent jurisprudential developments can be divided into three areas: developments in the field of the TFEU, developments in the field of remedies, and developments relating to the procedural rules contained in the directives, as well as their coverage.

Developments in the field of the TFEU refer to interpretations by the CJ that apply *positive* obligations to contracting authorities under the TFEU. There have been two cases in particular that mark significant departures from previous interpretations of the Treaty. The first, *Telaustria*⁹¹, is a landmark case in which the CJ decided that there is a general duty of transparency that applies to the Treaty, resulting in the necessity of 'a degree of advertising' even

⁸⁸ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L335/31

⁸⁹ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L216/7

⁹⁰ See http://ec.europa.eu/internal_market/consultations/2010/concessions_en.htm (last accessed 1 November 2010)

⁹¹ *Telaustria* (n 4).

for contracts to which the directives do not apply. The second, *Commission v. Spain*⁹², interpreted Article 346 TFEU as not granting an *automatic* exclusion from the Treaty for all hard defence procurement contracts. Instead, security concerns claimed under Article 346 have to be justified by Member States. Though both of these obligations were *established* by the CJ, neither has been satisfactorily elaborated on to date.

With respect to remedies, a landmark decision by the CJ imposed an obligatory 'stand-still' period prior to the conclusion of a contract. The decision made in *Alcatel*⁹³ had significant consequences for the traditional processes of contract conclusion in several Member States (notably, Austria and the United Kingdom) where no such period existed. Furthermore, the Remedies Directives in effect at the time of the decision did not specify a need for any sort of interim period between awarding and concluding a contract, meaning that the CJ's decision was not based on existing law as such. The new Remedies Directive has codified *Alcatel* into law.

Lastly, the CJ has significantly developed the procedural rules relating to EU public procurement law as well as the coverage of the directives. The development of the general principle of equal treatment as applicable to the procurement directives falls into the former category, as do various other judgments relating to the principle and its applicability to, among others, selection and award criteria.⁹⁴ Regarding coverage of the directives, there has been significant case law interpreting in a broad manner, for instance, the definition of a "body governed by public law", which has resulted in bringing many commercially active undertakings under the ambit of the procurement directives⁹⁵; the second coverage area that the CJ has developed in recent years concerns the applicability of the procurement rules when awarding contracts to another procuring entity. The general rule established is that the procurement rules do apply here, but

⁹² Case C-414/97 *Commission v Spain* [1999] ECR I-5585

⁹³ Case C-81/98 *Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-17671

⁹⁴ For a discussion see Arrowsmith 2006 (Evolution, n 3), p. 354 onwards and section 2.4.2 of this thesis.

⁹⁵ See, for instance, Joined Cases C-223/99 and C-260/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* [2001] ECR I-3605; Case C-373/00 *Adolf Truly v Bestattung Wien* [2003] ECR I-19131; Case C-18/01 *Arkkitehtuuritoimisto Riita Korhonen Oy v Varkauden Taitotalo Oy* [2003] ECR I-5321. For a discussion see Arrowsmith 2006 (Evolution, n 3), p. 373 onwards.

the CJ has also established that in-house procurement can be excluded from the application of the procurement rules.⁹⁶

2.1.5.2 Soft Law

In the past decade, Commission guidance has been issued on various subjects; notable guidance for the purpose of this study is the 2006 *Interpretative Communication*⁹⁷ on contracts falling outside of the directives, which offers the Commission's perspective on positive obligations stemming from the Treaty.⁹⁸ Also in 2006, the Commission issued an interpretative communication on the functioning of Article 346 TFEU on defence procurement.⁹⁹ Other interpretative communications have commented on social policy objectives and their compatibility with EU rules, concession agreements, and the application of community procurement law to institutionalized public-private partnerships (IPPPs).¹⁰⁰

The Commission has also issued several "*Explanatory Notes*", also of no legally binding value, on issues such as competitive dialogue and framework agreements and the definition of several concepts in the 2004 Utilities Directive.¹⁰¹

Lastly, the Commission frequently develops 'Green Papers' on public procurement, indicating what it perceives as the purpose of regulating public procurement at the European Union level, and how to improve existing regulation. Recent Green Papers have emerged in the field of

⁹⁶ See Case C-107/98 *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [1999] ECR I-08121, Case C-458 *Parking Brixen GmbH v Gemeinde Brixen, Stadtwerke Brixen AG* [2005] ECR I-08612, Case C-324/07 *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* [2008] ECR I-8457. The exemption is, however, defined limitedly – see Case C-26/03 *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-00001. For a discussion: F. Avarkioti, "The application of EU public procurement rules to 'in house' arrangements" (2007) 16 PPLR 22

⁹⁷ Commission, *Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives* [2006] OJ C176/02.

⁹⁸ This piece of guidance was challenged by Germany (with support of various other Member States); however, the CJ determined that it did not 'create' law but merely stated it and hence the Commission had not overstepped its boundaries in issuing the guidance document. (Case T-258/06 *Germany v Commission*, judgment of 20 May 2010.)

⁹⁹ Commission, *Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement* COM(2006)779.

¹⁰⁰ Commission, *Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement* COM(2001)566; Commission, *Interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement* COM(2001)274; Commission, (2000) OJ C121/02 (n 17); Commission, *Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP)* COM(2007)6661

¹⁰¹ For details, see http://ec.europa.eu/internal_market/publicprocurement/explan-notes_en.htm (last accessed 1 November 2010).

defence procurement¹⁰² and public-private partnerships¹⁰³, preceding legislation in the former case and an interpretative communication in the latter; of more interest for the present study are several older Green Papers, which comment on legislative changes that have already taken place, such as the development of the 2004 directives.¹⁰⁴

2.1.6 Conclusions

This section has described changes in the EU's approach to public procurement regulation. Starting with a very limited system of negative obligations up to the mid-1980s, the institutions of the EU have progressively increased the scope and volume of 'law' directed at the public procurement regulation. The obligations of Member States under the EU regime have thus increased significantly in the past 30 years; moreover, it can be noted that despite the intended period of stability following the 1993 legislative push, the Member States have been subjected to the greatest European 'push' in the field of public procurement in the past decade. This push will now be illustrated further by an examination of three newly developed areas of public procurement regulation: competitive dialogue (section 2.2), framework agreements (section 2.3) and the general principles of equal treatment and transparency (section 2.4)

¹⁰² Commission, *Green Paper on Defence Procurement* COM(2004)608

¹⁰³ Commission, *Green Paper on Public-Private Partnerships* COM(2004)327

¹⁰⁴ See, for example, COM(1996)583 (n 80) and Commission, *Communication from the Commission on Public Procurement* COM(1998)143.

2.2 Case Study 1: Competitive Dialogue

2.2.1 Introduction

The first 'case study' that will be examined in this thesis is the competitive dialogue procedure. Competitive dialogue is an interesting case study because it is one of the few *entirely* new additions to the 2004 directives. All that exists on the procedure in terms of clarification from the EU is an *Explanatory Note* from the Commission which (as discussed in section 1.4) has no binding legal value, but may nonetheless produce legal effects.¹⁰⁵

2.2.2 Legislative History & Purpose

The possibility of a new, more flexible procedure was first mentioned in the Commission's 1996 Green Paper entitled "Exploring the Way Forward"¹⁰⁶, where the Commission observed that industry was not willing to work on its own Private-Public Partnership (PPP)¹⁰⁷ infrastructure project (the Trans-European Network, or TEN) if there was no room for technical discussions prior to tendering. The responses the Green Paper received revealed that the standard procedures available under the procurement directives were perceived to be too inflexible to accommodate large complex contracts.¹⁰⁸ The UK, for instance, used the negotiated procedure with a notice—use of which has to be justified by the technical or financial complexity of a project—for all of its own PPP projects (hospitals, major new IT system contracts, schools, etc) under the Private Finance Initiative (PFI).

The Commission never formally brought a case against the United Kingdom for its use of the negotiated procedure for these PFI projects, but did send two reasoned opinions about this practice.¹⁰⁹ Though never formally stated and not pursued through action against a Member

¹⁰⁵ Commission, *Explanatory Note on Competitive Dialogue*, CC/2005/04_rev 1 of 5.10.2005

¹⁰⁶ COM(1996)583 (n 80), p. 34.

¹⁰⁷ A PPP is a contract in which the public sector collaborates with the private sector and transfers the risk of a project to the private sector, which has to obtain funding for the project privately.

¹⁰⁸ A. Rubach-Larsen, "Competitive Dialogue", Chapter 5 in Treumer and Nielsen (n 34), p. 67-68.

¹⁰⁹ See A. Brown, "The Impact of the New Directive on Large Infrastructure Projects: Competitive Dialogue or Better the Devil You Know" (2004) 13 PPLR 160, p. 163, referring to Commission Press Release IP/00/869 of July 27, 2000.

State, the Commission's perspective appeared to be that the negotiated procedure with a notice was not available for repeat PPP projects of the type the UK was setting up under the PFI scheme.

The respondents to the Green Paper argued these repetitive PFI projects could still not be feasibly procured without some discussion with bidders. Negotiation was deemed necessary in order to bridge the gap between the contracting authority's knowledge and the tenderers' abilities to provide innovative solutions: requiring contracting authorities to write detailed specifications and to use the restricted procedure ignored that they may have lacked the technical knowledge to write these specifications at all, or to the best possible solution.

Additionally, there were other perceived legal and financial reasons for needing negotiation in a PFI contract. As an example, it was common in UK practice to leave the 'details' for the winning tenderer alone—such as room design in buildings—so as to cut down tendering costs for other participants.¹¹⁰ Under the restricted procedure, this would not be possible.

The Commission, after both comments on its Green Paper and experiences with PPPs through the TEN project, came to realize that the restricted procedure was not appropriate for complex procurement.¹¹¹ It first alluded to the introduction of more flexible procedures in its *Communication on Public Procurement* from 1998.¹¹² The first draft of the new procedure was highly criticized, both by academics and involved parties,¹¹³ and it was redrafted twice¹¹⁴ prior to taking the shape it has in Directive 2004/18/EC.

Competitive dialogue, as included in the directive, offers a compromise between the negotiated procedure and the restricted procedure. Where it falls between these procedures, however, is

¹¹⁰ For a discussion of UK PFI practice, see C. Kennedy-Loest, "What Can be Done at the Preferred Bidder stage in Competitive Dialogue?" (2006) 15 PPLR 317, at p. 319-320. See also Arrowsmith 2005 (n 25), Chapter 8 (on the negotiated procedure with a notice and its use in UK PFI) and Chapter 10 (on competitive dialogue).

¹¹¹ Commission, *Communication of the European Commission to the Council, to the European Parliament, to the Economic and Social Committee and to the Committee of the Regions on Public Private Partnerships in Trans-European Network Projects* COM(97)453, section 2.1.

¹¹² COM(1998)143 (n 104), section 2.1.1.1.

¹¹³ Rubach-Larsen (n 108), p. 69; for criticism, see S. Arrowsmith, "The European Commission's Proposals for New Directives on Public and Utilities Procurement" (2000) 9 PPLR NA125, at 129 as well as R. Boyle, "Critique of Commission's Proposals for a New Directive on the Co-ordination of Procedures for Public Contracts COM(00)275 final, as updated by the discussions in the Working Group" (2001) 10 PPLR NA65, at 66.

¹¹⁴ Commission, COM(2002)236 final and COM(2003)583 final.

subject to debate. Details of the procedure, such as when it is available for use, what can be done during it, what can be done after it, and what are the effects of its existence on 'surrounding procedures' are unclear to differing extents.¹¹⁵

This section will not discuss the entire process of the procedure in depth.¹¹⁶ Instead, the subsequent discussion will focus on choices that the national legislator faces when approaching competitive dialogue.

2.2.3 National Implementation of Competitive Dialogue: Implementation Choices Available

The competitive dialogue procedure is optional, meaning that it does not *have* to be made available according to the directive. The national legislator thus principally starts out with two choices: to either implement the procedure as in the directive, or to not make it available in national legislation.

Within these two choices, there are other choices to be made: the national legislator retains the freedom to determine which contracting authorities can use the competitive dialogue procedure, or for which types of *contracts* the procedure can be used. Moreover, he can also opt to make the procedure *more limited* than it is drafted in the directive—for instance, post-tender negotiations could be banned altogether, or subjected to strict requirements. Other areas of the procedure can also be supplemented: for instance, while bid payments are permitted in the 2004 directive, it offers no guidance on when they can be used. National laws implementing the directives may engage with this issue in more detail, by stipulating the value of the bid payment or at which stage of the dialogue bidders become eligible for them. Similarly, the directive highlights that confidentiality must be maintained at all stages of a competitive dialogue, but does not elaborate on how; this is again an area that may be supplemented at the national level.

¹¹⁵ For general commentary as well as critical perspectives on the competitive dialogue procedure, see Rubach-Larsen (n 108); Arrowsmith 2005 (n 25), Chapter 10; S. Treumer, "Competitive Dialogue" (2004) 4 PPLR 178; C. Bovis, "The New Public Procurement Regime of the European Union: a critical analysis of policy, law and jurisprudence" (2005) 30(5) ELRev 607.

¹¹⁶ This has already been done; see the materials cited *ibid*, in particular, Arrowsmith 2005 and Treumer 2004.

The above issues all have to be considered by the national legislator when implementing the *directive*. However, it should also be remembered that the directive does not cover all types of procurement contracts potentially concluded by Member State authorities (see section 2.1.4). When contracts are not covered by the directives (because they are, inter alia, services concessions, or low value contracts), the national legislator can look to the competitive dialogue procedure for inspiration—either by making it available in the exact same form that it exists for contracts covered by the directive, or by amending it in some manner. This thesis will thus explore not only how competitive dialogue has been approached at the national level for those contracts covered by the directive, but also whether or not competitive dialogue has been made available for procurement not regulated by the directives.

2.2.4 Competitive Dialogue in the directive: Rules on Availability

Competitive dialogue is made available under the directive in limited conditions. First, Article 29(1) stipulates that “in the case of *particularly complex contracts* ... where contracting authorities *consider* that the use of the open or restricted procedure will not allow the award of the contract” competitive dialogue becomes available. [Emphasis added.]

Article 1(11)(c) then states that a contract may be considered particularly complex in two cases:

- “- where the contracting authority is not “objectively able” to define the technical means that will satisfy their needs with regard to the contract¹¹⁷
- where the contracting authority is not “objectively” able to specify the legal and/or financial make-up of the given contract”

Recital 31 of the directive offers some examples of particularly complex contracts. One of these examples refers back to the Commission’s TEN project; the other two are the non-specific examples of “large computer networks” or “projects involving complex and structured financing”.

¹¹⁷ This definition refers back to Article 23(3)(b), (c), and (d), which prescribe the contents of technical specifications for contracts.

This condition for use is the first of several grey areas found in the directive's provisions on competitive dialogue. Both criteria for use as listed in Article 1(11)(c) mention that a contracting authority has to be "objectively" unable to define specifications or legal/financial dimensions of a project. "Objectively" is not defined elsewhere in the articles of the directive; all there is to rely on in deducing the meaning of the word "objectively" in this context are the Recitals and the Commission's original proposal, which offer different impressions. The Recital indicates that competitive dialogue can be used when a contracting authority is not able to produce a *best possible* solution¹¹⁸, whereas the Commission's original proposal implied that competitive dialogue became available when it was "objectively impossible" to set specifications.¹¹⁹

Most commentators have tentatively arrived at the conclusion that the contracting authorities ought to enjoy a degree of discretion in deciding when to use the procedure¹²⁰—not necessarily because this is clear from the text, but because the alternative interpretation would leave very little room for the procedure. However, national legislators will have to construct their own interpretation of this provision, and this could result in different levels of availability in different Member States.

2.2.5 Legal Uncertainties in the Competitive Dialogue Procedure

In brief, the competitive dialogue procedure commences as the restricted procedure—by inviting a limited number (minimum 3 as opposed to minimum 5) of tenderers to participate in the procedure—but then deviates, by allowing for dialogue between contracting entity and tenderers prior to the submission of final tenders. Here, the procedure is also different from the negotiated procedure with a notice, where no such 'final tender' is required prior to contract award.

¹¹⁸ See S. Treumer, "The Field of Application of Competitive Dialogue" (2006) 6 PPLR 307, p. 312, commenting on Recital 31's phrase "or of assessing what the market can offer".

¹¹⁹ Commission, *Proposal for a Directive on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts*, COM(2000)275 final, part III, on Chapter 4, Article 29; this interpretation is broader than it seems because the Commission offers, as an example, that the use disproportionate money and time would trigger availability.

¹²⁰ See Arrowsmith 2005 (n 25); Brown 2004 (n 109); Rubach-Larsen (n 108); For the opposing perspective, see Treumer 2006 (n 118) and 2004 (n 115).

Uncertainty can be found in various stages of the competitive dialogue process. In Article 29, the process for eliminating tenderers prior to the final tendering stage is left ambiguous; Article 29(4) indicates that successive stages of tendering can take place, but does not address whether or not a contracting authority can eliminate competitors during the dialogue stage *without* arranging for a formalized tendering round to take place. True clarity on this issue can also not be found in the Commission's *Explanatory Note*, where only reference to use of award criteria is made; this could arguably be done without formal tendering.¹²¹

Further uncertainties are found with respect to the 'final tender' stage required by Article 29(6). The number of participants required during the final tendering round is unclear—if the minimum number of participants in a procedure is 3, and successive elimination is possible, one could argue that it is implied that at the final tender stage, *less than three* participants may suffice.¹²² Article 44(4), however, merely indicates that a number of tenderers that allows for "genuine competition" (not defined) must be retained.

The difficulties continue with the very concept of 'final tenders', as it is unclear how complete these offers have to be. The directive states that the finalized tender must have in it "all elements required and necessary for the performance" of the contract.¹²³ This implies that a very complete tender is required at this stage—a perspective also adopted in the Commission's *Explanatory Note*.¹²⁴ Arrowsmith has noted that such an interpretation is highly discouraging for potential tenderers because of how much time and money will have to go into a tender at a stage where award of the contract has not yet been determined, and may for that reason be undesirable.¹²⁵

Moreover, the directive itself casts some uncertainty onto what is meant by a 'final tender' by stating in Article 29(6) that final tenders may be "clarified, specified and fine-tuned" if this is necessary and will not distort competition. From the wording of the Article it is clear that further

¹²¹ *Explanatory Note on Competitive Dialogue* (n 105) p. 8.

¹²² Brown and Arrowsmith recognize this reasoning; Brown 2004 (n 109), p. 174 and Arrowsmith 2004 (n 34), p. 1286.

¹²³ Article 29(6).

¹²⁴ *Explanatory Note on Competitive Dialogue* (n 105), p. 9.

¹²⁵ Arrowsmith 2004 (n 34), p. 1286; she notes that in particular, in UK PFI practice, it is accepted that some important parts of the tender (such as risk allocation) are finalized through negotiations with the winning bidder only. The Commission, in its judgment on the *London Underground* case (Commission, Case N 264/2002, *London Underground Public Private Partnership*, Decision of 2 October 2002—dealing with state aid), accepted that negotiations on such points could be held under the negotiated procedure with a notice.

negotiation between contracting authorities and the final tenderers is not allowed; however, it is unclear what the three above terms *do* mean.

Finally, post-award discussions are permitted to an unclear extent. Article 29(7) allows that “the [winning] tenderer may be asked to clarify aspects of the tender or confirm commitments” providing that this does not modify “substantial aspects of the tender.” As discussed in section 2.2.2, it has been UK practice to leave elements of the contract (such as obtaining planning permission) for only the winning tenderer to deal with. Where such an element results in substantial changes to the contract, it follows from the wording of the Article that the competition will have to be re-opened, if not restarted.¹²⁶

However, it is unclear what the article permits in terms of *minor* post-award changes. One perspective is that the final steps can fall under the provision of “confirming commitments” or “clarifying”, but this is a stretch of the directive’s language.¹²⁷ Alternatively, these types of changes can be considered from the perspective of competition—as every bidder would have to obtain planning permission upon winning the contract, undertaking this step at the very end is unlikely to impact on the status of the winning tender.¹²⁸

It has been argued that some details are best filled in following the conclusion of the contract—this includes not only the obtaining of planning permission, but also, for example, the filling in of patient rooms in a contract for a hospital.¹²⁹ Whether or not these changes are permissible under the wording of Article 29(7), however, is a subject of debate.¹³⁰ The *Explanatory Note* again does not address this issue to any great extent; instead, it simply notes that there is no room for actual

¹²⁶ Arrowsmith 2005 (n 25), p. 662, argues that an additional round of tendering is “probable”, providing the eliminated bidders still want to participate.

¹²⁷ Arrowsmith, *ibid*, indicates that while it is debatable if the concept of ‘confirming commitments’ covers steps such as obtaining planning permission, it ought to if the procedure is going to be suited to complex contracts.

¹²⁸ This logic does not necessarily apply to all steps that are usually completed at the end of a procedure; for instance, if funding competitions are to be held, these can have a very deliberate impact on the quality of the bid. (See Kennedy-Loest (n 110), p. 322).

¹²⁹ See Arrowsmith 2005 (n 25), p. 651.

¹³⁰ See Kennedy-Loest (n 110), p. 324, who argues that the “cumulative effect of such changes in any particular deal” have to be considered, as well as that what at first can be perceived as a ‘minor change’ may in the end fundamentally change the bid.

negotiation post-award, as this was rejected in the drafting process.¹³¹ The precise scope for changes following the award of the contract is thus left relatively unclear.

2.2.6 Conclusions

Competitive dialogue offers national legislator a new, Commission-sanctioned option for the procurement of complex contracts—but is it more like the restricted procedure, or more like the negotiated procedure?

As illustrated above, there are both narrow and wide interpretations of competitive dialogue possible—when it comes to scope of application as well as it when it comes several steps in the procedure itself. The fact that are to date no real ‘legal’ answers to the questions raised in this section means that for the most part, Member States are fully reliant on sparse guidance issued by the Commission as well as their own interpretations of the directive’s text. In addition to having to interpret these legal uncertainties, the Member States also have significant leeway in deciding how to integrate the procedure into the national legal order. How the three subject countries have dealt with these choices will be discussed in Chapters 3 through 5.

¹³¹ *Explanatory Note on Competitive Dialogue*, (n 105), p. 10.

2.3 Case Study 2: Framework Agreements

2.3.1 Introduction

The second 'case study' that will be examined in this thesis is the possibility for concluding framework agreements under the Public Sector Directive. Framework agreements have newly been regulated in the 2004 Public Sector Directive, although they were already 'permitted' under the 1993 Utilities Directive. They were included as a case study because various jurisdictions were already concluding public sector framework agreements prior to 2004, and it will be interesting to see if and how EU legislation on the procedure has changed national rules.

This section will begin with an explanation of what framework arrangements are (section 2.3.2) and what their status was under the old directives (section 2.3.3). Thereafter, the new directive's provisions on framework agreements will be discussed (section 2.3.4), with a focus on options and uncertainties Member States are presented with in implementing the directive's provisions.

2.3.2 What is a Framework?

A framework arrangement¹³² is an arrangement between a contracting entity and a supplier, where the contracting entity agrees on terms to purchase from the suppliers over a period of time. It can take various shapes:

- one contracting entity, one supplier (single provider framework)
- one contracting entity, several suppliers (multi-provider framework)
- several contracting entities, several suppliers (multi-user framework)

One element that distinguishes these types of arrangements from regular 'contracts' is that they

¹³² The term 'framework arrangement' will be used in this discussion to describe all possible configurations of the framework; this is done to distinguish all hypothetical arrangements from those actually permitted under Article 32(1) of the Public Sector Directive, which are referred to as 'framework agreements'. (Adopted from Arrowsmith 2005 (n 25), p. 669).

can be concluded in a manner that leaves all parties, either party, or no parties 'bound' by the agreement made.

At the EU level, framework arrangements were not referred to at all in the public sector directives prior to 2004¹³³; however, this did not mean that they were perceived to be unavailable under the old directives.¹³⁴ The benefits of framework arrangements for regular bulk off-the-shelf purchasing, as well as for ensuring security of supply, were appreciated by several Member States, and so framework arrangements were used insofar as that they did not conflict with the 1993 directives.¹³⁵

In 1997, however, use of a particular multi-provider framework was objected to by the Commission, leading to general uncertainty over their availability under the public sector directives.¹³⁶ The debate that followed this incident led to several Member States requesting the inclusion of framework arrangements in the 2004 Public Sector Directive.¹³⁷ The final version of the 2004 directive contains provisions on what it has termed framework agreements in Articles 1(5) and 32, as well as references to these framework agreements in various other articles.

2.3.3 Types of Framework Arrangements: a General Taxonomy applicable to the Old Directives

Sue Arrowsmith has created a useful taxonomy for framework arrangements, resulting in ten different 'types' of framework arrangements that are available.¹³⁸ The table below summarizes the most common forms of framework arrangements, based on Arrowsmith's taxonomy.

¹³³ The Utilities Directive has at all times included provisions on framework arrangements; for a discussion, see Arrowsmith 2005 (n 25), Chapter 11.

¹³⁴ On framework agreements under the old directives, see, S. Arrowsmith, "Framework Purchasing and Qualification Lists under the European Procurement Directives: Part 1" (1999) 8 PPLR 115 and S. Arrowsmith, "Framework Purchasing and Qualification Lists under the European Procurement Directives: Part 2" (1999) 8 PPLR 161.

¹³⁵ An example of this is the United Kingdom; for an analysis, see Arrowsmith, *ibid*.

¹³⁶ Commission, Press Release IP/97/1178, 19/12/97; the case at hand, dealing with a framework set up by the Northern Ireland Department of the Environment, did not proceed to the CJ.

¹³⁷ Arrowsmith 2005 (n 25), p. 671; see also S. Arrowsmith, "Framework Agreements and Dynamic Purchasing Systems: the EC Directives and the perspective of the UK", paper presented at conference Public Procurement: Global Revolutions III (Nottingham, June 2006) and S. Arrowsmith, "Methods for Purchasing On-Going Requirements: The System of Framework Agreements and Dynamic Purchasing Systems Under the EC Directives and UK Procurement Regulations", Chapter 3 in Arrowsmith 2009 (n 6).

¹³⁸ See Arrowsmith 1999 (Part 1, n 134), p. 115 onwards; the taxonomy presented in that article is significantly more detailed. A slightly modified version of it appears in Arrowsmith 2005 (n 25), Chapter 11.

	Single-Provider Framework	Multi-Provider Framework
<i>A: Two Step Process¹³⁹</i>	Purchaser buys from supplier; afterwards agree on terms for future purchases	Purchaser buys from suppliers; afterwards set up terms for future purchases
<i>B: Binding Contract</i>	Purchaser undertakes to buy; supplier undertakes to provide	Purchaser undertakes to buy; suppliers all undertake to provide
<i>C: Supplier Bound</i>	Purchaser does not undertake to buy; supplier undertakes to provide	Purchaser does not undertake to buy; suppliers all undertake to supply
<i>D: Purchaser Bound</i>	Purchaser undertakes to buy; supplier does not undertake to supply	Purchaser undertakes to buy; suppliers do not undertake to supply
<i>E: No Binding Contract</i>	Purchaser and supplier discuss supply, but neither commits to a binding agreement	Purchaser and suppliers discuss supply, but neither commit to a binding agreement

Table 2.3.3 – A Taxonomy of Framework Arrangements

There was little controversy regarding single-provider framework arrangements under the old directives: both the open and restricted procedure could be easily used in order to arrive at the framework arrangement.

¹³⁹ The first purchase is, from the perspective of the EU directives, a stand-alone 'contract'. The arrangement for future purchases can take any of the forms described in B-E.

Contractually, as described in the above table, various arrangements of single provider frameworks were possible. What distinguished procedures A, B and C from procedures D and E was when a “contract” was concluded from the perspective of the directives. In situations A through C, the framework arrangement itself was the “binding contract”, as there was a binding commitment to purchase from a given provider.¹⁴⁰ Providing that the framework arrangement was concluded in line with the directives, these types of arrangements were not contrary to EU law. Under scenarios D or E, on the other hand, no ‘contract’ existed until an order was placed and the contracting entity itself became bound by the agreement—but if the original framework was set up in line with the directives, and the orders were placed in line with the framework agreement, there would again be no violation of EU law.¹⁴¹ Member States thus had significant discretion in deciding what contractual terms to apply to framework arrangements, as the EU directives appeared to permit all forms described above.

Multi-provider frameworks were more complicated under EU law, largely because of the fact that in a multi-provider framework, a second stage of award (a ‘call-off’) is needed in order to determine which of the suppliers actually will supply the good/work/service in question at the time that the contracting entity requires it.

The old directives clearly allowed for the situation where a call-off under the framework agreement was placed based on the *original tenders* the suppliers used to enter into the framework agreement. In this scenario, the Commission has argued that the framework agreement itself is the contract¹⁴²; it is supported in this perspective by the CJ.¹⁴³ Providing the original framework agreement was concluded in line with the rules in the directives, these framework arrangements were permissible.

¹⁴⁰ Arrowsmith 2005 (n 25), p. 677.

¹⁴¹ Ibid.

¹⁴² Commission, *Explanatory Note on Framework Agreements*, CC/2005/03_rev 1 of 14.7.2005; it argues that orders placed under these types of framework agreements are not subject to the directive’s award criteria as the framework agreement itself is the relevant public contract (section 3.2 and 3.4).

¹⁴³ Case C-119/06 *Commission v Italy* [2007] ECR I-00168 (“Health Care”); see also its earlier judgment in Case C-79/94, *Commission v Greece*. [1995] ECR I-01071

A second variety of the multi-provider framework required that a 'mini-competition' was held before the order was awarded to any of the suppliers under the framework. In this scenario, again, a contract existed only at the point when (post-mini-competition) the order was placed with the winning supplier. The difficulty with these kinds of framework arrangements was that they implied a round of discussion or negotiation (leading to re-tendering) between the contracting entity and the suppliers, in order to determine which supplier was best suited to the particular needs of the contracting authority *at the time*.¹⁴⁴ This would be permitted under the negotiated procedure, but it is uncertain whether or not this was permissible under the restricted or open procedure.

A third possibility was a framework arrangement under which the suppliers were allowed to modify and improve their tenders at any point in time, leading to a situation where the contracting entity simply chose the best 'tender' available at the time of its purchase. While permitted under the negotiated procedure, this would not have been permitted under the open or restricted procedure.¹⁴⁵

Lastly, there was the option of setting up a framework arrangement that 'rotated' the award of an order among the suppliers; this was clearly forbidden under the old directives as it fails to consider which supplier has the lowest/most economically advantageous offer at the time the order is placed, and consequently ignores the directives' set award criteria.¹⁴⁶

Barring the setup discussed last, there was scope for all of these different types of framework arrangements under the old EU regime. Prior to 2004, national legislators thus had to determine if and how national contracting authorities could conclude framework arrangements.

The position of the EU on framework agreements is clarified to an extent by the 2004 Public Sector Directive—primarily in that it now expressly permits for both single-provider frameworks and multi-provider frameworks to be used, thus dismissing earlier uncertainties on this point.

¹⁴⁴ See Arrowsmith 2005 (n 25), p. 681-683, discussing how the restricted and open procedures approach iterative tendering processes.

¹⁴⁵ Arrowsmith 2005 (n 25), p. 684; the process is not transparent and could result in collusion.

¹⁴⁶ The wording of the 2004 Directive insinuates that these kinds of frameworks are now permissible; this is also the view adopted by the Commission in its *Explanatory Note on Framework Agreements* (n 142), section 3.2.

Still, the 2004 directive does not discuss the variants of multi-provider frameworks that are outlined above to any great extent and so the legality of several of the scenarios discussed above remain unclear. These uncertainties, as well as general choices left to Member States on the implementation of framework agreements, will now be analyzed.

2.3.4 Framework Arrangements under the 2004 Directive

2.3.4.1 National Implementation Choices

As with the competitive dialogue procedure, the first thing to note about the provisions on framework agreements is that they are optional:

"Member States may provide that contracting authorities may conclude framework agreements".
(Article 32(1), emphasis added).

It is further left to the Member States to structure and categorize the availability of framework agreements to their contracting entities: framework agreements do not have to be made available to all contracting authorities under all circumstances.

The directive is silent on the contractual setting-up of framework agreements, as discussed in section 2.3.3—the issue of whether or not a framework agreement contains any or exclusively binding obligations is not addressed. The consequences of this are two-fold: firstly, the various framework agreements outlined in section 2.3.3 in principle all seem available, but the directive also does not make it clear when a particular contractual form would be useful. The extent to which "binding obligations" are established can also differ; for instance, there may be requirements to buy the entire supply from a single supplier, or to only require buying supply up to a certain amount. The national legislator may decide to engage with these issues even though the directive does not.

More generally, the directive also does not comment on when, for instance, a single-supplier framework is preferable to a multi-supplier, and vice versa. It is possible that the national legislator will wish to establish rules that relate these different types of framework agreements to types of purchases (ie, supplies versus services) or even different products (ie, energy supply versus stationary), even though the directive does not restrict use of framework agreements in this way.

There are several other situations where the directive opts to not set out strict rules, but where national entities might. For instance, Article 35 on contract award notices makes it clear that only award of the *framework* has to be publicized, but the award of orders under the framework does not. As the CJ stated in the *Beentjes* case, nothing precludes a Member State's right to legislate *beyond* what the directives require.¹⁴⁷ As such, Member States can opt to make contract award notices mandatory even for orders placed under the framework.

What this means in practice is that existing national approaches—both in procurement and in contract law—can have a great influence on how framework agreements are implemented after 2004; if a Member State determined that it was illegal (or perhaps plain unwise) to use a specific contractual form of multi-provider frameworks under the old directives, and the new directives remain silent on their appropriateness, it may lead to a Member State opting to continue not making that type of framework arrangement available. Conversely, Member States that did not legislate on the use of framework arrangements at all under the old directives may now adjust the national regime to allow for various, if not all, possible framework arrangements.

2.3.4.2 Awarding & Using Framework Agreements under the 2004 Directive

The EU rules on framework agreements relate to procedures to be followed in concluding and operating framework agreements. The first observation to be made is that framework agreements are not considered to be a separate 'procedure' as such; instead, the directive (in

¹⁴⁷ *Beentjes* (n 2), para. 20.

Article 32(2)) clearly indicates that in setting up a framework agreement, the normal 'rules of procedure' (ie, open or restricted) will be followed.¹⁴⁸

The 2004 directive's rules on awarding and using framework agreements are as follows:

a) Single Supplier Framework (Article 32(2) and 32(3))

When a contracting authority wishes to award a single-supplier framework, they advertise the procurement as they would any other contract covered by the directive. Interested bidders then submit tenders on an estimate of the overall requirement, and the contracting authority identifies the winning bidder using the same award criteria as they would for any other contract under the directive. The contracting authority then can either immediately conclude a contractual arrangement with the supplier for regular requirements, or they can arrange to purchase specified goods or services under the agreement only as requirements arise.

b) Multi-Supplier Framework (Article 32(2) and 32(4))

As with single-supplier frameworks, under a multi-supplier framework, the advertising of the contract takes place under the directive's general advertising rules. Interested bidders then submit tenders on an estimate of the overall requirement; from these bidders, the contracting authority selects the suppliers that will become part of the framework agreement (known as the 'framework suppliers'; the directive requires at least 3 suppliers are admitted, where available).

When a call-off under the framework agreement is then made in the future, there are two methods to determine which supplier will actually provide the requested supply:

- By using the terms of the 'estimated tenders' the bidders supplied to access the framework; or

¹⁴⁸ Arrowsmith 2005 (n 25), p. 696.

- By holding a new 'mini-competition', in which bidders submit new 'miniature tenders' that specifically respond to the call-off requirements.

While the majority of the rules on framework agreements are found in Article 32, some other subject-specific rules can be found in other places in the directive. The remaining rules on framework agreements are generally found 'per topic'—so, for instance, Article 9 on aggregation of contract value has a specific clause on framework agreements, as does Article 35 on contract award notices.

2.3.4.3 Legal Uncertainty in the directive's Provisions on Framework Agreements

Several procedural elements regarding framework agreements remain unclear from the wording of the directive, the most significant of which are:

- 1) **The application of Article 53 (on award criteria) to framework agreements.** The application of Article 53 is expressly mentioned in Article 32(2), which deals with the award of the *framework agreement*. A first question is whether or not price always has to be considered when selecting the framework suppliers; in markets with very volatile prices, for instance, it may not be possible or realistic to request binding prices when tenderers apply to join the framework agreement.¹⁴⁹ A second concern is that the application of Article 53 is not discussed with respect to orders placed in multi-provider frameworks in Article 32(4). One possible interpretation of this is that for orders *placed* under the framework, the award criteria do not apply; the Commission adheres to this view.¹⁵⁰ It can, however, also be argued that Article 53 would apply regardless so as to make the entire framework agreement more transparent and to make framework agreements appear more consistent with other types of contracts awarded.¹⁵¹ The first interpretation potentially allows for the 'rotating' award of contracts that was forbidden

¹⁴⁹ Arrowsmith 2009 (Methods, n 137), p. 160.

¹⁵⁰ *Explanatory Note on Framework Agreements* (n 142), section 3.2-3.4.

¹⁵¹ Whether this is a goal of the EU legislation, however, is debatable; moreover, awarding a contract on the basis of pre-stated criteria in the framework agreement is not 'untransparent' by definition. [Arrowsmith 2006 (Frameworks, n 137).]

under the old directives (providing the award is transparent and treats suppliers equally)¹⁵²; the second interpretation, however, probably does not.

- 2) The use of and disclosure of award criteria in framework agreements.** The law on the use of different award criteria and sub-criteria and weighting mechanisms has been complicated immensely in recent years by CJ jurisprudence on this issue. The fact that the 2004 directive thus does not explicitly state whether award criteria at the call-off stage need to be made public, and whether or not they can differ from those used at the framework award stage, means that the CJ's case law has to be consulted in trying to determine what is permissible. To illustrate the potential problem, consider that where a call-off is urgent, speed of supply will play a bigger role than it will under normal circumstances (when, for instance, cost may be more important)—but it is unlikely that criteria and weightings used at the framework award stage will consider 'urgency'. The Commission's *Explanatory Note* here suggests that at the call-off stage, different award criteria may be used; problematic, however, is the CJ's case law in *ATI*¹⁵³ and *Lianakis*¹⁵⁴, where the general principle of transparency was used to require contracting authorities to disclose their award criteria and weightings in advance. Under framework agreements, if different criteria for particular call-offs are permitted, advance disclosure will be quite difficult as the circumstances and requirements of each individual call-off may be slightly different.
- 3) Multi-User Frameworks.** The directive is silent on these. Nothing in the directive in principle appears to forbid their use, but how they are operated in practice is complicated by the aforementioned silence. For instance, the rules on contract value aggregation (Article 9(9)) indicate that for a framework agreement, the value of the contract will be the value of all contracts concluded under the framework during its existence. This, however, presumes that only one contracting authority is using the framework. How this is dealt with for *multiple* users has direct bearing on the rules on advertising the contract—it can occur that all users individually do not cross the

¹⁵² Arrowsmith, *ibid*, notes that as there is no jurisprudence on what the general principles of the directives require in terms of award criteria, there is no certainty as to what types of award criteria (outside of Article 53) would be permissible.

¹⁵³ Case C-331/04 *ATI EAC Srl e Viaggi di Maio Snc and others v ATCV Venezia SpA and others* [2005] ECR I-10109

¹⁵⁴ Case C-532/06 *Emm.G. Lianakis AE and others v Dimos Alexandroupolis and others* [2008] ECR I-251

thresholds on their purchases, but that the framework as a whole does. Depending on how multiple users are treated (separately or as a whole), the rules of the directive will or will not apply.¹⁵⁵

- 4) Identification of parties to the framework.** Article 32(2) indicates that the normal rules on advertising the contract will apply to framework agreements. However, the directive is not clear on the extent to which entities that will be party to the framework agreement have to be identified in the original contract notice. As the directive only refers to the “contracting authority”, it is unclear what has to be done in the event that the framework is to be used by several contracting entities. Article 32(2) also indicates that no additional parties can be added to the framework agreement following its conclusion, which seems to imply that all parties have to be identified—but whether this is by name, or more generally (ie, ‘all central government bodies’) remains unclear.¹⁵⁶ The Commission has taken an intermediary position on this issue, by noting that while it is inappropriate to identify framework users as “all contracting authorities” in a given Member State, it is possible to set up a multi-user framework with a description of, ie, “all UK universities”, providing these are then clearly identifiable on a secondary document (like a list).¹⁵⁷

- 5) Information Requirements in Article 41 and call-offs.** Article 41 of the directive requires that, in order to assure that losing tenderers can protest an award decision in a timely manner, all tenderers are notified when a ‘contract’ or ‘framework agreement’ is awarded. Article 41, however, does not refer to call-offs; it is thus unclear whether or not all parties to a framework agreement have to be notified when a particular call-off is awarded.¹⁵⁸

There are thus, as with competitive dialogue, several ‘grey areas’ in terms of the procedural aspects of concluding and operating framework agreements. It will be up to national legislators

¹⁵⁵ The logical interpretation is that aggregate value of the framework is the value of *all contracts* awarded, independent of how many contracting entities are party to the framework. (See Arrowsmith 2006 (Frameworks, n 137).)

¹⁵⁶ Arrowsmith 2009 (Methods, n 137), p. 155; see also Arrowsmith 2005 (n 25), p. 701.

¹⁵⁷ *Explanatory Note on Framework Agreements* (n. 142) at 3.2.

¹⁵⁸ Arrowsmith 2009 (Methods, n 137), p. 174-175, argues that the information obligations apply to call-offs because these are ‘public contracts’ per the Directive’s definitions.

or guidance institutes to interpret these provisions and steer contracting entities towards what they consider best practice within the boundaries of EU law.

2.3.4 Conclusions

The EU rules on framework agreements are intended to be skeletal. This leaves the Member States with significant discretion in deciding whether or not to allow the use of the procedure at all; which incarnations of the procedure will be allowed; which contracting entities may use the procedure, and in which circumstances. One extreme possibility is that a Member State disallows all framework agreements, but as they are considered beneficial in various circumstances—such as when ensuring security of supply, or saving time and cost when making off-the-shelf purchases—this is unlikely. However, it is also possible that individual Member States will build their own rules with regard to framework agreements, and thus variation between Member States will be detected. Chapters 3-5 will consider the choices made in the Member States discussed in this thesis.

2.4 Case Study 3: The General Principles of Equal Treatment and Transparency

2.4.1 Introduction

This section will discuss the development of the general principles of equal treatment and transparency and how these principles are (or can be) applied to a) contracts covered by the directives and b) contracts not covered by the directives.

The general principles were selected as a case study because the post-1993 case law of the CJ has imposed positive obligations on Member States beyond those that are explicitly stated in the directives; this includes obligations extending to below-threshold contracts, part II-B service contracts, and service concession agreements ("non-directive procurement"), but also obligations for above-threshold procurement that are not stated in the directives themselves ("directive procurement"). What the obligations entail is largely unclear, primarily because the CJ has developed the obligations on a case-by-case basis.

The section will commence with a discussion of the development of the general principles under the directives and what types of obligations have been superimposed onto the directives through application of the general principles (section 2.4.2). In section 2.4.3, the impact of the principles on the Treaty, and the Commission's *Interpretative Communication* on this relationship, will be examined.

2.4.2 The General Principles under the Directive

There are two general principles recognized by EU law that have a direct bearing on public procurement: first, the European Courts have been consistently referring to the principle of equal treatment/equality in the past ten years of procurement case law. In the 1993 directives, the

principles were generally not stated¹⁵⁹ and were thus found only in the Courts' case law, but as of 2004 they are made express in both the Utilities and the Public Sector Directives.¹⁶⁰

The principle of equal treatment under the directives was first referred to in *Storebaelt*¹⁶¹ in 1993, but not expanded on beyond indicating that contracting authorities had to treat tenderers equally. Between 1993 and 2005, the principle was referred to in various cases, but not defined further.¹⁶² The first judgment that offers a workable definition of the equal treatment principle under the directives is *Fabricom*¹⁶³, where the Court stated that "the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified".¹⁶⁴ The CJ further stated that there does not have to be a cross-border element before this principle applies; the principle can thus be invoked by *any* bidder if it feels it has been treated unequally, independent of whether it is domestic or foreign.¹⁶⁵

In *Fabricom*, the Court demonstrated a willingness to scrutinize the choices made by contracting authorities and to subject them to a test of proportionality—ie, is the unequal measure proportionate to what it proposes to aim—in assessing equal treatment of tenderers.¹⁶⁶ *Fabricom* concerned a Belgian law excluding all tenderers who participated in the preparatory work for a contract from the bidding process, which was deemed to be disproportionate for ensuring equal treatment of tenderers. According to the CJ, equal treatment only required that a tenderer was excluded if they *could not* rebut the presumption that they had gained a competitive advantage from the preparatory work. The judgment thus essentially established a new obligation for all Member State to not automatically exclude all tenderers who assist in preparatory work.

¹⁵⁹ The exceptions here are the 1993 Utilities Directive (which contained a reference to non-discrimination, of which equal treatment is one example) and the 1993 Services Directive.

¹⁶⁰ Article 2 of the Public Sector Directive; Article 10 of the Utilities Directive.

¹⁶¹ Case C-243/89 *Commission v Denmark* [1993] ECR I-3353 ("Storebaelt")

¹⁶² See, for instance, Case C-87/94 *Commission v Belgium* [1996] ECR I-2043 ("Walloon Buses")

¹⁶³ Joint Cases C-21/03 and C-34/03, *Fabricom v Etat Belge* [2005] ECR I-1559. See also S. Treumer, "Technical dialogue and the principle of equal treatment – dealing with conflicts of interest after *Fabricom*" (2007) 16 PPLR 99

¹⁶⁴ *Fabricom*, *ibid*, para. 27.

¹⁶⁵ *Storebaelt* (n 161), para. 33 and *Walloon Buses* (n 160). For a discussion see Arrowsmith 2006 (Evolution, n 3), p. 354-55.

¹⁶⁶ *Ibid*, p. 355-357.

The *Fabricom* judgment illustrates how the general principle of equal treatment can be used by the CJ to create new positive obligations; it can be assumed that the CJ may rely on the same general principle to regulate other areas not addressed in the directives at the moment.¹⁶⁷

Examples of where the equal treatment principle could apply, even when the directives are silent, include whether or not it is possible to accept late submissions of tenders or pre-qualification questionnaires (PQQs); the directive does not address either of these situations, but the CJ jurisprudence on equal treatment suggests that the equal treatment principle would prohibit accepting late tenders/PQQs, as this would give an 'unequal' advantage to the tenderer submitting information past submission deadlines.

The principle of transparency has been established to a lesser extent under the directives. Its primary role is to support the principle of equal treatment by ensuring that 'unequal treatment' can be easily recognized. Arrowsmith has identified four separate aspects of the transparency principle under the directives: "publicity for opportunities, publicity for the rules governing each procedure, ... rule-based decision making, and opportunities for verification and enforcement".¹⁶⁸ A clear example of the application of the principle of transparency is found in *Universale-Bau*¹⁶⁹, where a contracting authority had informed the tenderers of the award criteria to be used during a procedure, but had failed to disclose the 'scoring system' it had developed in order to make its assessments. The CJ in this case stated that transparency would have required that *where a weighting system is decided on in advance, the tenderers must be made aware of what those weightings are*. More recently, this line of case law has been developed by *ATI* and *Lianakis*, wherein it was established that the transparency rules on award criteria and weightings also generally apply to sub-criteria and the weightings of sub-criteria.¹⁷⁰

In a recent decision, the General Court (GC) clarified the relationship between the equal treatment principle and the transparency principle by assessing both in the same case. In

¹⁶⁷ Ibid.

¹⁶⁸ Ibid, p. 358.

¹⁶⁹ Case C-470/99 *Universale-Bau v EBS* [2002] ECR I-11617.

¹⁷⁰ In *ATI* (n 153), it was determined that assigning weightings to sub-criteria at a late, but pre-bid-submission, stage did not violate the transparency principle, providing that these weightings did not distort competition; in *Lianakis* (n 154), on the other hand, setting weightings and sub-criteria after bid submissions did violate the equal treatment and transparency principles. See also T. Kotsonis, "The nature of award criteria and the subsequent stipulation of weightings and sub-criteria: *Lianakis v Dimos Alexandroupolis* (C-532/06)" (2008) 17 PPLR 128.

*European Dynamics*¹⁷¹, the GC had to determine if having an incumbent service provider bid on a contract violated the equal treatment principle. It concluded that such a provider had a *de facto* advantage, but this would not necessarily violate equal treatment; problematic was the fact that the incumbent provider had access to documentation and information that other bidders did not. In order to satisfy the equal treatment requirement in this case, the GC concluded that the transparency principle had to be satisfied¹⁷², and so the available information had to be made available to all parties, so as to counteract a competitive advantage for the incumbent provider.

The most recent development in equal treatment under the directives can be found in the *Michaniki*¹⁷³ case, where the CJ determined that "in addition to the grounds for exclusion [in procurement procedures] based on objective considerations of professional quality", (proportionate) exclusionary measures could also be taken to preserve the equal treatment of bidders in procedures.¹⁷⁴ This builds on the general principle established in *Fabricom*, whereby national laws or measures that aim to guarantee equal treatment and transparency between bidders will be tested as to their proportionality.

From these cases, we can see that the CJ will use the general principles as a means of evaluating an award procedure, and that the potential freedom for Member States to interpret the directives flexibly is restricted by a narrow application of both principles.¹⁷⁵

Still, the two general principles under the directives are not generally perceived as a source of controversy. While the CJ developed them, they are now a part of the legislation, indicating that

¹⁷¹ Case T-345/03, *Evropaiki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission* [2008] ECR II-00341. See also P. Braun, "Addressing the competitive advantage of an incumbent provider: *Evropaiki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission* (Case T-345/03)" (2008) 17 PPLR NA140.

¹⁷² The CJ has stated that transparency is necessary for the equal treatment principle to be satisfied before; see also, for example, Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* [2003] ECR I-14527.

¹⁷³ Case C-213/07 *Michaniki AE v Ethniko Simvoulío Radiotileorasis and Ipourgós Epikratias* [2008] ECR I-09999. See D. McGowan, "Exclusion of bidders on grounds of holding media interests: *Michaniki AE v Ethniko Simvoulío Radiotileorasis and Ipourgós Epikratias* (C-213/07)" (2009) 18 PPLR NA79.

¹⁷⁴ *Michaniki*, *ibid*, has since been further developed in Case C-538/07 *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano* [2009] ECR I-04219 wherein the CJ determined that a national measure that absolutely prohibited "simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control" was, while aiming to achieve equal treatment of tenderers, not proportionate to the aim pursued. [Para 33.]

¹⁷⁵ Arrowsmith 2006 (Evolution, n 3), p. 357-358.

Member States support the general principles and the way in which the CJ interprets their application to procurement under the directives.

2.4.3 The General Principles under the TFEU

As mentioned in section 2.1.5.1, prior to a landmark case in 1998, the Treaty was believed to only apply to public procurement by setting *negative* obligations, prohibiting any discrimination against bidders from other EU Member States. In 1998, however, the CJ stated in *Telaustria*¹⁷⁶ that the general principle of transparency applied not just to the procurement directives, but also to procurement under the TFEU. The Court's reasoning was that in order to abide by the non-discrimination provisions in the Treaty, contracting authorities are obligated to be transparent in their procurement decisions. To fulfil this obligation, the Court concluded, "a degree of advertising sufficient to enable ... competition and [judicial review of the procurement procedure]" is needed.¹⁷⁷

Whether or not the general principles have always applied to the TFEU has been a subject of debate¹⁷⁸—some commentators believe that as the CJ has, since the 1970s, recognized that there is a principle of 'equality' or equal treatment under the TFEU and its predecessors¹⁷⁹, the recognition of a principle of transparency to uphold this principle follows logically. Others maintain that the source of the general principles is most definitely the directives, as the TFEU only recognizes equal treatment in specific contexts/provisions, and in any event, none of the general principles found in the TFEU have been interpreted previously by the CJ to hold positive obligations for Member States.¹⁸⁰ We will now consider what these positive obligations are.

¹⁷⁶ *Telaustria* (n 4).

¹⁷⁷ *Ibid*, para 62.

¹⁷⁸ For discussions on the general principles and the TFEU, see L. Richer, *L'Europe des marchés publics* (LGJD: Paris 2009), Chapter 3.2; F. Neumayr, "Value for Money v. Equal Treatment: the Relationship Between the Seemingly Overriding National Rationale for Regulating Public Procurement and the Fundamental EC Principle of Equal Treatment" (2002) 22 PPLR 215, which offers the perspective that the general principles are naturally derived from the Treaty; for contrasting opinions, see P. Braun, "A Matter of Principle(s)—The Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives" (2000) 9 PPLR 39; Arrowsmith 2005 (n 25), p. 197, E. Pijnacker Hordijk and M. Meulenbelt, "A Bridge Too Far: Why the European Commission's Attempts to Construct an Obligation to Tender outside the Scope of the Public Procurement Directives should be Dismissed" (2005) 14 PPLR 123.

¹⁷⁹ See Neumayr, *ibid*; for more information on general principles under the TFEU, see Craig and de Burca, (n 29), Chapter 11.

¹⁸⁰ Arrowsmith 2005 (n 25), p. 198; Braun 2000 (n 178), p. 45.

2.4.3.1 Transparency & Advertising Obligations

The CJ's case law on 'the principle of transparency' did not commence with *Telaustria*. In two judgments in 1999, the Court referred in more general terms to transparency. The first, *RISAN*, indicated that the Treaty imposed an obligation "to ensure equal treatment and transparency."¹⁸¹ The Court built on this general idea by stating, in *Unitron Scandinavia*, that "the principle of non-discrimination ... implies ... an obligation of transparency in order to enable the contracting authority to satisfy itself that it has been complied with."¹⁸² Following these two preliminary cases, the *Telaustria* judgment introduced the 'how' of complying with the obligation for transparency: 'advertising'.

Telaustria, which concerned a services concession contract, demanded a "degree of advertising" that met two criteria: the enabling of competition and the operation of a judicial review procedure to assess the impartiality of the award process. The fact that the decision failed to be more specific about the degree to which these criteria had to be met, or in what circumstances they had to be met, led to speculation as well as criticism because of legal uncertainty.¹⁸³

Further clarification on the scope and applicability of the transparency obligation would not come until 2005. *Coname*¹⁸⁴ concerned a service concession awarded directly to a local undertaking, failing *prima facie* on the 'advertising' requirement. Nonetheless, in its analysis of the facts the case, the CJ (in a full-court judgment) provided some further guidance on the requirement for advertising.

It first considered the size and value of the contract, and stated that if the contract had had "a very modest economic interest at stake", there would be no reason to presume cross-border

¹⁸¹ Case C-108/98 *RISAN. Srl v Comune di Ischia, Italia Lavoro SpA and Ischia Ambiente SpA* [1999] ECR I-05219, para 20.

¹⁸² Case C-275/98 *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri* [1999] ECR I-08291, para. 31.

¹⁸³ Arrowsmith 2005 (n 25), p. 197.

¹⁸⁴ Case C-231/03 *Consorzio Aziende Metano (Coname) v Cingia de' Botti* [2005] ECR I-07287. See also A. Brown, "Transparency obligations under the EC Treaty in relation to public contracts that fall outside the procurement Directives: a note on C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*" (2005) 14 PPLR NA153.

interest in it, and as such there would not have been an obvious infringement of the freedom of movement provisions.¹⁸⁵ The CJ did not indicate whether or not there are additional, non-economic circumstances that would have made the contract not of cross-border interest.

After determining that the contract in *Coname* was not of a very modest economic interest, the Court indicated that it was for a national court to determine if the transparency principle was satisfied. It added that the transparency criteria do not necessarily imply an obligation to issue a formal invitation to tender: what is required of a contracting authority, under the principle of transparency, is making available “appropriate information regarding [a contract] before it is awarded” in such a way that foreign bidders would be able to access it.¹⁸⁶

In some ways, *Coname* appears to have reduced the advertising requirements—though it by no means clarifies them. Instead of relying on the word ‘advertising’, the Court in *Coname* stressed the availability of information about a contract—which can be accomplished by, for instance, posting information about the contract on a public website. However, the Court failed to indicate in what circumstances ‘information provision’ would suffice in satisfying the transparency criteria. As the CJ determined whether or not advertising was required by examining the value of the contract, it is possible that the *extent* of advertising required is also affected by contract value—but true guidance is not found in *Coname*.

Cases that followed *Coname* did not elaborate greatly on this point: in *Parking Brixen*¹⁸⁷, the CJ indicated that individual contracting authorities must decide on a case-by-case basis to what extent a formal ‘call for tenders’ was needed. Of course, there is significant scope between a ‘formal call for tenders’ and ‘no call for competition at all’, leaving great questions for contracting authorities on what is expected of them.¹⁸⁸

¹⁸⁵ Ibid, para 20.

¹⁸⁶ Ibid, para. 21.

¹⁸⁷ *Parking Brixen* (n 96).

¹⁸⁸ On this point, see also Case C-260/04 *Commission v Italy* [2007] ECR I-7083. See also A. Brown, “The obligation to advertise betting shop licences under the EC principle of transparency: Case C-260/04 *Commission v Italy*” (2008) 17 PPLR NA1.

Additional relevant cases were decided in 2007¹⁸⁹, and further detailed the scope of application of the transparency principle. The first of these, *Commission v Finland*¹⁹⁰, made it clear that the transparency principle also applied to contracts below the directives' thresholds, though the case itself was dismissed on procedural grounds.¹⁹¹ The next case, *Commission v Ireland (An Post)*¹⁹², was the first Part II B services contract to be the subject of infringement proceedings. The case concerned a non-advertised contract awarded to the Irish Post Office, whereby social welfare benefits could be collected from the post offices. The CJ again dismissed the case, this time because the Commission failed to sufficiently support its case. The CJ reasoned that it was for the Commission to demonstrate that there was cross-border interest for the contract in question; as the Commission, in its proceedings, had acted on a presumption of cross-border interest, the case was dismissed.¹⁹³ Identical reasoning on burden of proof was used to reject the Commission's complaint in *Commission v Italy (Health Care)*¹⁹⁴, which concerned framework agreements for healthcare transport services.¹⁹⁵

Finally, *Commission v Ireland (Ambulances)*¹⁹⁶ concerned a verbal agreement between a city council and a health authority to provide ambulance services. The Commission initiated an infringement proceeding on the basis of this verbal agreement as it had not been advertised and thus violated the transparency obligation. Ireland, on the other hand, asserted that as there was no contract in writing and the ambulance service was provided according to a statutory right, no public contract existed. The Court accepted that Ireland's argument was 'conceivable' and as such, for a third consecutive time, failed the Commission's claim on the basis that they had made a presumption that it did not back up with evidence.

¹⁸⁹ For commentary, see D. McGowan, "Clarity at last? Low value contracts and transparency obligations" (2007) 16 PPLR 274

¹⁹⁰ Case C-195/04 *Commission v Finland* [2007] ECR I-03351.

¹⁹¹ One of the criteria of Article 258 of the Treaty, which enables the Commission to bring an action before the Court, is that a clear and specific summary of the pleas in law has to be submitted; the CJ determined the Commission failed to do this in this case. For a discussion of the case see T. Kotsonis, "The Extent of the Transparency Obligation Imposed on a Contracting Authority Awarding a Contract Whose Value Falls Below the Relevant Value Threshold: Case C-195/04, *Commission v Finland*, April 26, 2007" (2007) 16 PPLR NA119, p. NA120.

¹⁹² Case C-507/03 *Commission v Ireland* [2007] ECR I-09777 ("An Post"). See also A. Brown, "The European Commission fails to prove that an Irish contract for Part B services was of cross-border interest: a note on Case C-507/03 *Commission v Ireland*" (2008) 17 PPLR NA35 and D. McGowan, "Commission v Ireland: post offices, proof and transparency" (2008) 17 PPLR NA48

¹⁹³ *An Post*, *ibid*, para. 32.

¹⁹⁴ See *Health Care* (n 143).

¹⁹⁵ For a discussion, see A. Brown, "Application of the Directives to Contracts with Not-For-Profit Organisations and Transparency under the EC Treaty: a note on Case C-119/06 *Commission v Italy*" (2008) 17 PPLR NA96.

¹⁹⁶ Case C-532/03 *Commission v Ireland* [2007] ECR I-11353 ("Ambulances"). See also A. Brown, "The Commission loses another action against Ireland owing to lack of evidence: a note on Case C-532/03 *Commission v Ireland*" (2008) 17 PPLR NA92.

While the obligation to ‘advertise’ was not clarified by the 2007 cases, the CJ did consistently require a demonstrable ‘cross-border interest’ to trigger any advertising requirements—providing slightly more guidance to national legislators and contracting authorities on what is required under the Treaty.

2.4.3.2 Other Cases on the General Principles outside of the Directives

The general principles have also been used to comment on equal treatment and transparency obligations outside of the specific context of advertising. Of particular interest is *APERMC*¹⁹⁷, wherein the CJ said the following in paragraph 77:

“Furthermore, it follows from Article 86(1) EC that the Member States must not maintain in force national legislation which permits the award of public service contracts without a call for tenders since such an award infringes Article 43 EC or 49 EC or the principles of equal treatment, non-discrimination and transparency (see, by analogy, *Parking Brixen*, paragraph 52, ...).”

This judgment has been interpreted in the Netherlands¹⁹⁸ as potentially meaning that legislation that permits the award of public contracts without advertising is *generally* contrary to the general principles of equal treatment and transparency. Legislation that establishes thresholds below which advertising obligations do not exist, for instance, would by that definition run contrary to the TFEU.

Other important cases on the general principles were decided in 2008. The first of these, *Commission v Italy*¹⁹⁹, explicitly stated that legislation is not *required* for contracts falling outside of the directives in order to comply with the general principles under the TFEU. This general

¹⁹⁷ C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* [2007] ECR I-12175, (“APERMC”), para. 77.

¹⁹⁸ Pijnacker Hordijk et al (n. 11), p. 172-173.

¹⁹⁹ C-412/04 *Commission v Italy* [2008] ECR I-00619. See also J. Knibbe, “*Commission v Italy* (Case C-412/04): classification of mixed works/services contracts, the treatment of below threshold contracts, and the rules on aggregation of works” (2008) 17 PPLR NA135.

conclusion has since been followed by CJ judgments that determine that generally applicable rules, intended to comply with the general principles of equal treatment and transparency, which do not consider individual circumstances of contracting authorities are actually *contrary* to the TFEU. A key example of such a case is *SECAP*²⁰⁰, wherein an Italian rule that banned all abnormally low tenders for contracts that fell below the directive's thresholds was deemed contrary to the TFEU because it did not consider that economies of scale in other Member States might produce lower offers than would be considered 'normal' in Italy.²⁰¹ Another example is *Serrantoni*²⁰², which follows the *Michaniki* judgment on mandatory exclusion rules (see section 2.4.2 above) and applies it to contracts falling outside of the directives, by saying that mandatory exclusion rules established in the view of safeguarding the equal treatment of all tenderers nonetheless have to be proportionate to their aim.

Finally, it is worth mentioning here the *Wall*²⁰³ case, which considered the general principle of transparency's role in the amendment of an existing service concession contract. The directives have explicit rules on the extent to which concluded contracts can be amended, recently clarified in the *presstext*²⁰⁴ case, which were not believed to apply to the TFEU. In *Wall*, the CJ effectively applied *presstext* to a non-directive procurement, using the general principle of transparency to justify that "substantial amendment to the essential provisions of a service concession contract" may in some cases necessitate the re-awarding of that contract. As Brown has said, it can be suggested that due to the CJ's use of the general principles, the rules in the directive and the TFEU are coming closer together.²⁰⁵

²⁰⁰ Joined Cases C-147/06 and C-148/06 *SECAP SpA and Santorso Soc. coop. arl v Comune di Torino* [2008] ECR I-03565. See also T. Kotsonis, "Italian law on the automatic exclusion of abnormally low tenders: *SECAP SpA v Comune di Torino* (C-147/06)" (2008) 17 PPLR NA268.

²⁰¹ *SECAP* effectively applies an explicit rule in the directive—that abnormally low tenders cannot be rejected outright—to the TFEU. [See A. Brown, "EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives" (2010) 18 PPLR 169, at 177.]

²⁰² Case C-376/08 *Serrantoni Srl and Consorzio stabile edili Srl v Comune di Milano*, judgment of 23 December 2009

²⁰³ Case C-91/08 *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH*, judgment of 13 April 2010. See also A. Brown, "Changing a sub-contractor under a public services concession: *Wall AG v Stadt Frankfurt am Main* (C-91/08)" (2010) 19 PPLR NA160.

²⁰⁴ Case C-454/06 *presstext Nachrichtenagentur GmbH v Republik Österreich and others* [2008] ECR I-04401

²⁰⁵ Brown 2010 (EU, n 201), p. 177.

2.4.3.3 The Commission's Interpretative Communication

The Commission has issued its own opinions on the obligation of transparency as well as the general principles of equal treatment and transparency, and has initiated proceedings against several Member States on the basis of its understanding.

In the *Interpretative Communication on Concessions*²⁰⁶, the Commission commented on *Telaustria* judgment and outlined what it believes is required under the 'general principles' of the Treaty. Where the *Telaustria* judgment does not refer to 'equal treatment', the Commission addressed it as both separate from and related to the principle of transparency in its communication.

The Commission's main determination in the *Interpretative Communication* is that procurement under the Treaty is subject to rules very similar to those stated in the directives: "choice of candidates must be made on the basis of objective criteria, ... the award procedure must be conducted in accordance with the procedural rules originally set, and ... the intention to grant a concession must be advertised."²⁰⁷

The Commission's approach in this first Communication has been heavily criticized as introducing undue administrative burdens on Member States for those contracts that were excluded (for whatever reason) from the (burdensome) directives.²⁰⁸ However, the Commission has not recanted its initial position.

It issued a second *Interpretative Communication* in 2006, this time addressing the law applicable to contracts not (or not fully) subject to the provisions of the directives.²⁰⁹ This Communication aims to offer 'guidance' to Member States on how to abide by the Treaty principles.²¹⁰ Unlike the 2000 Communication, the 2006 Communication does refer to a requirement for cross-border

²⁰⁶ Commission, [2000] OJ C121/2 (n 17).

²⁰⁷ M. Krugner, "The Principles of Equal Treatment and Transparency and the Commission *Interpretative Communication on Concessions*" (2003) 12 PPLR 181, at p. 181.

²⁰⁸ See Arrowsmith 2005 (n 25), p. 197-198, as well as A. Brown, "Seeing Through Transparency: the requirement to advertise public contracts and concessions under the EC Treaty" (2007) 16 PPLR 1 and Pijnacker Hordijk and Meulenbelt (n 178).

²⁰⁹ Commission, *Interpretative Communication on contracts outside of the Directives* (n 97).

²¹⁰ *Ibid*, Section 1.

interest before a violation of the transparency obligation can be found.²¹¹ It also indicates that how to determine and respond to cross-border interest is for individual contracting authorities to decide.²¹²

Generally, however, the Commission does not deviate from its earlier position. It requires *active* publicity in the form of advertising without exception, and while it suggests several possible placements for an advertisement (ranging from the authority's own website to the OJEU), it does not offer any suggestions on when a particular type of advertising is appropriate.²¹³

With regards to equal treatment, the Commission requires a non-discriminatory description of the contract's subject matter; equal access to the contract; mutual recognition of all relevant qualifications; appropriate time-limits; and a transparent and objective 'approach'. Limiting the number of potential candidates is permissible providing done in a transparent and non-discriminatory fashion.²¹⁴ If followed literally, this guidance would result in procedures very similar to those contained in the directives, albeit with more freedom for contracting authorities to determine issues such as time limits.

The legitimacy and potential importance of the Commission's guidance has increased recently, when a German challenge²¹⁵—supported by the Member States examined in this thesis—to the 2006 *Interpretative Communication* failed before the CJ. The Court determined that "the Communication does not contain new rules for the award of public contracts which go beyond the obligations under Community law as it currently stands" and consequently declared Germany's challenge as inadmissible, as the Communication did not produce binding legal effects. While a dismissal on technical grounds, the CJ's detailed considerations of all contested parts of the Communication and conclusion that they did not produce 'new law' can be read as implicit

²¹¹ Ibid, Section 1.3.

²¹² Ibid.

²¹³ Ibid, Section 2.1.

²¹⁴ Ibid, Section 2.2.

²¹⁵ *Germany v Commission* (n 98).

agreement with the Communication. In this light, it may be that this piece of soft law will have a significant impact on national regulation.²¹⁶

2.4.4 Conclusions

The CJ's case law on the general principles of equal treatment and transparency is a particularly dynamic area of EU procurement law. The above discussion highlights how the CJ has used the principles in a variety of situations, both for contracts covered by the directives and not covered by the directives, to add onto the explicit rules established by the EU legislator. It also demonstrates that despite significant amounts of case law, the specific obligations that stem from the jurisprudence are not always clear.

Uncertainty about specific obligations is especially prevalent in the *Telaustria* line of case law, which has been further complicated by strong suggestions that cross-border interest must be determined on a case-by-case basis. Such a rule would preclude setting a general threshold below which contracts do not have to be advertised. National governments are also faced with the Commission's perspective, which may be of significant influence given the number of infringement procedures the Commission has started in this area and the fact that the CJ considers its opinion to be purely reflective of existing law. Chapters 3-5 will thus assess in what form and to what extent the Member States examined in this thesis have responded to the CJ's jurisprudence on these principles.*

²¹⁶*Germany v Commission* was only decided in May 2010; any effects of the judgment have not revealed themselves prior to the submission of this thesis.

3. PUBLIC PROCUREMENT IN THE UNITED KINGDOM

3.1 The Development of UK Public Procurement Regulation

3.1.1 Introduction

This section will discuss the development of public procurement regulation in the United Kingdom from the 1970s onwards. It describes major developments and standard practice so as to provide an overview of UK policy and how it changed, especially as the EU directives were nationally implemented. Such an overview of procurement regulation in the UK is necessary to answer the thesis' primary question of whether or not recent developments at the EU level have altered the UK's approach to regulating procurement. A secondary purpose of the section is to provide a general background to the UK's procurement legal framework, which will assist understanding of following specific sections on competitive dialogue, framework agreements and the general principles in the UK.

3.1.2 UK Procurement Regulation in the 1970s and 1980s

In the United Kingdom, no formal laws dealing with public procurement existed in the 1970s for either central or local government.

The administration of procurement contracts was subject to the general private law on contract. In the event of disputes, the normal civil courts would adjudicate; no separate tribunal or 'administrative law' court has ever existed for public procurement in the United Kingdom.²¹⁷

There were very few specific rules on contract award; public law is a relatively underdeveloped area of UK law even today, and in the 1970s only a few specific 'government contract' rules

²¹⁷ C. Turpin, *Government Procurement and Contracts* (Longman: Guildford 1989), p. 84 and 101; this is still the case today, see Arrowsmith 2005 (n 25), p. 9.

existed, the foremost of which related to the requirements for Parliament to approve the budget prior to any contracts being signed.²¹⁸

More recently, additional rules affecting contract award have been established through the private law doctrine of the 'implied contract', developed in *Blackpool Aero Club*.²¹⁹ This case determined that if a contractor was excluded from being considered for a contract despite having submitted a tender on time, this would constitute a breach of an implied contract to have rightfully submitted tenders considered.

Moreover, providing that a 'public law' element to a contract award decision can be demonstrated, judicial review of public contracts award decisions can be applied for (see section 3.1.3.4). In the 1970s, however, both 'public' and 'private' law mostly proved tangential to public procurement practice, which was regulated almost exclusively by government-issued guidelines, as we will now see.

3.1.2.1 Central Government

Departmental guidelines formed the basis of central government public procurement regulation for many years, up to and including 1991. Rather than implementing the original 1971 Works Directive and the 1977 Supplies Directive in law, the government issued "administrative circulars instructing procuring entities to comply" with these new European rules.²²⁰ The Commission (in its 1984 report on the procurement directives²²¹) objected to this, as it expected Member States to implement the directives in such a way so as to create legally binding obligations (see section 2.1.4).²²² Administrative circulars of the kind produced in the United Kingdom were not enforceable by contractors and were thus not a proper method of 'implementation'; moreover, the use of circulars is likely to have undermined the effectiveness of the EU rules.

²¹⁸ Turpin, *ibid*, p. 91, describing the formal procedures that resulted in budgetary approval; Turpin further discusses other elements specific to government contracts, relating to the special nature of the Crown and the inability of Crown agents to fetter their statutory responsibilities, at p. 85.

²¹⁹ *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 2 All ER 25; [1990] 1 WLR 1195

²²⁰ Arrowsmith 2006 (Implementation, n 11), p. 89-90.

²²¹ COM(1984)747 (n 63).

²²² I. Harden, "Defining the Range of Application of the Public Sector Directives in the United Kingdom" (1992) 5 PPLR 362, p. 362.

Even after this substantial criticism was raised at the EU level in 1984, the UK continued to rely on non-binding guidance as its main regulatory instrument in the field of public procurement until 1991, when the first national regulations were adopted. As late as 1987, the directives were only alluded to within national guidance: “the present guidelines should at all times be read in the light of the UK’s international obligations, with which they are intended to be fully consistent”.²²³ The 1987 consolidated [procurement] guidelines issued to government departments indicated how the 1988 EU directives would be implemented: “arrangements will be made to ensure that those contracting authorities which are affected know of the new requirements”.²²⁴ Formal implementation did not seem to be scheduled at any time.

Lack of implementation, however, did not result in total non-applicability of EU law in the 1970s and 1980s. All EU directives have direct effect when their provisions are specific and clear enough, and domestic case law at the time reflected that this was recognized in the UK; specifically, in 1983, the Court of Appeal ruled on *Burroughs Machines Ltd v Oxford Regional Health Authority*²²⁵, which dealt with the question as to whether or not a damages remedy would be considered an adequate remedy under EU rules as well as domestic rules. There is therefore some indication that the directives played a role in the UK legal system despite not being implemented.

The UK’s non-legislative approach to central government procurement regulation up to the 1990s may suggest to readers from a more legislation-based jurisdiction that procurement regulation was underdeveloped in the United Kingdom. The lack of hard law, however, is not an indication of a lack of regulation: “over many years a substantial body of principles and recommended practices has evolved, under Treasury guidance—now including that of the Central Unit on Purchasing—for the conduct of procurement and contracting”²²⁶. The term ‘guidance’ is misleading, as the guidance resulted in policy for the most part—meaning that the

²²³ Consolidated Guidelines, published as Appendix C to R.B. Brown et al, *Government purchasing : a multi-department review of government contract and procurement procedures ; report to the Prime Minister* (HMSO: London 1984).

²²⁴ Ibid.

²²⁵ *Burroughs Machines Ltd v Oxford Regional Health Authority* [1983] ECC 434

²²⁶ Turpin (n 217), p. 64.

guidance contained practices that were made mandatory for procurement officials by the departments for which they procured. Although not outwardly enforceable, the guidance meant that internal standards were consistently applied.²²⁷

One of the main policy objectives in the 1980s was to increase competition in procurement, in order to achieve better value for money as well as provide a stimulus to industry. From 1981 onwards, competition was officially encouraged in all procurement practice; this included opening up national procurement to foreign suppliers so as to maximize competition.²²⁸ Competition officially became a Treasury focus in 1984 after departments proved to be somewhat slow in prioritizing competition over maintaining close contacts with national suppliers.²²⁹ In the 1980s, more generally, in-house procurement was determined to be ineffective from a value for money perspective and the untying of government procurement became official policy.²³⁰ This led to a situation whereby, even with the EU directives not being implemented through legally binding provisions, similar—competitive—methods of procurement were required in practice.

3.1.2.2 Local Government

The preceding discussion relates to the acts of central government departments; regulation of local government procurement has always been separate. Where prior to the implementation of European regulatory measures on a national level, central government procurement regulation relied almost exclusively on guidance, law did have play a role in the procurement regulation of local government: Section 135 of the Local Government Act 1972 stipulates that “standing orders providing for competitive procedures” have to be made available by local government purchasers for the sake of obtaining value for money. Revised rules on locus standi for judicial review post-1976²³¹ have meant that these standing orders are likely to be enforceable by tenderers.²³²

²²⁷ Ibid.

²²⁸ Ibid, p. 69-71.

²²⁹ Ibid.

²³⁰ This policy has gone on existing.

²³¹ See also *R v Hereford Corporation ex p Harrower* [1970] 1 WLR 1424, dealing with procurement standing orders and the issue of standing.

This one provision was supplemented with additional regulation in the Local Government Planning and Land Act 1980, which introduced a compulsory obligation to contract out to local government in the fields of construction and property purchasing. This programme became known as "Compulsive Competitive Tendering" (CCT).

The Local Government Act 1988 extended the CCT regime to other local government purchases, as part of an effort to ensure that "local and other public authorities undertake certain activities only if they can do so competitively".²³³ The LGA 1988 obliged local authorities to contract out (as supposed to award in-house) whenever this was more economically advantageous.²³⁴ However, it applied only to local government and only applied if one of the tenders submitted was an in-house one; CCT thus did not result in competitive procurement where there was no in-house provision to begin with.

3.1.2.3 Early Regulation: Conclusions

The preceding discussion shows that the arrival of formal regulations in 1991 would change procurement regulation in the UK. As opposed to the 'guidelines', the regulations that implemented the 1993 consolidated directives into UK law were both uniformly applied *and* legally enforceable. 1991 thus marked the start of a new era of public procurement regulation in the UK.

²³² However, Section 135 specifies that non-adherence to the standing order cannot invalidate a contract: "A person entering into a contract with a local authority does not have to inquire whether the standing orders of the authority which apply to the contract have been complied with."

²³³ LGA 1988, preamble.

²³⁴ For elaboration, see S. Arrowsmith, "Developments in Compulsive Competitive Tendering" (1994) 4 PPLR CS153-172.

3.1.3 1991 and Onwards

3.1.3.1 Implementation of the EU Rules

The most notable changes after 1991 were in the legal source, rather than the practice, of the UK public procurement regulation. In order to comply with the obligation to implement the directives in law, the UK issued formal procurement regulations which contained the substantive content of the EU rules. The UK did not, however, implement the 1989 Remedies Directive as a separate instrument; rather, specific provisions in the Works, Supplies and (later) Services Regulations implemented the requirements of the Remedies Directive.

The 1991 regulations (and all those following) were made under powers conferred by Parliament in section 2(2) of the European Communities Act 1972 as amended, which provides that "any designated Minister or department may by regulations make provision ... for the purpose of implementing any Community obligation of the United Kingdom." The designated Ministry in the case of public procurement was the Treasury.

The implementation method chosen was to 'copy out' the provisions in the directive into a national law. However, the attempt at verbatim transposition nonetheless resulted in a few errors; for instance, the UK regulations (The Public Supplies Contract Regulations²³⁵ and the Public Works Contracts Regulations²³⁶) failed to copy out that the negotiated procedure would be available in cases of urgency *only* when said urgency was not attributable to the governing authority.²³⁷

The UK implementation also elaborated in a minor way on the explicit requirements of the directive: the regulations specified what contracting authorities within the UK would be covered by the directives, both by listing examples within the regulation and by providing detailed annexes indicating what these bodies were.

²³⁵ SI 1991/2679.

²³⁶ SI 1991/2680.

²³⁷ N. O'Loan, "Implementation of the works, supplies and compliance Directives" (1992) 2 PPLR 88, p. 89.

From 1991 onwards, the UK has implemented all European directives in the field of public procurement in law, using the same mechanism for implementation and following the same pattern in implementing: an almost literal translation of the directives. Chronologically, the UK implemented the Utilities Directive and its corresponding Remedies Directive in 1992 (with an entry into force in 1993)²³⁸. In 1993, the Public Services Contracts Regulations²³⁹ implemented the 1992 Services Directive, again in similar style to the preceding Works and Supply Regulations. The 1993 Supplies Directive was implemented as an entirely new instrument, repealing the previously existing Public Supply Contracts Regulations and introducing the Public Supply Contracts Regulations 1995²⁴⁰. Similar revision was not conducted in light of the 1993 Works Directive, which simply led to amendments of the 1991 Works Regulations where needed. This can be explained by the fact that the Supplies Directive was amended more substantially than the Works Directive in consolidation, and one of the aims of consolidation was to bring the Supplies Directive in line with the Works and Services Directives. Lastly, the Utilities Contracts Regulations 1996²⁴¹ implemented the amended Utilities Directive (93/38/EC) and Utilities Remedies Directive (92/13/EC).

The above summary is very succinct for a reason: the UK has maintained a very minimalist approach to implementing EU-level legislation nationally. Government policy throughout the 1990s was to implement what was strictly necessary but to allow for as much discretion in purchasing practice as possible; this is illustrated by the fact that none of the aforementioned regulations contain any restrictions on procedures that a contracting authority may use. Guidance remained of crucial importance—one could argue that its importance actually increased in light of the implemented EU obligations, as these had to be clarified to purchasing departments.

²³⁸ Utilities Supply and Works Contracts 1992 (SI 1992/3279)

²³⁹ SI 1993/3228

²⁴⁰ SI 1995/201.

²⁴¹ SI 1996/2911.

To truly understand what UK public procurement policy was like in the 1990s, it is insufficient to examine the UK's implementation of the directives; other developments are much more illustrative of the UK approach to public procurement in the 1990s. These will be discussed next.

3.1.3.2 Local Government Procurement Policy in the 1990s

Local government procurement policy developed significantly in the years following 1991. As noted in section 3.1.2.2 above, CCT became mandatory in the 1980s when it was discovered that local government proved less willing to sacrifice close relationships with potential contractors in their regions for the sake of competition.²⁴² CCT persisted well into the 1990s: a new Local Government Act in 1992 extended CCT to the procurement of professional services.²⁴³ It bears reminding, however, that CCT was only ever applicable to tendering procedures involving an in-house bid and its overall effects were limited.

By the 1990s, significant criticism was levelled against not so much the purpose of the CCT regime, but its ineffectively rigid setup.²⁴⁴ Government reviews in the late 1990s thus led to change to the regime. In 1997, the Department of Transport, Environment and the Regions issued a Green Paper entitled *Modernising Local Government—Improving Local Services through Best Value*²⁴⁵, which accepted that the CCT regime had become too inflexible to be upheld, particularly as local government purchasers had demonstrated that they had come to realize what the benefits were to procuring competitively.²⁴⁶ The Local Government Act 1999 officially led to the abandonment of CCT and introduced the concept of “Best Value”, which imposed a more general duty to procure in a cost-effective way as well as an obligation on local authorities to establish performance plans on how to achieve ‘best value’.²⁴⁷ A 2006 review of the Best Value regime led to an even less onerous regime; the Local Government and Public Involvement in

²⁴² See Arrowsmith 1994 (Developments, n 234), at CS153, and the sources cited there at n.1.

²⁴³ Local Government Act 1992, s. 8.

²⁴⁴ See P. Badcoe, “Best Value—an overview of the United Kingdom’s Government Policy for the Provision and Procurement of Local Authority Services” (2001) 10 PPLR 63; see also S. Cirell and J. Bennett, “Best Value: Law and Practice” (Sweet & Maxwell, looseleaf), Ch. B2.

²⁴⁵ Department of Transport, Environment and the Regions, Green Paper, *Modernising Local Government—Improving Local Services through Best Value* (March 1998); see also Arrowsmith 2005 (n 25), p. 15.

²⁴⁶ Arrowsmith, *ibid.*

²⁴⁷ See section 3(1) of the LGA 1999.

Health Act 2007 scrapped most rules on 'performance plans', instead encouraging best practice through guidance.²⁴⁸

3.1.3.3 Central Government Procurement: Changes in the 1990s

The late 1990s also saw a reshaping of public procurement policy in general; the Labour government in 1997 implemented many changes to public procurement regulation in order to make it more efficient than it had been under the previous Conservative government. The Treasury remains to this date the body ultimately responsible for public procurement policy, but the various bodies that were responsible for providing either policy or purchasing for the entire government that had existed in the 1970s (such as Her Majesty's Stationary Office) were abolished.

In 1999, the Office of Government Commerce (OGC) was established; it held final responsibility for public procurement strategy, published all government guidelines for central government departments other than the Ministry of Defence, and trained procurement officers across the government.²⁴⁹ Further, a separate agency called Buying Solutions was established within the OGC to provide advice to the public sector and to coordinate framework agreements for procuring entities to use—thus assuming a similar role to the specific product-based agencies that existed in the Westminster government in the 1970s and 1980s.²⁵⁰ The role of the OGC will be discussed in more detail in section 3.1.4.2.

The 1990s also saw the development of the Private Finance Initiative (PFI). In PFI procurement, the risk of funding major infrastructure projects is transferred to the private sector, which becomes responsible for both the construction of the work in question and the operating of it over time.²⁵¹ There are several different schemes of funding available under the PFI, which aim

²⁴⁸ Though there are legal obligations; see LGA 1999 section 3(1). The current guidance from the Department of Communities on Best Value can be found here: <http://www.communities.gov.uk/publications/localgovernment/strongsafeprospereous> (last accessed on 1 November 2010.)

²⁴⁹ Arrowsmith 2005 (n 25), p. 10-11.

²⁵⁰ Ibid, p. 12.

²⁵¹ Ibid, p. 26 onwards.

to suit the specific needs for major works and services projects (such as hospitals, prisons, and extensive road works).

The PFI was launched officially in 1992, though by then the strategy for procurement envisaged by the PFI was already being engaged in by government departments. The regime again underwent significant changes with the arrival of the Labour government in 1997, which was supportive of the concept of PFI but aimed to improve it following an official review.²⁵² As a result, a special body within the Treasury was established to provide general as well as project-specific advice regarding PFI projects. This Treasury Taskforce was incorporated into the OGC in 1999 and continued being the lead policy maker in the field of PFI. The Taskforce has published several PFI-specific guidelines, such as operational guidelines relating to PFI procedures (including how to apply the directives) and standardized contract terms for many of the more common types of PFI projects.²⁵³

3.1.3.4 Other Laws Affecting Public Procurement: An Overview

Several other laws have also impacted on public procurement policy in the United Kingdom.²⁵⁴ The first worth mentioning is the Deregulation and Contracting Out Act 1994, which (in brief) deals with the legal consequences of contracting out of certain government services that used to be provided in-house. The Act aims to guarantee certain rights for citizens in the event that a government service is contracted out to a general public body; this means both that where the citizen would have the right to pursue judicial review against a government body in a given instance, it retains it with respect to this public body, *and* that where the public body commits

²⁵² This review is known as the "First Bates Report" and is unpublished; for more discussion, see *ibid*, p. 28.

²⁵³ See Operational Taskforce, Guidance Notes and *Standardisation of PFI contracts (SoPC)* at http://www.hm-treasury.gov.uk/ppp_index.htm (last accessed on 1 November 2010)

²⁵⁴ An example of a law with limited consequences for procurement is the Human Rights Act 1998, which states that it is unlawful for any public authority to act contrary to the rights listed in the European Convention on Human Rights (ECHR). The right not to be discriminated against in the Convention, however, cannot be relied upon by individuals on its own, meaning that a violation of a secondary provision (ie Art 9, freedom of religion) would have to be violated for the HRA 1998 to apply. For our purposes, tenderers are unlikely to be discriminated against grounds such as religious belief; if they were, however, this would also be caught by the EU procurement directives as discrimination on the ground of religious beliefs could only materialise if qualification criteria not permitted by the directives were used.

negligence towards a person this will be perceived as negligence on the part of the government.²⁵⁵

Public procurement is also potentially affected by the Freedom of Information Act 2000. The FOI requires that public authorities must pass information to any party requesting it within 20 days of the request or upon payment of the appropriate fee, where required. This is particularly relevant to those tenderers who have failed to win a given contract; noteworthy is that the FOI requires for far more extensive information to be made available than the EU rules do.²⁵⁶ Moreover, the FOI applies to all government contracts, including those not covered by the EU directives or the regulations for either exclusion or threshold reasons.²⁵⁷ Further, the FOI also applies to generally interested parties who are not tenderers—meaning its scope is significantly wider than that of the EU requirements to disclose award information.²⁵⁸ Guidance on the application of this law to public procurement practice has been issued by the OGC²⁵⁹ as well as by the Ministry of Defence.²⁶⁰

Lastly, the UK courts have developed several common law principles to help control the exercise of administrative power, commonly known as ‘judicial review’.²⁶¹ While judicial review can in principle apply to procurement contracts (as they are a form of administrative decision), the courts have been reluctant to acknowledge that there is a special element of “public law” to these contractual decisions—thus taking them outside of the scope of judicial review.²⁶² A few cases, however, have been admitted for review, without a clear assessment of this “public law” element;

²⁵⁵ Arrowsmith 2005 (n 25), section 2.48.

²⁵⁶ Ibid, p. 99.

²⁵⁷ Ibid.

²⁵⁸ Ibid; this can include interested citizens and pressure groups hoping to gain information about the government procurement process.

²⁵⁹ OGC, “FOI and Civil Procurement: Policy and Guidance” (November 2008, available at http://www.ogc.gov.uk/documents/OGC_FOI_and_Civil_Procurement_guidance.pdf; last accessed on 1 November 2010)

²⁶⁰ Where applicable to defence procurement. Arrowsmith 2005 (n 25), p. 98, mentions original guidance entitled “Freedom of Information Awareness”; this has since been replaced by a document in the MOD Commercial Toolkit entitled “Freedom of Information” (September 2010, available at http://www.aof.mod.uk/aofcontent/tactical/toolkit/downloadsindexed/fofi/full_fofi.pdf; last accessed 1 November 2010).

²⁶¹ It is beyond the scope of this thesis to discuss judicial review in detail, largely due to its limited application to procurement law; for more detail see P. Craig, *Administrative Law* (6th ed), (Sweet & Maxwell: London 2008), and S. Bailey, “Judicial review of contracting decisions” (2007) (Autumn) Public Law 444

²⁶² For a discussion, see Arrowsmith 2005 (n 25), at p. 81-84.

meaning that the law on judicial review of procurement decisions is both inconsistent and unclear.²⁶³

Since the 1990s, there has thus been a tremendous increase in the amount of 'law' dealing with public procurement in the UK. However, the preceding summary may suggest that law has largely superseded the role of guidance in the UK, and this is a misrepresentation. The OGC has been extremely active and has offered extensive guidance, especially regarding the developments that will be assessed as part of this thesis. The most recent and relevant contributions will be outlined in section 3.1.4.2.

3.1.4 2006 Onwards

3.1.4.1 Legislation

The UK implemented the 2004 directives²⁶⁴ by repealing all pre-existing public procurement legislation and condensing the new regime—in similar fashion to the EU itself—to just two sets of regulations: the Public Contracts Regulations 2006²⁶⁵ and the Utilities Contracts Regulations 2006²⁶⁶.

As with all preceding regulations, the new regulations in large parts follow the EU directives to the letter, and the availability of procedures in the directives is not restricted in national law in any way.

²⁶³ See, for instance, *R. v Leiwsham London BC Ex p Shell UK* [1988] 1 All ER 938, DC and *R v Enfield London BC Ex p Unwin* [1989] C.O.D. 466, DC, both discussed in Arrowsmith 2005 (n 23) at p. 80.

²⁶⁴ See M. Trybus and T. Medina, "Unfinished business: the state of implementation of the new EC Public Procurement Directives in the Member States on February 1, 2007" (2007) 18 PPLR NA 89. For a discussion on the implementation of the new directives in the UK, see Arrowsmith 2006 (Implementation, n 11).

²⁶⁵ Public Contracts Regulations 2006, SI 2006/5, recently amended by The Public Contracts (Amendment) Regulations 2009, SI 2009/2992, which implements the 2007 Remedies Directive.

²⁶⁶ Utilities Contracts Regulations 2006, SI 2006/6, recently amended by The Utilities Contracts (Amendment) Regulations 2009, SI 2009/3100, which implements the 2007 Remedies Directive.

3.1.4.2 Guidance

The OGC has been active since its creation, and has offered significant amounts of guidance to public authorities. The guidance ranges from quite general—OGC, *EU procurement guidance: Introduction to the EU procurement rules*²⁶⁷—to very specific guidance that only covers certain types of contracts or procedures. For the current thesis, the most relevant recent guidance documents are²⁶⁸:

- *Framework Agreements: OGC Guidance on Framework Agreements in the new Procurement Regulations (issued in 2006, revised in 2008)*
- *Competitive Dialogue Procedure: OGC Guidance on the Competitive Dialogue in the new Procurement Regulations (issued in 2006)*
- *Competitive Dialogue Procedure: OGC/HMT 2008 guidance on competitive dialogue*

The importance of the guidance should be stressed again at this point: “in the UK [the] function of clarification [of EU law] is performed largely through the guidelines, rather than the legislation itself, and thus it is an important supplement to the legislation.”²⁶⁹ The importance of guidance is heightened in the UK by the fact that it sees very limited case law on procurement; in jurisdictions such as France, where case law is frequent (see section 5.1.8), contracting authorities obtain significant legal clarification through jurisprudence and guidance may thus play a smaller role.

Other guidance issued by the OGC has reflected on UK government policy; its “Best Practice” guidance page indicates that recent government focus was on SME procurement, sustainability and green purchasing, social issues and innovation.²⁷⁰ The OGC also has issued regular “Procurement Policy Notes” (PPNs) that update on new legal developments, such as CJ jurisprudence or changes to the UK legislation.

²⁶⁷ Available at [http://www.ogc.gov.uk/documents/Introduction to the EU rules.pdf](http://www.ogc.gov.uk/documents/Introduction%20to%20the%20EU%20rules.pdf) (last accessed 1 November 2010)

²⁶⁸ All OGC-issued guidance up to June 2010 can be found here: http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_guidance_on_the_UK_regulations.asp (last accessed 1 November 2010).

²⁶⁹ Arrowsmith 2006 (Implementation, n 11), p. 89.

²⁷⁰ See http://www.ogc.gov.uk/procurement_documents_best_practice_guidance.asp, (last accessed 1 November 2010).

Several recent changes have taken place in the summer of 2010 that should be noted here.

Firstly, in June 2010, the OGC and Buying Solutions became part of the Cabinet Office's Efficiency and Reform Group (ERG), which was established to generate savings by centralizing government procurement.²⁷¹ The most recent guidance published on central government procurement has been in the name of the ERG (OGC) on the OGC website.²⁷²

Secondly, the 2010 Conservative/Liberal Democrat government has indicated that the guidance published by the OGC prior to June 2010 may not reflect their policy.²⁷³ The fact that the guidance *may* be revised in the future, however, will not affect the analysis in forthcoming sections, which considers all guidance published prior to 2010 as being indicative of UK government policy *at the time*.

3.1.4.3 Jurisprudence

Historically, there has been very little jurisprudence on procurement in the UK, but since the mid-2000s, a steady flow of approximately ten to fifteen procurement-related cases per year has been decided by the UK courts.

Most of these cases have focused on the incorrect application of award criteria and related technical matters; however, as discussed in section 3.1.2, the UK courts have also developed the doctrine of the so-called 'implied contracts'.²⁷⁴ The principle was first developed in *Blackpool Aero Club*; since this first case, there have been several cases that have indicated which procuring entities the doctrine applies to²⁷⁵, what other contractual obligations arise from the implied

²⁷¹ See http://www.cabinetoffice.gov.uk/newsroom/news_releases/2010/100615-shakeup.aspx (last accessed on 1 November 2010)

²⁷² See http://www.ogc.gov.uk/policy_and_standards_framework_transparency.asp (last accessed on 1 November 2010)

²⁷³ See <http://www.ogc.gov.uk> (last accessed 1 November 2010).

²⁷⁴ See Arrowsmith 2005 (n 25), p. 107-113; S. Arrowsmith, "Protecting the Interests of Bidders on Public Contracts: the Role of the Common Law" (1994) 53 Cambridge Law Journal 104

²⁷⁵ See *Deane Public Works Ltd v Northern Ireland Water Ltd* [2009] NICH 8, where a state-owned utility's purchasing procedure was submitted to the doctrine.

contract doctrine²⁷⁶, and what remedies are available if an implied contract is breached.²⁷⁷ The significance of *Blackpool* has diminished with the increasing influence of the general principle of transparency at the EU level, however—where contracts are covered by the directives, the transparency rules in the directive mandate that tenders are considered when submitted according to the directives' rules.²⁷⁸

It may be observed that in some of the areas discussed in detail in this thesis—such as framework agreements—the UK courts have issued significant judgments; this, however, must be contextualized by stating that the UK still only sees a fraction of the amount of case law in procurement that France (several hundred cases) and the Netherlands (close to a hundred) see on a yearly basis.

3.1.5 Conclusions

To summarize the findings of this chapter, several general observations about the UK approach to implementing EU regulations and regulating procurement can be made at this time:

- 1) The UK has consistently adopted a minimalist approach to implementation of EU directives, implementing them as broadly as possible, so as to leave as much freedom as possible to procuring entities.
- 2) Guidance has always been important in the UK and in large part not only supplements, but *creates* the national procurement policy. Guidance has ranged from being the only existing form of regulation to being consistently issued to make other existing regulation clearer to procuring entities.
- 3) The ordinary law of contract does apply to public procurement. Public procurement contracts are perceived to be *private* contracts for all intents and purposes, and the

²⁷⁶ Interesting cases are *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83 (from New Zealand); *Fairclough Building Ltd v Port Talbot Borough Council* [1991] 62 BLR 82 and *Scott v Belfast Education and Library Board* (High Court of Northern Ireland; judgment of 15 June 2007).

²⁷⁷ See *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons* (No.1) 67 Con. L.R. 1; (2000) 2 L.G.L.R. 372, where it was considered that the EU Directive's usual remedies apply.

²⁷⁸ It is simultaneously very unlikely that in the UK, contracts not subjected to the Directives are subject to precise and advertised tendering procedures, at which point no implied contract would come into existence.

applicability of public law principles to public procurement proceedings has been very limited at most.

- 4) Other legislation, such as the FOI 2000, as well as common law principles of judicial review also affect public procurement. There is thus a greater role for hard law in procurement now than there was in the 1970s, leaving aside EU obligations to implement the directives.
- 5) There is a great discrepancy between the regulation aimed at central government—which is still primarily guidance, though government departments have to follow the regulations where appropriate—and at local government—which has been regulated through legislative obligations since at least the early 1980s. Both regimes however still leave significant freedom for contracting authorities to determine their own policy, thus enhancing again the role of guidance.

3.2 Competitive Dialogue in the UK

3.2.1 Introduction

This section will discuss the UK's approach to the implementation of competitive dialogue. It will first examine legislative steps taken, if any, and will then evaluate any jurisprudence or guidance issued since 2006.

3.2.2 Legislation

It is first necessary to recall here that the UK used the negotiated procedure with a notice in order to procure complex contracts prior to the introduction of competitive dialogue; this use was criticized by the Commission and, eventually, led to the introduction of a separate procedure for these types of procurement contracts (see section 2.2.2). While there was thus no procedure in UK legislation that resembled competitive dialogue prior to 2006, a procedure quite similar to competitive dialogue was being used in practice.

In 2006, however, the UK legislator opted to implement the EU's competitive dialogue procedure. As noted in section 3.1.4, the Public Contracts Regulations 2006 preserve the full scope and number of optional procedures available in the directives.²⁷⁹ This means that not only is competitive dialogue available, but its use is also not restricted in the Regulations. In contrast with France (section 5.2.3) and the Netherlands (section 4.2.3), there are (as is the UK legislative tradition) no provisions whatsoever either permitting or forbidding the use of the procedure for contracts not covered by the directives.

In general, a few minor changes to the directive have been made in the UK's transposition. Unlike in the directive, a single regulation (Regulation 18) contains *all* the relevant provisions regarding the competitive dialogue procedure. Otherwise, however, the regulations themselves do not address any of the ambiguities found in the directive's provisions. Any clarifications or

²⁷⁹ Arrowsmith, 2006 (Implementation, n 11), p. 91.

conditions of use for the procedure—where available—are likely to be found in case law or in guidance offered by the OGC.

3.2.3 Jurisprudence

At the time of writing, no case law dealing specifically with the competitive dialogue procedure has emerged from the UK courts.²⁸⁰ Since, as explained in section 3.1.4.3, the UK has not traditionally seen a lot of public procurement jurisprudence, this is unsurprising.

3.2.4 Guidance

As discussed in section 3.1.4.2, the Office for Government Commerce (OGC) has developed and advised on central government procurement policy as well as the requirements of EU procurement law. Since January 2006 it has published several pieces of guidance specifically devoted to the competitive dialogue procedure.²⁸¹ The most recent guidance, published in June 2008, was written in partnership with the Treasury and offers input on some of the more contentious elements of the competitive dialogue procedure. This guidance is in part based on practical experience with the procedure to date.²⁸²

The OGC also acknowledges on its website that other, more specialist bodies have issued guidance to specific parts of the public sector.²⁸³ The Department of Health, for instance, held a consultation in October 2006 with a view to produce a guidance document specifically for NHS PFI procurement; as of yet, however, this guidance is not yet publicly available.²⁸⁴ On the other hand, Partnership for Schools, the organization at the head of a central government initiative to

²⁸⁰ In June 2010, a strike out application relating to a dispute about a competitive dialogue procurement was decided; however, the judge presiding did not comment on the merits of the case. [See *Montpellier Estates Ltd v Leeds City Council* [2010] EWHC 1543.]

²⁸¹ See http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_specific_application_issues.asp, last accessed 1 November 2010.

²⁸² OGC and HM Treasury, "Competitive Dialogue in 2008" (June 2008) (see http://www.ogc.gov.uk/documents/OGC_HMT_2008_Guidance_on_Competitive_Dialogue.pdf, last accessed 1 November 2010).

²⁸³ See (n 281).

²⁸⁴ See

http://www.dh.gov.uk/en/Aboutus/Procurementandproposals/Publicprivatepartnership/Privatefinanceinitiative/InvestmentGuidanceRouteMap/DH_4133181, last accessed 1 November 2010.

rebuild or remodel secondary schools in the United Kingdom, has issued guidance on competitive dialogue where used for its *Building Schools for the Future*²⁸⁵ (BSF) PFI projects in 2006.²⁸⁶

Another organisation that has issued guidance on competitive dialogue is *4ps* (now absorbed into *Local Partnerships*, a joint venture between the Local Government Association (LGA) (a local government lobby organisation) and Partnerships UK (a PPP formed out of HM Treasury)). *4ps* works in partnerships with all UK local authorities, helping them set up and run PFI schemes, public-private partnerships, and other complex contracts. *4ps* has thus issued guidance aimed at local authorities, but the guidance is general enough to be of assistance to central government departments as well.

The following sections will assess these listed guidance pieces in light of the EU law on competitive dialogue discussed in section 2.2.

3.2.4.1 Availability: Relationship to Negotiated Procedure

As the 2006 regulations do not pose any restrictions on the use and availability of the competitive dialogue procedure (beyond those restrictions found in the directive), guidance in the UK serves the important function of steering contracting authorities in a particular direction without actually legally binding them.²⁸⁷

OGC guidance issued in 2006²⁸⁸ and 2008²⁸⁹ suggests that even though this is not stated in the legislation, the negotiated procedure with a notice should *no longer* generally be used for PFI (or

²⁸⁵ See <http://www.partnershipsforschools.org.uk/about/aboutbsf.jsp> (last accessed 1 November 2010); the BSF programme has been scrapped by the new UK government (see <http://www.education.gov.uk/aboutdfe/spendingreview/a0065470/2010/012>, last accessed 1 November 2010).

²⁸⁶ See <http://www.partnershipsforschools.org.uk/about/aboutus.jsp> (last accessed 1 November 2010); the future of Partnership for Schools is unclear at this time, as current government initiatives are reconsidering its remit. (See <http://www.building.co.uk/sectors/education/analysis/the-quangos-and-spending-cuts-which-ones-survived/5007796.article>, last accessed 1 November 2010).

²⁸⁷ This has been observed to be particularly true with regards to guidance that encourages or permits desired procurement practice; see P. Braun, "The practical impact of E.U. Public Procurement Law on PFI/PPP Projects in the United Kingdom", Dissertation 2001, University of Nottingham, School of Law, 2001 (see http://www.nottingham.ac.uk/pprg/documents/phdtheses/phd_peter_braun.pdf, last accessed 1 November 2010).

²⁸⁸ OGC, "Competitive Dialogue Procedure: OGC guidance on the Competitive Dialogue Procedure in the new Procurement Regulations" (January 2006) (see http://www.ogc.gov.uk/documents/guide_competitive_dialogue.pdf, last accessed 1 November 2010).

²⁸⁹ OGC 2008 (Competitive Dialogue, n 282).

other, equally complex) contracts. Both guidance pieces state that “[the Commission expects that] the negotiated procedure should only be used in very exceptional circumstances.”²⁹⁰ PFS, in a guidance note entitled “Guidance on classification of the contract and choice of procedure under the EU procurement rules for the Building Schools for the Future Programme”²⁹¹ concludes that “in ... light of the OGC Guidance, PFS is of the view that the competitive negotiated procedure is not available for *BSF* programmes and the competitive dialogue procedure should be used.”²⁹² *4ps* takes a different approach; its guidance²⁹³ first observes that “the use of the Negotiated Procedure is only available in exceptional circumstances... This issue, however, has less relevance following the introduction of the Competitive Dialogue process which is expected to be the procurement route used for the majority of local authority PFI and PPP schemes post January 2006.”²⁹⁴

The guidance examined thus perceives the introduction of competitive dialogue as restricting the availability of the negotiated procedure, offering one possible interpretation of an issue left unclear at the EU level.

3.2.4.2 Availability: Competitive Dialogue versus the Open/Restricted Procedure

The directive also leaves unclear when the competitive dialogue procedure can be used instead of the open and restricted procedures. As discussed in section 2.2.4, competitive dialogue is available for a ‘particularly complex contract’, where it is impossible to objectively define either ‘technical means’ capable of satisfying the contract needs or the ‘legal/financial make-up’ of the contract.²⁹⁵

²⁹⁰ OGC 2006 (Competitive Dialogue, n 288), p. 3. It then cites the London Underground PPP as an example of such an ‘exceptional’ procurement project.

²⁹¹ PFS, “Guidance on classification of the contract and choice of procedure under the EU procurement rules for the Building Schools for the Future Programme” (February 2006) (see http://www.partnershipsfor schools.org.uk/documents/BSF_Guidance_Documents/GuidanceNoteonClassificationofContract%26ChoiceofProcedureFebruary2006.doc, last accessed 1 November 2010).

²⁹² *Ibid*, para 19.

²⁹³ *4ps*, “The competitive dialogue process”, (April 2007) (see <http://procurementpacks.localpartnerships.org.uk/guidance.aspx?secid=9&ppid=1>, last accessed 1 November 2010).

²⁹⁴ *Ibid*, p. 6.

²⁹⁵ Article 1(11)(c) of the Directive; Regulation 18(1).

The 2006 OGC guidance does not address the definition of a ‘particularly complex contract’, but instead offers examples of what technical and legal/financial complexity may be.²⁹⁶ The 2008 OGC guidance, instead of reciting original examples, refers to the Commission’s *Explanatory Note*²⁹⁷ for guidance—citing as the Commission’s main relevant point that technical complexity encapsulates both inability to find *a* solution and inability to find *the best* solution—and further refers to PFS guidance²⁹⁸ for more particular examples of legal/financial complexity.

There, PFS first states that in its view, the ‘broader’ definition of a particularly complex contract should be adhered to so as to not contravene the “spirit of the legislation” and so as to permit market innovation wherever possible.²⁹⁹ Regarding “technical complexity”, it cites the 2006 OGC guidance and the Commission’s *Explanatory Note* and concludes that a contract is technically complex when this ‘best solution’ cannot be detailed by the contracting authority. In discussing financial and legal complexity, the PFS guidance again cites the 2006 OGC guidance and the *Explanatory Note* and from these sources extrapolates that *BSF* projects and other types of “design—build—finance—operate” (DBFO) projects are all to be considered financially and/or legally complex.³⁰⁰

The *4ps* guidance does not address the concept of particularly complex contracts, but merely indicates that the competitive dialogue procedure “is expected to be used for most local authority PFI and PPP projects post January 2006”.

To summarize, the PFS and OGC guidance conclude that competitive dialogue *ought to be* available in those cases where the ‘best possible’ solution to a need is not immediately clear, thus conforming to the broad interpretation also allowed for by the Commission’s *Explanatory Note* and generally supported by academics, as discussed in section 2.2.4. The guidance makes no effort to further *define* technical or legal/financial complexity, but at least offer—like Recital 31

²⁹⁶ OGC 2006 (Competitive Dialogue, n 288), p. 4.

²⁹⁷ *Explanatory Note on Competitive Dialogue* (n 105).

²⁹⁸ PFS 2006 (Guidance, n 291).

²⁹⁹ *Ibid*, para. 29-30.

³⁰⁰ *Ibid*, para. 36.

of the directive—some clear indications of what types of situations can be deemed ‘complex’ in light of those provisions.

3.2.4.3 Use: Successive Tendering & Elimination

As discussed in section 2.2.5, the directive and the regulations allow for successive stages of tendering to be used in order to eliminate some ‘solutions’ during the course of the dialogue phase, but does not explain how this ‘elimination’ should take place.

The OGC’s 2006 guidance only addresses the issue of successive tendering by stating that “on the basis of written proposals (these could be “outline solutions,” “project proposals” or “tenders,”) the number of solutions can be reduced by applying the award criteria in the contract notice or the descriptive document.”³⁰¹

The 2008 OGC guidance states that “the Contracting Authority can structure the dialogue into a number of different phases if this suits its purpose” and that “it may require bidders to provide submissions during ... the dialogue phase [and] it can evaluate these submissions using the pre-stated award criteria.”³⁰² The OGC thus in both instances seems to suggest documented or written tender rounds, as the Commission’s *Explanatory Note* does.

The PFS guidance on how to organize a competitive dialogue³⁰³ does not address the organization of successive tendering rounds.³⁰⁴

4ps offers perhaps the most conclusive solution to the problem of how to organize successive tendering. Its 38-page summary of the ‘competitive dialogue process’ details several steps in the ‘dialogue’ process that are not discussed at all by the legislation.³⁰⁵ This detailed process outline

³⁰¹ OGC 2006 (Competitive Dialogue, n 288), p. 5.

³⁰² OGC 2008 (Competitive Dialogue, n 282), p. 20.

³⁰³ PFS, “BSF Guidance Note on how to Conduct a Competitive Dialogue Procedure” (January 2006) (see http://www.partnershipsforschools.org.uk/documents/BSF_Guidance_Documents/zipped_appendices/Guidance_on_How_to_Conduct_a_Competitive_Dialogue_Procedure.doc, last accessed 1 November 2010).

³⁰⁴ Ibid, p. 8.

³⁰⁵ 4ps (n 293), p. 18.

recommends a semi-formal elimination strategy: from the start, bidders are asked to prepare written submissions, which are then discussed with contracting authorities, and—when appropriate—evaluated in line with award criteria.

Like the OGC's guidance, *4ps* thus adopts the Commission's perspective as well, but offers further advice by recommending a 'best practice' elimination strategy that contracting authorities can rely on.

3.2.4.4 Use: Number of Final Tender Participants

As discussed in section 2.2.5, the directive and the regulations are not clear on the number of participants required to participate in the final tendering phase, merely alluding to the existence of "genuine competition".

The 2006 OGC guidance does not address this point, but the 2008 guidance states that at the final tender stage, "there must be genuine competition ... which normally requires at least two bids from credible bidders."³⁰⁶ The PFS guidance similarly states with regard to successive tendering that "*at the end of the dialogue* [there must be] sufficient bidders to allow for a genuine competition (usually a minimum of 2)" (emphasis added).³⁰⁷ *4ps* is less explicit than the other two guidance issuers, but recommends starting the dialogue with 3 participants and recognizes that at the end of the 'detailed submission' phase, "one or more" of the bidders can be de-selected. This implies that they, too, foresee the possibility of entering into the final tendering stage of the competitive dialogue procedure with only two participants.

3.2.4.5 Use: Completeness of Final Offers

In section 2.2.5, it was highlighted that the directive and the regulations require 'final tenders' in the competitive dialogue procedure to contain "all elements required and necessary for the

³⁰⁶ OGC 2008 (Competitive Dialogue, n 282), p. 26.

³⁰⁷ PFS 2006 (BSF, n 303) p. 7.

performance” of the contract³⁰⁸, but nonetheless permit ‘clarification, specification and fine-tuning’ of these final tenders as long as this does not distort competition.³⁰⁹ It is thus largely unclear how ‘final’ a final tender has to be.

The 2006 OGC guidance generally states that “it is sensible for these [final] tenders to be as complete as possible” in light of the restrictions on further discussion.³¹⁰ On the subject of what is permitted under ‘clarifying, specifying and fine-tuning’, the 2006 guidance notes that small changes are possible “as long as fundamental aspects of the offer, such as price and risk allocation, are not altered”.³¹¹

The 2008 guidance more firmly states that “the final bid must be final and not subject to change or negotiation”.³¹² Regarding clarification, fine-tuning and specification, the OGC has taken a more reserved approach in 2008. First, it states that “the legal meaning and interpretation of these terms in the directive are ultimately matters for the courts to determine” and that the guidance will not attempt to define the terms themselves, as this could be “potentially misleading”.³¹³ It then proceeds to quote the Commission’s position on these terms, as derived from the *Explanatory Note*, by stating that the terms have to be interpreted ‘narrowly’ and any discussion taking place must not amount to negotiation on fundamental aspects of the contract or price. From this, the OGC concludes that it is therefore impossible to consider or allow for the amendment of non-compliant bids.

On the subject of finality of tenders more generally, the 2008 guidance offers some examples of minor issues that are unlikely to be resolved by the final tender stage. The examples it offers, which are all included on the basis that they are either unduly costly to prepare when award of the contract itself is not yet a certainty, or just not possible to prepare at this stage, are: ‘detailed

³⁰⁸ Article 29(6) of the Directive; Regulation 18(25).

³⁰⁹ Article 29(6) of the Directive; Regulation 18(26).

³¹⁰ OGC 2006 (Competitive Dialogue, n 288), p. 5.

³¹¹ *Ibid*, p. 6.

³¹² OGC 2008 (Competitive Dialogue, n 282), p. 26.

³¹³ *Ibid*, p. 28.

information on subcontractors', 'complete design detail', 'detailed planning applications', and 'the lender's financial swap rates'.³¹⁴

Generally, we can see that the 2008 guidance is more reserved than the 2006 guidance. Where in 2006, the OGC indicated that some change was possible under the provisions of Regulation 18(26), its 2008 guidance stresses that actual change should *not* occur as a result of clarification, specification or highlighting and that these provisions have to be interpreted as narrowly as possible. It is worth noting here that the OGC might not wish to offer guidance on issues not yet clarified at the EU level, presumably for fear of the Commission disagreeing with its interpretation and initiating proceedings before the CJ. This is not uncommon; it is worth noting at this point that a similar fear of misinterpreting the directives resulted in the Netherlands not copying their content out into national law for almost 30 years (see section 4.1.3).

The PFS guidance also stresses the importance of fully-developed final tenders, as under competitive dialogue "there is far less flexibility to leave matters open and/or negotiate with bidders once final tenders have been submitted" than there was under the negotiated procedure.³¹⁵ The guidance then considers what contracting authorities may be able to do under 'clarification, specification and fine-tuning', and notes that "there is scope to leave some matters of detail open for resolution after Final Tenders have been submitted", provided these do not change the basic features of the tender, distort competition, or have a discriminatory effect.³¹⁶

It notes again that the scope for amendment is more limited than that available in the negotiated procedure, but that "it should still be interpreted in the context of a procedure which has been specifically designed to deal with 'particularly complex projects' and which therefore demands a greater degree of flexibility than would be permitted, for example, under the open or restricted procedures."³¹⁷ After warning that the Commission is likely to interpret these terms very narrowly, the PFS guidance then offers some examples of scenarios covered by the ability to 'clarify, specify or fine-tune': clarifications to the standard contract conditions (clarification);

³¹⁴ Ibid, p. 29.

³¹⁵ PFS 2006 (BSF, n 303), p. 9.

³¹⁶ Ibid, p. 11.

³¹⁷ Ibid.

“minor improvements to Final Tenders” (fine-tuning); inconsistencies or errors in the tender (clarification or fine-tuning); provision of additional information/detail (specification or fine-tuning); responses to changes in the specifications by the contracting authority (fine-tuning).³¹⁸

The PFS guidance further provides the following examples of ‘details that can be left open’: design development; detailed site surveys; investigation of legal title; lenders and due diligence; detailed planning application; performance mechanism; finance; and the lender’s financial swap rates.³¹⁹ It thus offers a number of additions to the examples that the OGC cited in 2008, and motivates these by saying that to include them in the tender prior to contract award would either be unduly costly or plainly impossible.

4ps does not specifically deal with the issues of how complete final tenders need to be and in what ways they can be amended, beyond noting generally that “once Competitive Dialogue is closed, only limited fine tuning of Final Tenders is allowable”.³²⁰

It is difficult to summarize the guidance on this subject, primarily because the OGC (in 2008) and PFS (in 2006) have adopted substantially different perspectives. The OGC has offered very conservative guidance that does not attempt to define any of the legally unclear terms in the directive, and only offers a limited number of examples of issues that can be left out of ‘final tenders’ for the preferred bidder to deal with. The PFS guidance, on the other hand, seems to be aware of the fact that the Commission is likely to severely restrict amendment of final tenders, but nonetheless offers an interpretation of Regulation 18(26) that even permits minor improvements to tender. Similarly, it lists a great number of more specific examples of issues that can be left for the preferred bidder to resolve and thus requires *less* complete ‘final tenders’ than the OGC guidance appears to.

³¹⁸ Ibid, p. 11-12.

³¹⁹ Ibid, p. 12-15.

³²⁰ 4ps (n 293), p. 25.

3.2.4.6 Use: The Preferred Bidder

As elaborated on in section 2.2.5, one final procedural difficulty in the directive is found in Article 29(7), which discusses the possibility to request the preferred bidder to “clarify aspects of the tender or confirm commitments”.³²¹ Like ‘clarifying, specifying and fine-tuning’, the concepts of ‘clarifying and confirming’ are not further defined in the directive or in the regulations.

Parts of this issue have already been discussed in section 3.2.4.5 above; the OGC 2008 and PFS guidance both make it clear that there are some parts of the final tenders that can be left for the preferred bidder to deal with, such as filling in design details or applying for planning permission. These comments are, in both sets of guidance, made outside of the context of a discussion of ‘clarifying’ and ‘confirming commitments’.

The OGC 2006 guidance here argues that a reference to not changing ‘substantial aspects’ of the tender implies that “some change is expected at this stage” and that certain issues are best left to be resolved with the preferred bidder alone—such as design detail or financial due diligence.³²² The 2008 OGC guidance, on the other hand, highlights that a further definition of the terms ‘clarify’ and ‘confirm commitments’ has to be left to the judiciary, but that “it seems clear that this represents a further narrowing of the scope for any discussion between the Contracting Authority and the preferred bidder.”³²³

The PFS guidance interprets these concepts as meaning that “there should be some scope for amendments and discussions with the Preferred Bidder prior to contract conclusion”, which more closely corresponds to the 2006 OGC guidance.³²⁴ Lastly, *4ps* takes a more specific approach, and states that “the final discussions [between contracting authority and preferred bidder] should be limited to fixing the final detail of the transaction documentation and satisfying

³²¹ See also Regulation 18(28).

³²² OGC 2006 (Competitive Dialogue, n 287), p. 6.

³²³ OGC 2008 (Competitive Dialogue, n 281), p. 30.

³²⁴ PFS 2006 (BSF, n 303), p. 15.

the reasonable requirements of the service provider's board and funders", which again implies very *limited* discussion and coincides more with the OGC's 2008 view.³²⁵

One observation that can be made is that guidance published in 2006, when the procedure was first introduced, appears quite optimistic about the possibility for discussing/filling in some parts of the final tender with the preferred bidder. Guidance issued in 2007 or later, on the other hand, seems to have adopted a more conservative perspective of what is possible at both this stage and the final tender stage, which could mean that practice revealed that it is *not* advisable to suggest that there can be "some change" at this stage of the procedure.³²⁶ What is interesting is that these reservations have come about without specific prompting from the Commission, either through additional guidance or infringement procedures against authorities that are adopting the less restrictive perspective of how much change can occur after the winning bidder is chosen.

3.2.4.7 Use: Reserve Bidders?

Prior to the development of the competitive dialogue procedure, it was common practice in the UK to appoint a 'reserve bidder' at the end of the negotiated procedure, primarily to ensure that if a financial close with the 'preferred bidder' fell through the entire procedure would not have to be restarted. The OGC, in its 2006 guidance, has interpreted the 2004 Directive's Recital 31, which states that non-MEAT tenderers cannot be involved in preferred bidder discussions, as meaning that the keeping of 'reserve bidders' is "discouraged" by the competitive dialogue procedure.³²⁷ 4ps has expressed disagreement with this perspective, and notes that "whilst it is not appropriate to keep more than one bidder in the final clarification stage (post selection of the Preferred Bidder), in the event that the Preferred Bidder cannot clarify aspects of the final bid or confirm commitments, it remains open to the local authority to cease discussions with the Preferred Bidder at an appropriate stage and go back to the next best bidder." It does note that this will happen rarely and only in exceptional circumstances, but should nonetheless be retained

³²⁵ 4ps (n 293), p. 26.

³²⁶ The OGC 2008 guidance is based on practice; it is unclear if the 4ps guidance is.

³²⁷ OGC 2006 (Competitive Dialogue, n 288), p. 6.

as a possibility.³²⁸ The 2008 OGC guidance no longer comments on the use of a reserve bidder, perhaps indicating a change of opinion on whether or not reserve bidders can be (in some way) retained—this remains unclear, however.

3.2.4.8 General Guidance: Confidentiality

The directive and the regulations attempt to prevent breaches of confidentiality and cherry-picking (ie, taking the best parts of tenderers' individual solutions, without consent), by stating that the contracting authority "shall not reveal to the other participants solutions proposed or any confidential information communicated by a participant without that participant's agreement."³²⁹ How confidentiality is to be preserved in the competitive dialogue process, however, is not addressed.

The 2006 OGC guidance suggests only that where a contracting authority wishes to make use of the possibility to share solutions between participants, it is best to indicate this "at the outside of the dialogue phase."³³⁰ The 2008 OGC guidance recommends that in order to counteract bidder concerns that their discussions during the dialogue are not confidential, contracting authorities should "set out in detail" how they will conduct the dialogue.³³¹ Furthermore, the guidance recommends that the contracting authority asks the bidders what parts of their solutions they perceive as confidential, and which parts can be shared, so as to not 'accidentally' breach Regulation 18(21)(c).

PFS does not make any specific recommendations in its guidance, but *4ps* notes that discussions in the 'detailed solution' phase of the dialogue generally "should be confidential to each bidder, unless they result in any modification to the project documentation".³³² This caveat is not placed in the 'outline solution' stage, so it can be presumed that *4ps* presumes more 'solution sharing' at that stage than at the later stage—possibly because the outline solutions are unlikely to be

³²⁸ *4ps* (n 293), p. 31.

³²⁹ Article 29(3) of the Directive; Regulation 18(21)(c).

³³⁰ OGC 2006 (Competitive Dialogue, n 288), p. 6.

³³¹ *Ibid.*

³³² *4ps* (n 303), p. 22.

detailed enough to result in breaches of confidentiality or to present intellectual property right considerations.

3.2.4.9 General Guidance: Payment of Bid Costs

The 2004 directive and the regulations both contain express provisions permitting the payment of bid costs in the competitive dialogue procedure, but without offering an indication of when and how these bid payments should be issued.

The 2006 OGC guidance notes that the possibility exists, but concludes that there is nothing in the competitive dialogue procedure—if carried out appropriately—that would result in *higher bid costs* than existed under the negotiated procedure in the past.³³³ The 2008 guidance, written in conjunction with the Treasury, adds the following: “HMT Policy, however, remains that there should be a strong presumption against contributing to bid costs—though it can be justified where there are legitimate concerns about competitive tension that cannot otherwise be addressed—and needs to be judged on a case by case basis.”³³⁴ The OGC thus discourages the payment of bid costs.

PFS offers a neutral opinion; it states that “the contracting authority ‘may’ agree (but is not obliged) to make payments to bidders participating in the dialogue”.³³⁵ The *4ps* guidance, on the other hand, does not mention bid payments at all.

The fact that payment of bid costs is thus now explicitly mentioned in the directive does not mean that the British policy makers have concluded that it is actually *necessary*, and in this case, a change in legislation does not appear to have resulted in a change in policy. Interesting to note here is that a similar ‘legislation: yes, policy: no’ method of dealing with the issue of bid payments was adopted in the Netherlands, despite quite different historic approaches to procurement regulation (see section 4.2.2.3).

³³³ OGC 2006 (Competitive Dialogue, n 288), p. 6.

³³⁴ OGC 2008 (Competitive Dialogue, n 282), p. 14.

³³⁵ PFS 2006 (BSF, n 303), p. 7.

3.2.5 Conclusions

The UK has not legislated beyond what the directive contains on the competitive dialogue procedure, and has not made competitive dialogue available in legislation for procurement not covered by the directive. We have also seen that there to date has been no case law on competitive dialogue in the UK at all. If legislation and case law were the only two sources of law in the UK, then, it would appear that there is very little regulation of competitive dialogue beyond that what the directive requires.

However, the extensive and highly detailed guidance published by various government bodies means that there is actually substantial material available on the procedure; we will see that this can be contrasted with the Netherlands and France (see sections 4.2 and 5.2), where there is equally sparse legislation but more limited guidance to assist public procurement officers in using the procedure.

In light of the findings in this section, it is perhaps unsurprising that the UK has had so many more competitive dialogue contracts advertised in the OJEU than every other country in the EU aside from France³³⁶—not only did it already have significant practical experience with a competitive dialogue-like procedure (through its use of the negotiated procedure, see section 2.2.2), but it has issued substantial guidance on the procedure—guidance that addresses issues that the EU law on competitive dialogue does not address well, or at all.

³³⁶ See S. de Mars and R. Craven, "Competitive Dialogue in the EU", presented at Global Revolution IV in Nottingham, UK on April 19 2010; their research demonstrates that the UK had used the procedure 1390 times prior to 2010, and France 1446 times – in France, however, the procedure was implemented in 2004 (see section 5.2.3).

3.3 Framework Agreements in the UK

3.3.1 Introduction

This section will examine how the UK has approached the provisions for framework agreements found in the 2004 Public Sector directive. To properly highlight any legal changes since 2004, the UK approach to framework agreements for public sector contracts prior to 2004 will first be considered (section 3.3.2). Secondly, implementation of the 2004 framework agreement rules will be discussed (section 3.3.3).

3.3.2 Framework Agreements prior to the 2006 Regulations

3.3.2.1 Legislation

As discussed in section 2.3.1, the old Works, Services and Supplies Directives did not address the possibility of concluding framework agreements; only the Utilities Directive explicitly permitted the use of framework agreements prior to 2004.

As with the new Public Sector Directive, the UK implemented the old classic sector directives by copying them out without making any substantial amendments or additions—see section 3.1. Consequently, there were no provisions on the use of framework agreements in the public sector regulations prior to 2006.³³⁷

Section 2.3.3 highlighted that a various types of framework arrangements are possible, ranging from binding commitments between just one supplier and one contracting authority to non-binding agreements between several suppliers and one (or several) contracting authorities. As legislation in the UK was silent on the issue as to whether any, and if so, which combinations were permitted, government guidance again proved important here—in particular after the

³³⁷ The Utilities Works and Services Regulations, however, retained the Utilities Directive's provisions on framework arrangements and as such they were permitted under those regulations.

Commission issued its press releases casting doubt on the possibility of multi-provider framework agreements under the classic sector directives (see section 2.3.2).

3.3.2.2 Guidance

In April 2003, the OGC issued guidance on framework agreements in anticipation of the 2004 directives' incorporation of the procedure, though the guidance effectively dealt with the pre-2004 legal situation. The guidance acknowledged the Commission's concerns about the legality of multi-supplier framework agreements—see section 2.3.2—but nonetheless concluded that most types of framework agreements were permissible under the classic sector directives.

First, the guidance discussed whether or not framework agreements could be construed as 'public contracts'. It indicated that in the event where there is consideration between the contracting authority and the supplier, the 'framework agreement' itself would be a public contract and could thus be treated as any other contract under the classic sector directives.³³⁸ It then stated that "the term [framework agreement] is normally used to cover agreements" which do not place binding obligations on the contracting authority to actually purchase. The OGC note concluded that "with this approach, contracts are formed, in [EU] directive terms, only when goods, works and services are called off under the agreement."³³⁹

Following this, the guidance highlighted that "the UK has always taken the view that the only sensible approach to such framework agreements is to treat them as if they are contracts in their own right for the purposes of the application of the EU rules."³⁴⁰ This indicates both that framework agreements were used in the UK prior to 2006, and that the official government position on their legality was that there was nothing precluding their use in the classic sector directive. The guidance elaborated on UK practice by noting that standard practice under the classic sector directives was to advertise the *framework agreement* in the OJEU and to follow the

³³⁸ OGC, "Framework Agreements and EC Developments" (April 2003) (see [http://www.ogc.gov.uk/documents/Framework Agreements and EC Developments.doc](http://www.ogc.gov.uk/documents/Framework%20Agreements%20and%20EC%20Developments.doc), last accessed 1 November 2010).

³³⁹ Ibid, para. 3.

³⁴⁰ Ibid, para. 5.

EU rules for award of the framework itself; subsequent call-offs would then no longer need to be advertised, but the overall procedure was nonetheless transparent.³⁴¹

The guidance additionally discussed some practical aspects of operating framework agreements. First, it indicated that pricing mechanisms and the global scope of purchasing imagined needed to be established prior to closing the framework agreement.³⁴² It is unclear whether or not the guidance recommended this due to legal considerations or just as 'good practice'; however, setting out quantity and pricing mechanisms is likely required by the principles of equal treatment and transparency as developed by the CJ.³⁴³

Secondly, the guidance noted that strictly speaking, it is not *necessary* to advertise the framework itself under the EU rules:

"If the framework approach is chosen, it will be necessary to advertise the framework itself in the [OJEU], if its estimated maximum value over its lifetime exceeds the relevant EU threshold and the procurements in question are not covered by one of the exclusions set out in the directives. If the framework itself is not advertised in [OJEU], in cases where the procurements are subject to the EU rules, an [OJEU] notice may be required for individual call-offs. ... It is far better, therefore, to advertise the framework itself..."³⁴⁴

This is very similar to what the *Explanatory Note* to the Dutch BAO contemplates (see section 4.3.3.1.2), but the 2003 OGC guidance explained the repercussions of this possibility far more clearly: if the framework agreement was not advertised and the call-offs were of a high enough value, each individual call-off would have to be advertised. In effect, a framework agreement would be functionally useless if individual call-offs had to be advertised, meaning that sensible *practice* would be to advertise the *framework* and not the call-offs, regardless of what the law permits.

³⁴¹ Ibid.

³⁴² Ibid, para. 8.

³⁴³ See section 2.4.2.

³⁴⁴ OGC 2003 (n 338), para. 9.

Thirdly, the guidance briefly discussed the more practical differences between single-supplier and multi-supplier frameworks, and in particular, how to organize call-offs under multi-supplier frameworks. It noted that regardless of whether call-offs were on the basis of the original tender or on the basis of a mini-tender, there could be “no substantive change to the specification or on the terms and conditions agreed at the time that the framework is awarded.”³⁴⁵

Interestingly, if (in a multi-supplier framework) call-off award was to be on the basis of the original tenders, and the ‘winning tenderer’ was not available, the OGC suggested in 2003 that the next best tenderer could be awarded the call-off.³⁴⁶ It took the view that the award criteria applied to these types of multi-supplier frameworks are the award criteria “*used at the time the framework was established*” (emphasis added), implying that these had to be award criteria stated in the old directives. This can be contrasted with the view propagated by the Commission in its *Explanatory Note on Frameworks*³⁴⁷, which argued that the call-offs in multi-supplier frameworks on the basis of the original tender are not ‘public contracts’ and as such, award criteria outside of those permitted in the directive can be used to award these call-offs. The issue of changing award criteria was presumably dealt with explicitly in this guidance document because it was at the root of the Commission’s Northern Ireland complaint.³⁴⁸

The guidance also considered the option of holding a mini-competition for call-offs. The OGC guidance stated that the only type of change possible during the mini-competition would be a “supplementing or refining” of the basic terms to the specific call-off in question—but it rejected the possibility that the tenders could be *generally* improved on price at this stage. In the examples it mentions of terms that could be supplemented, general prices are not mentioned; instead, the guidance notes that ‘pricing mechanisms’ are likely to require ‘filling in’ at the call-off stage.³⁴⁹

³⁴⁵ Ibid, para. 16.

³⁴⁶ Ibid, para. 18.

³⁴⁷ *Explanatory Note on Framework Agreements* (n 142).

³⁴⁸ See (n 136).

³⁴⁹ OGC 2003 (n 338), para. 19.

Lastly, the guidance noted that according to the proposals for the 2004 directives, framework agreements would be limited in duration to four years—but “that restriction cannot be said to apply now, since ... the existing public sector directives are silent on the use of frameworks.”³⁵⁰

The 2003 guidance primarily served to announce the introduction of explicit rules on frameworks in the new Public Sector Directive, but in doing so clarified the UK position on whether or not framework agreements were permitted *prior* to this new directive. The OGC demonstrated that according to the UK government, both single supplier frameworks and multi-supplier frameworks were permitted under the classic sector directives, subject to the restrictions placed upon procurement procedures in those directives. It implicitly approved both multi-supplier frameworks based on original tenders and those using a mini-competition by discussing their operation, but did not offer any particular guidance on *when* either type of framework agreement would be beneficial from a policy perspective. While the guidance was thus very useful from a legal perspective—in particular as it was released prior to explicit regulation of framework agreements in classic sector procurement legislation—it did not attempt to guide procuring entities in their determination of when a particular type of framework arrangement would be beneficial for achieving, for instance, value for money.

3.3.2.3 Jurisprudence

Of note in terms of case law on framework agreements was the High Court decision of *Denfleet*³⁵¹, in which the court condoned the permissibility of a specific type of multi-supplier framework.

The *Denfleet* case concerned a multi-provider framework agreement awarded using the restricted procedure. The framework in question awarded call-offs on the basis of a mini-competition, which was treated as permissible by the high court judge in question; Arrowsmith argues that it is logical to assume that if mini-tendering call-offs are permissible, frameworks in

³⁵⁰ Ibid, “Introduction”.

³⁵¹ *Denfleet v NHS Purchasing and Supply Agency* [2005] EWHC 55 (Admin)

which call-offs are based on original tenders would also be permissible.³⁵² This case thus legitimated the use of framework agreements in the UK prior to the introduction of national legislation regulating framework agreements.

3.3.2.4 Prior to 2006: Conclusions

Prior to 2006, there was no legislative regulation of framework agreements in the United Kingdom. However, both guidance issued by the OGC and the one High Court case dealing with framework agreement discussed the permissibility of certain variations of framework agreements and determined that framework agreements (both single and multi-supplier) were, in principle, possible under the old classic sector directives. That said, the OGC guidance did not address the policy dimension of operating framework agreements to any noticeable extent and only discussed a few specific legal restrictions in detail, and *Denfleet* merely concluded that revision of tenders through a mini-competition was in principle permitted.

3.3.3 Framework Agreements under the 2006 Regulations

3.3.3.1 Legislation

The Public Contracts Regulations 2006 have implemented the 2004 Public Sector directive in the UK. In line with past UK approaches to implementation, the regulations 'copy out' the majority of the directive's provisions without substantial changes, thus leaving the maximum discretion permitted under EU law to contracting entities.³⁵³ This approach has led to the inclusion of the directive's provisions on framework agreements without any substantial additions or limitations—with one notable exception.

The 2006 Regulations stated explicitly that the *Alcatel* stand-still was not applicable to call-offs under a framework agreement (Regulation 32(7)), and did so before the 2007 Remedies

³⁵² Arrowsmith 2005 (n 25), section 11.10.

³⁵³ The regulations do in various places omit or add minor points and change language; for more information on these minor changes, see Arrowsmith 2006 (Implementation, n 11), section 4.

Directive came into force and permitted the same derogation. This is one of the rare times when the UK has supplemented the directives; it is likely (though not explicitly stated by the OGC in its guidance) that this particular change was motivated by an effort to preserve the functionality of framework arrangements, whereby abiding by a 10-day delay after every call-off is awarded would be overly burdensome.

The provisions on framework agreements, however, are not altered from those in the directive beyond this. Consequently, the UK legislation permits the use all types of framework agreements permitted by the directive, by all contracting authorities and for any contract. The regulations also do not address the various grey areas or legal uncertainties—discussed in section 2.3.4.3—that the directive’s provisions bring with them. Reading the regulations as opposed to the directive itself thus provides little additional clarity or guidance to contracting authorities in the UK when using framework agreements; once more, the role of guidance and jurisprudence become significantly important in developing national procurement policy.

3.3.3.2 OGC Guidance

The OGC initially issued guidance on framework agreements in January of 2006, when the regulations first entered into force.³⁵⁴ This guidance was updated in September 2008, following more practical experience with framework agreements under the new regulations.³⁵⁵ The 2008 guidance revises the 2006 guidance on several points, where the OGC has changed its perspective on either legal possibilities or best practice. The noteworthy content in both pieces of guidance will now be discussed.

³⁵⁴ OGC, “OGC Guidance on Framework Agreements in the new procurement Regulations” (January 2006) (see http://www.ogc.gov.uk/documents/guide_framework_agreements.pdf, last accessed 1 November 2010).

³⁵⁵ OGC, “OGC Guidance on Framework Agreements in the Procurement Regulations” (September 2008) (see http://www.ogc.gov.uk/documents/OGC_Guidance_on_Framework_AgreementsSept_08.pdf, last accessed 1 November 2010).

3.3.3.2.1 Thresholds: Multi-User Frameworks

As neither the directive nor the regulations explicitly address how multi-user frameworks should function, guidance on this issue is welcome. The OGC in 2006 did not expressly address the issue of multi-user frameworks, but the 2008 guidance states that “when assessing the total value of the framework... it is important that the estimate should include all the potential call-offs over the lifetime of the agreement that may be made by *all contracting authorities* that are permitted to use the framework” (emphasis added).³⁵⁶ It thus concludes that in determining whether or not a multi-user framework agreement meets the EU thresholds, the total purchases of all framework users determine what the threshold value is. This perspective on how the aggregation rules apply to multi-user frameworks has also been adopted by Arrowsmith.³⁵⁷

3.3.3.2.2 Advertising: Identifying the Framework Parties

One area left grey by the directive, as discussed in section 2.3.4.3, is how closely the potential users of a framework agreement have to be identified: for instance, do they all need to be listed by name in the contract notice, or does a generic description of the *type* of authority that will be using the framework suffice?

The OGC in 2006 stated that parties to the framework agreement “can be individually named, or a generic description may be used”.³⁵⁸ In 2008, however, the same section of the guidance reads that “the authorities can be individually named, or a recognisable class of contracting authority may be used”. Alternatively, where there is no recognisable class of contracting authorities, the relevant authorities could be compiled onto a list that is publically accessible; this list would then need to be included in the contract notice.³⁵⁹ Between 2006 and 2008, then, the OGC appears to have concluded that it is in fact *not legal* under the directive or the regulations to ‘generically’ identify parties to a framework agreement. The 2008 perspective is very similar to that

³⁵⁶ OGC 2008 (Frameworks, n 355), para 3.3.

³⁵⁷ See, most recently, Arrowsmith 2009 (Methods, n 137), section 3:9.

³⁵⁸ OGC 2006 (Frameworks, n 354), para 4.5.

³⁵⁹ OGC 2008 (Frameworks, n 355), para 3.6.

expressed in the Commission's *Explanatory Note* on framework agreements³⁶⁰, which also stresses the explicit identification of the potential users of the framework. In this sense, it is possible that the Commission's *Explanatory Note* influenced the revised guidance.

3.3.3.2.3 Selection of Framework Suppliers: Price as Award Criteria

As discussed in section 2.3.4.3, the directive does not make entirely clear how the award criteria listed in Article 53 have to be applied to both the award of a framework agreement. It is unclear from the directive itself is whether or not price has to always be an award criterion at the first stage of award, where suppliers are admitted to the framework.

The OGC commented on the issue of price as an award criterion for multi-supplier framework agreements in both 2006 and in 2008. In 2006, it noted that "the framework should be capable of establishing a pricing mechanism" that will be applied whenever call-offs are requested over the duration of the framework. This reflects on the rule that can be generally surmised from the directive's award criteria, and thus does not address the specific issues arising out of markets with volatile prices as described above. In 2008, however, the OGC has amended its position to deal specifically with the "few limited circumstances" in which pricing structures cannot be established at the outset of the framework agreement, such when procuring "energy or fuel" or other highly price-elastic commodities. In this case, the OGC observes that a framework can appropriately be awarded on the basis of quality criteria alone—which must by proxy mean that it considers this would be legal.

3.3.3.2.4 Multi-Supplier Frameworks: Award Criteria for Call-Offs

As section 2.3.4.3 discussed, the directive is unclear on how (and which) award criteria have to be applied to the award of call-offs under multi-supplier frameworks. Where a call-off is awarded on the basis of original tenders, Article 32(4) requires award on the basis of "the terms laid down in the framework agreement". Similar wording is when describing a call-off on the

³⁶⁰ *Explanatory Note on Framework Agreements* (n 142), section 2.1.

basis of a mini-competition. It is unclear in both cases what types of 'terms' are appropriate to apply at this second stage of award: as discussed in section 2.3.4.3, Arrowsmith believes that the usual award criteria in Article 53 apply at this stage, whereas the Commission argues that *different* but stated award criteria are permitted.³⁶¹

The OGC in 2006, as in 2003, appears to have argued for the application of the Article 53 award criteria. It noted that "in order to ensure value for money, the authority should award the call-off to the provider who is considered to provide the most economically advantageous (vfm) offer based on the award criteria used at the time that the framework was established."³⁶² It is unclear if this is purely a policy recommendation or if the OGC believed that the Article 53 award criteria are the only *legally permitted* award criteria at this stage. The 2008 guidance is even less explicit on this point, only noting that it is important that the framework agreement contains information on "how the contracting authority would select the supplier to which an award is made, *for example by ...[applying] the award criteria used at the time that the framework was established*".³⁶³ (Emphasis added). Neither piece of guidance addresses the legality of this method or other methods of awarding call-offs at all; however, the 2008 guidance is possibly following the Commission's approach more closely, as it appears to suggest that other, non-Article 53 award criteria can be used as long as they are clear and objective.

3.3.3.2.5 Mini-Competitions: Weightings of Award Criteria

Largely due to the directive's unclear references to 'award criteria' at the call-off stage, there is significant uncertainty regarding whether or not contracting entities can vary the weight given to certain award criteria at the call-off stage. Section 2.3.4.3 noted that it is also unclear whether or not the award criteria themselves can be changed *per specific call-off* under a framework.

The OGC 2006 guidance only addresses the possibility of varying weightings at the call-off stage, and states that this "may need" to happen; it is unclear whether this is only best practice advice,

³⁶¹ See Arrowsmith 2009 (Methods, n 137), section 3:16 and *Explanatory Note on Framework Agreements* (n 142), section 3.3 respectively.

³⁶² OGC 2006 (Frameworks, n 354), para. 5.5.

³⁶³ OGC 2008 (Frameworks, n 355), para. 4.6.

or if the OGC believed it would be legal to vary weightings where appropriate. The 2008 guidance states that “it may be permissible to vary the weightings of the award criteria provided that the intention to do this was publicised in advance and ranges are given for each criterion.”³⁶⁴ It also states that “criteria used for mini-competitions may differ from the award criteria used to set up the framework if they are related (i.e. derive from) the original award criteria”, presumably allowing for call-off sub-criteria as long as the ‘parent’ award criteria are announced in advance. The guidance thus indicates that it *may be possible* to change both weightings and actual criteria themselves. However, it bears reminding here that the CJ has, in recent judgments, stressed the advance disclosure of award criteria so as to comply with the general principle of transparency³⁶⁵—to the extent that the OGC’s position is correct, then, it should be presumed that any differences in award criteria at the call-off stage have to be announced clearly in the contract notice and cannot be introduced on an ad-hoc basis.

3.3.3.2.6 Information Requirements

The OGC guidance on framework agreements does not address the directive’s information requirements—most relevantly, it does not discuss the post-award information obligations contained in Article 41, which may or may not apply to call-offs (see section 2.3.4.3). It can be argued that in order to have effective remedies, provision of information on awards is necessitated at the call-off stage, but the OGC does not express an opinion on whether or not this is legally required or recommended.

3.3.3.2.7 Guidance: Conclusions

Generally, the OGC 2006 and 2008 guidance on framework agreements does not differ greatly from the 2003 guidance; for instance, all three guidance documents refer to the same examples of ‘types of framework agreements’ and follow similar structures. It is thus likely that the guidance notes have primarily been amended several times in order to deal with changes of position

³⁶⁴ OGC 2008 (Frameworks, n 355), section 4.1

³⁶⁵ See, for instance, *Universale-Bau* (n 169) and *ATI* (n 153) and most recently, *Lianakis* (n 154), discussed in section 2.4.2 above.

within the OGC or in order to respond to case law determinations at the CJ or High Court level. Globally, however, no significant progress in terms of the development of an expansive national policy or best practice guidelines on framework agreement has been made since 2003.

3.3.3.3 Jurisprudence

In section 3.2.3, it was noted that there had been no relevant case law on competitive dialogue in the UK and that likely this followed from a lack of procurement cases being adjudicated in the first place. Surprisingly, however, a significant number of the UK's infrequent procurement cases concern framework agreements. Two cases from 2008 have particularly developed the law and will be discussed here.³⁶⁶

The first of the two relevant High Court cases is *McLaughlin and Harvey Limited*³⁶⁷. The procuring entity in this case announced their award criteria and sub-criteria in advance, but had set an evaluation methodology (whereby some of the sub-criteria set were specified and assigned weightings) that was not disclosed to the tenderers in advance. The judge ruled that the sub-criteria used to evaluate the tenders were arguably foreseeable, but the varying weightings assigned to them were most definitely not, and this constituted a violation of EU law³⁶⁸ as well as the regulations.

Following this ruling, the parties to the case were unable to agree upon an appropriate remedy.³⁶⁹ In deciding on what remedy should be awarded, the judge emphasized that the regulations specified available remedies for *public contracts*, but not what remedies were available or appropriate for an improperly concluded framework agreement—an issue since resolved by the UK's implementation of the 2007 Remedies Directive, wherein a framework

³⁶⁶ Other cases involving framework agreements concerned disputes about time limits to bring proceedings (*Amaryllis Ltd v HM Treasury* [2009] EWHC 962 (TCC)) and interim measures in procurement (*B2Net Ltd v HM Treasury* [2010] EWHC 51 (QB); *European Dynamics SA v HM Treasury* [2009] EWHC 3419 (TCC)), but did not develop the law on framework agreements specifically.

³⁶⁷ *McLaughlin and Harvey Limited v Department of Finance and Personnel* [No. 2] [2008] NIQB 91.

³⁶⁸ *Ibid*, para 57; the judgment specifically cited *Lianakis* (n 154) and *ATI* (n 153).

³⁶⁹ *McLaughlin and Harvey Limited v Department of Finance and Personnel* [No. 3] [2008] NIQB 122.

agreement is treated as a 'contract' for the purpose of remedies (Regulation 47 of the amended Regulations).

In *McLaughlin*, however, the judge determined that framework agreements were not 'contracts' as discussed in then-Regulation 47(9); consequently, nothing precluded setting the framework agreement aside. It is unclear if the framework would still have been set aside if contracts had been concluded under it—but nothing in the judgment precludes this. The currently applicable rules, as set by the 2007 Remedies Directive, would have prevented the contract being set aside, so *McLaughlin* here proves an interesting example of a UK interpretation of a concept not corresponding to a subsequent EU interpretation at all.

The other important case, *Henry Bros*³⁷⁰, concerning the award of a framework for major construction services, discussed pricing mechanisms used in awarding framework agreements. The plaintiffs argued that the pricing mechanism used to evaluate tenders—which evaluated the contractors' fee percentages, but did not assess the construction costs themselves as it had concluded these would be invariable among all tenderers—was contrary to the regulations' requirement to award to the 'most economically advantageous tender'. The judge, after considering relevant information and—importantly—the Commission's *Explanatory Note* on Framework Agreements, concluded that the pricing mechanism employed in this case was inherently inappropriate, as there was no evidence that these construction costs would be invariable.

However, the judgment did not expressly rule that using only fee percentages in order to determine the most economically advantageous tender was *de facto* contrary to the regulations; it merely determined that in the current case it was an inappropriate pricing mechanism as there would be no competition on price at the second stage of the competition.³⁷¹

³⁷⁰ *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland* [No. 2] [2008] NIQB 105.

³⁷¹ *Ibid*, para. 28.

The judge also commented on the role of price in award criteria more generally, albeit not as part of the *ratio* of the decision. On the role of price in tender evaluation, he noted that “... unless the cost or price of the relevant goods or service was fixed or not in dispute, it would be very difficult to reach any objective determination of what was or was not economically advantageous without some reasonably reliable indication of price or cost in relation to which other non-price advantages might be taken into account.”³⁷² This seems to indicate that the judge in question considers that a pricing mechanism is normally necessary in order to award a framework agreement; this may conflict with the 2008 OGC guidance discussed above (section 3.3.3.2.3), which advises *against* price as an award criterion in certain exceptional circumstances.

To summarize, the judgments arising from *McLaughlin* and *Henry Bros* developed the UK law on framework agreements significantly. *McLaughlin* analyzed the nature of the ‘framework agreement’ itself and concluded that it itself was not a ‘concluded contract’ as defined in the regulations. The *McLaughlin* proceedings thus suggested that framework agreements warrant a different approach to remedies than regular public contracts. This judgment is more striking now that the EU (in the 2007 Remedies Directive) determined that framework agreements *are* public contracts for the purpose of remedies, and *McLaughlin* has essentially been ‘overruled’ from above.

Henry Bros, on the other hand, offers more general observations that guide on the use of price as an award criterion for long, multi-staged contracts such as framework agreements. As such, the judge observed in passing that it is only in exceptional cases that a pricing mechanism does not have to form part of the evaluation of tenders awarded on the basis of most economically advantageous offers. Also interesting about *Henry Bros* is the fact that in arriving at a judgment, the judge referred expressly to the Commission’s *Explanatory Note* as a source of authoritative information—demonstrating influence of this document despite its non-binding nature. In 2008 in particular, case law thus helped develop the law on framework agreements in the UK; it remains to be seen if this was an exceptional year for the development of the law in this area.

³⁷² Ibid, para. 25.

3.3.4 Framework Agreements in the UK: Conclusions

Where prior to 2006, no legislative rules on framework agreements existed in the UK, the 2006 Regulations implement the directive's words verbatim; however, as we saw with competitive dialogue in section 3.2, no legislation was introduced to apply the directive's provisions to contracts *not* covered by the directives.

The UK's sparse legislative provisions have been supplemented by national-level guidance and a limited amount of jurisprudence. The influence of EU law on both the pre-and-post 2006 guidance is clear; there are direct cross-references to, where appropriate, the directive and Commission guidance. However, in examining the UK case law, it was seen that the judgments in both *McLaughlin* and *Henry Bros* develop the law on framework agreements beyond what the EU had stated about their operation at the time, particularly with regards to award criteria used in staged, long-term procurement and the relationship between framework agreements and EU remedies for procurement.

3.4 The General Principles of Transparency and Equal Treatment in the UK

3.4.1 Introduction

In section 2.4, we saw that from the 1990s onwards, the CJ has used the general principles of equal treatment and transparency to create new positive obligations for Member States; firstly, by reading obligations into the directives that are not explicitly stated there, and secondly, by inferring positive obligations from the TFEU, which traditionally has been understood to contain only negative obligations.

The following section will consider the how, if at all, the UK regulator has responded to the additional obligations stemming from the general principles of equal treatment and transparency under the directive (section 3.4.2) and under the Treaty (section 3.4.3).

3.4.2 Contracts Covered by the Directives

3.4.2.1 Legislation

It has been observed in previous sections of Chapter 3 that the UK does not traditionally legislate beyond what the directives require, and prefer instead to advise contracting authorities on appropriate behaviour through guidance and policy. It is thus unsurprising that the 2006 Regulations state the general principles of equal treatment and transparency (as required by the 2004 directive), but there are no additions made to UK legislation that can be attributed to the CJ's use of the general principles under the directives.

3.4.2.2 Guidance

We have seen in earlier sections that the UK generally offers guidance to contracting authorities on how to approach EU law obligations; however, as discussed with regards to competitive

dialogue and framework agreements, this guidance generally focuses on supplementing EU legislation with 'best practice' approaches.

Given that the CJ's case law on the general principles and their application to the directives has thus far not led to a coherent regime of positive obligations for the Member States to follow, it is understandable that the OGC has not (yet) attempted to determine how contracting authorities have to behave; this does, however, mean that there is no specific OGC guidance that attempts to anticipate the consequences of the equal treatment and transparency principles under the directives.

There are a few mentions of the concepts of equal treatment and transparency in the OGC's other guidance, but these do not elaborate on the requirements very specifically. As an example, the competitive dialogue guidance (see section 3.2.4) states that the general principles "are embodied most notably in a general requirement for public procurements of an appropriate type and value to be advertised openly in the Official Journal of the EU. *They should also be used as the main guide to interpreting the meaning of more detailed requirements where there is any uncertainty, including the new provisions for Competitive Dialogue.*"³⁷³ This is followed by several reminders to ensure "equal treatment" at various points of the process—such as confidentiality of solution—but the guidance does not attempt to outline how such equal treatment can be assured.

More helpful have been recent Procurement Policy Notes, which deal with the consequences of specific CJ cases; the most relevant one of these is PPN 04/09, which discusses the consequences of *Lianakis* and related cases on the publication of weightings and selection criteria.³⁷⁴

Interestingly enough, this note itself does not reference the general principles at all; it discusses the need to publicize weightings and selection criteria if developed as if these are set requirements not linked to the general principle of transparency at all. Compared to guidance

³⁷³ OGC 2008 (Competitive Dialogue, n 282).

³⁷⁴ OGC, "Procurement Policy Note 04/09" (April 2009), see <http://www.ogc.gov.uk/documents/PPN0409.pdf> (last accessed 1 November 2010).

available on, for instance, competitive dialogue, then, the OGC has not produced a significant amount of material on the general principles and their application to the directives.

3.4.2.3 Jurisprudence

The UK courts have applied CJ jurisprudence on the general principles for contracts covered by the directives; particularly visible in recent years are the *Lianakis* and *ATI* judgments, which require the publication of weightings and sub-criteria where they are used (see section 2.4.2). The cases *Henry Bros* and *McLaughlin*, discussed in detail in section 3.3.3.2 on framework agreements, and *Letting International*³⁷⁵ all concern disputes relating to award criteria applied in a given contract—*Lianakis*, in fact, was cited in all cases as an authority for the need to publicise weightings assigned to sub-criteria.³⁷⁶

Four other cases moved beyond the issue of how transparency requires the publication of sub-criteria and relevant weightings, but nonetheless relied on the general principles in order to determine what behaviour was required by EU law.

In *Lion Apparel*³⁷⁷, the court dealt with an application for interim measures, in anticipation of a pending trial regarding the award of a contract for fire-proof garments for firemen. In the award process, all tenderers were permitted to improve their original tenders on price, but not on quality. The plaintiff, who scored poorly on quality, argued that this was contrary to equal treatment as those who had scored poorly on price *could* improve their offers. However, the court denied the application for interim measures; part of its reasoning was that a determination that there had been no violation of equal treatment as all tenderers were treated equally with respect to price (which they could revise) and quality (which they could not), and as the testing

³⁷⁵ *Letting International Ltd v London Borough of Newham* [2008] EWHC 1583 (QB).

³⁷⁶ Also of interest here are *Lightways (Contractors) Ltd v North Ayrshire Council* [2008] CSOH 91, where the judge acknowledged that the applicant had a *prima facie* case to be tried on account of the defendant's unclear scoring and award mechanism system. Interim measures were, however, ultimately not awarded; and *J Varney & Sons Waste Management Ltd v Hertfordshire County Council* [2010] EWHC 1404, where it was determined that following an invitation to query a scoring mechanism by the contracting authority, there could be no violation of the principles of transparency or equal treatment as no bidders *did* query the scoring mechanism; and the *European Dynamics SA v HM Treasury* [2009] EWHC 3419 (TCC) case, wherein the plaintiff argued that the scoring or marking of tenders which led to the rejection of their tender was non-transparent and resulted in unequal treatment.

³⁷⁷ *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179 (Ch).

of the quality of the garments had proven to be expensive in the first round of tendering, not allowing an improvement of quality was deemed to be a proportionate measure.³⁷⁸

In *Law Society v Legal Services Commission*³⁷⁹, the High Court concluded that a unilateral clause for amendment of a contract, as long as advertised in the contract notices, would not violate the principle of transparency, even if it could lead to widespread changes to the original contract entered into with the bidder. The judge determined this on the basis of an assessment of CJ case law on the subject of transparency, citing judgments such as *Telaustria* and *SIAC*³⁸⁰. This decision, however, was overturned on appeal³⁸¹; it was there noted that CJ jurisprudence³⁸² was not to be interpreted as unequivocally permitting amendment clauses, and that the one in the dispute in question was so unlimited in breadth that it could not be deemed to be 'transparent'. Using a similar method of analysis, the Court of Appeal thus arrived at the opposite conclusion of the High Court on the facts of this particular case—but did confirm that amendment clauses do not necessarily violate the principle of transparency.

Another interesting case is *J B Leadbitter*³⁸³, in which a contracting authority refused to consider a tender because parts of it were submitted after the submission deadline, although the submission deadline had been extended for another tenderer who experienced a power failure.

The court decided that as the extended submission deadline benefitted all tenderers, this was not a violation of equal treatment—however, accepting documents after deadline *could* violate equal treatment.

³⁷⁸ In 2008, Firebuy sought for summary judgment on some of Lion Apparel's heads of challenge; equal treatment was referenced again in this application, but summary judgment was not given in favour of Firebuy regarding equal treatment on pricing information and deemed this fit to go to trial. [*Lion Apparel Systems Ltd v Firebuy Ltd* [2008] EWHC 122 (Ch).

³⁷⁹ *The Law Society, R (on the application of) v Legal Services Commission & Ors* [2007] EWHC 1848

³⁸⁰ Case C-19/00 *SIAC Construction v Mayo County Council* [2001] ECR I-07725

³⁸¹ *R. (Law Society) v. Legal Services Commission* [2007] EWCA Civ 1264. See also P. Henty, "The decision of the Court of Appeal in *R. (Law Society) v Legal Services Commission*" (2008) 17 PPLR NA108.

³⁸² In particular, Case C-496/99 *Commission v Succhi di Frutta SpA* [2004] ECR I-03801.

³⁸³ Although interestingly, as the missing submission was only pre-created case studies and did not materially alter or improve the general tender, which had been submitted before the deadline, Richards J concluded that accepting the late tender here would not have resulted in unequal treatment – but the contracting authority was nonetheless, on account of the general principle of equal treatment, permitted to reject the 'late' tender. See *J B Leadbitter & Co Ltd v Devon County Council* [2009] EWHC 930 (Ch).

Most recently, *Azam & Co*³⁸⁴ discussed information obligations in light of the equal treatment principle. In *Azam*, the contracting authority used two public media sources (a trade journal and a website) to announce a submission deadline for invitations to tender, and then secondarily contacted existing providers personally with a letter that did not itself state the submission deadline, but did link to the website that contained this information. The plaintiffs maintained that the equal treatment principle was violated as this process favoured readers of the trade journal over existing providers who had received the letter; however, the court rejected this line of reasoning as equal treatment merely required that the advertising was *equally accessible*, and nothing precluded the plaintiff from accessing the website.

From the UK case law, we can see that *ATI* and *Lianakis* in particular have had a substantial impact on national litigation procedures. However, the general principles under the directives have also been used by the High Court to decide wholly unrelated cases; the judges are clearly willing to apply the general principles to new situations, not yet considered by the CJ.

3.4.2.4 Contracts covered by the Directives: Conclusions

In summary, the effect of the general principles on procurement covered by the directives is not dealt with in UK legislation, but the various cases decided in the UK courts using the principles do indicate that there is a growing awareness (at least in the judiciary) of the breadth of applicability of the principles.

A lack of legislation is normally supplemented by OGC guidance in the UK, but it may be difficult to provide generic guidance on a subject that continues to be advanced by case-law, especially when the case law itself remains unclear and piecemeal. Lastly, regardless of method of 'response' to these principles chosen, the case law on the development of the general principles may move forward too fast for either the legislature or the OGC to follow up with appropriate measures in a timely fashion. Given that fact, the courts' proactive approach to using the general

³⁸⁴ *Azam & Co v Legal Services Commission* [2010] EWHC 960 (Ch)

principles may be key in making sure the UK procurement regime remains compliant with EU developments in this area.

3.4.3 Contracts Not Covered by the Directives

3.4.3.1 Legislation

The UK has not opted to supplement its legislation on procurement in any way so as to incorporate the *Telaustria* family of jurisprudence into the national procurement regime. The 2006 regulations are silent altogether on below-threshold or excluded procurement, and there are no separate pieces of legislation to deal with non-directive procurement.

3.4.3.2 Guidance

The OGC, however, has issued several guidance documents on the consequences of the CJ's jurisprudence in this area. First, even the general introduction to the 2006 Regulations references the general principles and indicates that they require some degree of advertising to demonstrate transparency. It adds that "this is in line with the UK objective of achieving value for money in *all* public procurement—not just those covered by the EU Procurement directives" and then refers to the Commission's *Interpretative Communication* on contracts not covered by the directive.³⁸⁵

More specifically, the OGC also issued Procurement Policy Information Note (PPN) 10/03, addressing the "evolving EU case law on the need to give sufficient publicity to contracts below the relevant thresholds or otherwise outside of the scope of the Public Procurement directives".³⁸⁶ The more recent PPN 03/06 discusses the Commission's 2006 *Interpretative*

³⁸⁵ OGC, "Introduction to the EU Procurement Rules" (March 2008), see [http://www.ogc.gov.uk/documents/Introduction to the EU rules.pdf](http://www.ogc.gov.uk/documents/Introduction%20to%20the%20EU%20rules.pdf), last accessed 1 November 2010.)

³⁸⁶ As stated in OGC, "Procurement Information Note 03/06" (July 2006), see <http://www.ogc.gov.uk/documents/ProcurementPolicyThresholdProcurement.pdf>, last accessed 1 November 2010; the original guidance note, OGC, "Procurement Information Note 10/03" (September 2003) is not available online anymore.)

Communication on procurement excluded from the directive³⁸⁷ and indicates what its main consequences are for those procuring in the UK.

In paragraph 8, PPN 03/06 discusses the importance of foreign interest in a given contract in determining whether or not (and if so, how much) publicity is needed. The PPN firmly places the responsibility of determining whether or not 'foreign interest' exists on contracting authorities, and states that this determination has to take place every time a procurement procedure is started.

The PPN then encourages contracting authorities to use www.supply2.gov.uk, an online procurement portal specifically geared at low-value procurement, for contracts that are not subject to the procurement directives in order to satisfy any advertising requirements. It makes this recommendation after considering the Commission's suggestions on publication for low-value contracts, observing that while the *Interpretative Communication* is not binding, it is based on CJ case law that has made a determination of positive obligations stemming from the Treaty. As such, "it is likely that the [CJ] would take account of the [Communication] in considering cases and Member States choosing to ignore this guidance may risk infringement proceedings in the future".³⁸⁸

The PPN also generally notes that at central government level, all procurement practice is generally expected to take place 'competitively', thus satisfying the Commission's additional requirements as stated in the *Interpretative Communication*.³⁸⁹ However, there are no central government rules that require advertising of all contracts above a given value.

New government policy emerging in PPN 13/10, aimed at increasing transparency in national procurement for accountability and value-for-money purposes, states that all central government contracts of a value of over 10,000 pounds sterling *which are advertised* will be placed on "a single website", and from January 2011 this policy will extend to *all advertised contracts*

³⁸⁷ Commission, *Interpretative Communication* on contracts outside of the Directives (n 97).

³⁸⁸ PPN 03/06 (n 386), para 13.

³⁸⁹ *Ibid*, para 12.

regardless of their value.³⁹⁰ Recent information from the government confirms that this policy only applies when contracts *are already being advertised*, but does not imply an advertising obligation itself.³⁹¹ Any policy to advertise all contracts of a given value as of now still originates with individual government departments. A useful example of such a policy is the Ministry of Defence's, which has decided that all contracts of a value over 40,000 pounds should normally be advertised.³⁹²

What is the legal consequence of such a policy? As a general rule, policy does not produce binding or enforceable legal effects; however, the UK courts have recently considered the EU principle of legitimate expectations in the context of public procurement. In *Azam & Co*³⁹³, the Court considered that despite there being no explicit statement in the procurement directives that the principle of legitimate expectations applied to procurement, there was no reason to not oblige a contracting authority to act so as to not frustrate legitimate expectations.³⁹⁴ In the current discussion, a generally advertised MoD policy to advertise contracts above 40,000 pounds would create legitimate expectations—namely, that these contracts are in fact advertised. However, the principle is not limitless—and if the MoD were to indicate that it will not advertise a specific type of contract, or stated that it would 'normally' advertise contracts above 40,000 pounds the principle would not create enforceable rights for contracting authorities.³⁹⁵ The applicability of the principle to any department's commitment to advertising low-value contracts thus largely depends on how this commitment is phrased.

3.4.3.3 Jurisprudence

It can be observed that the CJ's jurisprudence on contracts not covered by the directives has been cited on a regular basis in the UK courts. *Telaustria*, for example, has thus been cited as defining

³⁹⁰ OGC, "Procurement Information Note 13/10" (June 2010), see http://www.ogc.gov.uk/documents/PPN_1310_New_requirements_for_greater_transparency_in_central_Government_procurement_%282%29.pdf, last accessed 1 November 2010).

³⁹¹ ERG (OGC), "Guidance on Publishing Tender Documents" (September 2010), see [http://www.ogc.gov.uk/documents/Transparency_-_Publication_of_Tender_documentation_-_guidance\(1\).pdf](http://www.ogc.gov.uk/documents/Transparency_-_Publication_of_Tender_documentation_-_guidance(1).pdf), last accessed 1 November 2010).

³⁹² Ministry of Defence, "Freedom of Information" (September 2010). See <http://www.aof.mod.uk/aofcontent/tactical/toolkit/content/topics/advert.htm> (last accessed 1 November 2010).

³⁹³ *Azam & Co* (n 384).

³⁹⁴ *Ibid*, para 32.

³⁹⁵ *Ibid*, para. 39.

the general principle of transparency in the cases *McLaughlin*, *Letting International*, and *Law Society*, even though all these contracts were subject to the directives. There have recently also been several cases dealing with contracts excluded from the directives more specifically.³⁹⁶

*Federal Security Services*³⁹⁷ concerned a Part II B services contract that was awarded without an *Alcatel* stand-still period. It was argued by the defendants that as the standstill provisions in the 2006 Regulations did not apply to Part II B services, there was no obligation to provide for a standstill when awarding those contracts; but the judge did not accept this argument, and instead relied on the general principles under the Treaty (and the Commission's *Interpretative Communication's* interpretation of those, in brief) in determining that the contract had been awarded in violation of EU rules on transparency. The decision-making process that Deeny J applied demonstrated significant awareness of the many ways in which the *Telaustria* jurisprudence could affect procurement procedures; particularly, it emphasises that *Telaustria* may not *stop* with a requirement to advertise but rather that the general principles could have far wider consequences for contracts covered only by the Treaty.

The consequences of the general principles for below-threshold procurement were recently considered in *Chandler*³⁹⁸. Here, the court demonstrated awareness of recent CJ jurisprudence by indicating that the transparency requirement only applied to below-threshold contracts in the event of cross-border interest. Interestingly, in considering how cross-border interest was to be discovered, the court stated in para. 30 that: "we doubt whether the Court of Justice intended to hold that cross-border interest had been shown beyond reasonable doubt." The court thus concluded that in the event there was a 'realistic prospect' of cross-border interest, the general principle of transparency would require a degree of advertising.

³⁹⁶ In *Law Society* (n 379, 381) there was substantial debate on whether or not the contract in question concerned a services concession before it was determined that the contract was subject to the directives.

³⁹⁷ *Federal Security Services Ltd v Chief Constable for the Police Service of Northern Ireland and Resource Group Ltd* [2009] NICH 3, Ch D(NI)

³⁹⁸ *Chandler, R (on the application of) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011.

A further interesting case, *Deane Public Works*³⁹⁹, actually concerned a utilities contract, but as it fell below the threshold of the Utilities Directive it was only subject to the Treaty. The dispute, however, did not concern cross-border interest issues, but rather what was meant by the concept of projects that “must have been completed within the last five years” for the purposes of a pre-qualification questionnaire. Morgan LCJ considered the general principles of equal treatment and transparency under the Treaty before stating that, “Although it is common case that the advertising of the project was sufficient to address any issue of discrimination on grounds of nationality by reason of notification I consider that the Treaty obligations also apply to the assessment and evaluation of the bids...”⁴⁰⁰ While this cannot be held to be indicative of a trend, it is still striking that Morgan LCJ used the general principles to read a positive obligation into the Treaty where the CJ has not yet done so.

3.4.3.4 The Scottish Approach to the *Telaustria* Jurisprudence

As highlighted in the introduction to this thesis, Member States more generally have the possibility to legislate or to set policy that goes beyond the explicit legal requirements of the directives. Section 4.1 discussed that how UK prefers to regulate by guidance, meaning that it is unlikely that there will ever be additional legislation dealing with non-directive procurement unless required by the EU.

Scotland, which since 2006⁴⁰¹ has had its own procurement legislation, takes a different approach. Generally, the overlap of the Scottish regulations with the UK regulations is so significant that there is no need to discuss the Scottish regulations separately; however, unlike the UK regulations, the Scottish ones *do* attempt to engage directly with the *Telaustria* family of case law. Regulation 8(21) thus recites the main “principles” of *Telaustria*, by indicating that when awarding contracts not covered by the directives, contracting authorities must ensure “a degree of advertising which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non discrimination and transparency.”

³⁹⁹ *Deane Public Works* (n 275).

⁴⁰⁰ *Ibid*, para. 17.

⁴⁰¹ As a consequence of the 1998 devolution of Scottish Parliament. For more details on this subject see C. Boch, “The Implementation of the Public Procurement Directives in the UK: devolution and divergence?” (2007) 17 PPLR 410.

It is worth questioning whether or not a restatement of unclear case law is a worthwhile addition to legislation; Boch, in investigating the effect of this provision on procurement practice, found that practitioners did not perceive the inclusion of such a provision as providing any advantage—“clients needed to be alerted about the existence of Community law obligations—whether or not these were included verbatim in the Regulations—just as they had to be alerted about all the other aspects of the Court of Justice case law that may affect the conduct of their procurement operations”.⁴⁰²

3.4.3.5 Contracts Not Covered by the Directives: Conclusions

In summary, the application of the general principles to contracts subject exclusively to the Treaty is not dealt with by legislation in the UK; the fact that the Scottish Regulations recite the *Telaustria* case does not appear to help with the application of the principles as the obligations stemming from them are not clear in *Telaustria* to begin with.

The existence of positive obligations under the TFEU is acknowledged by the OGC, and it appears that new central government advertising requirements have as a partial consequence that the *Telaustria* line of jurisprudence will be satisfied in practice. However, the CJ and the UK courts have also, to a limited extent, demonstrated that the obligations stemming from the general principle of equal treatment and transparency under the TFEU are not *only* advertising obligations—at which point the role of guidance could continue to play a very important role in the UK.

3.4.4 Conclusions

The UK has traditionally opted to curb the influence of EU law on national procurement practice by implementing only that which is required and by not restricting contracting authorities in their freedom to procure in any other way. It is thus relatively unsurprising that the UK has

⁴⁰² Ibid, p. 427.

chosen not to legislate beyond what is currently required by the directives, despite a rapidly developing case law on the general principles. Influence of EU law in legislation here is not visible.

However, whereas in other areas of law, the lack of legislation is usually supplemented by guidance, the OGC here has not issued a comprehensive guide like it has done for framework agreements or competitive dialogue; various PPNs instead update on relevant legal provisions and practical requirements, with the majority of these covering developments regarding contracts not covered by the directive. This approach may have been taken because this is such a fast-developing and unpredictable area of law.

It is also worth stressing that while the comprehensive guides on framework agreements and competitive dialogue offer 'best practice' approaches in the context of a discussion of what is permitted and required by relevant EU rules, most of the PPNs on transparency and advertising do not reference EU law at all. PPN 03/06 specifically considers the relevant EU jurisprudence, but the more recent guidance focuses on transparency in a more general sense.

What we can observe is that the courts play a very important part in developing national law on the general principles. In the past few years, there have been at least 5 separate rulings that demonstrate the potentially limitless consequences of the CJ's inference of additional positive obligations from the general principles—even, such as in *Federal Security System*, in scenarios where the CJ itself has not yet commented on the role of equal treatment of transparency. The significant numbers of cases are particularly striking when it is considered that the UK does not see more than ten procurement cases per year on average; it can thus be stated that the CJ's jurisprudence on the general principles of equal treatment and transparency has had a significant impact on the reasoning and workload of the UK courts.

4. PUBLIC PROCUREMENT IN THE NETHERLANDS

4.1 Developments in Dutch Public Procurement Regulation

4.1.1 Introduction

This section will discuss the development of public procurement regulation in the Netherlands from the 1970s onwards. The section will describe the 'historical' approach taken to public procurement regulation in the Netherlands, and will highlight the specific changes that occurred in national policy as the EU increased its procurement regulation through the directives and case law.

This section will support the later discussion of how the 2004 directives and important CJ decisions have been approached by the Netherlands. Generally, the section aims to provide a consolidated overview of the current public procurement regulation setup in the Netherlands and also highlights current proposed changes to the regime.

4.1.2 Prior to the 1970s

Public procurement regulation has existed in the Netherlands since 1815, when by royal decree it was decided that all works and supplies contracts of a value above 500 guilders would be procured 'publically', which is to say, openly and competitively.⁴⁰³ This commitment to purchase publically was repeated in the 1927 Comptabiliteitswet (public expenditure 'Accountability Law'), with an increased threshold of 2500 guilders.⁴⁰⁴ The commitment did not amount to a significant 'public' procurement in practice, however, as many government departments could apply for exemptions to 'procuring publicly' via the second part of Article 33 of the 1927 Comptabiliteitswet.⁴⁰⁵ By 1976, there were no exclusively national laws left in the Netherlands that referred to public procurement, as the 1976 revision of the Comptabiliteitswet led to the

⁴⁰³ Koninklijk Besluit (KB) of 1815.

⁴⁰⁴ Comptabiliteitswet 1927, Article 33 (Staatsblad 259, 1927).

⁴⁰⁵ G. W. van de Meent, *Overheidsaanbestedingen: de EG-rechtelijke context* (Kluwer: Deventer 1995), p. 180.

scrapping of Article 33, out of recognition that it was not adhered to in practice. Public procurement at that time was no longer regulated through legislation at either central or lower government level.

4.1.3 The 1970s

By the time the first EU directive was published in 1971, a conscious choice appears to have been made to regulate central government procurement separately from local/provincial government. As actual legislation emerged in the 1970s (primarily in response to the new EU requirements), we see that the Netherlands perceived central government obligations quite differently from those of the 'lower governments', and was primarily concerned with establishing a compliant regime for central government.

The provinces, local governments, and waterworks were notified of the 1971 Works Directive through a circular⁴⁰⁶ distributed by the Ministry of the Interior in July 1972, which (similar to the UK circulars regarding the EU directives) had no legally binding value in the Netherlands.⁴⁰⁷ It took 5 years for this circular to be replaced by a binding law that implemented the directive for non-central government. Central government departments, on the other hand, were *obliged* by law to adhere to the EU directives from 1973 onwards, when an *algemene maatregel van bestuur* (general Order in Council)⁴⁰⁸ based on the 1927 Comptabiliteitswet was adopted. The AMvB made adherence to the EU rules both obligatory and legally enforceable by contractors in the regular court system.⁴⁰⁹

As we saw in section 2.1.4.1, there are two possible ways to comply with the EU requirements for implementing directives. Historically, the Dutch method of implementation can be contrasted with the approach taken in the UK and France, where the choice was made to transpose the

⁴⁰⁶ Circulaire F.V.72/U 559.

⁴⁰⁷ R.N. Brummelkamp, "E.E.G.-regels voor de overheidsopdrachten voor de uitvoering van werken" (1978) 15 *Bouwrecht* 533, p. 535.

⁴⁰⁸ An A.M.v.B. is a legally binding decision that exists to further execute the requirements of a law—in the case of public procurement, to elaborate on the requirements of Article 33 of the Comptabiliteitswet.

⁴⁰⁹ Besluit aanbesteding van werken 1973 (Staatsblad 1973, 202). It should also be noted here that although procurement disputes could be resolved by district courts, only one case was ever decided by a regular court prior to 1986 (when the courts lost jurisdiction). (HR 31 mei 1985, AB 1985, 480).

directives into national legal instruments; the Dutch Order in Council (entitled *Besluit aanbesteding van werken* 1973 (BAW)), on the other hand, referred readers to the original directives and any subsequent revisions of those directives. However, the Order in Council went beyond the requirements of Directive 71/305/EC and made the procurement of *all* works (including those excluded from the directive itself) subject to the directive's procurement procedures.⁴¹⁰

While this Order in Council was drafted, the Ministries of Transport, Public Works and Water Management, Defence, and Housing and Spatial Planning⁴¹¹ joined together to set up rules that they would bind themselves to when procuring works both above and below the thresholds set in the 1971 directive. The resulting Uniform Aanbestedingsreglement 1972 (UAR, 'Uniform Procurement Regulation') was a policy agreement between these "Construction Departments" (so called as they were responsible for procuring most central government infrastructure). The aim of the UAR 1972 was to apply consistent rules to all works procurement by these departments. When the BAW was drafted in 1973, it was decided that the UAR 1972 would further apply to all central government bodies, as a supplementary set of national rules to be followed during public procurement procedures.

Under this new regime, four separate procurement procedures (defined in the BAW) were available to government departments; these procedures would be administered and adjudicated in a predetermined way (set out in the UAR 1972). Alongside the award procedures found in the 1971 Works Directive—open, restricted and negotiated—the BAW also recognized the possibility of direct award for below-threshold works and other works contracts not regulated by the directive. The UAR regulated the operation of the procedures in practice as well as how any conflicts about the procedures would be resolved, and in what arena.⁴¹² The Dutch government did not treat it as an implementing measure⁴¹³, but in practice it acted as one—the UAR actually

⁴¹⁰ E. Pijnacker Hordijk, "Tenuitvoerlegging van de nieuwe EG-richtlijnen inzake overheidsaanbestedingen binnen de Nederlandse rechtorde" (1992) 2 *Bouwrecht* 101.

⁴¹¹ Now known as the Ministry of Housing, Spatial Planning and the Environment.

⁴¹² In the 1972 UAR, this was always the court system; from 1986 onwards, however, UAR-governed contracts would be under the jurisdiction of the Council of Arbitration for Construction Firms (see section 4.1.6).

⁴¹³ Meaning, the Dutch government did not report it (or any of its subsequent replacements) to the Commission as an implementing measure for any of the Works directives.

contained the procedures that were to be followed when procuring contracts covered by the directive, *as well as* supplementary procedures for procurement not covered by the directive (such as direct award). The BAW and the UAR 1972 exclusively made up central government procurement regulation until 1979, when the 1977 Supplies Directive was implemented.

The Works Directive was not legally implemented for non-central government until 1977. Rather than through an Order in Council, the procurement practices of 'lower government' bodies were regulated by a separate act of parliament: Wet aanbesteding van werken lagere publieksrechtelijke lichamen 1977 ("Walapuli").⁴¹⁴ Both the BAW and the Walapuli implemented the directive's content by reference; and implementation by reference was again used to implement the 1977 Supplies Directive, which was implemented in the form of an act (Wet overheidsopdrachten voor leveringen van produkten 1979⁴¹⁵) that 'redirected' the user to the Supplies Directive itself. The 1979 Supplies Act, however, did ensure that the EU directive's rules on awarding supplies contracts could be enforced by contractors in the regular court system.⁴¹⁶ Interestingly, the 1979 Act was never linked to the UAR (which remained exclusively concerned with works contracts).

4.1.3.1 Criticism of the BAW and the Walapuli

Some commentators throughout the 1980s and 1990s noted problems with the approach taken in the design of both the BAW and the Walapuli.⁴¹⁷ They questioned whether implementation by reference was an *appropriate* implementation method for the EU procurement directives.

⁴¹⁴ Wet aanbesteding van werken lagere publiekrechtelijke lichamen 1977 (Staatsblad 1977, 669).

⁴¹⁵ Wet van 13 juni 1979 (Staatsblad 1979, 334), houdende regelen voor het plaatsen van overheidsopdrachten voor leveringen van produkten.

⁴¹⁶ Pijnacker Hordijk 1992 (n 410), p. 113. Pijnacker Hordijk et al (n 11), p. 2, indicate that this law had very little impact on Dutch procurement practice.

⁴¹⁷ See, among others, Pijnacker Hordijk 1992 (n 410), p. 100; P. Glazener, E. Pijnacker Hordijk en E. van der Riet, *Application in The Netherlands of the Directives on Public Procurement* (1990) 4 SEW 194, 199; van de Meent (n 405), chapters 7 and 8; E. Manunza, *Effectiviteit van de communautaire regelgeving inzake overheidsopdrachten voor de uitvoering van werken, een evaluatie van de openstelling van de markt voor overheidsopdrachten voor de uitvoering van werken in het licht van het gelijkheidsbeginsel: juridische aspecten en praktijk* (1993) rapport Transferpunt Vrije Universiteit Amsterdam.

However, most of the criticism was not geared generally at implementation by reference, but rather at the way the Dutch government approached this technique.⁴¹⁸

Criticisms⁴¹⁹ geared at the Dutch approach to implementation by reference have related firstly to the legibility of the Dutch law: as it referenced the directives by article number without any further explanation, and did not annex the directives to the national law. Secondly, what rights of enforcement existed was also not specified in the early Orders in Council; this meant that even where the directives' rules *could* be legally enforced, this was not clear to contractors consulting the national law.⁴²⁰

However, commentators did also complain about the lack of flexibility offered by implementation by reference more generally. As we saw in section 2.1.4.1.3, the general drawback to implementing by reference is that it does not permit changes to the text in the directives. In the Netherlands, it was perceived as problematic that the national 'laws' could not respond to changes that were brought about by case law unless these result in changes in the directives themselves⁴²¹, and that unclear elements of the original directive could not be clarified in national law.⁴²² Only this point cannot be compensated for by 'proper' implementation by reference; but as section 2.1.4.1.3 noted, clarification is only a benefit of implementation by transposition when it is done correctly.

Unofficially, it has become clear that the Dutch government did not want to transpose the directives because it feared doing so *incorrectly*.⁴²³ Critics of this attitude, however, indicate that this in essence is simply moving the location of the problem from central government (who have to interpret if transposing) to the court system (who have to interpret if cases arise as a

⁴¹⁸ Denmark, for instance, was perceived to implement by reference in an effective way; see Arrowsmith 1998 (n 10), p. 509.

⁴¹⁹ See (n 417) for sources of the criticism; in most detail, see van de Meent (n 405), p. 209, who also notes that in 1992, the Minister of Economic Affairs noted that the Orders in Council would be difficult to read for the Dutch, but that foreigners would profit from the fact that the only relevant law was the Directives themselves. [Tweede Kamer, Handelingen II, 1992-1993, p. 52 3783.]

⁴²⁰ The UAR 1972 did refer to the possibility of conflict resolution in national courts, but was not presented as an implementing measure to the Commission and as such cannot contribute to the 'correct' implementation of the Directives.

⁴²¹ Van de Meent (n 405), p. 210.

⁴²² Pijnacker Hordijk 1992 (n 410), p. 100

⁴²³ Van de Meent (n 405), p. 210.

consequence of the 'failings' of the directives), and is not an 'acceptable' reason for not transposing the directives into the national legal order.⁴²⁴

4.1.3.2 Criticism of the UAR 1972

Significant criticism also concerned the UAR 1972⁴²⁵, which contained the substantive content of the directive's award procedures, but was not intended to be an implementing measure according to the Dutch government.⁴²⁶

Problematic here was the fact that the legal character of the UAR 1972 was solely determined by which contracting authority applied it; for central government, the UAR 1972 was a generally binding regulation⁴²⁷, but for non-central government it had the character of a 'ministerial rule' (which does not have a legally binding or enforceable character).⁴²⁸ The UAR 1972 and its successors have also been termed as a "standard procedure" or "a set of pre-contractual conditions", which again suggests that their content is of a non-binding legal value when voluntarily applied.⁴²⁹

In practice, however, agreement by two parties to apply the UAR 1972 to a contract is treated by the Dutch courts as amounting to a civil law contract, and the terms of the UAR 1972 are mutually enforceable in practice. There appear to thus be no practical disadvantages to the fact that its legal character differs between central and non-central government.⁴³⁰ That said, the likelihood that this Dutch legal construct was incomprehensible to foreign contractors is one of the main reasons that critics objected to Dutch approach taken to procurement regulation.⁴³¹

⁴²⁴ Ibid, p. 211

⁴²⁵ As well as the subsequent UAR 1986, UAR-EG 1991, and ARW 2004 and 2005.

⁴²⁶ Van de Meent (n 405), p. 185.

⁴²⁷ This was affirmed by the Dutch High Court in HR 31 mei 1985 (n 409), where the court noted that the UAR gained its binding legal character through its application via the BAW.

⁴²⁸ Van de Meent (n 405), p. 213. He indicates that in the event of voluntary application, it is (technically) necessary to make a mutual commitment to abide by the contents of the UAR.

⁴²⁹ Pijnacker Hordijk et al (n 11), p. 28.

⁴³⁰ This was particularly the case for cases adjudicated by the Raad van Arbitrage voor de Bouwbedrijven (see below), which concluded that the UAR was even enforceable by one bidder against another bidder. (RvA 1 augustus 1989, nr. 14.011, BR 1990 p. 63).

⁴³¹ See Pijnacker Hordijk 1992 (n 405), p. 101.

4.1.4 The 1980s

Despite criticism, the regime that was established in the 1970s was updated throughout the 1980s, but not changed. The UAR 1971 was replaced by the UAR 1986; like its predecessor, it was not made mandatory on any non-central government bodies.

It has been noted, however, that the 1986 UAR was significantly more detailed in its procedural requirements relating to award procedures than the 1972 UAR was.⁴³² More importantly, in 1986 there was for the first time an explicit mention of how bidder review of procurement contracts would take place under the UAR. Article 41 of UAR 1986 allocated the review of all procurement procedures covered by the UAR to the Raad van Arbitrage voor de Bouwbedrijven ("RvA", Council of Arbitration for Construction Firms). The RvA is an arbitral council which settles disputes between parties in a legally binding fashion without involving the traditional judicial process.

We can contrast the Dutch approach here to the UK and French approach to conflict resolution, where courts have always reviewed procurement award procedures. In the Netherlands, instead, a mixture of judicial and non-judicial review existed—disputes all central government contracts and all non-central government contracts where the UAR 1986 was *voluntarily applied* governments were 'settled' by the RvA. For all other contracts, and prior to 1986, review was undertaken by the Arrondissementsrechtbank (District Court), which is the Dutch national court of first instance dealing with civil, criminal and administrative law.⁴³³ In the national court as well as the RvA, the remedies of interim measures, set aside, and damages were historically available to aggrieved bidders; consequently no new national legislation was drawn up to implement the 1989 Remedies Directive.⁴³⁴

⁴³² Pijnacker Hordijk et al (n 11), p. 2.

⁴³³ Following a terminological review of the court system in the Netherlands in 2001, Arrondissementsrechtbank has been replaced by the word "rechtbank" (court).

⁴³⁴ For a detailed overview of the Dutch procurement remedies system prior to the 1990s, see E. van der Riet, "Rechtsbescherming voor aannemers onder het Europese aanbestedingsrecht" (1992) 2 Bouwrecht 117.

By granting the RvA jurisdiction over *most* procurement disputes, the 1986 UAR had a substantial impact. The RvA was considered to be both cheaper and more accessible, and as it gained the jurisdiction over procurement cases, a new field of procurement case law quickly developed.

4.1.5 The 1990s

In the early 1990s, the BAW was amended to refer to the 1989 directives. The remaining Dutch sources of public procurement (including the 1979 Services Act), however, were left unchanged. One commentator noted that following 1991, the Dutch procurement regulation was nearly incomprehensible—the BAW by then complied with the 1989 consolidated directives, but the UAR 1986 (the directive's procedural rules) was left untouched.⁴³⁵ Instead, further fragmentation was created by the development of a special UAR applicable to contracts covered by the EU directives: the UAR-EG of 1991. By the time the 1993 directives were published, the Dutch procurement regulatory regime was a mess: there were now four separate legally binding documents applicable to central government—and, in an odd contrast, still only a single binding reference to EU law applicable to non-central government.

The Dutch government appears to have viewed the arrival of the 1993 consolidated directives as an opportunity to 'clean up' the Dutch procurement regulation. In 1992, the government presented a proposal for a new 'implementation strategy' to the Dutch parliament. The proposal suggested the adoption of a general framework law (known as the "Raamwet"), and two adopted general Orders in Council to be based on this law. The first of these Orders in Council would concern the Utilities Directive—*Besluit aanbestedingen nutssector, BAN*—and the second—*Besluit overheidsaanbestedingen, BOA*—would implement the three public sector directives.

The purpose of the revision was twofold. Firstly, the setup of the Raamwet would ensure that all current and future procurement-related EU rules would be implemented under one banner.⁴³⁶

⁴³⁵ *Ibid.*, p. 102.

⁴³⁶ Preamble of the Raamwet.

The separate regime for lower governments would thus disappear with the introduction of the two general Orders in Council. Secondly, existence of the Raamwet would lead to a faster implementation of the EU rules in the Netherlands, as all updated directives and other measures could be implemented through Orders in Council (which require minimal consultation with parliament).

Both the Raamwet and its two Orders in Council came into force in 1993, with the provisions of the BOA dealing with supply and works coming into force in 1994. The BOA and the BAN still implemented solely by reference to the original directives, as all previous Dutch implementing measures had done.

Despite being an improvement, the arrival of the Raamwet did not solve the complexity of Dutch procurement regulation immediately. For instance, the arrival of the Raamwet did not eliminate the existence or applicability of the BAW or the UAR-EG. It took until 2001 for the relevant provisions of the BAW (which, most significantly, also applied procurement procedures to below-threshold works contracts) to be replaced by an updated document called *Beleidsregels 2001*. The *Beleidsregels 2001* applied the important BAW rules, but only to the three government departments that conceived of them and signed them, thus leaving most of central government without an obligation to purchase competitively below the directive's thresholds.⁴³⁷

Similarly, the UAR-EG existed alongside the BOA and the BAN but in some respects contradicted it, as it was based on earlier versions of the directives. The Dutch government opted to deal with this by giving the UAR-EG the title of 'supplementary regulation', which would apply only insofar that it did not conflict with the BOA and BAN rules.⁴³⁸

This situation was further complicated by the introduction of several other Dutch laws which made it obligatory for certain types of contracts to be procured in a specific way. An example of this is the *Wet Personenvervoer* (Law on the Transport of Persons) 2000, which contains

⁴³⁷ These are the same departments that drafted the UAR 1972 (n 411), henceforth known as the Construction Departments. The *Beleidsregels 2001* also obliged the Construction Departments to apply the UAR-EG and the UAR 2001.

⁴³⁸ *Nota van Toelichting op Besluit tot wijziging van het Besluit overheidsaانبestedingen* (Staatsblad 1994, 379), p. 9.

detailed procedures to be followed when procuring a public transportation concession.⁴³⁹ A more far-reaching example is the Wet BIBOB⁴⁴⁰, which applies additional policy guidelines for procurement in the IT, environment, and construction sectors. These policy guidelines explicitly restate the grounds for exclusion of service providers in these three sectors that could also be found in the 1993 directives.⁴⁴¹

However, the Dutch government thought it had adequately restructured national procurement regulation in the 1990s. The Raamwet and its Orders in Council were perceived to be an adequate form of implementation; the remedies available in the courts and before the RvA were thought to eliminate the need to implement the Remedies directive; and there was no pressure from either the Commission or national contractors to revisit the regime, however complicated it was.

4.1.6 The Early 2000s

In 2001, the former head of a construction firm leaked a story to the Dutch press detailing the tremendous amount of cartel-forming and negotiation among bidders that dominated Dutch construction procurement. Years of accounting audits were falsified and backed up; and approximately 600 construction firms were implicated in the scandal.⁴⁴² While the primary blame was placed with a lack of whistle-blowing among procuring authorities and other members of government (who were generally aware of the practices), the Parliamentary Enquiry on Construction Fraud which followed these findings also found fault in Dutch public procurement policy itself, which was deemed non-transparent and ineffective due to lax enforcement.⁴⁴³ Particular blame was placed with the RvA, which was perceived to be too 'friendly' towards the construction industry.⁴⁴⁴ Only after the Parliamentary Enquiry did the

⁴³⁹ Pijnacker Hordijk et al (n 11), p. 26.

⁴⁴⁰ Wet Bevordering Integriteit Beoordelingen door het Openbaar Bestuur (BIBOB) (Staatscourant 2004, 40).

⁴⁴¹ For a detailed discussion, see Pijnacker Hordijk et al (n 11), p. 279 onwards.

⁴⁴² Enquête Bouwnijverheid, "De Bouw Uit de Schaduw" (Tweede Kamer 2002-2003, Kamerstuk 28.244 nr 6, 12 December 2002), at 3.6..4

⁴⁴³ Ibid, at 2.4.1 onwards.

⁴⁴⁴ It is unclear whether or not the RvA was, in fact, aware, and furthermore difficult to state what it could have done about the situation had it been aware, given that it had jurisdiction over individual cases but not the entire construction sector. For criticism of this approach, see E. Pijnacker Hordijk, "Aanbestedingsrecht na de Parlementaire Enquête

Netherlands start considering the creation of a more elaborate procurement regulatory regime that would cover both directive and below-threshold procurement for all government departments.

However, radical changes to Dutch procurement regulation have not as yet taken place. Instead, the existing regime from the 1990s has been updated several more times. First, the 1986 UAR was replaced by the UAR 2001⁴⁴⁵, which aimed to cut the costs of procurement procedures and also put a stop to price-fixing practices in the construction sector that had been declared illegal by the Commission and the CJ in 1996.⁴⁴⁶ Finally, in 2004, both the UAR-EG and the UAR 2001 were replaced by the Aanbestedingsreglement Werken 2004 (ARW, Procurement Regulation for Works 2004), one single document that contained rules for both works contracts covered by and not covered by the directives.

Simultaneously, the Beleidsregels 2001 were replaced by the Besluit Aanbestedingsreglement 2004, which bound the Construction Departments⁴⁴⁷ of the central government to the application of the ARW 2004. What was interesting about the ARW 2004 is that the College bouw ziekenhuisvoorzieningen (College for Hospital Building and Supplies) also made its application mandatory for all entities listed in the Wet ziekenhuisvoorzieningen⁴⁴⁸ (Act Hospital Building and Supplies). All other government departments, local or central, retained the option to apply the ARW 2004 to their works contracts, but as has traditionally been the case, there were been no mandatory rules in place for their below-threshold works procurement.

Bouwnijverheid", Chapter 9 in M. Van den Berg (ed), *Hoofdstukken Bouwrecht: Aangenomen Werk* (Tjeenk Willink: Den Haag 2003).

⁴⁴⁵ UAR 2001 (Staatscourant 2001, 113).

⁴⁴⁶ See the *Explanatory Note* attached to the UAR 2001; it states that certain CJ-enforced opinions of the Commission necessitated a revision of the UAR 1986.

⁴⁴⁷ In 2004, the Ministry of Agriculture/Nature/Food Quality (LNV) joined the previous three Construction Departments.

⁴⁴⁸ This law has since been repealed. The law in force at the time of the circular was Wet ziekenhuisvoorzieningen (2002) (Staatsblad 2005, 320).

4.1.7 The Current Regime

	Central Government	Non-Central Government
Above Threshold	<p>RAAMWET 1993: with Orders in Council BAO and BASS, which copy out the directives</p> <p>For 4 ministries and hospital construction: ARW 2005, which contains rules in the directive and rules for <u>works contracts</u> not covered by the directives</p>	<p>RAAMWET 1993: with Orders in Council BAO and BASS Optional: ARW 2005</p>
Below Threshold	<p>In general: NONE</p> <p>For 4 ministries and Hospital Construction: ARW 2005</p>	<p>NONE</p> <p>(Voluntary ARW 2005 & own regime possible)</p>

Table 4.1.7 – Current Legislation Applicable to Public Procurement in the Netherlands

Despite existing ambitions to revise the setup of Dutch procurement regulation, the 2004 directives were implemented through Orders in Council set in the 1993 Raamwet. This is largely because the results of the 2001 Parliamentary Enquiry were published only shortly before the announcement of the 2004 EU directives, and there was not enough time to design and enact a new law (which would have needed approval from both houses of parliament) prior to the 2006 implementation deadline. The choice was thus made to comply with the EU implementation requirements first, and design a new national law later.

The new Orders in Council are known as the BOA (Besluit Overheidsaanbestedingen, for 2004/18/EC) and the BASS (Besluit Aanbestedingen Speciale Sectoren, for 2004/17/EC).⁴⁴⁹

Unlike previous Orders in Council, however, the BOA and the BASS copy out the EU directives. This is presumably a response to the criticism raised during the Parliamentary Enquiry that the previous system of cross-references to the directives was too complex. The BOA and the BASS have recently been complemented by the introduction of the WIRA (Wet Implementatie

⁴⁴⁹ Besluit van 16 juli 2005, houdende regels betreffende de procedures voor het gunnen van overheidsopdrachten voor werken, leveringen en diensten. (Staatsblad 2005, 408) and Besluit van 16 juli 2005, houdende regels betreffende de procedures voor het gunnen van opdrachten in de sectoren water- en energievoorziening, vervoer en postdiensten. (Staatsblad 2005, 409).

Rechtsbeschermingrichtlijn Aanbesteden) — an act which copies out the 2007 Remedies directive.⁴⁵⁰

Changes in implementation approach notwithstanding, however, the regulatory regime in the Netherlands has not changed significantly since the 1990s. The practice of local governments adopting their own regimes — made possible by the optional nature of the ARW — continues to date. The ARW 2004 has had to be replaced by an updated version that takes the new directives into account — and makes allowances for procedures such as competitive dialogue — but its replacement, the ARW 2005, again principally only binds the Construction Departments in the central government.⁴⁵¹ Like in 2004, however, the College for Hospital Works and Services opted to make the application of the ARW 2005 binding on procuring entities that are subject the *Wet Toelating Zorginstellingen*, which regulates the licensing of hospital construction projects.⁴⁵² The ARW 2005 is thus in practice binding on 4 departments and a variety of (re)construction projects in the healthcare sector; for all other departments, it remains optional.⁴⁵³

While they are not relevant to the research question posed in this thesis, it is worth noting that there are still various other laws (such as *WET BIBOB*) that apply to procurement. The Dutch procurement regime thus remains layered and complex.

4.1.8 Current Legislative Initiatives

As discussed above, the Construction Fraud affair prompted a government initiative to create a more centralized and uniform set of procurement rules, so as to make the regime both less complex and easier to enforce.⁴⁵⁴ Since 2004, two laws have been proposed in order to meet these goals; the first was rejected in the First Chamber of Parliament in the summer of 2008, as it

⁴⁵⁰ *Wet van 28 januari 2010 tot implementatie van de rechtsbeschermingsrichtlijnen aanbesteden (Wet implementatie rechtsbeschermingsrichtlijnen aanbesteden)* (Staatsblad 2010, 38.)

⁴⁵¹ The binding nature of the ARW 2005 (Staatscourant 2005, 20711) is established in *Beleidsregels Aanbesteding van Werken 2005* (Staatscourant 2005, 207) ("Beleidsregels").

⁴⁵² See *Circulaire Aanbesteding van werken WTZi* (Staatscourant 2006, 77) ("2006 WTZ Circular").

⁴⁵³ It has been endorsed by the VNG, however; see M. Essers, *Aanbestedingsrecht voor Overheden* (Elsevier: Den Haag 2006), p. 32.

⁴⁵⁴ See Tweede Kamer der Staten-Generaal, *Memorie van Toelichting op "Regels voor het gunnen van overheidsopdrachten door aanbestedende diensten en opdrachten door speciale-sectorbedrijven (Aanbestedingswet)"* (Tweede Kamer, Handelingen II 2005-2006, nr. 30 501); the explanatory memorandum to the rejected procurement law.

was perceived to be too rigid and cumbersome in its approach to exclusion of contractors “lacking in integrity” (expanding on the EU’s policy of mandatory exclusion for contractors convicted for certain offenses) and in its mandatory advertising rules that would apply to all contracts (including supplies and services) above a value of 50.000 euros.⁴⁵⁵ This law proposed a radical departure from the previous regime, but such an approach was ultimately rejected.

A new proposed law has been sent to the Second Chamber of parliament for discussion in June 2010⁴⁵⁶; it has appropriately been described as far less ambitious⁴⁵⁷, as explicit rules on advertising contracts below the European thresholds have been scrapped in their entirety. The primary consequence of the latest proposal is that by centralizing the procurement rules and implementing the EU rules in the form of an act, rather than an Order in Council, further developments in the EU procurement rules will be more difficult to quickly implement.

4.1.9 Guidance

Historically, there has not been substantial use of guidance in central government procurement regulation. This is slowly changing, however, with the development of *PIANOO*⁴⁵⁸—a post-2004 government initiative website that contains all relevant legislation and policy at central government level, summarizes important CJ and national case law, and which has recently started providing short explanatory notes prepared by a panel of national ‘procurement experts’ (academics, lawyers, and senior purchasing officers) that attempt to highlight procuring entities’ obligations regarding specific problems. Recent explanatory notes have discussed the legal possibilities to reserve contracts for handicapped and (long-term) unemployed workers, the time limits set in the directive, and the directive’s information requirements and how these have been implemented in Dutch law.⁴⁵⁹

⁴⁵⁵ Pijnacker Hordijk et al (n 11), p. 5.

⁴⁵⁶ All information about the new procurement law can be accessed at <http://www.PIANOO.nl/regelgeving/aanbestedingswet> (last accessed on 1 November 2010); as the law will not be debated in parliament before the submission of this thesis, it will not be discussed in great detail in the following sections.

⁴⁵⁷ Pijnacker Hordijk et al (n 11), p. 5.

⁴⁵⁸ <http://www.PIANOO.nl> (last accessed 1 November 2010)

⁴⁵⁹ For all notes, see <http://www.PIANOO.nl/over-PIANOO/vakgroepen/vakgroep-aanbestedingsrecht> (last accessed 1 November 2010.)

The Ministry of Economic Affairs, responsible for the development of national procurement laws and policy, does not offer any guidance on its website; instead, it refers readers directly to *PIANOO*, or—specifically for non-central government—to ‘Europa Decentraal’, an independent organization chaired by representative from both local, regional and central government that aims to expand the procurement knowledge of non-central government purchasers. Europa Decentraal’s website contains similar information to *PIANOO*, but (where appropriate) discusses the particular requirements of local and regional government more explicitly.⁴⁶⁰

One particular area of procurement where significant guidance has been issued concerns complex or public-private partnership procurement; however, while there is guidance to be found here, for instance by the Ministry of Finance or the Construction Departments⁴⁶¹, it tends to focus on the total management of complex projects such as PPP projects, and does not generally comment on the applicable legal rules beyond listing relevant procurement procedures available for such projects.⁴⁶²

4.1.10 Conclusions

The Netherlands has, historically, had a complex approach to implementing the EU procurement directives. The system used until 2004 should have in theory been accessible, as it implemented EU law by reference and supplemented the EU rules with only sparing national law on works contracts. However, in practice, the 2004 choice to implement the directives by copying them out into a national law has simplified the regulatory system substantially. Current proposals for change again are pursuing implementation by verbatim transposition; however, as they are not as of yet approved, it is unclear how Dutch public procurement legislation will look in the future.

⁴⁶⁰ For instance, in discussing the new proposed procurement law, it highlights specifically how the new regime will affect sub-central government departments in procurement. (See http://europadecentraal.nl/content/2592/100/Bekendmaking_nieuwe_Aanbestedingswet.html (last accessed on 1 November 2010).)

⁴⁶¹ Of particular note for the purpose of this thesis is recent 2009 guidance by the Construction Departments on competitive dialogue, which will be discussed in section 4.2.6 below.

⁴⁶² See, for instance, the joint guidance offered by the Ministries of Finance, Housing, Spatial Planning and the Environment, the Society of Dutch Councils and the Interprovincial Council on area development, which addresses competitive dialogue use (albeit limitedly) (see <http://www.neprom.nl/viewer/file.aspx?FileInfoID=309>, last accessed 1 November 2010).

One element in the Dutch approach to procurement regulation that should be remembered when reading future sections is that any additional regulation of procurement that exists—ie, beyond what the directives require—only covers *works* contracts. There is thus currently no supplementary legislation for services or supplies contracts applicable to either central or non-central government.

Interesting about the Dutch regulation of public procurement is the very limited role played by guidance. Unlike in the UK, only in recent years has some central government guidance emerged that aims to complement the legislation; the earlier situation in the 1970s cannot be compared to this, because guidance there was the primary method of regulation.

Lastly, there is a significant body of jurisprudence on procurement on the Netherlands, aided by the pre-2004 availability of an arbitral tribunal which significantly reduced the costs of disputes. Since 2004, exclusive jurisdiction over procurement disputes has transferred back to the general courts; however, we will see that this has not reduced the number of cases appearing.

4.2 Competitive Dialogue in the Netherlands

4.2.1 Introduction

This section will discuss the Netherlands' approach to the implementation of competitive dialogue. It will first examine legislative steps taken in the BAO and the ARW 2005, if any, and will then evaluate any jurisprudence or guidance issued since 2006.

4.2.2 Legislation: BAO

4.2.2.1 General Comments

In section 2.2.3, it was highlighted that competitive dialogue is an optional procedure. However, given that the BAO generally 'copies out' the directive, it is not surprising that competitive dialogue has been made available in this piece of legislation.

All provisions on competitive dialogue not relating to scope of the procedure are found in Article 29. Various wordings in the directive have been changed, but in light of the principles of interpretation discussed in Section 2.1.4.2, it seems unlikely any of these would have a significant effect.⁴⁶³ Generally, then, it can be noted that there are very few changes made to the directive in the BAO; however, there are two exceptions. The first of these relates to scope of the procedure, as stated in the BAO, and the second relates to bid payments.

4.2.2.2 Scope

The BAO does not restrict the use of competitive dialogue in terms of either contracting authorities that can use the procedure, or types of contracts that it can be used for. The only

⁴⁶³ As an example, Article 29(3) of the Directive states that the aim of the dialogue phase of the procedure is to "identify and define the means best suited to satisfying [the procuring entity's] needs". Article 29(4) BAO, which contains the same provision, does not include the word 'identify'. Similar changes can be found with regards to 'clarify, specify and fine-tune', where the Dutch BAO leaves off 'specify'.

restriction found in the BAO is in the retention of the definition of a particularly complex contract; however, the BAO's definition is not identical to that of the directive.

The BAO defines a 'particularly complex contract' in Article 1(w), and seems to restrict use of the procedure more than the directive does in one key aspect. The wording of Article 1(w) suggests that contracting authorities are not allowed to use the procedure merely to ascertain what the *best* solution to their problem is, as is generally considered to be possible under the directive⁴⁶⁴, but only when they cannot define *any* solution.

This word choice in transposition appears to have been conscious and deliberate, even from the *Explanatory Note* to the BAO, which discusses 'necessary' solutions to a given government 'problem', rather than 'the best' solutions.⁴⁶⁵

However, as will be discussed in section 4.2.3.2, the ARW 2005, which is intended to complement the BAO, *does* explicitly refer to a possibility for 'best solutions'. This may indicate that the wording in the BAO is not intended to restrict the use of the procedure after all. Secondly, as discussed in section 2.2.4, limiting what a particularly complex contract is can have significant consequences for the availability of the procedure, and its potential usefulness in practice—although it must be remembered that the judiciary is obligated to interpret the BAO in a 'conforming' manner to the 2004 directive. The end effect of this word changes thus depends on how the judiciary would interpret the BAO's wording in Article 1(w); it may consequently be limited.

A final important point on scope is that the BAO in its entirety, as discussed in section 4.1.7, is silent on procurement not covered by the directive; availability of competitive dialogue for these contracts is thus not addressed at all.

⁴⁶⁴ See the materials cited in (n 120).

⁴⁶⁵ *Explanatory Note* to the BAO, Artikel 29: "Van een bijzonder complexe overheidsopdracht in de zin van dit besluit is sprake als het objectief gezien onmogelijk is te bepalen welke middelen en oplossingen noodzakelijk zijn voor deze overheidsopdracht (emphasis added)". (Translation: "We are speaking of a particularly complex contract in the sense of this decree when it is objectively impossible to determine which means and solutions are necessary for this contract.")

4.2.2.3 Procedural Issues

As noted, in implementing competitive dialogue, the BAO has not restricted any of the possibilities made available in the directive.⁴⁶⁶ As such, the possibility to make bid payments has been retained (Article 29(15) BAO); however, this option has been restricted in practice for central government purchasers.⁴⁶⁷ Compensation for what is termed 'participation' (ie, any standard financial calculations involved in preparing a bid)⁴⁶⁸—which is permissible under the directive as well as the BAO—will thus not be extended by any central government departments; however, the rule is retained in the BAO because it also applies to non-central government, which is not subject to the same policy-based restriction, and because it refers not only to payment for 'participation' but also to payment for significant design work, which is not forbidden by this Dutch policy.

Generally, the BAO has not expanded on the procedure in a notable manner, nor has it attempted to clarify any of the legal uncertainties highlighted in section 2.2.5. The procedure has thus only changed linguistically in being implemented in the Dutch BAO.

4.2.3 Legislation: ARW 2005

4.2.3.1 General Comments

As discussed in section 4.1.7, the second most important piece of procurement legislation in the Netherlands is the ARW 2005, which is binding on the Construction Departments of the central government as well as any other procuring entity that opts to apply it; when applied, its

⁴⁶⁶ This is also stressed in the *Explanatory Note* to the BAO, Section 4.

⁴⁶⁷ See *Explanatory Note* to the BAO, Article 29; following the 2001 Parliamentary Enquiry, central government purchasers are *no longer allowed* (as a matter of central government policy) to offer compensation to bidders unless the bidders in question offered up a (specific to the contract) design that was requested by the procuring entity as a part of the missive to 'procure innovatively'.

⁴⁶⁸ These are described in Dutch as 'rekenvergoedingen', which translates loosely to compensation offered for 'calculations'; it refers to the costs incurred in trying to prepare the financial elements of the bid specifically, which prior to the Parliamentary Enquiry were paid out every 1 in 10 procurements. [F. Peters, "Onder Een Helm", *Parool PS*, 3 April 2002.]

provisions are legally binding, and enforceable by private parties in the courts.⁴⁶⁹ A key point to remember is that it only covers *works* procurement, regardless of who applies it.

4.2.3.2 Scope

As the ARW 2005 is only applicable to works contracts, services and supplies contracts are, when covered by the directives, regulated exclusively by the BAO, and not regulated at all when they are not covered by the directives.

Regarding works procurement, however, the ARW 2005 applies to both procurement covered by the directive (what it terms 'European' procurement) and procurement not covered by the directives ('national' procurement, falling below the directive's thresholds).

Chapter 1 of the ARW 2005 contains definitions as well as rules on the scope of application of the provisions. Article 1.4.1 makes clear that the ARW 2005 foresees use of the competitive dialogue procedure for 'European' procurement, and Article 1.4.2 contains the same provision with regard to 'national' procurement.

The rules applicable to 'national' procurement and 'European' procurement are not the same, however. Of particular interest here is Section 4.2 of the ARW 2005, discussing when competitive dialogue can be used. Firstly, in the 'European' column, Article 4.2.1 indicates that competitive dialogue is available for *particularly complex contracts*. The 'national' column, on the other hand, contains no provisions on the availability of the procedure. It thus appears that any restrictions placed on availability of competitive dialogue for contracts subject to the directive have been *intentionally left out* for all below-threshold and non-directive contracts. Competitive dialogue as defined in the ARW appears to be available for even non-complex procurement for contracts not covered by the directives.

⁴⁶⁹ See section 4.1.3.2.

This broad interpretation is further supported by the *Beleidsregels aanbesteding werken 2005*—the policy rules that make application of the ARW 2005 mandatory for the Construction Departments, discussed in section 4.2.4—which state that for ‘national’ procurement, competitive dialogue is to be used in all situations where it can lead to cost-efficiency.

As mentioned in section 4.2.2.2, the ARW 2005 also discusses what a ‘particularly complex contract’ is. For both ‘European’ and ‘national’ procurement, Article 4.18.1 reads that the dialogue phase serves to “(author’s translation) decide which means are appropriate to meet the needs of the procuring entity *in the best way possible*.”⁴⁷⁰ Section 4.2.2.2 discussed the BAO’s stricter language with regard to the scope of a particularly complex contract; as stated there, it is possible that the ARW 2005’s less restrictive wording would be upheld by the judiciary.

4.2.3.3 Procedural Issues

Chapter 4 of the ARW 2005 describes the competitive dialogue procedure in full: it contains not only the competitive dialogue-specific provisions found in Article 29 of the directive, but rather all provisions dealing with the entire process of *running* a competitive dialogue procedure—this includes provisions on advertising, information requirements, etc. However, only a few of these provisions are different from those found in the directive.

Firstly, Article 4.19.1 states that there is a possibility for the contracting authority to *request* a participant to make a final tender on the basis of a solution that is “(author’s translation) not at all or not entirely” of their own invention, and that when this is done, the contracting authority needs to *include the specifications* of this solution with the invitation to submit final tenders. This is an interesting addition to the directive (here applied to both ‘European’ and ‘national’ procurement), implying that the ARW 2005 foresees a degree of solution-sharing. However, the possibilities permitted by solution-sharing are not made entirely clear by Article 4.19.1: it is not discussed, for instance, whether or not the only shared solutions that can be used have to come from *other participants* in the dialogue, or could even come from the contracting authority itself.

⁴⁷⁰ Key is the phrase “zo goed mogelijk” which means “as good as possible”.

A second addition can be found in Article 4.26.2, which states that a tender to which 'conditions' not discussed in the dialogue are attached is not valid. As we will see in section 4.3.3.3 on framework agreements, the ARW 2005 contains a similar provision for all contracting procedures, so as to prevent the possibility of tenderers manipulating contracting authorities.

Another addition is found on the subject of variants. Article 25 of the directive stipulates that in the event where most economically advantageous tender (MEAT) is used as the basis for award, tenders can be submitted on the basis of variants if permitted by the contracting authority.⁴⁷¹ As MEAT criteria are required when awarding competitive dialogue contracts, Dutch contracting authorities could thus decide to allow variants to be submitted. However, the ARW 2005 (in Article 4.23.1) forbids this possibility for both European and national procurement when using the competitive dialogue procedure. This is especially interesting because the ARW 2005 permits (and actually encourages) contracting entities to allow variant submission for all other procedures, and indicates in the explanatory notes in part IV of the ARW 2005 that this has been a conscious change from the ARW 2004. The general explanatory note in Part III of the ARW even states that it is accepted that variants can lead to innovative solutions that would be missed out upon if variant solutions are not permitted.⁴⁷²

One possible reason for the exclusion of variant submissions in competitive dialogue is that there is a presumption that variants are unnecessary in such a procedure because the dialogue phase will have clarified *exactly* which possible solution a contracting authority is interested in; but that explanation is unpersuasive because variant submission is permitted under the negotiated procedures.⁴⁷³ It is thus unclear why tenderers in a competitive dialogue procedure cannot submit tenders on the basis of variants under the ARW 2005.

Other provisions left uncertain in the directive are left unclear by the ARW 2005, as they were left unclear by the BAO. While the ARW 2005 thus expands on directive's competitive dialogue

⁴⁷¹ Whether or not variants will be accepted is to be stipulated in the contract notice; Article 25(2).

⁴⁷² ARW 2005 Part III, Section 11.

⁴⁷³ Article 5.24 of the ARW 2005.

procedure more than the BAO does, in particular by making the procedure available for contracts where the directive does not apply, the ARW 2005 also leaves a significant amount of grey areas unclear.

4.2.4 Policy Rules (Beleidsregels 2005; Wet WTZ)

4.2.4.1 General Comments

This section has thus far discussed formal legislation. In procurement, Dutch government departments are also bound by 'policy rules', which regulate how government departments carry out tasks that they are responsible for, or that fall within their competences.⁴⁷⁴ Through the *Algemene wet bestuursrecht* (General act on administrative law), government departments will generally be bound by the policy rules they set for themselves.⁴⁷⁵

In the field of public procurement, existing policy rules usually result in the application of a specific set of procurement rules. The *Beleidsregels aanbesteding van werken 2005* (Beleidsregels, see section 4.1.7) make application of the ARW 2005 mandatory for the Construction Departments when procuring works not covered by the BAO/directive. Similarly, the 2006 Administrative Circular "Aanbesteding van werken Wet Toelating Zorgstelsel" (WTZ) makes application of the ARW 2005 mandatory for all procuring entities engaged in the building and managing of healthcare facilities for which a permit is necessary, when such contracts are not covered by the BAO/directive.

4.2.4.2 Scope

Generally, the Beleidsregels require that for all procurement below the directive's thresholds, the open or restricted procedure is used. However, several scenarios in which procuring entities can deviate from these two procedures are presented. One of these scenarios is where "(author's

⁴⁷⁴ Normally determined by law.

⁴⁷⁵ The exception being special circumstances where following the policy rule would have a disproportionate consequence for any concerned party; Article 4:84 Awb.

translation) competitive dialogue offers an advantage."⁴⁷⁶ There is thus no reference to 'particularly complex contracts', and from the *Explanatory Note* to the Beleidsregels it can be gleaned that this is deliberate:

"(author's translation) [... in determining the grounds for use of the competitive dialogue procedure, it was decided to deviate from the condition in the Order that there must exist a 'particularly complex contract.'] A broad applicability has been chosen under the precondition that this procedure must result in a genuine advantage. The procurer will thus have to be able to motivate this."⁴⁷⁷

A very similar provision can be found in the 2006 WTZ circular. It stipulates that the default method of procurement for 'national' procurement will be the open or restricted procedure as described in the ARW 2005, but adds that competitive dialogue can be used when this will benefit the procuring entity. Unlike the Beleidsregels, the 2006 WTZ circular defines what it means by 'benefit'—and indicates that this relates exclusively to works where early involvement on the part of the contractor is necessary for a successful procurement, such as 'turnkey' or design-build-operate contracts. It therefore does not appear that competitive dialogue is also available under the 2006 WTZ circular for non-complex procurement generally.

4.2.5 Jurisprudence

At the time of writing, no relevant case law on competitive dialogue has emerged from the Dutch courts; while a few cases deal with competitive dialogue disputes, the disputes in question do not specifically deal with competitive dialogue as a procedure but rather with general problems with contract award (such as non-transparent award criteria/weightings and/or incorrect award decisions).

⁴⁷⁶ "Het een werk betreft waarvoor een aanbesteding volgens de concurrentiegericht dialoog voordeel biedt".

⁴⁷⁷ "Voor het gebruik maken van de aanbestedingsprocedure volgens concurrentiegericht dialoog (artikel 4, eerste lid, onderdeel b) is afgeweken van het bepaalde in het besluit, dat er sprake moet zijn van bijzonder complexe opdrachten. Gekozen is voor een bredere toepasbaarheid maar wel onder de voorwaarde dat deze procedure daadwerkelijk voordeel biedt. De aanbesteder zal dit dan ook moeten kunnen motiveren."

4.2.6 Guidance

It was discussed in section 4.1.9 that the Netherlands has not traditionally created its own guidance on public procurement law. However, in 2009, the Construction Departments (with assistance from *PIANOO*) have issued a guidance document called “Competitive Dialogue”, discussing the use of competitive dialogue in design-build-finance-operate (DBFO) procurement projects. This guidance is based on Dutch practical experience; consequently, it does not address the law on competitive dialogue in detail, and instead aims to supplement the hard law rules in the BAO with a practical procedural guide.⁴⁷⁸

The guidance starts by discussing planning and risk analysis, and focuses on *organization* of the dialogue rather than the legal regime in which it is to take place. There are also explicit mentions that confidentiality should be maintained—but much as in the UK, there is no particular guidance on how this should be done (see section 3.2.4.8).⁴⁷⁹

Similarly to the UK discussion on the ‘reserve’ bidder (see section 3.2.4.7), the Dutch guidance contemplates the use of a ‘waiting room’—but suggests this is usually impractical, as shortly after being rejected, the bid consortia that participate in complex tenders are likely to disband.⁴⁸⁰ The Dutch guidance thus suggests that it is permissible to hold on to reserve bidders, but may not be possible in practice.

Generally, the guidance supplements EU law to a significant extent, much like the UK guidance by 4ps and PFS has done (see section 3.2.4), but does not address many of the practical and legal uncertainties in the procedure discussed in Section 2.2.5. It should also be noted that the guidance is very narrowly aimed at *contracting authorities*; issues such as the completeness of final tenders are not elaborated on, possibly because the contracting authorities do not write the final tenders themselves.

⁴⁷⁸ Rijksoverheid, “De Concurrentiegerichtte Dialoog” (October 2009) (see <http://www.ppsbiihetriik.nl/dsresource?objectid=709&type=org>, last accessed 1 November 2010).

⁴⁷⁹ Ibid, at 3.9.2.

⁴⁸⁰ Ibid, at 4.4.

A few legal uncertainties *are* discussed, however. The guidance firstly recommends that reduction of solutions can take place after a questioning of a proposed approach or “project vision” (at 5.4.3); it is implied that these submissions are written, as the guidance demands that dialogue will continue on the basis of the ‘submitted’ approach/vision. This is very similar to the recommended UK approach to reduction of solutions (see section 3.2.4.3).

Interestingly, the guidance also suggests that three candidates need to be retained at all times until the final tender phase; this can be contrasted with UK guidance, which generally suggests that competition at the final tender stage can be secured by just two tenderers (see section 3.2.4.4). In terms of the award criteria used to assess any sort of interim tender, the Dutch guidance merely indicates that these criteria should be ‘stated’—this is very similar to the PFS approach in the UK (see section 3.2.4.3).

Finally, unlike the UK guidance, the Dutch guidance does recommend best practice for establishing a bid (design) payment regime; the guidance (in 3.11.2) recommends considering in detail the objective costs of the design, what a reasonable price would be to pay for design work, and what bidders would become eligible for a payment—all bidders, or only the final two bidders? As we will see in section 5.2.3.1.3, these considerations are quite similar to the recommendations actually stated in the French CMP.

4.2.7 Rules for Contracts Not Covered by the Directives?

It is difficult to understand why only works procurement is subject to additional regulation in the Netherlands; historically, it can be explained by the fact that the 1971 Works Directive was the only directive implemented in the Netherlands for quite some time, but this does not explain why from 1993 onwards, additional regulation for supplies and services contracts has not emerged. The provisions that applied to the above-threshold procurement of services and supplies, however, have simply never been supplemented by rules for below-threshold or excluded contracts. In a complete absence of rules for services and supplies contracts, it can be assumed

that (much like in the UK) competitive dialogue is freely available for these contracts when they are not covered by the directive.

The first proposed new procurement law foresaw a system of 'national procurement' that applied to works, services and supplies equally;⁴⁸¹ despite various changes to the proposal that means that coverage is significantly less ambitious in the new proposal, a desire to create 'ARW 2005'-like rules for services and supplies has been expressed again in the Explanatory Memorandum accompanying the second proposed law.⁴⁸² However, the specifics of these rules have not been made clear at the time of writing and thus cannot be commented on.

4.2.8 Conclusions

Competitive dialogue has been brought into the Dutch legal order as it was created at the EU level. The Dutch legislative provisions in the BAO dealing with competitive dialogue principally add very little to the original provisions in the directive, and even the ARW 2005 only makes a few additions, primarily to make it clear that under the ARW 2005, competitive dialogue can also be used for excluded contracts that are *not* particularly complex. For services and works contracts excluded from the directives, the Dutch legislation remains silent (much as the UK legislation does).

The Dutch legislation is, despite various word changes, as limited as the UK legislation is; however, the Dutch government has not until recently supplemented the legal provisions with guidance. This is in line with the Dutch regulatory tradition, in which legal guidance has never played a particularly important role; even now, central government guidance focuses significantly more on best practice than it does on legal clarification. Lastly, much like in the UK and at the EU level, the courts have not yet dealt with the specific legal uncertainties of competitive dialogue at all—and consequently case law has played no role at all yet in the development of national rules on competitive dialogue.

⁴⁸¹ Pijnacker Hordijk et al (n 11), p. 5.

⁴⁸² *Explanatory Memorandum to the Procurement Law, Section 4.2* (see <http://www.PIANO.nl/sites/default/files/documents/documents/memorievantoeelichtingaanbestedingswet.pdf>, last accessed 1 November 2010).

4.3 Framework Agreements in the Netherlands

4.3.1 Introduction

This section will examine how the Netherlands has approached the provisions for framework agreements found in the 2004 Public Sector Directive. In order to examine the impact of these rules, the Dutch approach to public sector framework arrangements prior to 2004 will first be discussed (section 4.3.2). Following this, responses to the 2004 rules will be examined (section 4.3.3).

4.3.2 Framework Agreements Prior to 2004

The fact that framework agreements were not included in the old 'classic sector' directives (see section 2.3.1) led to a multitude of questions for contracting authorities as well as legal practitioners in all Member States, the most important two of which were:

- a) Were framework agreements permitted at all for 'classic sector' contracts?
- b) Or, did the fact that framework agreements were not listed in the 'classic sector' directives mean that the rules of those directives did not apply to framework agreements?

4.3.2.1 Clarification on Legal Position of Framework Agreements

In the Netherlands, prior to 2004, no legislation addressed the legality of 'classic sector' framework agreements. Because the Netherlands implemented by reference (see section 4.1), the national implementing measure (the BOA) did not address framework agreements any more than the directives did. Supplementary regulation such as the UAR-EG 1991 and the UAR 2001 also did not mention framework agreements.

4.3.2.2 Academic Writing on the Position of Framework Agreements

Very limited academic writing on public procurement regulation existed in the Netherlands prior to the 1990s, and most of the writing concerned Dutch public procurement law very generally. However, a main textbook on public procurement law in the Netherlands from 1996 offers a brief discussion of some of the questions stemming from a) the definition of a 'framework agreement' and b) whether or not they could legally be concluded under the 1993 directives.⁴⁸³

Much like the OGC's guidance on framework agreements prior to 2004 (see section 3.3.2.2), the authors highlight the difficulties stemming from the Commission's conceptual distinction between a *framework agreement* and a *framework contract*. According to Dutch civil law, an agreement that is not *binding* on both parties is not a 'contract'—non-binding framework agreements in the Commission's sense are thus not public contracts.⁴⁸⁴

The authors then directly challenge the UK approach to framework agreements prior to 1994, by stating that "(author's translation) Arrowsmith [in the 1996 edition of *The Law on Public and Utilities Procurement*] points out that the British government assumes that the regulation of [non-binding] framework agreements can also be applied to the [classic sector directives]. This conclusion is incorrect." In other words, the authors conclude that as non-binding framework agreements were not (public) *contracts*, they were not covered by the classic sector directives. However, the textbook does not make it clear whether a lack of coverage by the directives this was interpreted as meaning that non-binding framework arrangements were *illegal* under the directives.

Unlike non-binding framework agreements, framework contracts *can* be considered 'contracts' in Dutch civil law because they place binding obligations on both the contractor and the contracting authority; the fact that they are in essence binding public contracts that have a 'repeat' element to them meant that these were *prima facie* permissible under and covered by the classic sector

⁴⁸³ E. Pijnacker Hordijk and G. van de Bend, *Aanbestedingsrecht: Handboek van het Europese en Nederlandse Aanbestedingsrecht* (1st druk) (SDU: Den Haag 1996), pages 49 and 50.

⁴⁸⁴ *Ibid.*, p. 49.

directives. That said, opinion at the time was also that as these 'framework contracts' were just regular 'public contracts', they should not necessarily be able to benefit from the less strict regulation of framework agreements available under the Utilities Directive.⁴⁸⁵

Pijnacker Hordijk and van de Bend thus summarized the Dutch opinion at the time as such: if the original 'framework contract' was awarded in line with a procedure in the directives, subsequent orders placed under that directive could be directly awarded.⁴⁸⁶ Conversely, however, in the case of a non-binding framework *agreement*—which was perceived as not being covered by the old directives—any call-offs were subject to the EU rules.

4.3.2.3 Jurisprudence

Shortly following the publication of this 1996 academic text, the CJ in *Togel*⁴⁸⁷ left open whether or not non-binding framework agreements could be concluded under the classic sector directives. In the Netherlands, this silence appears to have been interpreted as approval.⁴⁸⁸ At least one Dutch case in the 1990s that concerned a non-binding framework *agreement* adopted a similar approach and appears to have simply assumed that the use of non-binding framework agreements in the classic sector was permitted.⁴⁸⁹

With regards to the second question—as to whether or not framework agreements were *subject* to the directives—*Togel* supported the Dutch perspective on the difference between a non-binding framework agreement and a framework contract. The CJ appears to have implied in its judgment that if the framework arrangement in question—which was binding on both parties, and was thus a 'contract' instead of merely a non-binding 'agreement'—*had* been concluded following 1993, the agreement would have had to have been procured according to the 1993

⁴⁸⁵ See Europa Decentraal, *Factsheet Raamovereenkomsten*, (January 2005, see http://www.europeseaanbestedingen.eu/europeseaanbestedingen/download/common/factsheet_raamovereenkomsten_finale_opzet.pdf, last accessed 1 November 2010), discussing the historical difficulties with the differences between framework agreement/contract and how these are to be resolved in Directive 2004/18/EC.

⁴⁸⁶ Pijnacker Hordijk and van de Bend (n 483), p. 50.

⁴⁸⁷ C-76/97 *Walter Tögel v Niederösterreichische Gebietskrankenkasse* [1998] ECR I-5357; the case concerned framework agreements for patient transport, but the CJ did not address the legality of this type of purchasing arrangement being concluded.

⁴⁸⁸ Pijnacker Hordijk and van de Bend (n 483), p. 73. See also S. Corvers, F. van der Klauw-Koops, and W. Damste, *Een nieuwe Europese aanbestedingsrichtlijn voor de klassieke sectoren* (SDU: Den Haag 2007), p. 122.

⁴⁸⁹ Hof Arnhem, 17 oktober 2000, rolnr. 99/264.

Service Directive. It treated the framework 'contract' in question as a regular public contract—this coincides with the Commission's definitions⁴⁹⁰ of framework *contracts* versus (non-binding) framework *agreements* as well as the Dutch academic opinion at the time.

Following *Togel*, there is at least one example of the Dutch courts considering the application of the public sector directives to non-binding framework agreements. In the *Canon/Staat der Nederlanden*⁴⁹¹, which concerned a multi-supplier framework arrangement of type C—committing the supplier to supply, but not committing the contracting authority to buy⁴⁹²—the Dutch Supreme Court confirmed the High Court ruling, which had stated that having such an agreement does not absolve a contracting authority from following the directive's rules when placing call-offs. This is an important judgment in the sense that it addresses, through a concrete example, two specific grey areas with regard to framework agreements:

- Are type C multi-supplier framework 'agreements' permissible?
- How are call-offs to be treated?

Neither the High Court nor the Supreme Court explicitly addressed the first issue, but rather stated that where a non-binding framework agreement was concluded, its call-offs would have to be procured according to the EU rules where the individual call-off was subject to the directive.⁴⁹³ This essentially follows the same logic that Pijnacker Hordijk and van den Bend apply in their academic discussion of 'framework agreements', and concludes that these non-binding agreements themselves are not public contracts and thus not subject to the classic sector directives. Consequently, any subsequent 'actual contract' stemming from such an 'agreement' would have to be publically procured in line with the classic sector directives. Even though the court thus failed to address the *inherent legality* of multi-supplier non-binding framework agreements under the classic sector directives, by demanding full-procedure for all call-offs the *Canon* case made them almost unworkable for contracting authorities in practice.

⁴⁹⁰ See Commission, *Draft Policy Guidelines on Framework Agreements*, CC/92/91_rev of 18.12.1993; see also Arrowsmith 2005 (n 25), p. 455 onwards, for commentary on the draft policy guidelines.

⁴⁹¹ HR 25 januari 2002, C00/180HR; and the High Court judgment: Hof Den Haag 16 maart 2000, NJ 2000/43.

⁴⁹² See section 2.3.3.

⁴⁹³ Para. 5.2 of the High Court judgment; the Supreme Court did not reconsider the point.

The most striking element of the *Canon* judgment is that it took a completely different approach from all the RvA cases adjudicating framework arrangements in the early 2000s, where the RvA (implicitly) permitted the use of both single and multi-supplier non-binding frameworks without commenting on how the directives applied to call-offs under such agreements.⁴⁹⁴

The general impression created by Dutch jurisprudence at this time, then, was that non-binding framework agreements were not *impermissible*, but how these interacted with the requirements of the public sector directives was not clarified. Framework 'contracts', on the other hand, were commonly accepted to be covered by the public sector directives.

4.3.3 Framework Agreements since 2004

4.3.3.1 Legislation: BAO

4.3.3.1.1 Availability

As explained in Section 2.3.4.1, the 2004 directive leaves it for Member States to decide if (and if so, how) they want to allow the use of framework agreements. The Netherlands has indicated in the *Explanatory Note* to the BAO that its intent in implementing the directive is to leave all of its possibilities open to contracting authorities. Framework agreements have thus been made available without restrictions: Article 1(n) of the BAO makes it clear that multi-user, multi-supplier and single-supplier frameworks can all be concluded.

⁴⁹⁴ Bindend advies 26 mei 2000, W.340, discussing the completeness of specifications on a framework; it was here accepted that a framework was concluded on the basis of estimated quantities that may be subject to change. See also *Vr. Breda* 23 April 2003, rolnr. 117552/ KG ZA 03-100, wherein it was accepted that an above-threshold framework agreement for ambulances only contained approximate numbers of ambulances required; RvA 21 december 2000, nr. 21.929, where it was determined that detailed discussions around a 'sample' framework agreement resulted in an obligation to let the bidder submit prices on the basis of the framework agreement. (However, the Council did indicate that the agreement offered significantly less rights than an actual contract (ie, the subsequent call-off) would have); and RvA 29 juli 2004, nr. 26.765, discussing whether or not orders could be placed under a wrongfully concluded framework; the framework agreement itself had been found to be wrongfully concluded in RvA 16 juni 2004, nr. 70.878.

4.3.3.1.2 Mandatory rules or not?

The procedure to follow when concluding a framework agreement is found in Article 32 BAO. A preliminary interesting point is that the BAO indicates that framework agreements ‘may’ be procured using the procedure outlined in Article 32. The *Explanatory Note* to the BAO makes it clear that this is for a reason: the legislator follows the Dutch case law (*Canon*, discussed in section 4.3.2.3 above) preceding the new directive in summarizing that a framework agreement that does not contain either binding obligations for the supplier, or for the contracting authority, is not a ‘public contract’ as defined by the directive. It then adds that where the Article 32 procedure is not followed in awarding the framework, individual contracts awarded on the basis of such an agreement would have to be awarded using the normal procedures stated in the directive.⁴⁹⁵

This is similar to what the OGC guidance from 2003 stated about the applicability of the directive to the procurement of framework agreements (see section 3.3.2.2), and the point raised there is worth repeating here: not awarding a framework agreement using the directive/BAO’s procedures makes the setting up of a framework agreement pointless. It is wholly unclear why both the Dutch and the UK governments highlight this ‘possibility’ as no contracting authority would ever opt to establish a framework without ensuring that call-offs were *not* subjected to individual advertising requirements.

4.3.3.1.3 Procedural Rules: Single-Supplier Frameworks

With regards to the procedure for single-supplier call-offs, the BAO (Articles 32(7) and 32(8)) and the directive (Article 32(3)) follow the same wording; no relevant additions or changes have been introduced from the directive.

⁴⁹⁵ *Explanatory Note* to the BAO, Article 32.

4.3.3.1.4 Procedural Rules: Multi-Supplier Frameworks

The procedures for multi-supplier frameworks listed in Article 32(4) have been incorporated nearly verbatim into the BAO. The directive's and the BAO's provisions on call-offs based on original tenders are identical. Some minor changes have taken place with regard to call-offs based on the so-called 'mini-competition', as described in Article 32(4) of the directive.

The directive there discusses a situation where "when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms", a specific procedure has to be followed in order to award the contract. The BAO, in Article 32(10)(b), has rephrased this to state that if not all the terms of the framework agreement have been laid down, a new competition can be held in accordance with the terms set in the framework agreement or its specifications. It is unlikely that this change is intended to result in a deliberate restriction on the original wording of the directive; the principles of EU law interpretation discussed in section 2.1.3.4 once again would require an interpretation to conform to the directive's wording, and so in a dispute this changed wording would presumably not be upheld.

Generally, however, the BAO does not clarify aspects concerning the mini-competition that are left unclear by the directive; in particular, complex issues (discussed in section 2.3.4.3) such as whether or not the weightings given to different award criteria can change at the call-off stage are not addressed further.

4.3.3.1.5 BAO: Conclusions

In summary, the BAO's provisions on framework agreements are slightly differently worded than those in the directive, but these changes are unlikely to have practical effects. Legal uncertainty presented by the directive's wording is not clarified by the BAO.

4.3.3.2 Guidance: BAO Explanatory Note

The *Explanatory Note* to the BAO contains useful supplementary information on a different subject, namely, that of commitments stemming from framework agreements (rather than contracts concluded on the basis of framework agreements)⁴⁹⁶. The directive itself is fully silent on this; the BAO also does not contain explicit provisions detailing to what extent a framework agreement can be considered 'binding', or has obligations, but rather addresses the issue in its *Explanatory Note*.

The *Explanatory Note* states that even though a framework agreement is *not* a contract, this does not mean that no obligations stem from such an agreement. It stresses that the 'pre-contractual principles of good faith' and the 'general principles of good governance' require that a contracting authority does not simply *ignore* a concluded framework agreement by awarding a contract to an economic operator not party to the framework agreement. The *Explanatory Note* states that awarding outside of the agreement would only be acceptable where market conditions change so substantially following the conclusion of the agreement that adhering to the agreement would be unreasonable.⁴⁹⁷ Even though the *Explanatory Note* is not binding, inclusion of these comments does indicate that the legislator believes that there are binding obligations that stem exclusively from the framework agreement itself.

4.3.3.3 Legislation: ARW 2005

4.3.3.3.1 Availability

As discussed in Section 4.2.3.2, the ARW 2005 contains the procurement rules to be followed when the four Construction Departments of the central government procure works. It covers both contracts covered by the directives ('European') and those not covered ('national').

⁴⁹⁶ This issue was previously considered in RvA 21.929 (n 494).

⁴⁹⁷ *Explanatory Note* to the BAO, Article 32.

The ARW 2005 adheres to the directive's distinction between single-supplier frameworks (found in Chapter 9) and multi-supplier frameworks (in Chapter 10). It allows for the conclusion of both types of frameworks as long as procured according to the rules detailed in the stated chapters. The ARW 2005 also appears to allow multi-user frameworks to be concluded, but does not contain any rules on how these should operate.

4.3.3.3.2 Single Supplier Frameworks

While not changing the definition of a framework agreement, the ARW 2005 does, however, make some subtle changes with regards to when and how framework agreements can be concluded. While for 'European procurement' (Article 9.1.2), the ARW 2005 indicates that one of the directive's procedures has to be followed in order for a framework agreement to be concluded, for 'national procurement' (Article 9.1.3), framework agreements can be concluded using the 'underhanded' procedure. The 'underhanded' procedure involves a direct invitation to 2-6 suppliers to tender for a certain contract; in other words, there is no advertising or publication requirement.⁴⁹⁸ The ARW 2005 thus gives more procedural freedom to contracting authorities procuring a 'national' framework agreement.

The ARW 2005 has grouped what it terms the 'general restrictions' together, but has not changed their content. This means that even where not covered by the directive, framework agreements cannot be concluded for more than 4 years (unless duly justified), parties cannot be added to the framework agreement, call-offs cannot result in substantial changes to the framework agreement, and the framework agreement cannot be used to restrict competition.

An addition to the directive/BAO is found in Article 9.5.2, which states that "(author's translation) a conditional tender is not valid".⁴⁹⁹ As discussed in section 4.2.3.3, a similar condition can be found in the ARW 2005's provisions for competitive dialogue; it ensures that tenderers cannot put 'demands' in their tenders.

⁴⁹⁸ Aside from this, the procedure resembles the restricted procedure, and is thus not comparable to 'direct award'. However, the 'underhanded procedure' is possibly contrary to the Treaty (*Telaustria*, n 4); this will be discussed in section 4.4.3.2.2.

⁴⁹⁹ "Een inschrijving waaraan voorwaarden zijn verbonden, is ongeldig."

Several other additions are found with regards to contracts awarded under the framework agreement. Article 9.7.1 states that for both 'European' and 'national' procurement, a party to the framework agreement can only be awarded a contract if they meet the requirements set out in the framework agreement on both the day the framework agreement was concluded, *and* the day the call-off is placed. The directive is silent on the issue of how financial and economic standing is to be 'measured' in terms of a framework agreement; however, the ARW 2005's provisions here are logical, as it is conceivable that a contractor qualifies to become a party to the framework agreement, but will no longer qualify when a call-off is placed in later years.

4.3.3.3 Multi-Supplier Frameworks

A few elements of note are found in the ARW 2005's provisions on multi-supplier frameworks. First, Article 10.1.2 indicates that at least 3 contractors (where possible) have to be party to a multi-supplier framework, and somewhat surprisingly—given that the ARW 2005 tends to relax the rules for 'national procurement'—applies this demand to both 'national' and 'European' procedures. However, Article 10.1.3 does once again allow 'national' framework agreements to be concluded using the underhanded procedure.

Secondly, Article 10.1.5 allows for an electronic auction to be used to award a contract under the framework agreement where a mini-competition is held. The ARW 2005 copies out the BAO's provisions on electronic auctions in explanation.

Thirdly, Article 10.3.1 (discussing a mini-competition) states that a call-off can be awarded on the basis of "(author's translation) other terms, of which an indication is given in the specifications of the framework agreement."⁵⁰⁰ This suggests that mini-competitions concluded under the 'national' rules in the ARW 2005 can have quite different (and only *later specified*) terms than the original framework agreement spells out. The same wording is used for 'European procurement',

⁵⁰⁰ "...op basis van andere voorwaarden waarvan in het bestek van de raamovereenkomst een *indicatie* is gegeven" [emphasis added]

but here, the rules of interpretation (see section 2.1.4.2) would require that in a dispute, the original wording of the directive is considered in interpreting the national implementing provisions.

Fourthly, Article 10.5.2 repeats the aforementioned prohibition on 'conditional tendering' for multi-supplier framework agreements.⁵⁰¹

Fifthly, Article 10.9 discusses call-off award, and has an interesting condition in it which is not found in the directives or the BAO. Should two of the submitted tenders be equal in all manners—and thus technically *both* win—the winning tender will be decided through a lottery.⁵⁰² This is comparable to the kind of 'cascading' award system permissible according to the Commission's *Explanatory Note*⁵⁰³ (see section 2.3.4.3).

Finally, with respect to notification, the ARW 2005 contains a response to one of the uncertainties highlighted in section 2.3.4.3. Article 10.9.3 explicitly requires the contracting authority to notify all 'parties to the framework agreement' in writing when a call-off has been awarded. The ARW 2005 thus directly applies the rules of Article 41 on 'award of a contract' to call-offs under a multi-supplier framework.

4.3.3.3.4 *The Alcatel Standstill*

It is important in the case of multi-supplier frameworks with a mini-competition to highlight how ARW 2005 approaches the *Alcatel* 'standstill requirement', as (like the UK regulations, see section 3.3.2.1) the ARW 2005 has added to the 2004 directive's provisions. The 2007 Remedies Directive has incorporated the *Alcatel* judgment, but the ARW 2005 precedes this directive (and its Dutch implementation) by a number of years.

⁵⁰¹ See section 4.3.3.1.4.

⁵⁰² This is also the case for the open/restricted/negotiated procedures.

⁵⁰³ *Explanatory Note on Framework Agreements* (n 142), section 3.2.

For multi-supplier framework agreements, the ARW 2005 applies the standstill not merely following the award of a framework agreement itself, but also at the call-off phase. At the time that this was introduced, it was a highly interesting and potentially burdensome addition to the applicable EU rules—and it should be noted that the ARW 2005 has not since been amended to reflect the Dutch implementation of the 2007 Remedies Directive.

The ARW 2005's position on standstills under framework call-offs has become problematic now that the 2007 Remedies Directive has been implemented, however. The Dutch law implementing of the 2007 Remedies Directive (the "WIRA") has made use of the option to not apply a standstill to framework agreements, but to instead to introduce a remedy of ineffectiveness as permitted by Article 2(d) of the directive. The rules in the ARW 2005 are now substantially different from those in the BAO, with the ARW 2005 imposing a more time-consuming process.

4.3.3.5 ARW: Conclusions

In general, the ARW 2005 provides limited additions to the framework agreements regime set up by the directive or the BAO. Uncertainties relating specifically to framework agreements are not generally clarified, nor does the ARW 2005 or its *Explanatory Note* offer any guidance as to when a particular framework agreement *ought* to be used. However, the ARW 2005 does address the information requirements in Article 41 and how these apply to call-offs, and considered the *Alcatel* standstill requirement and its application to call-offs under framework agreements. The ARW 2005 opted to apply the standstill to call-offs as well, which has recently become problematic, as implementation of the 2007 Remedies directive has introduced 'ineffectiveness' instead of the standstill. As noted, the ARW 2005 has not been updated to reflect this change.

4.3.3.4 Policy Rules

The *Beleidsregels aanbesteding van werken* 2005, which make application of the ARW 2005 mandatory for the Construction Departments, contain only two provisions on framework agreements. The definition of a framework agreement, found in Article 1(l), is identical to the

one used in the directive, BAO, and ARW 2005. Article 3 of the Beleidsregels then indicate that when awarding contracts on the basis of a framework agreement, the open and restricted procedure will not be applicable.⁵⁰⁴ No further instructions are found in the text of the Beleidsregels themselves, but the *Explanatory Note* to the Beleidsregels adds that the framework agreement procedures in the ARW 2005 apply to these contracts.

The 2006 WTZ Circular, which makes application of the ARW 2005 mandatory for all procuring entities engaged in the building and managing of healthcare facilities for which a permit is necessary, contains very similar provisions to the Beleidsregels; again, it is merely indicated that contracts awarded on the basis of a framework agreement should be awarded using the procedures in the ARW 2005.

Neither set of policy rules thus expands on the Dutch legislation on framework agreements.

4.3.4 Guidance

At the central government level, no specific guidance on framework agreements has been issued either before or since 2004.

Europa Decentraal, the organization that offers guidance on how the EU rules affect non-central government, published a Fact Sheet on the 2004 directive's provisions on framework agreements in 2005.⁵⁰⁵

The Fact Sheet, drafted prior to the enactment of the BAO, generally limits itself to summarizing the procedures to be followed when awarding framework agreements under the new directives. However, it does offer an opinion on at least one issue that is not immediately clear from the directive itself. It states that when conducting a mini-competition, not all parties to the framework agreement have to be invited to participate—and simultaneously acknowledges that

⁵⁰⁴ "Van het houden van een aanbesteding volgens de openbare procedure of de niet-openbare procedure als bedoeld in artikel 2 wordt afgezien ..."

⁵⁰⁵ *Factsheet Raamovereenkomsten* (n 485).

other guidance institutions interpreted the same provision⁵⁰⁶ as meaning that all parties to the framework have to be invited to participate.⁵⁰⁷ What it actually recommends as either required by law or best practice is thus not entirely clear.

4.3.5 Jurisprudence

The majority of recent Dutch case law on framework agreement actually deals with the principles of equal treatment and transparency rather than the rules on framework agreements themselves. Other cases confirm generally understood elements of framework agreements, such as that the total scope of the purchases made is not known and cannot be firmly indicated at the time the agreement is concluded, in specific purchasing disputes.⁵⁰⁸

One interesting recent case is *Bouw & Vastgoed/UWV*⁵⁰⁹, wherein the court disallowed a third party to be added to a framework agreement (in an attempt to comply with Article 32(9) of the BAO on minimum number of parties) on the basis of the general principle of transparency—but did not observe that the directive and the BAO themselves do not allow parties to be added after the conclusion of a framework agreement.

Generally, however, the case law has not expanded on the EU rules on framework agreements to a great extent; and as there is no recent CJ case law on framework agreements, the Dutch courts also have not had an opportunity to incorporate CJ judgments into national jurisprudence.

4.3.6 Conclusions

In implementing the directive's provisions on framework agreements, the Dutch legislator changed very little; much like in the UK, there were no rules in legislation prior to 2004 and following 2004, the rules are identical to those in the directive.

⁵⁰⁶ NPPP/NVILG/*PIANOO*, "Achtergrondinformatie over de opties uit de nieuwe Europese aanbestedingsrichtlijnen" (September 2004), p. 6 e.v.

⁵⁰⁷ *Factsheet Raamovereenkomsten* (n 485), p. 6.

⁵⁰⁸ See Hof Den Haag 6 Maart 2008, rolnr. 07/1490, which confirms V.zr. Rb. Den Haag 16 november 2007, rolnr. KG 07/1316.

⁵⁰⁹ Rechtbank Amsterdam 15 juni 2006, rolnr. 341231/KG 06-824 P.

The ARW 2005 has made two interesting additions; one of which relates to information requirements for call-offs, and the other relates to the current provisions in the ARW 2005 on a standstill prior to call-off conclusion. Its inclusion in the ARW 2005 may indicate that the drafters of the ARW 2005 consider a standstill preferable to ineffectiveness of call-offs; however, the WIRA overrode these rules and consequently the ARW 2005's instructions conflict with those in other pieces of procurement legislation.

While the Dutch government has recently issued a substantial guidance document on competitive dialogue (see section 4.2.6), they have not issued any particularly useful guidance on framework agreements. The Commission's *Explanatory Note* on Framework Agreements further is not highlighted on the Dutch procurement websites. Lastly, there is scant jurisprudence that deals specifically with issues on framework agreements; unlike in the UK, this is not an area of law that has been developed by the national courts beyond what the EU has already said.

4.4 The General Principles of Equal Treatment and Transparency in the Netherlands

4.4.1 Introduction

Section 2.4 discussed how the CJ, through its case law, has extended the obligations that Member States have under both the Treaty and under the directives.

This section will examine how the Netherlands has dealt with the development of the general principles of equal treatment and transparency in its national laws. We will here explore how the Netherlands has approached additional obligations stemming from CJ jurisprudence on contracts covered by the directives (section 4.4.2) and those obligations stemming from contracts not covered by the directives (section 4.4.3.).

4.4.2 Contracts Covered by the Directives

4.4.2.1 Legislation: BAO

As discussed in section 4.1.7, the BAO generally 'copies out' the directive. Consequently, the BAO repeats the directive's provision on the general principles in Article 2: "(author's translation) a contracting authority treats economic operators equally and without discrimination and acts transparently".

The BAO contains a further set of provisions regarding "bidders from other Member States". Article 5(1) indicates that a contracting authority shall 'approach' bidders from other Member States (and parties to the EEA) under the same conditions that it approaches national bidders, and shall do so transparently. It is unclear why this provision is included, as this adds little to the restatement of the general principles found in Article (2).

Beyond these two general articles, however, the BAO has not made any additions to the provisions of the directive in order to reflect CJ case law on the general principles. As discussed

in earlier sections, this is unsurprising; Dutch implementation of the directives has not involved going 'beyond' the requirements of implementing EU legislation.

4.4.2.2 Legislation: ARW 2005

As discussed in section 4.1.7, the ARW 2005 contains supplementary information to the BAO that is mandatory for the four construction departments and optional for all other government departments.

Unlike the BAO, the ARW 2005 does *not* copy out Article 2 of the 2004 directive; in fact, upon examining the text of the ARW 2005, the only places where 'transparency' and 'non-discrimination' are mentioned are in the *Explanatory Note* to the document, which comments on the 'increasing amount of jurisprudence [on the general principles] for non-European procurement'. Following this, it highlights that contracting authorities engaged in 'national procurement' procedures need to be aware of the implications of the general principles; but does not stress this for procurement covered by the directives at all.

The main text of the ARW 2005, however, is silent on the repercussions of the CJ's case law on the general principles as applying to 'European' procurement.

4.4.2.3 Jurisprudence

The previous section has made it clear that in its legislation, the Netherlands has not responded to any requirements stemming from the general principles as applying to contracts covered by the directives. As we will see, however, the Dutch national courts have dealt with the general principles and how they apply the directives in a substantial manner.

4.4.2.3.1 Selection Criteria

Various cases, many of which predate *Universale-Bau*, have determined that setting advance selection criteria without making them known to bidders is a violation of what was then, in Dutch law, called the 'objectivity' principle. In cases such as *Eurobekes/Provincie Noord-Brabant*⁵¹⁰, where the contracting authority deposited a 'secret' weighting system with a notary, or *17.030*⁵¹¹, where selection under the UAR 1986 was made by an independent panel that did not make its selection methodology known to the bidders, the courts ruled that contracting authorities had violated the 'objectivity' principle. Though the 'transparency' principle was not called as much until 2001, case law from 1994 onwards has required advance notification of weightings and methodology to bidders is necessary in order to secure fair procurement⁵¹². Until recently, the Dutch courts have adjudicated on selection criteria *without* reference to CJ jurisprudence.⁵¹³

4.4.2.3.2 Award Criteria

Dutch jurisprudence on award criteria jurisprudence also mimics closely to the CJ's application of the general principles; for instance, Dutch courts have ruled that award criteria cannot be altered partway through the 'award' procedure and must correspond to those listed in the contract notice⁵¹⁴, nor can new 'procedural rules' be applied at the tender evaluation stage where tenders could not have possibly prepared themselves for these changes.⁵¹⁵ It can again be observed that some of these cases were decided prior to seminal EU-level cases such as *Lianakis*.⁵¹⁶

Consequently, we see here also that the Dutch courts have applied the general principles to award criteria before the CJ issued similar judgments.

⁵¹⁰ Pres. Rb. Den Bosch 10 juli 2001, rolnr. 66393 / KG ZA 01-0377, BR 2002, p. 97.

⁵¹¹ RvA 27 juni 1994, nr. 17.030, BR 1996, p. 258.

⁵¹² See also RvA 23 juni 1995, nrs. 18.020 and 18.023, BR 1996, p. 265; RvA 25 mei 1998 (appel), nr. 70.303, BR 1998, p. 696; Vz. Rb. Maastricht, 7 maart 2001, rolnr. 63600 / KG ZA 01-57, ro 3.3.1; RvA 20 februari 2002, nr. 23.750, BR 2003, p. 639; RvA 28 December 2001, nr. 23.820, BR 2002, p. 987.

⁵¹³ An example of where the Dutch courts do cite CJ jurisprudence directly is Rb. Zwolle-Lelystad, 3 november 2006, rolnr. 12503/KG ZA 06-429, which in paragraph 4.2 makes reference to *SIAC* (n 380) and states that the comments there on award criteria needing to be transparent enough to be easily understood should be assumed to also apply to selection criteria.

⁵¹⁴ Vz. Rb. Zwolle, 6 februari 2001, rolnr. 62524 / KG ZA 01-37, ro 2.3

⁵¹⁵ Vz. CBb., 17 oktober 2005, rolnr. AWB 05/565, ro 6.5. See also Hof Den Bosch, 1 April 2008, rolnr. 181903 / KG ZA 07-625, on sub-criteria.

⁵¹⁶ *Lianakis* (n 154).

More recent judgements *have*, however, made reference to related CJ case law such as *Lianakis* in discussing the transparency of award criteria.⁵¹⁷

4.4.2.3.3 Other Issues

Dutch courts have also used the general principles to build on related CJ judgments. For instance, in *Connexxion Water BV/Gemeente Dordrecht*⁵¹⁸ the court set aside a contract because there had been unequal distribution of information between the bidders: the incumbent provider had information about the exploitation costs of a ferry and a competing bidder, after requesting it, was not given these figures. This case is contextually similar to the *European Dynamics*⁵¹⁹ case, but actually found that the contracting authority was remiss in ensuring an 'equal' or level playing field between bidders—resulting in the incumbent provider's advantage.

Other Dutch cases consider issues that have not in any form appeared before the CJ. In *Straton-KNK VOF/Gemeente 's-Hertogenbosch*⁵²⁰, the contracting authority had explicitly forbidden the use of alternative/variant submissions. It was determined that accepting one of a bidder's four variant bids after submission deadlines would violate the equal treatment principle, as allowing the bidder to select her 'actual' submission at a later date would give her a competitive advantage.

The Dutch courts have also decided cases regarding late tenders and how these interact with the general principle of equal treatment. As an example, in *CSU Schoonmaak/Politieregio Brabant Zuid Oost*⁵²¹, the court concluded that even though *none* of the competing tenders had been opened and the late tender was only 7 minutes late, the late tender was inadmissible. Recently, *Gebr. van Kessel Wegenbouw/Gemeente Neerijnen*⁵²² (which concerned the late submission of a certificate of qualification) was decided the opposite way: as this document was a standard

⁵¹⁷ See Hof Leeuwarden, 6 April 2010, rolnr. 107.001.752/01; this, however, can be contrasted with Vزر. Rb. 's Gravenhage, 16 September 2008, rolnr. 315453 / KG ZA 08-913 and Hof Arnhem, 29 juli 2008, rolnr. 107.002.674/01 which were also decided after *Lianakis* (n 154) but contained no reference to it.

⁵¹⁸ Vزر. Rb. Dordrecht 24 januari 2008, rlnr. 72979 / KG ZA 08-2.

⁵¹⁹ *European Dynamics* (n 171).

⁵²⁰ Vزر. Rb. Den Bosch 3 juli 2007, rolnr. 160315 / KG ZA 07-390.

⁵²¹ Hof Den Bosch 24 juli 2001, rolnr. KG C0100285/HE.

⁵²² Rb. Arnhem, 24 juni 2008, rolnr. 171063 / KG ZA 08-353.

document to be prepared by third parties, and all bidders had them, there was no competitive advantage to be gained from handing them in late, and as such there was no violation of the equal treatment principle. Other, similar cases have considered the relationship between equal treatment and the acceptance of bids that do not meet minimum requirements set⁵²³, and bids that are not compliant⁵²⁴—in all of these cases the Dutch courts have ruled that there cannot be an exercise of discretion and the bids must be rejected to secure equal treatment. This line of national case law dates back as far as 2001.⁵²⁵

The general principles have also been used to protect the rights of tenderers more generally; one example of this is *Darthuizer Boomkwekerijen/Gemeente Groningen*⁵²⁶, where the contracting authority refused to further clarify the tender documents after a request for clarification from a bidder, and the court concluded this was contrary to the transparency principle.

4.4.2.3.4 Summary

The Dutch courts have applied the general principles to the directives for a number of years, although it is very sparingly acknowledged that these principles may have their origins in CJ jurisprudence. Only recently are there a few direct references to CJ cases like *Lianakis* found in national judgments. Taking into consideration that the case law on selection and award criteria, as well as admissibility of tenders, predates similar CJ case law by a number of years, it is very difficult to state with certainty that EU law has had a significant impact on the Dutch courts—it is perhaps more appropriate to conclude that a gradual convergence of use of the general principles can be seen here.

⁵²³ Rb. Arnhem 7 november 2006, rolnr. 2006/771 KG; Rb. Almelo 19 januari 2007, rolnr. 83188/KG ZA 07-9, wherein it was added that if it cannot be determined if the minimum requirements are met, the tender also has to be rejected.

⁵²⁴ Notably, Rb. Den Haag 8 november 2006, rolnr. KG 06/1104, in which there were two competing non-compliant tenders, and the court decided both had to be rejected to comply with the equal treatment principle.

⁵²⁵ See, inter alia, Hof Den Bosch 24 juli 2001, rolnr. KG C0100284/HE.

⁵²⁶ Rb. Groningen 30 maart 2007, rolnr. 92633 / KG ZA 07-66.

4.4.2.4 Guidance

It was noted in section 4.1.9 that the Netherlands not traditionally extended guidance at the central government level; this holds true for guidance on the general principles of equal treatment and transparency under the directives. The principles are thus not expanded on in any clear way on any of the government guidance websites, although *PIANOO* and Europa Decentraal do maintain a list of jurisprudence that includes mentions of the important CJ cases in this field.

4.4.2.5 Contracts Covered by the Directives: Conclusions

Though in terms of legislation the Dutch legal system has not responded to the CJ jurisprudence on the general principles, the judiciary actively adjudicates using these principles. As demonstrated above, it even has done so in areas where the CJ itself has been silent to date—such as in considering equal treatment following market consultations and regarding late tenders. We have also seen that on subjects (such as award/selection criteria) where the CJ has issued important judgments, national jurisprudence frequently existed already.

While it can be observed that more recently, the national courts have referred to related CJ jurisprudence where appropriate, it is very difficult to conclude that the CJ's jurisprudence has had a significant influence on Dutch law in a general sense.

4.4.3 Contracts not Covered by the Directives

4.4.3.1 Legislation: BAO

The BAO does not contain any provisions on contracts not covered by the directives; this choice was justified by the legislator in detail when the BAO was first issued. The Dutch Minister of Economic Affairs firstly indicated in 2004 that there was no reason to establish advertising rules for Part II-B service contracts until a judgment from the CJ confirmed that the broad requirements of publicity and competition outlined by the Commission also applied to these

contracts.⁵²⁷ This sentiment is repeated in the *Explanatory Note* to the BAO, which comments on *Telaustria* by saying that the CJ argued in that case that for concession agreements for services of a value above threshold, there is an obligation to provide enough advertising so as to secure competition.⁵²⁸ The *Explanatory Note* goes on to say that the Commission, in its Green Paper on Public-Private Partnerships⁵²⁹, argues for an entire set of obligations as stemming from the general principles of the Treaty—but that “(author’s translation) further jurisprudence will have to show if the CJ underwrites the Commission’s interpretation”.

As section 2.4.3 explained, the CJ has (since 2004) decided various cases dealing specifically with the application of the general principles to non-concession contracts (such as below-threshold contracts and Part II-B services contracts). The argument that the application of the principles to these types of contracts is ‘not clear’ has thus lost some of its merit⁵³⁰; however, to date this has not resulted in a change in legislation in the Netherlands.

One possible explanation for this is that new national procurement laws were in preparatory stages while most of this case law was decided, meaning that no changes were planned to the ‘old legislation’. Another explanation is that the Netherlands remains unwilling to amend its national legislation so as to put more stringent requirements on excluded contracts unless specifically forced to do so at the EU level. In light of this possibility, it is important to note that the Netherlands did join Germany in contesting the Commission’s *Interpretative Communication* on below-threshold contracts as being ‘quasi-lawmaking’ that should not be permissible.⁵³¹

⁵²⁷ Minister van EZ, 7 September 2004, *Brief aan 2e Kamer*. This is in light of the fact that all cases prior to 2004 dealt with concession agreements, rather than part II-B services contracts.

⁵²⁸ *Explanatory Note* to the BAO, p. 64: “Voorts heeft het Hof in o.a. het arrest *Telaustria* (Hv) EG, zaak C-324/98, 2000, blz. I-10745) geoordeeld ten aanzien van een concessieverlening voor diensten met een waarde boven de drempelwaarde dat de op de aanbestedende dienst ingevolge het beginsel van non-discriminatie rustende verplichting tot transparantie inhoudt dat aan elke potentiële inschrijver een passende mate van openbaarheid wordt gegarandeerd, zodat de dienstenmarkt voor mededinging wordt geopend en de aanbestedingsprocedures op onpartijdigheid kunnen worden getoetst.” (Emphasis added).

⁵²⁹ COM(2004)327 (n 103), para 30.

⁵³⁰ It can be noted here that Advocate General Sharpston in *Commission v Finland* (n 190) considers that, taking into account the principle of subsidiarity, low-value procurement should not be subject to extensive EU-originating advertising requirements. Firstly, she argues that such a rule ignores the divide struck in procurement between Community competence (ie, regulation of contracts covered by the Directive) and competence retained by the Member States (ie, regulation of contracts falling below the Directives’ thresholds). She further argues that it is cost-prohibitive to in fact investigate cross-border interest for all low-value contracts, as this may unduly burden local authorities in particular. The CJ did not consider her points in *Commission v Finland* (which was dismissed on procedural grounds), but it is possible that it will in future cases on low-value procurement and advertising.

⁵³¹ *Germany v Commission* (n 98).

4.4.3.2 Legislation: ARW 2005

As discussed in section 4.2.3.2, the ARW 2005 contains procedures for both 'national' and 'European' procurement. In its regulation of 'national' procurement, the ARW 2005 covers a lot of contracts that are only subject to the TFEU. However, it should be stressed here that the ARW 2005 has not started regulating 'national' procurement in response to the CJ's jurisprudence on the general principles; the ARW and its predecessors have historically contained provisions for 'national' procurement, as discussed in section 4.1.3.

As always, application of the ARW 2005 is limited to works contracts. It will thus never apply to a services concession, or a part II-B services contract. Moreover, application is voluntary for all central government and local government departments that are not the four 'Construction Departments' or those contracting authorities covered by the 2006 WTZ Circular. The scope of coverage of the ARW 2005 is thus limited, and as such the fact that it does cover certain types of below-threshold contracts cannot lead to a conclusion that the Netherlands *generally* has in place competitive procedures that require advertising for contracts excluded from the directive.

4.4.3.2.1 Approach

Detailed rules outlining when a certain procedure in the ARW 2005 has to be followed by the Construction Departments are, as discussed in section 4.1.7, set out in the *Beleidsregels Aanbesteding van Werken* 2005 (Beleidsregels) and the aforementioned 2006 WTZ Circular. Both of these sets of policy rules indicate that a general obligation to procure using the open or restricted procedure (of the ARW 2005) exists for all below-threshold works contracts.⁵³²

This obligation is waived in certain specific circumstances under the Beleidsregels, the most important ones of which are:

⁵³² Article 2, Beleidsregels; "Nationale Aanbestedingen", Circular.

- a) Public works concessions; the Beleidsregels makes procurement using the special "Concession Agreement" procedure listed in Chapter 8 of the rules obligatory, even for below-threshold concessions agreements.
- b) Any works contract of which the aggregated value is less than 1.5 million euros. These works do not have to be procured using any of the 'European' procurement procedures, but do have to be procured using the 'underhanded' procedure outlined in Chapter 7 of the ARW 2005 (discussed in section 4.4.3.2.2).
- c) Any works contract for which there are 'good reasons' to presume that procuring using an open or restricted procedure will not be 'in the financial interest of the state.'⁵³³
These contracts also have to be awarded using the 'underhanded' procedure.⁵³⁴

This means that for the Construction Departments, there is no 'bottom limit' for formal procurement; even contracts of minor value, in this case defined as being below 1.5 million Euros, have to be procured using a formal procedure.

The 2006 WTZ Circular, on the other hand, obliges contracting authorities to expressly request permission to use a different procedure⁵³⁵:

- a) Where the agreement concluded is a concession agreement.
- b) Where there are good reasons to assume that using the open or restricted procedure will not be in the financial interest of the authority; or where there are special requirements to the work in question that could not be suitably fulfilled through the use of the open or restricted procedure, the authority can request to use the underhanded procedure.

⁵³³ Article 4(f): ... goede gronden doen verwachten dat een aanbesteding volgens de openbare procedure of de niet-openbare procedure niet in het financieel belang van de staat zal zijn.

⁵³⁴ The last condition refers to a quality control mechanism whereby the contracting authority would be able to investigate if the work has been completed to a certain standard; in contracts where this cannot simply be confirmed by a check during and after the process, the open and restricted procedures do not have to be followed.

⁵³⁵ The Circular also describes under what circumstances direct award is possible: namely, in cases of unforeseen urgency contract continuity (ie using the same supplier for an additional order or unexpected restoration/maintenance).

When a contracting authority wants to apply for an exemption, they have to submit a written request for permission to use a different procedure. This is the case for all contracts of an aggregate value between the directive's thresholds, and 1.5 million Euros. The Circular expressly notes that where the aggregate value of a work contract is less than 1.5 million Euros, such written permission is *not* required and one of the other procedures of the ARW 2005 can be freely used. However, application of the ARW 2005 is again mandatory for *all* contracts, meaning that even contracts of a low value will be procured using a competitive procedure.

4.4.3.2.2 *The Underhanded Procedure*

The express permission in both policy rules to use the underhanded procedure (which involves directly inviting a minimum of two tenderers for a competition) is interesting in light of CJ jurisprudence; the CJ has stressed since 2007 that, where there is cross-border interest in a contract, contracting authorities need to provide for a degree of publicity (section 2.4.3.1).

Regardless of how a 'degree of advertising', or the later concepts of 'publicity' and 'publication', are interpreted, the underhanded procedure appears to fail on account of not requiring *any* type of advertising at all—the contracting authority simply directly approaches two or more contractors it is interested in and allows them to compete for the contract.

However, the 'underhanded' procedure also has some positive qualities. The fact that the underhanded procedure is a structured, *competitive* procedure means that it in all likelihood would satisfy the CJ's concept of "genuine competition"; it even complies with the majority of the Commission's proposed obligations as listed in the Green Paper on PPP.⁵³⁶

⁵³⁶ Namely: fixing of the rules applicable to the selection of the private partner, adequate advertising of the intention to award a concession and of the rules governing the selection in order to be able to monitor impartiality throughout the procedure, introduction of genuine competition between operators with a potential interest and/or who can guarantee completion of the tasks in question, compliance with the principle of equality of treatment of all participants throughout the procedure, selection on the basis of objective, non-discriminatory criteria.

The latest draft for the new Dutch procurement law, which contains procedures that can only be used in 'national' procurement, has clearly considered the position of the underhanded procedure in more detail: it is henceforth only available for contracts that do not have any cross-border interest (though the proposed law declines to define what cross-border interest is, as the CJ itself has not yet done so!).⁵³⁷ This seems like an appropriate compromise given the current state of CJ jurisprudence, and clearly demonstrates that this particular line of CJ case law has had significant influence on the new proposals for Dutch procurement regulation.

4.4.3.2.3 Works Concessions

With regards to works concessions, the Beleidsregels appear to require all concession agreements between 1.5 million euros and the current EU threshold value for public works contracts to be awarded using the 'concession agreement' procedure outlined in Chapter 8 of the ARW 2005.⁵³⁸ This procedure requires advertising—in the case of 'national' procurement, on a 'generally accessible electronic platform', the State Gazette, or a nationally distributed professional journal.

However, the ARW 2005 contains no provisions indicating how 'competition' is to be assured between economic operators when awarding a works concession. Aside from stating that advertising is necessary, no other provisions deal with the selection of the 'winning' concession holder or how many tenders have to be invited to participate in the tendering process. There is thus nothing guaranteeing real competition in the 'national' procedure for concession agreements, as appears to be required by the Commission's recently-legitimated *Interpretative Communication* on contracts not covered by the directives (see section 2.4.3.3).

⁵³⁷ It is worth noting that the current proposal does not differentiate between works, services and goods, unlike the ARW 2005 – the underhanded procedure will thus available for all three categories of purchases when falling outside of the Directive. [Article 1.13 of the proposal, see http://www.PIANOQ.nl/pv_obj_cache/pv_obj_id_F7BE3099FB7E3D65820C33974DC78289D7170300/filename/voorstel_aanbestedingswet_0.pdf (last accessed 1 November 2010).]

⁵³⁸ The Beleidsregels are not very clear on whether or not concession agreements below the value of 1.5 million euros also have to be procured using the concession agreement procedure; largely because the 1.5 million euro clause refers to a 'works contract', rather than a works concession.

4.4.3.3 Jurisprudence

There have been, in recent years, various cases that have affirmed the CJ's case law in the Dutch courts. However, the interpretation of the CJ's jurisprudence has always been very literal—for instance, in 2006 (preceding *An Post*) a Dutch court concluded that *Telaustria* and *Coname* were not relevant in the consideration of the case at hand, which concerned a Part II B Services contract rather than a services concession.⁵³⁹ Prior to 2008, it thus appears attempts were made to limit the impact of the CJ's jurisprudence only to those contracts it had expressly considered.

Judgments in 2005 and 2006 took variable approaches to applying the CJ's jurisprudence, possibly because the CJ's jurisprudence had not yet clearly established the idea that cross-border interest would determine whether or not advertising was required at all. Consequently, there are cases in this time period in which the Dutch courts concluded that *all* services concessions contracts had to be advertised regardless of cross-border interest⁵⁴⁰, and one case in which the Commission's *Interpretative Communication* was examined for guidance on how much publicity was needed in a specific situation.⁵⁴¹

However, since 2007, the Dutch courts have assessed disputes about advertising and transparency purely on the basis of the cross-border interest factor⁵⁴², with internet advertising having been accepted as an appropriate degree of advertising.⁵⁴³

While using 'cross-border interest' as a test has produced fairly consistent judgments, generally considering the scope of the contract in question and the physical location of the contracting authority⁵⁴⁴, the courts do not always treat this concept in a comprehensible way—there is the

⁵³⁹ Rb. Dordrecht, 14 december 2006, rolnr. KG ZA 06-196.

⁵⁴⁰ Rb. Utrecht 16 augustus 2005, rolnr. 199214/KG ZA 05-788; see also Rb. Dordrecht, *ibid*.

⁵⁴¹ See Rb. Dordrecht KG ZA 06-196 (n 539).

⁵⁴² See, for instance, Rb. Amsterdam, 18 juni 2008, rolnr. 380704 / HA ZA 07-2711; Rb. Amsterdam 13 november 2008, rolnr. 411081 / KG ZA 08-2027. Interesting is Rb. Den Haag 21 januari 2008, rolnr. KG 07/1407, wherein the Dutch court determined that the applicants failed to demonstrate that there was cross-border interest in the contract and consequently there was no violation of the transparency principle, very similarly to the CJ has done in *An Post* (n 192) and *Ambulances* (n 196).

⁵⁴³ See Rb. Dordrecht KG ZA 06-196 (n 539).

⁵⁴⁴ See, for instance, Raad van State 30 juni 2010, rolnr. 200906164/1/H2; wherein the Council of State considers the contracting authority's location in a province that borders Belgium means it is likely that there will be interest from Belgian bidders.

example of a case concerning a 30 year concession for the exploitation of parking garages in Maastricht (which borders Germany and Belgium) being considered as not having any cross-border interest.⁵⁴⁵ It is worth noting again here that the proposed new Dutch procurement law does not contain a definition of 'cross-border interest' and it is thus of particular relevance that the Dutch courts are creating a significant body of jurisprudence on the meaning of that phrase.

Also relevant is the fact that the general principle of transparency has been used more generally to decide disputes about contracts not covered by the directives, usually citing *Succhi di Frutta*: "the principle of transparency which is its corollary is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority." This concept of transparency has been used to consider whether or not supporting documentation could be submitted after the tender deadline⁵⁴⁶; whether or not a procurement procedure in general was clear enough to comply with the transparency principle⁵⁴⁷; and that the transparency requirements of the Treaty cannot be more onerous than those of the directive.⁵⁴⁸

In summary, we thus find that the Dutch courts have recently embraced the CJ's jurisprudence on advertising to a greater extent. The courts are starting to develop an interesting line of case law wherein the concept of 'cross-border interest' is given meaning in the specific Dutch geographical context (ie, a small country that shares borders with two other EU member states).

The influence of the CJ on the development this line of case law is very clear—in 2005, there was still judicial resistance to the idea that *Telaustria* could be applied to contracts such as Part II-B services or below-threshold contracts, but by 2008, a variety of 'transparency' cases on these types of contracts have been decided. However, it should also be observed that the Dutch courts use the general principle of transparency in a far more general manner to also decide disputes—though in defining the transparency principle there, they again rely on a CJ definition.

⁵⁴⁵ Rb. Maastricht 8 oktober 2008, rolnr. 119309 / HA ZA 07-419.

⁵⁴⁶ Vz. Rb. Arnhem 12 september 2008, rolnr. 173246 / KG ZA 08-475.

⁵⁴⁷ RvA, 17 februari 2003, rolnr. 25.098, BR 2004, p. 172.

⁵⁴⁸ In the context of award criteria, where the contracting authority's information on sub-criteria would have complied with the Directive and consequently could not have failed to comply with transparency under the TFEU. (Vzr. Rb. Zwolle, 28 oktober 2008, rolnr. 149572 / KG ZA 08-457.)

4.4.3.4 The Two Proposed New Procurement Laws

The first proposed new procurement law had as one of its goals the harmonization of above and below threshold public procurement legislation in the Netherlands. It approached this by encouraging several changes to the existing regime⁵⁴⁹:

First of all, where the ARW 2005 had a lower threshold of 1.5 million euros, the proposed procurement law would set out the procurement rules (requiring competition, and in most cases advertising) applicable to all supply and service contracts above a value of 50,000 euros, and all works contracts above 150,000 euros. It is unclear whether or not this change was suggested in response to CJ jurisprudence or rather just a desire to provide rules for low-value contracts, so as to create uniformity. What is clear is that this threshold was among the reasons why this law proposal was rejected, as the administrative burden it produced was deemed too great.⁵⁵⁰

Even in preliminary discussions preceding the First Chamber vote, the Minister of Economic Affairs conceded that the lower threshold might have been set too low, and would be raised before the final law came into practice.⁵⁵¹ Fascinating is that below these thresholds, the concept law was silent on the possibilities of direct award; the Dutch legislator did not address how direct award relates to the general principles, and whether direct award should be permissible for any contracts at all *as a general rule*. This issue was raised by several members of the First Chamber, who also noted that the Commission's perspective on below-threshold contracts appeared to not be considered by the current law at all.⁵⁵² Since the concept law was designed, the CJ has in fact suggested that general rules that establish a no-advertising-below-this-threshold policy are not permissible under the TFEU.⁵⁵³

⁵⁴⁹ The rejected proposal be viewed at http://www.eerstekamer.nl/behandeling/20060920/gewijzigd_voorstel_van_wet/f=/w30501a.pdf (last accessed 1 November 2010).

⁵⁵⁰ See Pijnacker Hordijk et al (n 11), p. 5.

⁵⁵¹ For discussion at the time of the vote, 8 July 2008, see <http://www.eerstekamer.nl/9324000/1/i9vvgh5ihkk7kof/vhxn9xhqsazv/f=y.pdf> (last accessed 1 November 2010).

⁵⁵² See treatment of the proposed law, 8 July 2008, available at <http://www.eerstekamer.nl/9324000/1/i9vvgh5ihkk7kof/vhxn9vxrpizt/f=y.pdf> (last accessed 1 November 2010).

⁵⁵³ See *APERMC* (n 197); it discussed public service contracts explicitly, but there is no reason to assume this principle would not also apply to goods or works.

Secondly, and surprisingly, the proposed changes to the ARW 2005 retained room for an underhanded procedure, though several modifications were made to ensure that more parties were invited to the procedure—the minimum was set at 3. The largest correction needed—an inclusion of a requirement to advertise contracts—was not incorporated.⁵⁵⁴ Instead, the proposal contained a single provision in the underhanded procedure stating that it would be up to the public authority in question itself to determine what the market value and cross-border interest of a contract was, and to “be transparent” accordingly. This would not have been a change from the current regime, where the decision whether or not to advertise is also left with contracting authorities.⁵⁵⁵

The currently proposed procurement law takes a very different approach: rather than working with thresholds, the law merely states that the general principles also apply to all contracts that the law itself does not apply to—meaning, contracts not covered by the EU directives, *as long as there is cross-border interest* (Article 1.4 of the proposal). This is a similar approach to the one taken in Scotland, as discussed in section 3.4.3.4; the questions asked there about the practical effect of such provisions are relevant here as well, although in the Netherlands this provision at least has had interesting consequences for the availability of the underhanded procedure—as discussed in section 4.4.3.2.2, current proposals state the procedure will only available when there is *no* ‘obvious’ cross-border interest in a contract.

4.4.3.5 Guidance

Again, as with the general principles as applicable to contracts covered by the directive, there is no specific Dutch guidance prepared at either the central government or local government level that discusses the requirements set out by CJ jurisprudence for contracts not covered by the directive. The most useful pieces of information made available are again the case summaries

⁵⁵⁴ The Minister of Economic Affairs at the time of the vote (n 551) noted that the “multiple underhanded procedure” was not contrary to CJ jurisprudence at that time. She also indicated express disapproval of the Commission’s opinion on the requirements of the general principle of transparency, and said it would result in a situation where all below-threshold contracts would be awarded according to ‘lowest price.’

⁵⁵⁵ This criticism was also launched by Mr. Franken of the Christian Democratic Appel (CDA) during the vote (n 551); he noted that the Commission’s perspective on transparency regarding below-threshold contracts would likely result in a situation whereby low-value contracts would solely be awarded using lowest price as a criteria, as it would simplify the transparency requirements significantly.

presented on PIANOO and Europa Decentraal, but as these merely restate the (unclear) judgments of the CJ in brief, these case summaries do not offer true 'guidance'.

4.4.4 Conclusions

CJ jurisprudence on the general principles has had different effects on different parts of the Dutch procurement regulatory regime. For contracts covered by the directives, there are no legislative indications that the rules have had an impact—but we have seen that the judiciary is using the general principles in a very similar, if not more expansive, manner to how the CJ does, citing the CJ where it is relevant. There are thus some signs of influence, especially in recent years; but we also saw that some applications of the general principles of equal treatment and transparency predate seminal EU cases on similar subjects. In terms of guidance, the Dutch tradition of not offering much if any material has prevailed in this area of law.

The situation is notably different when it comes to the *Telaustria* family of jurisprudence and how this has affected Dutch procurement regulation. It can be noted transparency only started being used by the Dutch courts as a grounds for requiring advertisement of contracts not covered by the directives after the CJ's case law on this developed; and that in recent years in particular, the Dutch courts have cited the CJ's jurisprudence extensively. However, the influence of the general principles does not stop there—attempts were made in 2007 to revise Dutch procurement legislation and take the issue of advertising into account by forcing advertising on all contracts above a value of 50,000 euros. While this effort failed, the current proposals do still explicitly consider the issue of transparency on non-directive procurement, and have made procedures that appear contrary to the CJ's jurisprudence available only when there is no cross-border interest.

There is once more no guidance on the role the general principles play in procurement not covered by the directives or the BAO, but in all other regulatory forms examined, we can clearly see that EU law has had a significant impact on the Dutch approach taken.

5. PUBLIC PROCUREMENT IN FRANCE

5.1 France: Developments in French Procurement Regulation

5.1.1 Introduction

This section will discuss the development of public procurement regulation in France. It will highlight major developments so as to provide an overview of how the regulatory regime changed, especially in response to the introduction of EU public procurement regulation. Most specifically, the section aims to provide an overview of the current public procurement regulatory regime, which will aid understanding of the more particular rules that will be discussed in the next three sections of the thesis.

5.1.2 History: 1833 – 1964

France has legislated public procurement since 1833, when Article 12 of the Law on (State) Finance of 31 January 1833⁵⁵⁶ stated that further ordinances would provide rules to regulate state purchases. The concept of the “state” at this time was defined so that only central government bodies were covered by additional purchasing rules set out in ordinances; prior to 1964, the French *communes* were covered by different rules under completely separate regimes.

Regarding central government purchasing, a first ordinance with more specific rules was issued in 1836. The Ordinance on State Purchasing of 4 December 1836⁵⁵⁷ stated, quite simply, that “(author’s translation) all purchasing done in name of the state shall be done with competition and publicity”⁵⁵⁸. All later pieces of regulation (such as the 1882 Decree on State Purchasing⁵⁵⁹) have merely expanded on this principle with more specific rules.

⁵⁵⁶ Loi de finances du 31 janvier 1833.

⁵⁵⁷ Ordonnance du 4 décembre 1836.

⁵⁵⁸ “Tous les *marchés* au nom de l’Etat seront fait avec concurrence et publicité”.

⁵⁵⁹ Décret du 18 novembre 1882 relatif aux adjudications et aux marchés passés au nom de l’Etat.

Until 1960, all regulation of central government purchasing originated from the 1833 law. In 1893, the Conseil d'État (Council of State) concluded that nothing in French administrative law indicated that the departments could not also be obliged to engage in competitive public purchasing on the basis of the 1833 law: at the time that law had been enacted the *départements* were in fact part of the concept of "l'Etat".⁵⁶⁰ A subsequent decree, also issued in 1893, copied out the 1882 Decree on State Purchasing and applied it to the *départements* as well, resulting in a harmonized set of purchasing rules at sub-central and central government levels.⁵⁶¹

The *communes* (or local governments) were also obliged to engage in competitive public purchasing but through a different mechanism: an ordinance passed on the basis of the Local Government/Municipalities Law of 18 July 1837.⁵⁶² The ordinance in question (of 14 November 1837)⁵⁶³ was eventually replaced by the 1884 Municipalities Law, which retained the same principles.⁵⁶⁴

Further harmonization between the central government and non-central government regimes occurred in 1938, when a 'décret-loi' empowered the government to extend the current regulation of state purchasing to the *départements* and *communes*.⁵⁶⁵ This décret-loi referred to provisions of the 1882 Decree on State Purchasing, which remained the key piece of legislation on state purchasing until the 1940s, when a new state purchasing decree was published.⁵⁶⁶

Between the 1940s and the 1960s, several decrees updating the existing legislation were issued; by 1956, central government purchasing was already being regulated by a decree containing more than 40 provisions.⁵⁶⁷ However, the rules applying to the *départements* and the *communes* were not updated at the same time as the rules applying to central government, meaning that the purchasing regime once more fractured between the different levels of government.

⁵⁶⁰ CE 9 Février 1912, *Société Cooperative des Ouvriers de Limoges*, Recueil Lebon p. 193; see also Décret du 12 juillet 1893 sur la comptabilité départementale.

⁵⁶¹ Dcret du 12 juillet 1893, *ibid.*

⁵⁶² Loi municipale du 18 juillet 1837.

⁵⁶³ Ordonnance royale du 14 novembre 1837.

⁵⁶⁴ Loi municipale du 5 avril 1884.

⁵⁶⁵ Décret-loi du 12 novembre 1938 portant extension de la réglementation en vigueur pour les marchés de l'Etat aux marchés des collectivités locales.

⁵⁶⁶ Décret n° 1082 du 6 avril 1942 relatif aux marchés passés au nom de l'Etat.

⁵⁶⁷ Décret n° 56-256 du 13 mars 1956 relatif aux marchés passés au nom de l'Etat.

Helpfully, in 1960 a decree was issued that consolidated all procurement rules for the *départements* and the *communes* applicable at the time.⁵⁶⁸ However, this still did not bring the regime in line with central government purchasing regulation, which would be updated one last time by a 1964 consolidated rules decree.⁵⁶⁹ In 1966, the merging of these two consolidated rulebooks (by decree) would result in what is these days referred to as the first *Code des Marchés Publics*, or the CMP 1964.⁵⁷⁰

5.1.3 1964: CMP #1

The CMP 1964 contained both rules on central government procurement (books 1 and 2) and non-central government procurement (books 2 and 40). It was repealed in 2001, meaning it was in force for almost forty years, but it was amended many times. For the purposes of this thesis, it is not necessary to consider all these changes in detail; rather, we will focus on how the interference of EU law in public procurement regulation affected the French Code.

France clearly already had detailed legislation in place in the 1970s, and since this was similar to the first EU directives (which were largely inspired by French law), the introduction of the directives did not require extensive national action; in the words of Richer, transposition was not necessary as a few amendments to the CMP 1964 resulted in compliance with the first EU directives.⁵⁷¹

The revised EU directives of the late 1980s, however, were not implemented so easily, and were in fact implemented through various different instruments. Firstly, amendments were made to the CMP in 1989 and 1990; a fifth Book was added which dealt with the contents of Directive

⁵⁶⁸ Décret n° 60-724 du 25 juillet 1960 relatif aux marchés passés au nom des départements, des communes, des syndicats de communes, des établissements publics départementaux et communaux.

⁵⁶⁹ Décret n° 64-729 du 17 juillet 1964 portant co-définition des textes réglementaires relatifs aux marchés publics.

⁵⁷⁰ Décrets n° 66-887 et 66-888 du 28 novembre 1966 modifiant et complétant le décret n° 64-729 du 17 juillet 1964 (modifié) portant codification des textes réglementaires relatifs aux marchés publics.

⁵⁷¹ L. Richer, *Droit des Contrats Administratifs* (7th edition) (LGJD: Paris 2010), p. 357; see also Décret n°79-98 du 12 janvier 1979 relatif à la mise en concurrence de certains marchés publics de travaux et de fournitures dans le cadre de la CEE.

88/295 on Supplies and Directive 89/440 on Works.⁵⁷² However, the scope of application (in particular with regards to bodies covered by the directives) of the CMP and the directives differed. Not all bodies considered “public bodies” under the EU rules were considered public bodies under the CMP, which excluded bodies such as mixed economy companies (categorized as ‘private persons’ in French law) and, for instance, the French national bank (Banque de France) from its application.⁵⁷³ To fully comply with EU law, a new law was created in 1991. The 1991 law applied the EU rules to these public bodies and also introduced general transparency and anti-corruption measures.⁵⁷⁴ To correctly implement the Works Directive, an additional decree was issued on 31 March 1992.⁵⁷⁵

The Services Directive is a separate matter. The French government resisted implementing this directive to the fullest extent for many years, primarily out of a reluctance to see its own “devolved services” (decentralized government bodies with no legal personality of their own, charged with providing services to sub-national government) be put in competition with the private sector in providing services to local communities.⁵⁷⁶ Only in 1996, when the CJ condemned implementation of the Services Directive as executed prior to that point⁵⁷⁷, did the French government start transposing the Services Directive; this was completed with a law dated 22 January 1997⁵⁷⁸ and two decrees of 27 February 1998.⁵⁷⁹

Implementation of the Utilities Directive⁵⁸⁰ took place in a similar fashion—by amending the CMP, and by issuing separate laws and decrees to supplement the CMP—and implementation of

⁵⁷² Décret n° 89-236 du 17 avril 1989 modifiant le code des marchés publics and Décret n° 90-824 du 18 septembre 1990 modifiant le code des marchés publics.

⁵⁷³ P. Valadou, “Contracts of ‘Mixed Economy’ companies and competitive procedures in France” (1992) 1 PPLR 376, p. 376.

⁵⁷⁴ Loi n° 91-3 du 3 janvier 1991 relative à la transparence et à la régularité des procédures de marché et soumettant la passation de certains contrats à des règles de publicité et de mise en concurrence.

⁵⁷⁵ Décret n° 92-311 du 31 mars 1992 soumettant la passation de certains contrats de fournitures, de travaux ou de prestation de services à des règles de publicité et de mise en concurrence.

⁵⁷⁶ Richer 2010 (n 571), p. 357.

⁵⁷⁷ Case C-234/95 *Commission v France* [1996] ECR I-2415.

⁵⁷⁸ Loi n° 97-50 du 22 janvier 1997.

⁵⁷⁹ Décret n° 98-111 du 27 février 1998 and Décret d’application n° 98-112 du 27 février 1998.

⁵⁸⁰ Loi n° 92-1282 du 11 décembre 1992 relative aux procédures de passation de certains contrats dans les secteurs de l’eau, de l’énergie, des transports et des télécommunications and Décret 3 août 1993; modified by Décret no 98-113 of 27 février 1998, adding Book V title II to the CMP.

the Remedies Directives was done fully outside of the CMP, in two separate laws (one for the classic sectors, one for the utilities).⁵⁸¹

It is clear from this overview that transposition of EU law into the French CMP did not prove easy, and despite consolidation efforts, by 2001 the CMP was nearly illegible again; this was worsened by the fact that it was supplemented by a great number of related laws and decrees that also affected public procurement. Foremost among these are the law on subcontracting⁵⁸², the law MOP (*maitrise d'ouvrage publique*) of 12 July 1985⁵⁸³, dealing with the duties of a contracting authority when acting as project management in works projects, and loi MURCEF of 11 December 2001 (dealing with urgent measures of economic and financial reform)⁵⁸⁴, which defines various types of procurement contracts and classifies them in French legal terms (ie, thus stating that all contracts concluded under the CMP are administrative law contracts).

The illegibility of the CMP by 2001 was the most substantial problem, however:

"The old Public Procurement Code was characterised by a complexity which made it very difficult to read and to apply. In particular, some parts of this Code applied to the State and to State bodies, whereas others applied to local authorities. A separate part applied to contracts falling within the scope of application of the ... directives; it indicated that it prevailed over other parts of the Code, but without stating explicitly which rules did not apply to contracts governed by the directives. In addition to this complexity resulting from the way the Code was drafted, the substance of the rules was also complex: for example, there were several award procedures, numerous thresholds."⁵⁸⁵

⁵⁸¹ For the classic sectors: Loi n° 92-10 du 4 janvier 1992 and Décret no 92-964 du 7 septembre 1992; for the utilities: Loi n° 93-1416 du 29 décembre 1993. For an English overview of the implementation process, see S. Ponsot, "Public procurement in France: transposition of the "Remedies Directives"" (1996) 5 PPLR 29.

⁵⁸² Loi n° 75-1334 du 31 décembre 1975 relative à la sous-traitance.

⁵⁸³ Loi n° 85-704 du 12 juillet 1985 relative à la maîtrise d'ouvrage publique et à ses rapports avec la maîtrise d'oeuvre privée.

⁵⁸⁴ Loi n° 2001-1168 du 11 décembre 2001 portant mesures urgentes de réformes à caractère économique et financier (titre I).

⁵⁸⁵ J. Arnould, "French Public Contracts Law after the reform of March 2001" (2001) 10 PPLR 324, at 330.

Two separate projects were launched to restructure French public procurement in the 1990s. The first of these, based on a 1996 report issued by MOP Mr. Trassy-Paillogues⁵⁸⁶, was sent to the National Assembly as a draft act, but then was not ratified before the National Assembly was dissolved in 1997.⁵⁸⁷ The second project did not commence on the basis of this first initiative; instead, in 1999, the Ministry of Economics and Finance launched a consultation prior to the drafting of a new act. A subsequent policy paper indicated a desire for change among very similar lines to that of the 1996 report; namely, increasing transparency and legal certainty for contracting authorities, clarifying the scope of application of the law; improving the efficiency of procurement procedure through e-procurement; and opening up procurement to SMEs to a greater extent.⁵⁸⁸ Eventually, this second consultation process led to the adoption of the second *Code des Marchés Publics*.⁵⁸⁹

5.1.4 2001: CMP #2

The main achievement met by the 2001 CMP was halving the number of articles in the old CMP simply by not repeating all the regulations for the *collectivités locales* in separate books, but by integrating these into the main text relating to central government procurement: this resulted in only 136 articles. However, the new CMP nonetheless came accompanied by several implementing measures and additional texts that supplemented the rules within it, so even in terms of volume and overall complexity only limited improvements were found.

More importantly, perhaps, the new CMP once again only implemented the directives insofar as the directives' and the CMP's definitions of a "public body" were compatible; the contracts of bodies that were considered 'private persons' in French law remained subject to separate regulation (in the form of the aforementioned 1991 Law on Transparency).

The CMP made some important changes to the procurement procedures; most notably, it made *appel d'offres* (open or restricted procurement on the basis of 'most economically advantageous

⁵⁸⁶ A. Trassy-Paillogues, "Rapport du 8 mars 1996" (Moniteur, 5 avril 1996).

⁵⁸⁷ Richer 2010 (n 571), p. 349.

⁵⁸⁸ J. Arnould, "The reform of French public procurement law postponed again" (2000) 9 PPLR CS78.

⁵⁸⁹ Décret n° 2001-210 du 7 mars 2001 portant code des marchés publics.

tender' award) the default procurement procedure. It also made other concepts—such as non-discrimination—more explicit and attempted to clarify the legal language used. On the whole, however, the 2001 CMP was not considered a success, as the overall goal of simplification had not been attained.

Criticism came from two distinct sources: interested parties in France and the Commission.⁵⁹⁰

First of all, French professional bodies, economic operators and other interested parties lodged several actions for annulment with the Conseil d'État in the hopes of stimulating further reform; these actions first of all dealt with the method—by decree, rather than through a parliamentary procedure—in which the government had adopted the new CMP, which was perceived as undemocratic, and second of all dealt with the expanded coverage of the 2001 CMP, which meant that many services that had previously been excluded from the CMP were now covered by it, increasing the administrative burden for certain service providers greatly.

The Commission, on the other hand, concluded that the new CMP violated the directives in a number of ways: importantly, certain types of contracts were excluded from formal tendering procedures where the directive did not permit this, and the directives' thresholds and publicity requirements were improperly implemented.⁵⁹¹

The Conseil d'État confirmed the majority of the 2001 CMP despite the annulment actions⁵⁹², but nonetheless the government—partially due to EU pressure—announced it would revisit large sections of the CMP in order to deal with national and especially the Commission's criticism.

5.1.5 2004: CMP #3

The 2004 CMP⁵⁹³ commenced as an ambitious project; complaints about lingering rigidity of the rules meant that the drafters opted to not subject below-EU-threshold contracts to any particular

⁵⁹⁰ See Richer 2010 (n 571), p. 350 and onwards, and J. Arnould, "The French Council of State and the reform of the Public Contracts Law of 2001" (2004) 13 PPLR NA6.

⁵⁹¹ For details, see the Commission Press release IP/02/1507 of October 17, 2002.

⁵⁹² One notable exception being the exclusion of appointment contracts, which was a provision annulled by the Conseil d'État (CE 5 mars 2003, *Ordre des avocats à la Cour d'appel de Paris and Union nationale des services publics industriels et commerciaux and others*, req. n° 238039).

procedures, but instead allowed them free choice among the available procedures without any severe prescriptions. This was met by staunch resistance in-country, and after significant protest the Prime Minister announced that the reform project would be subjected to a parliamentary consultation before it proceeded.⁵⁹⁴ This opening up of below-EU-threshold procurement was rejected by the consultation process, resulting in a more modest amendment to the 2001 CMP.

Several changes—in particular dealing with complaints of coverage and the introduction of competitive dialogue—were introduced, but it is not necessary to elaborate on these; the 2004 CMP was due for amendment almost immediately after it entered into force, as it did not implement the 2004 directives. The reform process thus continued into 2006; in part because as with the 2001 CMP, the Commission found fault with the 2004 CMP (in failure to adhere to a ‘minimum number invited’ to a restricted procedure, and failure to comply with advertising requirements set out by *Telaustria* for Part II-B services by allowing these to *always* be awarded without publicity).⁵⁹⁵

5.1.6 2006: CMP #4 and Current Developments

Current (Relevant) Applicable Legislation to the State	Deals With
CMP 2006 [last amended in Sep. 2009]	Procurement of all ‘public sector’ bodies, excluding bodies that have special & exclusive rights or are otherwise economically active but covered by the directives.
Loi n° 91-3 du 3 janvier 1991	Public bodies not covered by the CMP, works concessions & transparency/anti-corruption. [Updated by Ordonnance n°2005-649 du 6 juin 2005]
Loi MOP	Rules that apply when public bodies purchase ‘works’ contracts that has them acting as project management.
Decree No. 2004-16 of 7 January 2004	Military Procurement, where not covered by CMP.
Loi n° 2008-735 du 28 juillet 2008	PPP contracts; this law as well as two decrees issued in February 2009 modify Ordonnance n°2004-559 du 17 juin 2004.

Table 5.1.6: Current Legislation applicable to Public Procurement in France

⁵⁹³ Décret n° 2004-15 du 7 janvier 2004 portant code de marchés publics.

⁵⁹⁴ Richer 2010 (n 571), p. 351.

⁵⁹⁵ See Commission Press Release IP 04/162 of 4 February 2004.

The 2006 CMP⁵⁹⁶ transposed the 2004 directives in full. It also dealt with the remaining infringements that the Commission found in the 2004 CMP, and accordingly, increased the number of participants required to be invited for a restricted procedure and amended the provisions on the advertising of Part II-B services contracts.

Barring the combining of central government and *collectivités locales* purchasing, the setup of public procurement regulation in France has not changed drastically since 1996. The areas covered by the first CMP are thus strikingly similar to those of the current CMP, with the addendum that in some places, EU rules have required additional regulation, particularly on advertising and transparency. The 1991 Act that deals with transparency and the coverage of ‘private persons’ covered by the EU directives, in fact, remains in force to this day simply because the scope of the CMP has not expanded to the point where it is no longer necessary; certain bodies covered by the directives thus remain not covered by the CMP, and even a more updated version of the same legislation—a 2005 ordinance⁵⁹⁷—does not repeal the previous 1991 Act. More generally, since 2001, numbering of the articles and overall structure have not changed in any of the CMPs.

Other previously mentioned pieces of legislation—such as Loi MOP and Loi MURCEF—also remain in force to this date. It should also be noted that (works and services) concession agreements have never been part of the CMP, as they are not considered ‘public contracts’ in France; their procurement is thus regulated in separate legislation, also in force since the 1990s.⁵⁹⁸ The CMP notwithstanding, not much of the procurement landscape in France has changed, with one notable exception.

A 2003 Loi D’Habilitation⁵⁹⁹ empowers the French government to directly transpose EU directives where these are issued, but also empowers the government to regulate the conclusion

⁵⁹⁶ Décret n° 2006-975 du 1er août 2006 portant code des marchés publics.

⁵⁹⁷ Ordonnance n°2005-649 du 6 juin 2005 relative aux marchés passés par certaines personnes publiques ou privées non soumises au code des marchés publics.

⁵⁹⁸ Services concessions are regulated in Loi n° 93-122 (n 575), where they are treated as one type of ‘devolved service’; works concessions were regulated in Loi n° 91-3 (n 574) and are now regulated by Ordonnance n° 2009-864 du 15 juillet 2009 relative aux contrats de concession de travaux publics.

⁵⁹⁹ Loi n°2003-591 du 2 juillet 2003 habilitant le Gouvernement à simplifier le droit.

of public/private partnership contracts. The Act (devolving power from parliament to the executive) was drawn up using the UK PFI initiative as a model, and has since resulted in a 2004⁶⁰⁰ ordinance regulating the award and executing of works and services PPP contracts (both above threshold, and thus covered by the directives, and below threshold) as well as a law dated 28 July 2008.⁶⁰¹

Military procurement, regulated by the CMP in general terms, is also further regulated by a separate decree where it concerns contracts covered by Article 346 TFEU (which are then excluded from the applicability of EU law).⁶⁰²

The CMP and related decrees were all modified by three decrees adopted in December 2008.⁶⁰³ These decrees opted to raise French's 'national' thresholds relating to advertising requirements (for contracts below the directive's thresholds) significantly and implement other changes so as to promote economic recovery. Lastly, in November 2009, the 2007 Remedies Directive was implemented in France—again by decree.⁶⁰⁴

5.1.7 Guidance

In addition to extensive legislation, the French government has also consistently relied on guidance to supplement the hard law regulatory framework in place. Traditionally, this has taken place through circulars distributed among government departments. Since 2001, also, each CMP has come accompanied with an "application instruction", acting as guidance in applying the provisions of the CMP.⁶⁰⁵ Interesting is that in 2009, following the changes to the CMP that were to help French economic recovery in the global recession, a completely new

⁶⁰⁰ Ordonnance n°2004-559 du 17 juin 2004 sur les contrats de partenariat.

⁶⁰¹ Most recently, see Décret n° 2009-244 du 2 mars 2009 pris en application du code général des collectivités territoriales, which updates the Loi n° 2008-735 du 28 juillet 2008 relative aux contrats de partenariat.

⁶⁰² Décret n° 2004-16 du janvier 2004.

⁶⁰³ Décrets n° 2008-1334 du 17 décembre 2008, n° 2008-1355 du 19 décembre 2008 and n° 2008-1356 du 19 décembre 2008.

⁶⁰⁴ Décret n° 2009-1456 du 27 novembre 2009 relatif aux procédures de recours applicables aux contrats de la commande publique.

⁶⁰⁵ See Instruction du 28 août 2001 pour l'application du code des marchés publics (JO n°208, 8 septembre 2001); Circulaire du 16 décembre 2004 modifiant la circulaire du 7 janvier 2004 portant manuel d'application du code des marchés publics (JO n°1, 1 janvier 2005); Circulaire du 3 août 2006 portant manuel d'application du code des marchés publics (JO n°179, 4 août 2006).

“Guide to Good Practice” (*Guide de Bonnes Pratiques*) was introduced as a governmental circular.⁶⁰⁶ It is significantly more detailed than the 2006 *Manuel d’Application* and covers, as its title may imply, best practice as well as the applicable law contained in the CMP.

The main source of general central government guidance is the Ministry of Economics, Industry and Employment website (MinEFE).⁶⁰⁷ Aside from citing all French legislation on the subject of public procurement, the website offers a ‘guidance for public authorities’ section that explains individual procurement procedures in much more detail, contains answers to parliamentary questions on the subject of public procurement, and contains a whole specialized sub-website dealing with the French regulation of PPP contracts. There is also significant information (including guidance on what is legally permissible and not) on two current priorities of French public procurement, namely, the stimulation of using SMEs in government contracts and socially responsible procurement.

Also noteworthy is Bercy Colloc⁶⁰⁸, the economic affairs website of the *collectivités locales*. While providing some specific guidance for local government, the website is also a valuable resource for central government procurement material. Bercy Colloc reproduces all relevant procurement regulations and their drafting histories, where available. It also carries reports on studies carried out by different ministries on procurement, offers practical guidance on specific procedures organized by topic, and also provides updates on important jurisprudence originating from both the CJ and national courts.

5.1.8 Jurisprudence

As stated above, all contracts covered by the CMP and related decrees are considered administrative law contracts. This means that disputes are handled by the administrative courts (*tribunaux*), courts of appeal, and the Conseil d’État, which serves as the highest administrative court in the country.

⁶⁰⁶ Circulaire du 29 décembre 2009 relative au Guide de bonnes pratiques en matière de marchés publics (JO n°0303, 31 décembre 2009)

⁶⁰⁷ http://www.minefe.gouv.fr/themes/marchés_publics/accueil-daj.htm, last accessed 1 November 2010.

⁶⁰⁸ http://www.colloc.bercy.gouv.fr/colo_struct_marc_publ/index.html, last accessed 1 November 2010.

France sees a significant number of procurement disputes: over 100 between January and July of 2009 alone.⁶⁰⁹ Interesting about French administrative law is that it is largely case-law developed, and this holds true (albeit to a lesser extent, due to the extensive legislation that *does* exist) for public procurement as well. Other than in dispute settlement, the Conseil d'État has obviously also had a significant influence on French public procurement by annulling various provisions in the CMP throughout the years.

5.1.9 Conclusions

The historical French approach to procurement could not be more different from those of the UK and the Netherlands. The volume of legislation applicable to public procurement is immense, and it has been supplemented by a consistent stream of case law. In terms of volume, France and the UK are clearly at opposite ends of the European spectrum in terms of public procurement regulation, but as we saw in Chapter 3, the UK compensates for a lack of hard law by a heavy emphasis on guidance. It would not be illogical to assume that in France, the opposite—little guidance, much hard law—could be found, but this is not true. French legislation and case law is also supplemented with a fair amount of guidance—significantly more than the Netherlands, for instance, provides.

The following sections will examine how the French legislator has resolved the tensions between an intense history of legal—both through hard and soft law—regulation and an ever-increasing EU presence in national public procurement law.

⁶⁰⁹ Search conducted on <http://www.legifrance.fr> on 26 July 2009.

5.2 Competitive Dialogue in France

5.2.1 Introduction

This section will discuss the French approach to the implementation of competitive dialogue. The section will first examine legislative steps taken in France, if any, and will then evaluate any guidance issued as well as any jurisprudence originating from the French courts.

5.2.2 Background: la procédure de l'appel d'offres sur performances

France is the only Member State in this thesis that had, in its pre-2004 legislation, a procedure comparable to competitive dialogue in place; we can contrast this with the UK (see section 3.2.2), which developed practice similar to that of competitive dialogue through a *soft law* approach to the negotiated procedure.

The procedure, called 'l'appel d'offres sur performances' (literally translated 'call for tenders on performance'), was first introduced by decree of 27 March 1993⁶¹⁰ and retained in the 2001 CMP, in Article 36.⁶¹¹

L'appel d'offres sur performances was intended as a specific variant to the restricted procedure. There are therefore some aspects of the procedure that are more similar to the restricted procedure than to competitive dialogue or the even more flexible negotiated procedure. The following table outlines the French 'appel d'offres sur performances' and compares it to competitive dialogue and the UK use of the negotiated procedure.

⁶¹⁰ Décret n° 93-733 du 27 mars 1993.

⁶¹¹ Richer 2010 (n 571), p. 462 onwards.

Procedure	Number of Candidates Required to Invite	Outline Offers? Discussions on Outline Offers?	Possibility to Reduce Bidders?	Availability of Procedure
France: Appel d'Offres Sur Performance	5 (as with restricted procedure)	No: initial bid submission and subsequent 'clarify/specify/fine-tune'	No	When contracting authority cannot identify means to meet its needs; cannot assess the technical or financial solutions available.
UK: adapted Negotiated Procedure	3 (as with negotiated procedure)	Yes	No	Availability of negotiated procedure with a contract notice.
EU: Competitive Dialogue	3	Yes	No	Particularly complex contract (cannot identify means or technical/financial complexity).

Table 5.2.2 – Pre-Competitive Dialogue Procedures in the UK and France

Table 5.2.2 reveals that in terms of advantages offered regarding a) number of bidders, b) pre-bid discussions and c) staged or iterative bidding, the UK use of the negotiated procedure is more similar to competitive dialogue; however, when it comes to wording of the competitive dialogue provisions in the directive, the French procedure appears to be the precedent for, inter alia, the concept of a 'particularly complex contract' and what can be done post-bid submission (clarifying, specifying and fine-tuning).

Interestingly, Article 68 of the 2001 CMP states that all tenders (including prices and solutions) would be confidential. Article 68 also stressed that the contracting authority cannot modify its "functional program" or specifications in order to reflect a particular tenderer's solution without their express permission; these concepts are found in the directive's provisions on competitive dialogue, which also transparency, equal treatment and the prevention of cherry-picking.

In summary, the stricter conditions of operating competitive dialogue—such as the notion of a particularly complex contract, or very limited post-bid discussion—can be found in 'appel d'offres sur performance'. Generally, however, competitive dialogue offers more flexibility than

this French adaptation of the restricted procedure ever did, by allowing fewer bidders to be involved and bidders to be eliminated in stages.

5.2.3 “Dialogue compétitif” in French Legislation

As discussed in section 2.2.3, the competitive dialogue procedure is an optional procedure in directive 2004/18/EC. The first issue to consider is then whether or not France made it available at all in the CMP. In the case of France, where the CMP regulates not only contracts covered by the EU directives but also contracts falling outside of them, a second important question is whether or not competitive dialogue is available for, for instance, below threshold contracts. Lastly, it must also be stressed that the CMP does not cover certain types of contracting authorities (ie, certain bodies governed by public law under the EU rules) or certain types of contracts (such as *contrats de partenariat*); in evaluating the extent of an impact this EU procedure has had, it is thus also worth investigating its availability for non-CMP regulated contracts (which may or may not be covered by the directives, depending on their value).

The remainder of this section will first investigate the implementation of competitive dialogue for a) contracts covered by the CMP that are covered by the directives; it will then examine b) contracts covered by the CMP that are not covered by the directives, and c) rules applicable to specific contracting authorities or specific contracts.

5.2.3.1 contracts covered by the CMP that are covered by the Directives

Competitive dialogue has been made available in France—it was already elaborated on in the 2004 CMP and has been retained in the 2006 CMP. This section will focus primarily on the current provisions relating to competitive dialogue, but where relevant changes have taken place since the 2004 CMP, these will be highlighted.⁶¹²

⁶¹² D. Chabanol, J-P. Jouquelet, and F Bourrachot, *Le régime juridique des marchés publics : Droits et obligations des signataires des marchés de travaux* (Le Moniteur: Paris 2007), s. 789 onwards.

5.2.3.1.1 Definition

Competitive dialogue is defined in Article 36 of the CMP. The definition provided is in many ways identical to that provided in the directive, with one minor difference—Article 36 indicates that the procedure becomes available when the contracting authority is not able to supply, *in advance*, a single best possible solution. This again corresponds to a ‘best possible’ interpretation of availability, as discussed in section 2.2.4.

5.2.3.1.2 Procedure

Article 67 describes the competitive dialogue procedure. As is typical in French legislation, this article does not merely contain the provisions that pertain specifically to competitive dialogue but rather all provisions that apply to the *entire procurement*. The Article thus starts by referencing publicity requirements, and then proceeds to repeat the directive’s provisions on minimum number of participants (3) unless no other suitable participants are available. Article 67 continues by listing the time limits for receipt of requests to participate in the dialogue; again, these provisions are copied out from the directive.

Only in section VI of Article 67 does the article begin dealing with specific elements of the competitive dialogue procedure, namely, the start of the dialogue process. The following sections outline the process of the dialogue and follow the wording of the directive (and its time limits) directly. This includes a mention of equal treatment of tenderers during the dialogue process and a ban on solution-sharing without consent of the solution ‘creator’, as well as the requirement to announce, if this option is chosen, in the contract notice that the number of solutions participating will be successively reduced throughout the dialogue.

On the subject of the award, there is an important change from the 2004 CMP. The 2004 Code said that the contracting authority itself would provide one set of final specifications.⁶¹³ This approach, if used improperly, could cause problems with regards to the ban on cherry-picking—a

⁶¹³ CMP 2004, Art. 67 section II.

'single specification' would allow competing tenderers to benefit from the solutions they each provided without any scope for confidentiality. The 2006 CMP deletes this provision and instead, as the directive permits, states that each tenderer will submit a final tender on the basis of their own solution *or* any solutions shared with permission.

The remainder of the sections of Article 67 competitive dialogue take contracting authorities through the contract award and notification parts of the dialogue process. The provisions on these issues are again identical to those in the directive; in general, in fact, it can be concluded that French provisions relating to competitive dialogue for contracts covered by the directive are very similar to those of the directives, and procedurally there are no notable differences. That said, the French legislator has supplemented the directive in two interesting ways, which will be discussed next.

5.2.3.1.3 Additions

The first change concerns payments for bid costs/preparations. Whereas the directive refers to this possibility in the abstract, the French CMP goes into more detail by indicating some possibilities of how to use bid payments: Article 67 thus states that bid costs can be returned to all bidders, or only to those bidders that reach a certain part of the process, or perhaps only to the highest-ranked bidders. The approach here can be contrasted with that taken in the Netherlands and in the UK, where not only there is discouragement of bid payments, but any use of bid payment is regulated through soft law (ie, policy) rather than hard law.

Also of note, the CMP contains some provisions applicable to specific types of contracts that are nonetheless likely to be covered by the directive; an example of this is the so-called 'marchés de conception-réalisation' procedure which applies to public works contracts that contain both a design and build element. These generally are awarded using a modified restricted procedure (discussed in Article 69 of the CMP), but Article 69(II) also indicates that where such a 'design and build' contract relates to the restoration of buildings and the conditions for use of competitive dialogue are met, this procedure may be used instead:

5.2.3.2 contracts covered by the CMP that are not covered by the Directives

As will be discussed in section 5.4 in detail, France operates a much more rigorous system of thresholds than that mandated by the directives, primarily to determine the type of contract publicity required and, separately, to determine what procurement procedure must be used for contract award.

There are two thresholds that are relevant for the discussion of competitive dialogue. The highest threshold is where the EU directives become applicable (henceforth the 'EU' threshold). Above this threshold, the EU rules on availability of the procedure (ie, 'particularly complex contract') are mandatory. The second relevant threshold was a lower threshold for works procurement only, set at the EU threshold for supplies and services contracts⁶¹⁴ (206,000 euros in 2006). Above this secondary threshold, works contracts had to be procured using a procedure found in the EU directives.

Possibly to compensate for this works-only requirement for formal tendering, Article 36 of the 2006 CMP originally allowed all works contracts between the works threshold and the EU threshold to be procured using competitive dialogue *regardless* of the complexity of the contract.

Availability of the procedure changed in 2008, however, when the French government removed the 206,000 euros threshold for works, and simultaneously removed the Article 36 paragraph that permitted use of competitive dialogue for non-complex procurement.⁶¹⁵ This had as an ultimate consequence that the *procédure adaptée*, a simple and unrestricted procurement procedure (previously only available below the 206,000 euros works threshold), was suddenly available for all works procurement below the EU thresholds instead.

The '*procédure adaptée*' allows contracting authorities to structure the award process however they like; this includes possibilities for unrestricted negotiation. The legislative situation created

⁶¹⁴ When procured by non-central government; because of the WTO's Government Procurement Agreement, different thresholds apply to central government procurement.

⁶¹⁵ This was part of a general economic stimulus package intended to simplify, speed up, and reduce the costs of public procurement in France; see décrets n°2008-1355 and n°2008-1356 (n 603).

in 2008 has made competitive dialogue less available for contracts not covered by the directive (services, supplies and works contracts now all have to be 'particularly complex' before it can be used), and the *procédure adaptée* more available. As this procedure is more flexible and less burdensome than competitive dialogue, it seems unlikely that competitive dialogue will still be used to award contracts below the directive's thresholds in France.

In summary, the current French legislation still makes competitive dialogue available for all contracts below the directives' thresholds, but all contracts have to be 'complex' before it can be used. The current French approach is far more limiting than the approach taken by the UK and the Netherlands to the availability of competitive dialogue for contracts that fall below the directive's thresholds; the UK's legislation is silent on the availability of competitive dialogue for below-threshold contracts, and in the Netherlands, in the case of works, competitive dialogue is actually more freely available.

5.2.3.3 CMP: Conclusions

Most of the European legislation on competitive dialogue—which is so similar that it appears to almost be *modeled* on the French 2001 CMP provisions on *l'appel d'offres sur performances*—was implemented into the French code without significant changes, although the procedure's availability and usefulness of bid payments is considered in more detail by the French legislator than by the directive.

What is interesting is that the procedure has been made *de facto* available for all below-EU-threshold procurement as well, but currently can only be used if the directive's conditions of complexity can be satisfied. As discussed above, in reality this is likely to mean that competitive dialogue will not be used frequently for below-threshold procurement.

5.2.3.4 contracts not covered by the CMP

5.2.3.4.1 Bodies covered by Ordonnance 2005-649

Competitive dialogue is made available to bodies covered by the directives but not covered by the CMP (such as 'private law' bodies that exercise public functions) on terms that are nearly identical to those found in the CMP. Aside from minor word changes, there is only one notable aspect of how the 2005 ordinance regulating these bodies deals with competitive dialogue: the conditions for use for contracts that fall below the directive's thresholds are phrased very differently.

Contracting authorities covered by these rules, rather than the CMP, do not have to use any of the 'formal' procedures (ie, the EU procedures) for procurement below the directive's thresholds. The only comment the 2005 ordinance makes about the availability of these procedures is that *should* a contracting authority decide to use a 'formal' procedure (such as competitive dialogue), detailed specifications would be required (Article 7). This implies that competitive dialogue can be used for the award of contracts below the thresholds under this ordinance, but does not clarify whether or not *all* the rules in the ordinance (or the directive) would have to be applied in this case. As there is full freedom to use a 'non-formal' procedure for to award below threshold contracts under the ordinance, it would seem that contracting authorities are also free to use a 'changed' version of competitive dialogue that has less rigid rules on, for instance, negotiation after submission of bids—but this issue is not entirely clear from the wording of the ordinance.

5.2.3.4.2 Ordonnance 2004-559 on PPP: Le "Dialogue"⁶¹⁶

Design-Build-Finance-Operate contracts in France are subject to separate legislation and principally not covered by the rules in the CMP. Instead, an ordinance introduced in 2004 (no. 2004-559) sets out the rules to be followed when awarding this particular type of public private

⁶¹⁶ For a general discussion of competitive dialogue and PPP contracts, as well as some practical experiences therewith, see T. Reynaud and J. Léraut, "Pour un dialogue compétitif équitable dans la passation d'un contrat de partenariat: retours d'expérience et amorces de méthodologie" (2006) 47 BJC 236.

partnership (PPP) contract.⁶¹⁷ PPP contracts as defined in the ordinance are public works and services contracts—depending on their value, these may thus be covered by the EU directives. The concept of ‘PPP’, however, does not cover works or services concession agreements, which are regulated in separate pieces of legislation and are procured using more flexible procedures than competitive dialogue.⁶¹⁸

The standard method of procurement of PPP contracts set out in this ordinance is the “dialogue”. The process of the “dialogue” is nearly identical to competitive dialogue as presented in the CMP and the directive. However, there is one crucial difference. One of these is that a modification to the 2004 decree by a 2008 act has made the negotiated procedure with a notice freely available for the procurement of PPP contracts below a certain threshold (set by decree).⁶¹⁹ The negotiated procedure is more flexible than competitive dialogue, meaning that competitive dialogue is unlikely to be used for these procedures in practice.

5.2.3.5 Legislation: Conclusions

As the above discussion has shown, the provisions in the directive that are specific to competitive dialogue have been implemented with very few changes in France. However, the provisions on competitive dialogue are complemented by specific ‘French’ additions; this is clearest from how France has approached the availability of competitive dialogue for contracts not covered by the directives.

As a general rule, it can be noted that the French have made competitive dialogue available for contracts below the directives’ thresholds. For contracts covered by the CMP and the ordinance on PPP, the procedure remains available only in the case of complexity. For contracts not

⁶¹⁷ Relevant provisions for local government (which are identical) are as of 2009 found in the Local Authorities Code. See LOI n° 2009-179 du 17 février 2009 pour l’accélération des programmes de construction et d’investissement publics et privés (1), which moved the provisions from the Ordonnance to the local authorities code

⁶¹⁸ See Loi n° 93-122 (n 575) and Ordonnance n° 2009-864 (n 598).

⁶¹⁹ The actual rules on this are in Article 5 of Décret n° 2009-243 du 2 mars 2009 relatif à la procédure de passation et à certaines modalités d’exécution des contrats de partenariat passés par l’Etat et ses établissements publics ainsi que les personnes mentionnées aux articles 19 et 25 de l’ordonnance n° 2004-559 du 17 juin 2004. The Décret indicates that the negotiated procedure can be used for below-EU-thresholds contracts as long as the primary goal of the contract is to conceptualize and/or build a public work that meets needs the public authority has set out; if this is not the goal, the negotiated procedure becomes available below 133,000 Euros.

covered by the CMP, the procedure is much more generally available—this may reflect on a general difference in approach to contracts historically covered by the CMP, and contracts that are regulated in France only because this is required by EU law. For the latter, there are no rules on competitive dialogue in place below the EU thresholds.

5.2.4 Guidance

5.2.4.1 MinEFE Website

The central government, as discussed in section 5.1.7, offers public procurement advice through the Ministry of Economics, Industry and Employment website (MinEFE). There is significant information on this website, but little guidance that deals specifically with competitive dialogue.

The website provides a walk-through map of every procedure that indicates in very broad lines what the steps involved in the procedure are; there is one available for competitive dialogue as well, though it does not add anything to the legislation.⁶²⁰

The 2009 *Guide de Bonnes Pratiques*, discussed in section 5.1.7, provides significantly more information. It has long been in development by the name of *Projet du Manuel D'Application*⁶²¹ and, for instance, contains a whole section titled “When and Why (to) Negotiate” (12.1). This section describes the usefulness of a dialogue phase in a procurement procedure and then also discusses competitive dialogue specifically in this context. The section devoted to competitive dialogue merely elaborates on the entire procedure in detail—as a walkthrough—but the discussion on negotiation is actually helpful as it assists the contracting authority in making choices about the types of procedure to use when several options are available—ie, when a contract is clearly complex, but the negotiated procedure is also available. This goes beyond the scope of the EU law, which does not offer ‘advice’ to public authorities.

⁶²⁰ Direction des Affaires Juridiques (DAJ), “Dialogue compétitif”, see http://www.minefe.gouv.fr/directions_services/daj/conseils_acheteurs/dialog.pdf (last accessed 1 November 2010)

⁶²¹ DAJ, “Projet du Manuel d'Application” (2009), see http://www.minefe.gouv.fr/directions_services/daj/marchés_publics/projet-manuel-application-cmp.pdf (last accessed 1 November 2010)

The PPP-specific website *PPP Bercy*, also run by the MinEFE, contains additional information. Firstly, the website links to a PPP roadmap that is significantly more detailed and helpful than the one provided by the central government.⁶²² It also provides additional pieces of guidance prepared by the Mission d'appui à la réalisation des contrats de partenariat (MaPPP), a department within the MinEFE that deals with PPP contracts, on issues such as how to conclude the dialogue and what can be done if the dialogue fails to properly conclude with the anticipated winning tenderer,⁶²³ or what happens if the legal entity that wins the contract changes members at various parts of the procedure.⁶²⁴ These are both issues not covered by the directive, and the guidance here provides useful practical advice.

Further, this website also hosts the *Charte du Dialogue Compétitif*.⁶²⁵ This document, signed by (among others) the Minister of Economics and the Minister of the Local Territories, as well as approved by the Senate, sets out 10 principles that they recommend be followed during the process of a competitive dialogue procedure. The 10 principles are first listed and then elaborated on in the remainder of the chart; some of them are repetitions of legally binding commitments (such as an obligation to treat tenderers equally) but others are much more practical and relate to the setting up of proper project management for a competitive dialogue procedure, keeping the tenderers informed of the progress, setting up a proper risk management scheme, and finally, how to determine that a solution/candidate will not remain in the dialogue process.

This *Charte*, albeit not legally binding, is being used in practice as a guiding line for competitive dialogue PPP projects and adds substantial practical guidance onto the rules contained in the directive. The materials found on *PPP Bercy* in general can be compared to the materials

⁶²² Mission d'appui à la réalisation des contrats de partenariat (MaPPP), "Phases du recours au contrats de partenariat" (2006) (see http://www.ppp.bercy.gouv.fr/complexite/diagramme_colloc_dialogue.pdf, last accessed 1 November 2010)

⁶²³ MaPPP, "La gestion de la fin du dialogue compétitif" (2006) (see http://www.ppp.bercy.gouv.fr/fiche_fin_dialogue.pdf, last accessed 1 November 2010)

⁶²⁴ MaPPP, "Les contrats de partenariat et l'intangibilité des groupements candidats" (2006) (see http://www.ppp.bercy.gouv.fr/fiche_intangibilite.pdf, last accessed 1 November 2010)

⁶²⁵ MaPPP et al, "Charte du Dialogue compétitif" (January 2007) (see http://www.ppp.bercy.gouv.fr/charte_dialogue_competitif.pdf, last accessed 1 November 2010)

produced in the UK by, for instance, *4ps* or BSF (see section 3.2.4), which also consider the practical side of using competitive dialogue.

Lastly, *PPP Bercy* contains a link to the Commission's *Explanatory Note* on Competitive Dialogue⁶²⁶, but rather than highlighting it or listing it first as most other central government procurement websites do, it just lists it in a list of other guidance pieces, included those mentioned above.

5.2.4.2 *Bercy Colloc*

There is no significant original material on competitive dialogue available on *Bercy Colloc*; instead, it links to the *PPP Bercy* materials already discussed above. Generally, *Bercy Colloc*'s main selling point is its collection of jurisprudence but that is not relevant here, since, as we will see in section 5.2.5, there to date have been very few cases considering aspects of competitive dialogue specifically.

5.2.4.3 *Other*

One other organisation has issued substantial guidance on competitive dialogue; the Mouvement des Entreprises de France (French Confederation of Business Enterprises, MEDEF) has issued a 38 page guide to the competitive dialogue process⁶²⁷. It does not aim for any legal clarification; instead, it recites all the applicable laws (in the directive and the CMP, as well as the ordinance on PPPs) and then elaborates on how practice should supplement these provisions. It is consequently quite similar in setup to the *4ps* guidance in the UK (see section 3.2.4) and the "Competitive Dialogue" guidance issued in the Netherlands (see section 4.2.6). It thus, for instance, indicates that confidentiality has to (by law) be maintained during the dialogue, but offers no particular recommendations on how to achieve this. This piece of guidance thus also

⁶²⁶ *Explanatory Note on Competitive Dialogue* (n 105).

⁶²⁷ MEDEF, "Guide de Dialogue compétitif" (2007) (see http://archive.medef.com/medias/files/114468_FICHER_0.pdf, last accessed 1 November 2010)

operates *next to* EU law for the most part; it covers issues not addressed in the directive, such as best practice.

5.2.4.4 Guidance: Conclusions

France, in general, has significantly more detailed legislation on the subject of public procurement than the UK does, and so one could assume that consequently they would have less guidance. Competitive dialogue proves that this is not at all the case; in many ways, the guidance produced is actually quite similar. Most of the French guidance, much like the UK guidance, focuses on elaborating on 'best practice' in running a competitive dialogue procedure. Very interestingly, the official government guidance actually attempts to explain what the benefits of negotiating are more generally—but this too is an elucidation of best practice, rather than law.

What is most similar not only with regards to guidance issued on competitive dialogue in the UK, but also in the Netherlands, is that the French guidance also does not address the more difficult 'grey areas' of the procedure. Consequently, the guidance produced at the national level exists almost separately from EU law altogether—the law itself is taken 'as is' without any real interpretation, and all elaboration or covers practice rather the law. Finally, it is noteworthy that the Commission's *Explanatory Note* is reproduced on the MinEFE website, but not commented on.

5.2.5 Jurisprudence

The French administrative courts have seen several cases dealing with competitive dialogue procedures to date, though only three specifically answered a question relating to the procedure used (rather than the procurement process as a whole).

Perhaps the most interesting case to date has been *Societe Heli Union*⁶²⁸, in which out of 9 interested parties, seven were invited to participate in the dialogue; however, 5 did not respond to this invitation and so the contracting authority ended up only conducting the dialogue with 2

⁶²⁸ TA Versailles 22 janvier 2008, *Société Heli Union*, req n° 0800043.

parties. One of the non-selected parties claimed this was contrary to the ordinance on PPP, wherein a minimum of 3 tenderers had to be invited to participate in the dialogue unless no other suitable candidates were available. The Tribunal rejected this argument as the contracting authority itself had complied with the requirements of the ordinance (and, by proxy, those of the directive) by inviting more than 3 tenderers; the fact that they failed to respond to the invitations did not cause the contracting authority to be in violation of the ordinance.

Additionally, in 2004⁶²⁹, the Conseil d'État considered whether or not, after the dialogue phase of the procedure, the contracting authority was entitled to elaborate on how it would apply its award criteria in light of the solutions discussed during the dialogue phase. The case in question concerned whether or not the Local Authorities Code was in violation of the directive by explicitly permitting the contracting authority to clarify its award criteria post-dialogue phase. The Conseil d'État concluded that the Code was not in violation, as long as the award criteria themselves and their weights were not altered from those announced in the contract notice.

Most recently, the Conseil d'État determined in 2009 that there was no obligation in the Local Authority Code to justify the use of the competitive dialogue procedure in the contract notice, but merely to state that competitive dialogue was the chosen procedure.⁶³⁰ The case in question concerned a local authority PPP contract, but presumably has similar implications on the obligations of transparency in deciding to use competitive dialogue for central government PPP contracts.

Beyond these three interesting judgments, there is still very little case law that specifically deals with competitive dialogue. Given the amount of case law dealt with by the French administrative courts, additional jurisprudence is likely to arrive in the next few years.

⁶²⁹ CE 29 octobre 2004, *M. Sueur et autres*, N°269814-271119-271357-271362.

⁶³⁰ CE 10 juin 2009, *Société Baudin Chateauneuf*, N° 320037.

5.2.6 Conclusions

As expected, most French regulation of competitive dialogue can be found in legislation.

Procedurally, very little has been added to the procedural provisions contained in the directive—regardless of whether we examine the CMP, contracts covered by the directives outside of the CMP, or (potentially covered by the directives) “contrats de partenariat”, the rules in place are mostly identical to those in the directive.

The interesting changes take place with regards to availability of the procedure below the directive’s thresholds, where very different approaches are taken to contracts covered by the CMP, and the other French pieces of legislation that contain provisions relating to competitive dialogue. Contracts covered by the CMP and by the ordinance on PPP can only ever use competitive dialogue for ‘particularly complex contracts’, and can use other (more flexible) procedures to award below-threshold contracts; however, contracts covered by the 2005 ordinance on bodies not covered by the CMP do not have any rules on below-threshold procedures at all. There are no clear reasons for this distinction in approach.

The influence of EU law is thus clear in the legislation, but more difficult to see in the guidance, which in fact primarily deals with the practical management of a competitive dialogue procedure—an issue not dealt with at the EU level. It can be observed that the Commission’s own guidance has had no perceivable impact on French guidance or legislation produced, and so the 2004 directive is the main inspiration to the French approach on competitive dialogue; this is also the case for the limited jurisprudence decided at the national level, which relies exclusively on the legislative provisions of the CMP, directly copied from the directive.

5.3 Framework Agreements in France

5.3.1 Introduction

This section provides an overview of French law applicable to the conclusion of framework agreements; it first considers the approach taken for classic sector procurement prior to 2004, and then considers the effect of the 2004 directive's provisions on framework agreements.

5.3.2 Framework Arrangements Prior to 2006

5.3.2.1 CMP 1964

The first mentions of a 'framework agreement' can be found in France as early on as in the 1930s, when purchases orders by the name of "marchés a commandes" were made available. These purchase orders required setting a maximum and minimum, in either price or quantity, for a determined period of time. Marchés a commandes were first made available in French legislation in 1956⁶³¹, when they were opened up to central government, and, in 1962, extended (in part) to local authorities.⁶³²

The first CMP, in 1964, reiterated the availability of "marchés a commandes" and also introduced a second type of framework arrangement, namely, "marchés de clientele"; the latter was an arrangement whereby the contracting authority committed to buying all of a particular need (at a fixed price) from a given provider over a specified amount of time, but without specifying quantity.⁶³³ Both marchés a commandes and marchés de clientele were binding contracts; as such, contracting authorities could not step outside of their concluded framework agreements in order to obtain the same work/product/service from a different provider.⁶³⁴

⁶³¹ Décret n° 56-256 du 13 mars 1956 relatif aux marchés passés au nom de l'Etat, Titre 1, Chapitre 1, Article 8.

⁶³² Décret n° 62-473 du 13 avril 1962, Article 2.

⁶³³ CMP 1964, Article 76 (original).

⁶³⁴ A. de Laubadère, F. Moderne and P. Delvolvé, *Traité des contrats administratifs* (2nd ed) (LGDJ: Paris 1984), p. 189.

This regime was revised in the 1990s in order to achieve greater flexibility and an easier-to-use setup. In 1993, Article 76 of the CMP was rewritten entirely⁶³⁵, and a new title of “marchés à bons de commande” was used to describe both previous types of purchasing arrangements. Under “marchés à bons de commande” arrangements, object and cost had to be specified, and a minimum and maximum of either quantity or value. The duration of these agreements was also explicitly limited to 3 years.

Also introduced was a so-called contract of “marchés à tranches conditionnelles”, which could be used for ‘staged’ contracts; a contracting authority would be bound to purchase the first ‘stage’ of a contract, but successive stages were optional and could be called off by the contracting authority one by one. Each stage had to represent a complete contract, and defined both the object (including quantity) of the contract and its price; it is in that sense distinguishable from “marchés à bons de commande”, which require one or the other.

Even though the agreements specified above all met the basic requirements of a ‘public contract’—they all reflect the variety of framework arrangements that result in *binding commitment* on the part of the contracting authority as well as the supplier—eventually, the Commission caught wind of a French circular that encouraged contracting authorities to conclude identical “marchés à bons” agreements with various contractors without any commitments on the part of the purchaser to buy.⁶³⁶ As indicated in section 2.3.2, these types of non-binding framework agreements were frowned upon by the Commission as they did not result in ‘public contracts’ *stricto sensu*, and the Commission sent a complaint to the French government.

The complaint, as well as clarification from the CJ on the aggregation rules applicable to framework agreements⁶³⁷, led to a tightening of the availability of both types of ‘marchés’.⁶³⁸ By 1999, framework arrangements of either type could only be concluded if, for “economic, financial

⁶³⁵ Décret n° 92-1025 du 17 septembre 1992; these provisions were extended to local government by Décret n° 93-733 (n 610), introducing article 273 to the CMP). Both these decrets were both modified by Décret n° 99-331 du 29 avril 1999.

⁶³⁶ Circulaire 5 août 1993, J.O. 31 août 1993, p. 12243.

⁶³⁷ See *Commission v Greece* (n 143).

⁶³⁸ This was made clear in DGCCRF Avis n° 97-134 du 4 mars 1997. (See P. de Gery, “À l’origine de l’accord-cadre : les marchés à bons de commande” (2007) 66 CP-ACCP 32, at 33.)

or technical reasons", the scope and purchase rate of the stated requirements could not be finalized in the contract notice.⁶³⁹

5.3.2.2 CMP 2001-2004

The 2001 CMP changed little about the definitions of these types of purchasing agreements. Other than relabeling them as "marchés fractionnées" (split contracts), the earlier provisions as well as restrictions transferred over to the 2001 CMP without changes. However, where since 1993, multi-supplier frameworks were actively discouraged in France, the 2001 CMP made them available again (subject to similar restrictions as single-supplier framework arrangements).

As the provisions relating to "marchés fractionnées" barely changed from the 2001 to the 2004 CMP, these two texts will be discussed together.⁶⁴⁰

5.3.2.2.1 Single Supplier Frameworks

Single-supplier frameworks under the 2001/2004 CMP were still never readily available. However, it is still possible to differentiate between the 'standard' single-supplier arrangement, the 'exceptional' kind, and "marchés à tranches conditionnelles."

1. Standard

Procedure

Article 71.1 contained the rules for the 'standard' single-supplier framework. It required that the subject of the contract was clearly specified, and that the contract notice had to contain either price or the pricing mechanism. Lastly, the notice had to state a maximum and minimum value or quantity. The minimum *had* to be purchased, or the contracting authority could be sued for

⁶³⁹ Décret n° 99-331 du 29 avril 1999, modifying Articles 76 and 273 of the CMP.

⁶⁴⁰ One obvious change is that the 2004 CMP puts "marchés à bons de commande" in Article 71 and "marchés à tranches conditionnelles" in Article 72.

damages; the maximum (which could not be more than four times the minimum) simultaneously served as a “threshold” calculator, determining which of the CMP’s available contract award procedures could be used to award the framework.⁶⁴¹

Actual orders were placed without strict formalities; to call off, all that was required was a written request for a specified quantity for one of the products of services tendered in the original framework contract notice.

Duration

In 2001, the duration of “marchés à bons de commande” was limited to three years; the 2004 CMP amended this to four years, presumably in anticipation of the 2004 directive. In exceptional circumstances, the framework agreement could be awarded for a longer period of time.

Exclusivity

The 2001 CMP was silent on the subject of exclusivity of the single-supplier framework agreement. The 2004 CMP, however, makes this issue clearer, by highlighting an exception to what appears to otherwise be the general rule: in the event where the contract concerned occasional needs only, the contracting authority could buy from other suppliers where the total value of any external-to-the-framework purchases amounted to less than 1% of the framework agreement, or 10,000 euros. It is unclear if this rule was introduced purely for the sake of slight flexibility for the contracting authority, or a different reason—such as potential small-medium enterprise involvement for low-value call-offs.⁶⁴² Nonetheless, relying on this option to purchase outside of the framework occasionally did not negate the binding obligation to procure the minimum contract amount/value from the framework supplier.⁶⁴³

⁶⁴¹ The CMP operates additional thresholds to the EU, which determine when certain procedures become available; for details, see section 5.4.3.1.

⁶⁴² Neither the 2004 CMP itself nor the *Manual d’Application* elaborate on the reasons for the exception.

⁶⁴³ L. Folliot-Lalliot, “The French Approach to Regulating Frameworks under the New EC Directives”, Chapter 4 in Arrowsmith 2009 (n 6), at p. 199.

2. Exceptional

The non-standard single-supplier framework, found in Article 71.2, permitted the establishment of a framework agreement *without* a minimum or maximum in exceptional circumstances. A written report had to be provided on why this type of framework was needed, and the only possible justification presented by the CMP was that the nature of contract prevented the purchasing requirements or the rate at which call-offs would be placed from being determined.

3. Marchés à tranches conditionelles

This variant to the “marchés à bons de commande” was retained in both the 2001 and 2004 code; in the 2004 code, it received a separate article (72), but its provisions remained identical to what they had been prior to 2001.

5.3.2.2.2 Multi-Supplier Frameworks

As indicated in section 5.3.2.2.2, the 2001/2004 CMP reintroduced the availability of multi-supplier framework agreements. However, the 2001/2004 CMP did not open up the use of multi-supplier frameworks completely; instead, the legislators established several situations in which a multi-supplier framework could be used. As with single-supplier frameworks, a first requirement for use was that the object of the contract in question could not be specified in advance due to economic, financial or technical reasons; beyond this, the conditions for use were very different.

1. “Standard”

The CMP only permitted multi-supplier frameworks in exceptional circumstances to begin with; as such, referring to a ‘standard’ arrangement is misleading. What is meant by it in the following discussion, however, is that the following conditions *always* had to be met.

Multi-supplier frameworks became available in two circumstances: firstly, when a single supplier could not possibly meet all the contracting authority's needs, and secondly, when security of supply demanded having more than one supplier on hand.

The contract in question would be divided up into lots, and the contract terms would stipulate *in advance* how the lots would be awarded; mini-competitions were thus not possible. The *Instruction* attached to the 2001 CMP indicated that it was possible to award the lots alphabetically or through a process of successive award rather than through a formal bid comparison procedure; this is similar to what the Commission proposes in its *Explanatory Note*.⁶⁴⁴

Noteworthy also is the 2001 *Instruction*'s position on parties admitted to this type of framework: it states that where security of supply is the cause for setting up a multi-supplier framework, it is not possible to add "(author's translation) 3, 4 or 5 suppliers" to the framework where 2 suppliers would guarantee security of supply.⁶⁴⁵ This is not retained in the 2004 *Manuel d'Application*, presumably because the 2004 directive requires at least 3 parties to a framework agreement.

2. Exceptional (General)

The CMP 2001/2004 also foresaw the possibility of concluding a multi-supplier framework without a minimum or a maximum; however, the only available justifications for concluding such a framework were a) price volatility of the contract subject; b) rapid obsolescence of the contract subject; or c) urgency not attributable to the contracting authority. When one of these conditions was met, the contracting authority could conclude a framework agreement that required a mini-competition before call-offs. The mini-competition would take place on the conditions of the original framework agreement; award was based on price, and where relevant, the speed of completion of the call-off.

⁶⁴⁴ *Explanatory Note on Framework Agreements* (n 142).

⁶⁴⁵ 2001 *Instruction*, Article 72.4.4: "Ainsi, il ne saurait être admis que la personne responsable du marché prévoie d'attribuer simultanément le marché à 3, 4 ou 5 titulaires si la nécessité de sécuriser les approvisionnements peut raisonnablement être assurée par 2 titulaires."

Because the conditions that made this procedure available implied a high degree of uncertainty on the part of the contracting authority, the CMP stipulated that the contracting authority was *not* obliged to place any orders under the framework, but conversely, the suppliers party to the framework were bound to supply if call-offs were placed.

3. Exceptional (Scientific and Technological Research)

The second 'exceptional' type of multi-supplier framework agreement that could be concluded under the 2001/2004 CMP related to purchases that could not be defined in advance because scientific or technological research was required to complete contract specifications.

As with the 'general' exceptional case, these framework agreements required a mini-competition at the call-off stage and would then be awarded according to criteria stated in the contract documents. However, in three situations a mini-competition was *not* required: a) call-offs for goods or materials worth less than 1500 euros; b) where only one possible product can suffice for the authority's need, and it is only supplied by one supplier; or c) where previously obtained supplies need to be replaced and obtaining them from a different supplier would result in incompatibility or technical difficulties.

5.3.2.2.3 Multi-User Frameworks

France has been a pioneer in the use of multi-user frameworks. The 2001 and 2004 CMP contained explicit provisions on the setting up of multi-user framework arrangements, under the banner of either 'grouped' contracts, or a central purchasing agency.

1) Ad-Hoc Grouping

France has a long tradition of government departments grouping together their purchases of routine items; Article 34.1 of the 1964 CMP already foresaw for this possibility, but it was elaborated on in the 2001/2004 CMP.

Article 8 contained the rules on grouping. It first stipulated that grouped contracts were available to central government as well as to local authorities. To establish a grouped contract, Article 8 required a signed agreement between all participating contracting authorities, and one nominated 'coordinator', who would be responsible for organizing and selecting the suppliers admitted to the agreement. Each contracting authority party to the agreement would then have to agree to purchase its indicated needs from the selected suppliers.

There were no restrictions set on joining one of these agreements, but, as Folliot-Lalliot notes, that may not have helped non-members who wanted to join, as an existing agreement did not have to be re-advertised.⁶⁴⁶

2) Central Purchasing Agency

The second type of multi-user framework permitted by the 2001/2004 CMP is the use of a so-called Central Purchasing Agency (CPA), which coordinates the purchases of unrelated government departments. The 2004 directive introduces provisions on this subject, but prior to 2004 they were not regulated at the EU level.

The specific use of a CPA goes beyond the scope of the thesis and its availability here is merely highlighted here as an illustration of how the French legislation on repeat purchasing arrangements predates related EU initiatives; in fact, it is possible that the French approach to regulating repeat purchasing influenced the direction that the directives took in 2004.⁶⁴⁷

⁶⁴⁶ Folliot-Lalliot (n 643), p. 203.

⁶⁴⁷ Ibid, p. 204.

5.3.2.3 Pre-2006 Legislation: Summary

By 2004, French regulation of framework arrangements was highly complex; rules on various types of agreements were found in different parts of the CMP, and the use of most types of framework arrangements was still heavily restricted.

5.3.2.4 Guidance

Most relevant guidance issued prior to the 2001-and-onward revisions of the CMPs has taken the form of circulars. Already mentioned above is the 1993 circular on *marchés fractionnés* which indicated, among other things, that multi-supplier agreements ought to be possible without binding commitments. This circular offered a clarification of legal issues, an elaboration on the technical requirements needed for contract notices and specifications, as well as recommendations on when to employ certain types of frameworks. It is worth highlighting that this *supplemented* the detailed provisions in the 1964 CMP.

The 1993 circular was replaced in 2000, after the use of framework agreements was severely restricted in 1999. The 2000 circular clarified legal obligations, set out administrative formalities, and indicated (by example) when certain types of frameworks could or should be concluded.⁶⁴⁸

From 2001 onwards in particular, there has also been significant guidance on “marchés à bons de commande” issued in the explanatory memoranda accompanying the CMPs. The *Instruction* with the 2001 CMP offers clarifications that are not apparent from the legislation itself; such as, that when concluding a multi-supplier framework for reasons of security of supply, this had to be very strictly interpreted and could not just lead to a generic multi-supplier framework with many suppliers. The 2001 *Instruction* also indicated when it might be useful to conclude “marchés à tranches conditionnelles”, or a combination of a “marché à bons de commande” and a “marché à

⁶⁴⁸ Circulaire du 24 janvier 2000 - Les marchés fractionnés (NOR : ECOM9900874C - RLR : 353-0b)

tranche conditionnelle". It thus ventured beyond explaining the law and instead offered general guidance.

The 2004 *Manuel d'Application*, issued with the 2004 CMP, operated on a question-answer basis. In these rhetorical questions, it highlighted that the maximum value/quantity set for the framework agreement would determine its 'value' for the purposes of threshold calculation, which was left unstated in the legislation itself. It also emphasized the implicit exclusivity to framework agreements unless one of the exceptions apply, which is not inherently clear from the 2004 CMP's wording.

In short, the role of guidance on the subject of framework agreements prior to 2006 cannot be underestimated; the guidance, in many ways, set out the French legal requirements in a more transparent and comprehensible manner than the legislation itself does.

5.3.2.5 Jurisprudence

There is little case law on "marchés (a bons) de commande" that actually developed the law; the most common dispute before the courts concerned the duration of framework agreements—ie, when they could be concluded for longer than the 3-4 years permitted by the CMPs—and/or the degree of specificity needed in the subject of the framework agreement.

The latter issue has produced some interesting case law. A 2004 case clearly demonstrates that recourse to "marchés à bons de commande" under the old regime was, in fact, very limited, by annulling a contract that *could* have been specified enough to use a regular procedure for award.⁶⁴⁹ The case in question concerned a 1-year framework arrangement set up for pavement repair works in specific portions of the city; the municipality wanted to use a framework agreement so that they could spread out the orders for repair, but the Court concluded this was not permissible under the CMP. Conversely, a 2006 judgment concluded that a contracting

⁶⁴⁹ CAA Bordeaux 27 avril 2004, *Cne de Saint-Denis-de-la-Réunion*, req. n° 00BX01639; see also CAA Bordeaux 24 février 2005, *Région de la Réunion*, req. n° 00BX01361, and CAA Marseille 13 mai 2005, *SIVOM c/ préfet du Gard*, req. n° 01MA02692 and CAA Versailles 11 juillet 2006, *Dpt de l'Esson c/ préfet de L'Esson*, req. n° 04VE00124.

authority had had no right to conclude an 'exceptional' framework agreement. The contract in question concerned a one-year (but extendable) framework arrangement to buy advertising space in national and regional media. Given this limited duration, the court concluded that given the object of the contract, the authority was capable of setting a minimum and maximum in quantity and so had no legal right to conclude an 'exceptional' framework agreement.⁶⁵⁰

Generally, however, the administrative courts did not evolve the use of framework arrangements in the same way that they have other areas of administrative law. One can suggest that the repeat case law on the subject of 'improper use of framework agreements' is a problem of France's own making; by limiting the availability of framework agreements severely, numerous disputes arose that could have been avoided had framework agreements been made more generally available.

5.3.2.6 Prior to 2006: Conclusions

The regime in 2004 was very complicated; not only because there was substantial and frequently amended legislation, but especially because the legislation itself was not comprehensible without additional guidance. The greatest problem, demonstrated by the case law, stemmed from the restrictions on the use of framework agreements; by stating that they could only be concluded where there was an inability to specify the contracting authority's needs in advance, framework arrangements could not be used to set up regular purchasing for known needs that simply were not all needed at once.

⁶⁵⁰ CAA Versailles 4 avril 2006, *Département de l'Esson c/ préfet de l'Esson*, req. N° 04VE00648.

5.3.3 Framework Agreements Since 2006

5.3.3.1 Legislation

5.3.3.1.1 CMP 2006 & Ordonnance 2005-649

With the arrival of the 2004 directives, France repealed its legislation on “marchés à bons de commande” and chose to adopt the directive’s provisions. However, as the non-binding framework agreements permitted by the 2004 directive would not normally be considered ‘public contracts’ in France, the CMP 2006 distinguishes between “frameworks” on the one hand and “public contracts” on the other. It has been argued that by including ‘frameworks’ as a type of contract rather than a *procedure* to award public contracts, the French legislator has essentially created a new type of administrative law contract by implementing the directive.⁶⁵¹

Consequently, the 2006 CMP splits the directive’s provisions on “framework agreements” into two separate types of contracts. Framework agreements that set all the terms and conditions in the original agreement and do not require a competition phase are known as “marchés à bons de commande” (found in Article 77); those that require a second phase of either tendering or clarification of the particular call-off, on the other hand, are known as *accords-cadre*, or actual framework agreements (found in Article 76). The Conseil d’État has made clear that this definitional difference will have no practical consequences at the EU level, by noting that “(author’s translation) marchés à bons de commande in CMP terms are framework agreements in the directive’s terms.”⁶⁵²

It should be noted here that the provisions that will be discussed below have been copied directly into *Ordonnance 2005-649* (containing the rules for public bodies covered by the directives but not the CMP); these ‘public bodies’ are also free to conclude framework-type arrangements. However, under the CMP framework arrangements have been made available regardless of

⁶⁵¹ See Folliot-Lalliot (n 643), Section 4:20.

⁶⁵² CE 8 août 2008, *Cne de Nanterre*, req. n° 309136.

contract value, albeit with identical rules applicable to contracts that fall above the EU thresholds and contracts that fall below the EU thresholds⁶⁵³; in the ordinance, there are no specific rules on framework agreements for contracts below the EU thresholds, as there are generally no rules on contracts below the thresholds in this piece of legislation (see section 5.2.3.4.1).

5.3.3.1.2 Marchés à bons de commande in 2006

The provisions on “marchés à bons de commande” have been simplified significantly in the 2006 CMP. Both single-supplier and multi-supplier framework agreements (of all types) are now freely available to all contracting authorities.

Article 76 indicates very clearly that a “marché à bons de commande” does not result in a second stage of competition, and requires all specifications (other than quantity needed) to be set out in advance. Duration of “marchés à bons de commande” is limited to four years, as per the directive, and since December 2008—codifying recent French case law on the subject⁶⁵⁴—they can be concluded with a minimum *or* a maximum in quantity *or* value.

It is worth highlighting at this stage that these changes made by France were not *required*. As discussed in section 2.3.4.1, framework agreements *may* be introduced, meaning that the directive’s provisions were optional and in any event can be greatly altered in terms of restrictions of use. Nothing in the 2004 directive precluded France from keeping framework ‘arrangements’ available only in very limited circumstances, but France clearly opted to break with its traditional method of regulating framework purchasing.

Two possible reasons for these changes have been suggested: the first being the general goal in France, discussed in section 5.1.5 and 5.1.6, to simplify its national procurement laws and to

⁶⁵³ See Article 76(1) of the 2006 CMP, which states: ‘Les accords-cadres définis à l’article 1er sont passés selon les procédures et dans les conditions prévues par le présent code.’ [Author’s translation: “Framework agreements, defined in Article 1, will be concluded using the procedures and in the conditions established in the current Act.”] Framework agreements can be awarded using all procedures available in the CMP, and can therefore be concluded regardless of their value (albeit with different procedures at different value thresholds – see section 5.4.3 for details on the French system of thresholds).

⁶⁵⁴ CE 24 octobre 2008, *Union des Groupements d’Achats Publics*, req. n° 314499; see also CE 24 octobre 2008, *Communauté d’agglomération de l’Artois*, req. n° 313600, where the CE determined that if neither maximum or minimum is stated, the contracting authority has to put an estimate or method of estimation in the contract documents.

introduce greater flexibility to the contracting authority. It was noted in section 5.1.6 that the 2001 and 2004 reforms of the CMP neither simplified nor increased flexibility to a great extent, and it has been suggested that the removal of restrictions on repeat purchasing arrangements was introduced to meet these demands for greater flexibility.⁶⁵⁵ A second potential reason for the simplification is interesting for our purposes, as it has been argued that the reason that the EU directives' provisions on framework agreements have been worked into the French CMP in such a literal manner is to close the gap between EU regulation of procurement and the French regulation of procurement.⁶⁵⁶ France's history of Commission complaints was discussed in section 5.1 as well, and it is possible that the directive was followed so closely in 2006 in an attempt to limit the risk of further complaints following on from these latest changes to the CMP. However, this is purely speculative—the only stated reasons issued by the French government relate to the greater flexibility offered by the directive's provisions on framework agreements.

Despite these significant changes to the rules applicable to “marchés à bons de commande”, some other traditional French rules have been retained; for instance, Article 76.II still permits a contracting authority to deviate from the exclusivity requirement of a “marché à bons de commande” as long as this is done for a minor, separate portion of the contract.

5.3.3.1.3 Marchés à tranches conditionnelles in 2006

This provision has remained wholly unchanged since 2004, and is still found in Article 72; it is thus not linked to the “framework agreements” provisions of the CMP and appears to now be treated as a different type of ‘special purchasing method’.

⁶⁵⁵ As was suggested by the Director of Legal Affairs (DAJ) of MinEFE; see J-M. Binot, “Jerome Grand d'Esnon: L'accord-cadre est un outil intelligent qui va répondre à la critique permanente de la lenteur de la commande publique”, 2 July 2005, available at <http://www.achatpublic.com>; see also A. Fraisse, “Accords-Cadres: l'introduction d'un dispositif souple et réactif dans notre système d'achat?”, Master Thesis, Université Lumière Lyon 2, 2006 (see http://doc.sciencespo-lyon.fr/Ressources/Documents/Etudiants/Memoires/Cyberdocs/Masters/MSPCP/fraisse_a/pdf/fraisse_a.pdf, last accessed 1 November 2010)

⁶⁵⁶ Fraisse, *ibid*; see also de Gery (n 638), p. 32, where he highlights that the introduction of framework agreements in the classic sectors shows at last a compromise between the EU and France on repeat purchasing in the classic sectors.

The CMP 2006 implements the directive's on framework agreements *stricto sensu* nearly verbatim, but adds a few particular things that help delineate the award process.

First of all, in describing the need for a second stage of award, the CMP indicates that call-offs can be scheduled either to take place at a time of need, or at a scheduled, regular interval. The directive does not appear to preclude either of these choices but also does not make them explicit.

This added possibility, however, leads to a set of additional instructions with regard to organizing the mini-competition for call-offs; the CMP specifies that where a framework agreement is divided into lots, and a call-off takes place at a time of *need*, only those suppliers assigned to the particular lots may be included in a call-off. However, where the call-off is a regular call-off, all lots have to be automatically included. The directive is silent on the issue of which framework suppliers to invite to the call-off, and the French CMP thus offers one possible approach to take.

Also of interest is Article 76.VI, which states that “(author’s translation) Contracts awarded on the basis of a framework agreement may be marchés à bons de commande. They are then awarded in accordance with the rules provided by this article and executed according to the rules laid down by Art. 77.” This provision has been interpreted as permitting “marchés à bons de commande” to be concluded *within the context* of a framework, by approaching the framework provider/providers and setting up a set purchase order. This may particularly be interesting for large purchasing ‘groups’ who have periodic regular purchases without necessarily being able to set up all the terms for their purchase in advance.⁶⁵⁷

⁶⁵⁷ H. Pongérard-Payet & T. Bangui, “La procédure de l’accord-cadre : un nouvel instrument du droit de la commande publique” (2007) AJDA 1055, p. 1058.

Generally, however, the French legislation has left the directive's provisions on framework agreements intact. The duration restrictions are also 4 years here, with the directive's possibility for extensions in justified cases copied out verbatim, and the minimum of 3 participants to the framework agreement is also stated clearly in Article 76.

5.3.3.1.5 Grouped Contracts

The provisions on grouped contracts remain unchanged since 2004, with the exception that all relevant provisions now reflect the distinction between "marchés" and on the one hand and "accords-cadre" on the other, thus indicating a permissiveness of both multi-user framework "contracts" and framework "agreements".

5.3.3.1.6 Legislation: Conclusions

Even though the French provisions on framework purchasing are not fully identical to those in the EU directive, they resemble the directive's provisions far more than they do the provisions in the 2001 and 2004 CMP. The EU rules appear to thus have influenced the 2006 French rules significantly and directly, resulting in a simplified and freely-available mechanism for framework purchasing in France.

5.3.3.2 Guidance

Since 2006, new French guidance has been issued on *accords-cadre*; one can assume that "marchés à bons de commande" are not generally covered in detail because they are not technically 'new'.

The *Manuel d'Application* to the CMP 2006⁶⁵⁸ contained information on framework purchasing, albeit without significant changes from what was included in the 2004 *Manuel*. One specific addition, however, was that the provisions on *accords-cadre* concluded with a list of 'advantages'

⁶⁵⁸ 2006 *Manuel*, question 6.2.2.

that can be found in *accords-cadre*, citing such things as quick reactivity to problem situations such as shortages, the ability to *not* cite a minimum and maximum, and better being able to take advantage of technological advancements in the products that are being purchased on a repeat basis.

The 2009 *Guide de Bonnes Pratiques* that has replaced the 2006 *Manuel* no longer indicates what the potential advantages of framework agreements are, but does comment on the use of framework agreements in other ways: firstly, it notes that when framework agreements are awarded for contracts *not* covered by the directives, it is possible to negotiate directly with framework members prior to organizing a mini-competition. Providing this is done in a manner that respects equal treatment and transparency, there are no rules in the TFEU that prohibit a negotiation phase—this is consequently a helpful suggestion.

Added to this is the recently revised “fiche” on *accords-cadre* published by the MinEFE⁶⁵⁹. It aims to collate the Commission’s *Explanatory Note on Framework Agreements*, the provisions of Article 76 CMP, and recent jurisprudence from France itself into one helpful walkthrough of the procedure. It first states that a framework agreement *stricto sensu* is still a contract with binding obligations.⁶⁶⁰ The “fiche” also deals with issues such as which award procedure to use when awarding a framework agreement, which is—because of the system of additional thresholds used in France, to be discussed in section 5.4.3—a very complex issue in France. Lastly, it stresses again the potential advantages of combining a “marché à bons de commande” with an “accord-cadre”, by noting that this combines the “(author’s translation) flexibility of the framework agreement with the reactivity of the marché à bons de commande”.⁶⁶¹

One can imagine that the fiche will be regularly revised in the coming years, as it attempts to follow all jurisprudence that influences the interpretation of the Article 76 provisions.

⁶⁵⁹ DAJ, “Les Accords Cadres” (September 2010) (see http://www.economie.gouv.fr/directions_services/daj/conseils_acheteurs/accords-cadres.pdf, last accessed 1 November 2010); after being originally provided in 2006 alongside the CMP, it was revised in both July 2009 and September 2010, albeit with minimal changes in each instance.

⁶⁶⁰ It does not address how these binding obligations would manifest themselves in the case of multi-supplier frameworks, however; possibly the intended interpretation is that a framework agreement results in a binding obligation to *purchase the requirement*, but not necessarily from any particular supplier.

⁶⁶¹ “Un tel dispositif permet de conjuguer la souplesse propre à l’accord-cadre et la réactivité permise par le marché à bons de commande.”

5.3.3.3 Jurisprudence

While there has not been a significant amount of case law in the administrative courts developing the new 2006 rules on framework agreements, two important cases on the 2006 CMP's provisions on framework purchasing have been decided by the Conseil d'État.

The Conseil d'État has first of all pronounced that both “marchés à bons de commande” and “accords-cadre” are framework agreements for European purposes.⁶⁶² More importantly, however, it has dealt specifically with the last lingering restrictions on availability of the provisions on “marchés à bons de commande”, by concluding that they did not need a minimum and a maximum in quantity or value, but *either a minimum or a maximum* would suffice.⁶⁶³ Interestingly, in amending the legislation in light of the 2008 global recession, the French legislator opted to not only apply this judgment to “marchés à bons de commande” but also to “accords-cadre”.

5.3.3.4 Post-2006 Regulation: Conclusions

France has seen significant changes in its legislation and guidance on framework agreements since the 1990s. Each revision of the CMP has, prior to 2006, brought with it additional complications in this area, but in 2006, France scrapped all pre-existing rules and implemented those in the directive instead.

The new legislative package has reduced the need for guidance—this is particularly true when contrasted with the 2001 *Instruction* attached to the 2001 CMP—and may have increased the importance of case law. As we saw, the Conseil d'État has already had to interpret the provisions of the CMP, expanding on them where necessary.

⁶⁶² *Cne de Nanterre* (n 652).

⁶⁶³ *Union des Groupements d'Achats Publics* (n 654).

The 2006 CMP has brought about a significant change in approach in the legislation of framework arrangements—from very restrictive and limited, to very flexible and open. The impact of the directives on the 2006 CMP in this area is highly evident. Furthermore, unlike the other examined guidance (see sections 5.2 and 5.4), the French national guidance piece on framework agreements directly refer to the Commission's *Explanatory Note*. EU law has thus had significance influence on the regulation of French framework agreements post-2006.

5.4 The General Principles of Equal Treatment and Transparency in France

5.4.1 Introduction

This section will examine how the general principles of equal treatment and transparency have been approached in French procurement regulation. We will first examine how the development of the general principles under the directive has affected French regulation of contracts covered by the directives (section 5.4.2); following this, we will examine how the French regulator has dealt with the more uncertain obligations set out by CJ case law for contracts outside of the directives (section 5.4.3).

5.4.2 Contracts Covered by the Directives

5.4.2.1 Legislation

5.4.2.1.1 CMP 1964 Prior to 1992

As discussed in section 5.1, France has a long-standing history of extensive legislative regulation of public procurement. Direct references to the principles of equal treatment and transparency were not found in the 1964 CMP, but there were already substantial rules requiring advertising: competition was pursued through a general obligation to publicise public contract notices in the *Bulletin Officiel des annonces des marchés publics*.⁶⁶⁴ It is possible that there is a connection between a desire for transparency in the rules and this advertising requirement—however, it is more likely that *value for money* motivated these advertising rules.

There were also no direct references to the notion of 'equal treatment' in the 1964 CMP; however, very interestingly, there does appear to have been a perceived need for 'fairness' that led to the inclusion of at least one rule that would be covered by the equal treatment of tenderers principles under EU law. The provisions on the *appel d'offres* procedure contained a specific

⁶⁶⁴ CMP 1964, Article 38.

paragraph that stated that only compliant tenders *received by the deadline* stipulated by the contracting authority would be opened. By 2001, before the CMP 1964 was replaced by the CMP 2001, this concept had been expanded; the “appel d’offres” procedure had been split up into two separate procedures (an “open” version and a “restricted” version) and in both, the same restriction on participation was included.

It bears stressing that this principle predates EU legislation on public procurement by at least a decade, and direct references to equal treatment in case law or legislation by another 20 years.

5.4.2.1.2 Post-1992 Developments in the CMP 1964

By 1992, references to a general principle of equal treatment surfaced in the CMP 1964. Article 47 of the CMP 1964 was modified in 1992, to state that barring the existence of some reserved contracts, “(author’s translation) [all tenderers] will benefit from equal treatment in the consideration of their requests to participate or tenders.”⁶⁶⁵

The 1992 changes occurred as part of one of the first efforts to simplify the CMP; however, the decree that prompted the simplification was not accompanied by further guidance and so it is unclear what prompted the inclusion of this new Article 47.⁶⁶⁶ What can be noted is that in 1992, *Storebaelt* had not yet been decided, so in any event it cannot have been a *reaction* to CJ procurement jurisprudence.

By 2001, the requirements for publicity had also been expanded on. In the 1980s, changes were introduced to permit advertising in journals other than the Bulletin Officiel where relevant; and by 1988, thresholds were introduced to determine the degree of publicity required. These changes were not prompted by provisions in the 1988 directives (which were not included in the CMP until 1989⁶⁶⁷) and were not linked to any general principle of ‘transparency’.

⁶⁶⁵ CMP 1964, Art. 47: “...Sous réserve des dispositions des articles 61 à 73, ils bénéficient d’une égalité de traitement dans l’examen de leurs candidatures ou de leurs offres.”

⁶⁶⁶ Décret n°92-1310 du 15 décembre 1992.

⁶⁶⁷ Article 380, introduced by Décret n°89-236 du 17 avril 1989.

The word 'transparency' was not found in the 1964 CMP; not even when in 1992, Article 38 was amended to stipulate what information had to be contained in a contract notice, in detail, and also indicated (by reference to Article 104, where the negotiated procedure without a notice was found) which contracts did *not* have to be publicized. This, again, appears to again be a solely French initiative to, in this case, streamline the way in which procurement contracts were advertised.

By 2001, the French legislator appeared to be pursuing similar objectives to those the CJ would pursue in its jurisprudence in the 1990s: transparent and non-discriminatory public procurement. However, there are no signs that these French legislative developments were inspired by concurrent EU developments.

5.4.2.1.3 CMP 2001 & 2004

From 2001 onwards, we see an expansion on earlier principles that reflect upon equal treatment and transparency in the CMP.

5.4.2.1.3.1 Article 1, Paragraph 2: the Principles

The 2001 CMP for the first time refers directly to both equal treatment and transparency. One might speculate that French law influenced EU law here, as Article 1(2) states that: "(author's translation) public procurement contracts will respect the principles of ... *equal treatment of tenderers and transparency of procedures*."⁶⁶⁸ (Emphasis added). This is very close to the wording of Article 2 in the 2004 directive, but predates it by several years.

The 2001 *Instruction* indicates that (according to the French legislator) these principles do not have an EU origin at all. Instead, the *Instruction* explains that 'equal treatment' is a general

⁶⁶⁸ CMP 2001, Article 1, para 2: "Les marchés publics respectent les principes d'égalité de traitement des candidats et de transparence des procédures."

principle of law in France, and has constitutional value⁶⁶⁹; it also highlights that it is of particular importance in ensuring competitive public procurement, and has been so historically, by citing a Conseil d'État case of 1939.⁶⁷⁰ It continues to say that 'equal treatment' is a principle included in the CMP to set 'ground rules' that will lead to greater transparency and competition, and finally observes that: "(author's translation) equal treatment is equivalent to the non-discrimination principle in EU law."⁶⁷¹ In the eyes of the 2001 legislator, then, the equal treatment principle is of French origins, and merely has an equivalent at the EU level.

On the subject of transparency, the *Instruction* explains that the purpose of transparency is to ensure that all contracts are publicized and all procurement procedures used are fair/impartial. Following this, the *Instruction* comments on *Telaustria*: "(author's translation) Regarding in particular procurements exceeding the [EU] thresholds, the principle of transparency has been quoted in [Telaustria], which stated that the principle of non-discrimination 'requires, specifically, an obligation of transparency that permits the contracting authority to ensure that the [non-discrimination] principle is respected.'"⁶⁷² Much like in the Netherlands (several years later, see section 4.4.3.1), explanatory materials attached to the CMP thus appear to have interpreted *Telaustria* of having consequences primarily for contracts above the EU thresholds.

The 2004 *Manuel*, on the other hand, explains Article 1(2) of the 2004 CMP as meaning that *regardless of their value*, public procurement contracts are subject to an equal treatment and transparency obligation. In section 8.1, which considers why publicity is necessary, the *Manuel* notes that 'publicity' is a fundamental principle of public procurement. Only in discussing how publicity can be satisfied is the notion of transparency mentioned: "(author's translation) one must consider that a contract was awarded in conditions that satisfy the transparency

⁶⁶⁹ This is a French term relating to the hierarchy of general principles and norms; when they are of constitutional value, they cannot be overruled by other norms (such as those found in legislation).

⁶⁷⁰ CE 25 juillet 1939, *Dame veuve Gautron*, Recueil Lebon p. 529.

⁶⁷¹ "L'égalité trouve des équivalences en droit communautaire dans le principe de non-discrimination", on p. 14.

⁶⁷² "S'agissant en particulier des marchés d'un montant supérieur aux seuils communautaires, ce principe de transparence des procédures a été posé dans l'arrêt de la Cour de justice des communautés européennes du 7 décembre 2000 (Telaustria Verlags GmbH), qui dispose que le principe de non-discrimination « implique, notamment, une obligation de transparence qui permet au pouvoir adjudicateur de s'assurer que ledit principe est respecté », on page 15.

requirement when the advertising method used actually permitted interested bidders to be informed and led to a substantial variety of offers, thus ensuring genuine competition.”⁶⁷³

A similar approach is taken to equal treatment, which is solely referenced with regards to section 9.1, which asks “(author’s translation) why use competitive tendering procedures?”⁶⁷⁴ Here, all stated general principles are quoted, but only to indicate that competitive tendering is *how* they are all satisfied.

The 2001/2004 CMP’s references to the principles themselves are very general and bear a resemblance to their later enunciation in the directive, but in the case of equal treatment—as made clear by the 2001 *Instruction* in particular—are not related to it. Regarding transparency, most of the discussion on publicity relates to *where* covered contracts have to be advertised, but does not consider the consequences of a transparency requirement more generally.

5.4.2.1.3.2 Transparency Requirements in 2001/2004

To summarize the 2001 changes, aside from introducing several options made available through the directives (such as the PIN notice), the publicity requirements have not been further elaborated on than they were prior to 2001. The 2001 CMP also does not respond to the effect transparency may have on, for instance, the publication of selection or award criteria, or providing timely information to bidders. There are thus no great additions in the field of transparency that indicate a great influence of such cases such as *Universale-Bau* in either 2001 or 2004.

5.4.2.1.3.3 Equal Treatment

On equal treatment, on the other hand, there are some minor additions to the CMP. It was already noted that late tenders in the open and restricted procedure could not be opened in the

⁶⁷³ “On doit considérer qu’un marché a été passé dans des conditions satisfaisantes au regard de l’exigence de transparence si les moyens de publicité utilisés ont réellement permis aux prestataires potentiels d’être informés et ont abouti à une diversité d’offres suffisante pour garantir une vraie mise en concurrence.”, at question 8.1.

⁶⁷⁴ “Pourquoi faut-il faire une mise en concurrence?”, at question 9.1.

1964 CMP; this was retained in 2001, and expanded upon, in that late requests to participate in restricted procedures *also* could not be considered.⁶⁷⁵ Furthermore, some additional changes were made to the provisions on award of contract and choice of tenderer; Article 53(II) in 2001 stated that where a tenderer cannot provide supporting documentation (such as certificates proving compliance with social and fiscal obligations) before a set deadline, they (and their bid) will be rejected. These changes held over in 2004 as well, and are the only concrete example of the French advancing on equal treatment of tenderers in a way not specifically required by the directive.

However, as noted, the general idea that late submissions should be rejected has existed since 1964, so it cannot be concluded that CJ case law here had any effect on the French legislation; if anything, it is worth considering if prohibitions such as these may eventually make their way *into* the directives.

5.4.2.1.4 CMP 2006 & Ordonnance 2005-649

The current CMP has, as has been noted in section 5.1.6, barely been changed from previous drafts in most areas, and in fact has mostly served to correctly implement the EU directives.

Like the 2001 and 2004 codes, the CMP 2006 restates the general principles of equal treatment and transparency; they are found unchanged in Article 2.

Regarding equal treatment, where the CMP in past versions went beyond the directives' requirements, it continues to do so now. Provisions on disqualifying tenderers who submit supportive documentation past a given deadline (Article 46) and the provisions on rejecting late tenders and requests to participate are retained. The latter have now been expanded to also apply to the negotiated procedure and competitive dialogue.⁶⁷⁶

⁶⁷⁵ Article 62 of CMP 2001.

⁶⁷⁶ Open procedure: Art. 58; Restricted procedure, requests to participate: Art. 61; tenders: Art. 63; Negotiated procedure, requests to participate: Art. 65; tenders, Art. 66. Competitive Dialogue: Art. 67.

Article 52 deals with missing and incomplete information on candidates *requesting to participate*, and states that where a contracting authority notes that supporting evidence about the candidates is missing, the tenderers in question can be contacted and granted an additional 10 day delay during which to complete their request to participate. The second sentence of Article 52 then adds that *all other candidates* must also be notified and given an option to “complete” their requests. The latter principle in particular shows an application on the equal treatment principle in a manner that the CJ has not dealt with as of yet.

The 2005 ordinance that applies the directive to ‘public bodies’ not covered by the CMP contains no additional rules; it recites directive’s general principles (Article 6), and copies the rule on the disqualifying tenderers who submit supporting documentation after a deadline (Article 18 of the decree⁶⁷⁷ on ‘public body’ procurement procedures). However, there is no mention of having to reject bids/requests to participate if received after deadlines. It is unclear why this is included in the CMP and not in the ordinance.

In general, current French legislation again seems to be mostly non-influenced by EU developments. There has been more CJ case law in recent years to indicate that the equal treatment provision in particular comes with some requirements that could be legislated on—for instance, treatment of the incumbent bidder. The French CMP and 2005 ordinance do not include any such additions. Instead, expansion of the existing ideas seems to be the primary sign of change—such as expanding the late request/tender ban to all other procedures, in the case of the CMP 2006.

5.4.2.2 Guidance

The contents of the 2001 *Instruction* and the 2004 *Manuel* were already discussed in section 5.4.2.1.3.1 above. The 2006 *Manuel* contains no relevant changes from the 2004 *Manuel*, and thus also provides limited guidance.

⁶⁷⁷ Décret n° 2005-1742 du 30 décembre 2005 fixant les règles applicables aux marchés passés par les pouvoirs adjudicateurs mentionnés à l'article 3 de l'ordonnance n° 2005-649 du 6 juin 2005 relative aux marchés passés par certaines personnes publiques ou privées non soumises au code des marchés publics.

Generally, the guidance offers little practical advice, but does contain an interesting discussion on the origins of the general principles. We saw that the 2001 *Instruction* explained that equal treatment and transparency were principles originating from *French* constitutional values, rather than EU law. The 2009 *Guide de Bonnes Pratiques*, however, offers a different explanation. Firstly, it states that the principles in Article 1 of the CMP are *derived from* EU law; and that French law knows 'comparable' principles. Why this has been rephrased so as to emphasize the EU-origins of the general principles is not clear. The 2009 *Guide*, however, again stresses *Telaustria* in discussing the EU source of the general principles, which makes it unclear if the French legislator is aware of the consequences the general principles may have under the *directives*.

More generally, it can be noted that none of the guidance documents issued alongside the CMPs offer substantial advice on how the general principles affect contracts covered by the directives. To illustrate, the 2001 *Instruction* and the 2004 *Manuel* are both silent on the reason for rejecting late tenders/requests to participate; they merely note that they cannot be opened by the committee that assesses the bids.⁶⁷⁸

Furthermore, none of the French government procurement websites offer guidance pieces on how equal treatment and transparency, or the CJ's case law thereon, affect contracts covered by the directives. The role of guidance in shaping practice in this area is thus very limited.

5.4.2.3 Jurisprudence

Most case law of the past two decades reflects primarily on requirements set out by the *equal treatment* principle; any cases found on the transparency principle and the publicity requirement exclusively tend to follow from 2000 onwards, and bear a strong resemblance to *Telaustria* by explicit references to a *complete* failure to advertise. Such cases will be discussed in section 5.4.3.3.

⁶⁷⁸ See, for instance, 2001 *Instruction*, Article 59.

Equal treatment has been, prior to 2009, treated as “French” concept rather than an EU concept. There is significant case law that cites ‘equal treatment’ as a reason for contract nullity or annulations,⁶⁷⁹ and the following discussion will thus present a summary of the courts’ general approach to the general principles, rather than a complete overview.

The French courts have first of all used the general principle of equal treatment to decide cases in which a clear violation of the substantive rules in the directives has taken place. We see this in the 1980s⁶⁸⁰, the 1990s⁶⁸¹, and more recent years. For example, 2005 saw a case where a contracting authority offered an advantage in qualification assessment to the incumbent bidder⁶⁸², which violated the CMP (and directive’s) rules on selection criteria. The French administrative court did not cite the more precise rules in the CMP that forbid this practice, but instead highlighted that equal treatment had been violated.

In one important recent case, the Conseil d’État used the equal treatment principle to ensure that the incumbent bidder could participate in a new tendering procedure. Shortly before *Fabricom*, the Conseil d’État decided that a tenderer who participated in project conception did not automatically have access to information that would have resulted in unequal treatment of candidates.⁶⁸³ There have, however, also been various cases in which the Conseil d’État has annulled contracts because bidders participating in project preparatory work *did* have unreasonable advantages and the equal treatment principle was violated.⁶⁸⁴

Other recent cases have mimicked CJ case law on weightings and sub-criteria; the Conseil d’État has recently confirmed that concealing the existence of sub-criteria would violate the equal

⁶⁷⁹ Even when attempting to limit cases to only those contracts covered by the CMP, over 100 searches came up in the past three years alone. (<http://www.legifrance.fr>, 1 October 2010).

⁶⁸⁰ See, for instance, CE 13 mai 1987, *Sté “Wanner Isofi Isolation”*, req. n° 39120.

⁶⁸¹ See, for instance, CE 1 avril 1994, *Etablissements R. Ducros*, req. n° 120121; CE 19 mars 1997, *Sté Bull*, req. n° 171140; CAA Marseille 29 juin 1999, *Cne de Vaison-la-Romaine*, req. n° 97MA00912.

⁶⁸² CAA Bordeaux 19 juillet 2005, *OPAC de la Communauté urbaine de Bordeaux Aquitanis*, req. n° 01BX02528.

⁶⁸³ CE 29 juillet 1998 *Sté Genicorp*, req. n° 177952; see also CAA Nancy 13 novembre 1997, *OPAC des Ardennes c/M. Lenoir*, req. n° 95NC00085-95NC00096.

⁶⁸⁴ See, for instance, CE 8 juillet 1991, *OPHLM du département de l’Aisne*, req. n° 95305; CE 8 septembre 1995, *Cne d’Évreux*, req. n° 118010.

treatment and transparency principle.⁶⁸⁵ In the very important *ANPE* judgment, the Conseil d'État applied the general principles of equal treatment and transparency to a Part II B services contract—and concluded that, as the award criteria and their weightings were not properly specified, this was a violation of Article 1 of the CMP (reciting the general principles).⁶⁸⁶

Most recently, the Conseil d'État set a limit to the case law on award criteria and weightings, by stating very clearly that while set award criteria and weightings have to be publicized in the contract notice (even for contracts below the directive's thresholds), there is no requirement for contracting authorities to also reveal scoring mechanisms used.⁶⁸⁷

We can see that both in this case and in *ANPE*, the Conseil d'État actually applied rules on award criteria and weightings to contracts *not* covered by the directives.

These French developments *may* be a consequence of the judgments in *Universale-Bau*, *ATI* and *Lianakis* (see section 2.4.2), where transparency requirements for award criteria and weightings (as well as sub-criteria) were developed by the CJ; however, the French courts exclusively cite the general principles as stated in Article 1 of the CMP as a source for these requirements. It is thus difficult to assess what role EU law has played in these developments; it appears that the French courts are applying similar principles to those found in the CJ case law even to contracts that are not covered by the directives (which may not be subject to the requirements established in *Lianakis* and other cases—the CJ has not yet considered this issue.)

In summary, the general principle of equal treatment is frequently used to denounce non-competitive behaviour where there are no specific articles in the CMP to prohibit a given practice. However, it is impossible to state with certainty that CJ jurisprudence has had an influence on how the French courts perceive equal treatment, as they do not normally cite the CJ in their decisions.

⁶⁸⁵ CE 15 décembre 2008, *Communauté urbaine de Dunkerque*, req. n° 310380.

⁶⁸⁶ CE 30 janvier 2009, *ANPE*, req. n° 290236.

⁶⁸⁷ CE 31 mars 2010, *Collectivité territoriale de Corse*, req. n° 334279.

5.4.2.4 Contracts Covered by the Directives: Conclusions

Despite extensive regulation in the field of public procurement, the French legislator has not responded in an obvious manner to CJ-obligations for equal treatment of tenderers and transparent procedures in amending the CMP in 2001, 2004 or 2006.

Any provisions that indicate a requirement for equal treatment or transparency predate the CJ's case law on the subject. In this respect, it must be assumed that the CJ's case law has *not* have a great effect on French legislation for contracts covered by the directives.

Case law in France seems to have aligned itself with recent CJ jurisprudence on the general principles, although again, it is highly unclear whether or not there is any 'influence' to speak of, or whether the French courts have applied the equal treatment principle independently. Guidance is minimal, and has until recently argued that the principle of equal treatment in particular does not originate from EU law, but rather is a separate and pre-existing principle in French procurement law—a perception that is supported by both legislation and national case law.

5.4.3 Contracts Not Covered by the Directives

5.4.3.1 Legislation

Because the CJ jurisprudence affecting contracts not covered by the directives was only decided in 2000, only the most recent CMP 1964 and subsequent versions will be considered.

5.4.3.1.1 CMP 1964 in 2001

By 2001, the 1964 CMP had been greatly revised and contained advertising rules that generally covered also those contracts that fell below the thresholds in the EU directives.

There were four levels of thresholds in operation at the time, elaborated on in Article 38 (and subject to frequent changes):

a) *National Advertising Threshold* – below this threshold, no advertising was required.

Above this threshold, up to the *BO Threshold*, contracts had to be advertised in either the *Bulletin Officiel* (BO) or in a different journal, “(author’s translation) entitled to receive legal notices”.⁶⁸⁸ In 2001, this threshold was set at 300,000 francs.

b) *BO Threshold*—between the BO threshold and the EU threshold, contracts had to be advertised in the national BO. In 2001, this threshold was set at 700,000 francs.

c) *EU Threshold*—above the EU threshold, contracts were required to be published in the OJEU as well as in the BO.

The only types of contract that did *not* have to be advertised were those awarded with the negotiated procedure *without* a notice, and those below the ‘national’ thresholds. The former was compliant with EU law, as the negotiated procedure without a notice can be found in both the 1993 and the 2004 EU directives, and the French conditions for use were no different than those in the directives.

From the perspective of the *Telaustria* jurisprudence, there are only a few problems with the CMP 1964; the *National Advertising Threshold* set at 300,000 francs, below which neither competitive purchasing nor advertising was obligatory, would not have met a requirement to provide a degree of publicity or to act transparently. However, for all contracts above that threshold, a ‘degree of advertising’ was required.

The CMP 1964 demonstrates that national legislation requiring advertising for (some) contracts not covered by the directives was definitely not introduced in response to the CJ case law. These national advertising requirements existed long before 2000.

⁶⁸⁸ “Les avis d’appel public à la concurrence et les avis d’attribution sont insérés dans le Bulletin officiel des annonces des marchés publics ou dans une publication habilitée à recevoir des annonces légales.”, Article 38, para 1.

The 2001 CMP contained rules that, *prima facie*, appear to be even more *compliant* with *Telaustria*—primarily because the thresholds adhered to in the CMP 1964 were lowered. Beyond this, the CMP also introduced a new, “simple” procedure for low-value contracts that did require advertising.

Article 28 of CMP 2001, first of all, set the threshold for ‘formal tendering’ at 90000 Euros. Below this, contracts could be concluded without any ‘formalities’. Article 29 added to this that below thresholds of 130000 Euros for goods and services and 200000 Euros for works, perishable foods could be purchased at fairs, markets, or places of production. Article 30 described the more limited requirements that certain (what are now known as) Part II B services had to satisfy; these included only a requirement to abide by technical specification requirements and to post a notice following contract award. There are problems with all of these rules from a *Telaustria* perspective, in that none of them seem to require any sort of competition or publicity at the outset.

Secondly, Article 32 described the “mise en concurrence simplifiée” procedure, a “simplified tender” procedure that could be used for contracts below a threshold of 130000 Euros for goods and services and 200000 Euros for works. [Any of the other tendering procedures in the CMP could also be used to award these contracts instead, but where these were used, the procedural rules applicable to those procedures would apply.]

Despite its name, the “simplified tender” procedure *did* require advertising; however, following a choice of tenderers, the contracting authority was permitted to simply negotiate with “several” tenderers. Use of this procedure places responsibility for *Telaustria* compliance with contracting authorities, as despite the requirement for advertising, the *method* of advertising is left up to the individual authority.

Despite these generally positive changes, the Commission launched a complaint about the French CMP⁶⁸⁹; some of the Commission's complaints dealt with violations of the Treaty general principles. Specifically, the Commission criticized Article 30 of the CMP 2001, stating that despite the more limited regime that certain types of services were subjected to, a general obligation to act in a non-discriminatory and equal manner still stemmed from the Treaty. This is a direct reference to *Telaustria* and how it affected excluded contracts; the Commission highlighted in particular that there was an obligation to advertise, and that this could not be ignored simply because it was not stated explicitly in the Services directive.⁶⁹⁰

The Commission also criticized the Article 28 threshold⁶⁹¹, below which no formal procedures were required by law at all; again, the Commission reiterated that a lack of procedural requirements in the directive did not mean that these contracts were exempt from Treaty obligations.

The advertising regime in the 2001 CMP was thus heavily criticized, with the exception of the “mise en concurrence simplifiée” set out in Article 32—which, as noted, *required* some form of advertising. The French legislator nonetheless opted to revisit all of these provisions again in 2004, in large part to respond to the Commission's critique of Article 28.

5.4.3.1.3 CMP 2004

The 2004 CMP again saw some substantial changes to the thresholds employed in 2001, as well as a change to the procedure made available for the award of contracts that fell below the directives' thresholds.

Article 28 of the 2004 CMP outlined the new procedure, renamed to the “procédure adaptée”—a name chosen because it loosely translates to ‘adequate’ procedure, in light of EU advertising

⁶⁸⁹ Commission, IP/02/1507 (n 591).

⁶⁹⁰ Ibid.

⁶⁹¹ Ibid.

requirements.⁶⁹² Under the *procédure adaptée*, the “means of advertising and competition” used are set by the contracting authority advertising the contract. The procedure originally was set to be used for contracts between a low threshold of 90000 euros, below which no formal competition or advertising was required, and the EU-level thresholds.

However, a decree of November 2004⁶⁹³ modified the 2004 CMP and established a new ‘lowest’ threshold of 4000 euros. Between the threshold of 4000 and the EU thresholds, the *procédure adaptée* could be used, but with different advertising requirements between 4000 and 90000 euros on the one hand (free choice of advertising method), and 90000 and the EU thresholds on the other (required advertising in the French *BO* or other suitable journal). Only below this new threshold of 4000 euros was it possible to award a contract without advertising. It is possible that this change was a response to pressure from the Commission to regulate low-value contracts in light of the CJ’s case law; however, this is speculative.

The Commission appears to have accepted this approach. It did not commence an infringement procedure before the CJ in 2002; instead, the Commission awaited the 2004 redevelopments of the CMP.⁶⁹⁴ In launching a new complaint about the French CMP 2004⁶⁹⁵, which still was perceived as not entirely compliant with EU law, the Commission merely referred back to the “simplified” procedures available for Part II B services—retained from the 2001 CMP without changes. The French concept of a very, very low threshold below which no advertising is necessary was thus principally condoned by the Commission.

⁶⁹² Richer 2010 (n 571), p. 450.

⁶⁹³ Décret n° 2004-1298 du 26 novembre 2004 relatif à diverses dispositions concernant les marchés de l’Etat et des collectivités territoriales.

⁶⁹⁴ See IP 04/162 (n 595): “The Commission found that the new code adopted on 7 January 2004 did not take into account the 11 complaints which the Commission had made in its reasoned opinion of 23 October 2002 regarding the earlier version of the code dated 7 March 2001 (see IP/02/1507).”

⁶⁹⁵ *Ibid.*

5.4.3.1.4 Contracts not Covered by the CMP

Not all contracts subject to *Telaustria* jurisprudence are regulated in the CMP; the Commission, for instance, has reminded France in its 2004 complaint that any legislative provisions on services concessions also have to be compliant with the general principles.⁶⁹⁶

Services concessions are regulated in a separate law, as they are not considered 'public contracts' as defined in the CMP.⁶⁹⁷ Services concessions are in fact subject to publication requirements regardless of their value; where below the EU thresholds, they have to be advertised in a relevant journal entitled to receive legal notices.⁶⁹⁸ These rules were introduced in 1996, and thus again precede relevant CJ jurisprudence requiring advertising for services concessions.

Also of relevance is the 2005 *Ordonnance* on 'public bodies' outside of the CMP; as we saw with competitive dialogue (in section 5.2.3.4.1), there are no formal procedures in place below threshold in this *ordonnance*, and consequently no advertising 'requirements'. The *ordonnance* and its procedural decree⁶⁹⁹ are fully silent on how to award contracts below threshold; the responsibility for compliance with obligations under the Treaty will thus fall firmly on the public bodies awarding these types of contracts.

5.4.3.1.5 CMP 2006

The 2006 CMP, when first introduced, changed little about the thresholds established in 2004; the 4000 and 90000 euro thresholds requirements were retained, presumably because the Commission found no fault with the regulatory system in place for low-value contracts. Also retained was the 'procédure adaptée', with no changes.

⁶⁹⁶ Ibid.

⁶⁹⁷ See section 5.1.6.

⁶⁹⁸ See Article 1 of Décret n°93-471 du 24 mars 1993 portant application de l'article 38 de la loi n° 93-122 du 29 janvier 1993 relatif à la publicité des délégations de service public

⁶⁹⁹ Décret n° 2005-1742 (n 677).

Regarding the contested provisions on Part II B services, the CMP 2006 did introduce a change—it made the ‘procédure adaptée’ available for these contracts as well.⁷⁰⁰ The fact that it was made ‘available’, rather than mandatory, however, begs the question as to whether or not this suffices in terms of compliance—by making a procedure *available*, the CMP 2006 has not actually ensured that all of these contracts *are* advertised, especially since Article 30 still explicitly excludes Part II-B services from the regular advertising requirements for procurement contracts, set out in Article 40(III). However, the Commission has thus far not criticized the approach taken in Article 30.

Though France has always regulated below-threshold contracts, the *manner* in which it has regulated them has changed since 2001—although if this is directly in response to EU developments is difficult to deduce. However, what is a helpful indicator in this regard is the way that the French government opted to change the 2006 CMP thresholds in light of 2008 ‘recession’ plans to stimulate the French economy.

5.4.3.1.5.1 Recent Changes: The Lowest Threshold

A set of decrees published in December 2008⁷⁰¹ aim to enable the use of public procurement contracts to quickly boost economic recovery in France. Crucial to these developments are some changes to procedural rigidity, which will simplify and speed up procurement procedures.

The 4000 euro “bottom” threshold was replaced by a 20000 euro threshold instead, hoping to encourage fast procurement for low-value contracts; the French legislator is thought to have set the new threshold after considering bottom thresholds in various other countries, including the United Kingdom—presumably by reference to individual departmental policy, as no thresholds other than the EU thresholds existed in UK legislation (see section 3.4.3.1).⁷⁰²

⁷⁰⁰ Article 30, CMP 2006.

⁷⁰¹ See, in particular, Décret n° 2008-1356 and Décret n° 2008-1355 (n 603).

⁷⁰² The levels of the thresholds in other countries were cited regularly in the French news media at the time, as a justification for making the change to 20,000 euros; see, for instance, Secteur Public, “Simplification des procédures dans les marchés publics”, 4 December 2008, available at <http://www.secteurpublic.fr/public/article.tpl?id=15184> (last accessed 1 November 2010).

President Sarkozy's speech announcing the forthcoming changes, made on December 4 2008, reveals the reasons for adjusting the threshold; the threshold for non-advertised contracts was raised so as to stimulate local enterprises by enabling direct contract award to them.⁷⁰³ This measure, despite impacting on the general principles of equal treatment and transparency, thus seems to have been taken without any consideration of CJ jurisprudence on the transparency obligation.

However, the change existed only for a very short period of time. The Conseil d'État ruled in 2010 that this raising of the threshold ran contrary to the general principles of equal treatment and transparency.⁷⁰⁴ The Conseil d'État stated (author's translation) "that these principles do not preclude the [legislator] to enable the contracting authority to decide that the contract will be awarded without advertising or without competition, in only those cases where it appears that such formalities are impossible or clearly unnecessary particularly because of the contract, its value or the degree of competition in the sector."⁷⁰⁵ After this general statement, the Conseil d'État concluded that by releasing all contracts below 20,000 euros from any advertising obligations, the French legislator contravened the general principles (as stated in the 2006 CMP, without specific reference to EU law)—implying that advertising those contracts is neither impossible nor 'clearly unnecessary'. As the plaintiff in the case merely requested the repeal of the 2008 decree that changed the threshold, the advertising threshold is as of 1 May 2010 back at 4,000 euros—a low threshold below which no advertising is generally required thus remains, even though the CJ has recently indicated that this may not comply with EU law.⁷⁰⁶

5.4.3.1.5.2 Recent Changes: Buyer Profiles

From the 1st of January 2010 onwards, contracts between 90,000 euros and the EU thresholds have to be advertised on mandatory "buyer's profile" sites. This concept has been lifted from the

⁷⁰³ A summary of the speech was made available at <http://www.localtis.info/cs/ContentServer?pagename=Localtis/artlour/artlour&cid=1228369436380> (last accessed on 1 November 2010).

⁷⁰⁴ CE 10 février 2010, *M. P.*, req. n° 329100.

⁷⁰⁵ "... que ces principes ne font pas obstacle à ce que le pouvoir réglementaire puisse permettre au pouvoir adjudicateur de décider que le marché sera passé sans publicité, voire sans mise en concurrence, dans les seuls cas où il apparaît que de telles formalités sont impossibles ou manifestement inutiles notamment en raison de l'objet du marché, de son montant ou du degré de concurrence dans le secteur considéré"

⁷⁰⁶ See the discussion on *APERMC* (n 197) in section 2.4.3.2.

EU directives (where it is found in Articles 35 and 36 as well as Annexes VIIA and VIII), according to the 2009 *Guide de Bonnes Pratiques*. Mandatory advertising of contracts above 90,000 euros on the buyer profile website has been adopted *in addition to* the pre-existing obligation to advertise these contracts in the BO or other relevant industry journals; this is thus different from recent UK policy changes (see section 3.4.3.3), where the choice to advertise remains open but *when* advertised, this has to be (additionally) done on an internet portal.

5.4.3.1.6 Legislation: Conclusions

The French legislator appears to appreciate the importance of advertising, and advertising beyond the scope of the directives has been a part of the French regulatory approach for several decades now. A general requirement for publicity thus precedes *Telaustria*, and in general it cannot be stated that by *regulating* below-threshold contracts, the French CMPs have “responded” to new CJ developments.

Most recently, the French legislator opted to raise the ‘no-advertising’ threshold to 20,000 euros, which it deemed to be ‘in line’ with what most other European countries were setting as their bottom threshold; this was overturned by the Conseil d’État, meaning that the 4,000 euro threshold is now back in place. It is unclear whether or not either threshold is compliant with the Treaty obligations (as these are not clear), but the Conseil d’État’s reasoning for moving the threshold back—not all of these contracts cannot/should not be advertised—may indicate awareness of the CJ’s focus on assessing advertising requirements on a case-by-case basis.

5.4.3.2 Guidance

5.4.3.2.1 Guidance on the CMPs

As discussed above, in the 2001 CMP introduced a general cut-off of 90,000 euros, below which no advertising was necessary. The 2001 *Instruction* on this subject states that though below this threshold no formal procedures are required, “(author’s translation) it is nonetheless

recommended" that the general principles are adhered to, and that the contract is awarded competitively where the value and nature of the contract warrant it.⁷⁰⁷ This, however, is the most that is said on the subject of the general principles and how they relate to below-threshold contracts—noteworthy is that advertising is not mentioned specifically.

The 2004 *Manuel*, in section 8.2, considers the advertising thresholds in the CMP. On asking how to publicize contracts of a value of less than 4000 euros, the *Manuel* states that: "(author's translation) in the event of purchasing contracts of a **very small value**, advertising can result in 'ballast' and unnecessary spending."⁷⁰⁸ This is an interesting point, given that the EU procurement rules generally take account of a need to prevent disproportionate costs in the procurement process; for example, the restricted procedure is generally available alongside the open procedure because the cost of evaluating large numbers of bids is high and not always necessary to guarantee competition. When pressed on the issue of contracts of a 'very small value', the CJ may thus also conclude that the Treaty does not require advertising contracts when the costs of doing so would outweigh the savings.

On the subject of advertising contracts between 4000 and 90000 euros, the *Manuel* states that despite the fact that choice of advertising method is left to the contracting authority between these thresholds, this right is not limitless and can be tested by the courts. It then concludes that the method of publicity chosen will be deemed adequate in light of the general principles of public procurement if potential candidates can, through the method of advertising chosen, become aware of the procedure, in order to achieve a sufficient diversity of tenders so as to *assure genuine competition*. While not verbatim, this is very close to the reasoning adopted by the CJ in the *Telaustria* judgment, although transparency itself is not highlighted in the 2004 *Manuel*. This may indicate influence of the case law; however, it should be remembered from the discussion in section 5.4.2.1 that the French legislation has always linked publicity to competition—this may thus merely be a more explicit statement of a long-standing French procurement principle.

⁷⁰⁷ 2001 *Instruction*, Article 28.

⁷⁰⁸ " ... S'agissant d'achats d'un très faible montant, une publicité peut devenir un élément d'alourdissement et de dépense inutile.", at question 8.2.1.

The 2004 *Manuel* next considers various advertising options in detail; it discusses the usefulness of, for example, specialist press options or the internet. Neither the UK nor the Netherlands have provided this kind of guidance on advertising requirements, but in France, it can presumably be attributed to the fact that advertising has been mandatory in most procurement for forty years. Nonetheless, it will prove helpful to contracting authorities that are struggling with the concept of an appropriate 'degree of publicity' as required under the Treaty.

The 2006 *Manuel* does not add to the 2004 *Manuel* to any significant extent, though it does note that "publicity" does not necessarily mean "an advertisement" in the stricter sense of the word—a suggestion also raised by Advocate-General Sharpston in *Commission v Finland*.⁷⁰⁹

The 2008 changes to the thresholds did not come with specific guidance. While the French government *did* issue a circular on the subject of economic measures taken in light of the recession, this circular only noted the 20000 euros threshold without any further explanation.⁷¹⁰

As discussed in section 5.4.2.2, the 2009 *Guide de Bonnes Pratiques* for the first time (in section 10) refers to *Telaustria* and the EU origins of the advertising rules applicable to contracts below the directives thresholds. However, it does not elaborate on any of the requirements established by the *Telaustria* line of jurisprudence, and generally offers identical guidance to that provided in the 2006 and 2004 *Manuels*.

5.4.3.2.2 Additional Guidance

There are no mentions of the effects of the CJ's jurisprudence on contracts covered by the TFEU in any of the guidance available on either the MinEFE website or Bercy Colloc, although the Bercy Colloc jurisprudence collection *does* list and refer to various cases in which the general principles of transparency and equal treatment are discussed. It does not go so far as to offer discussion or

⁷⁰⁹ See, for instance, AG Sharpston on *Commission v Finland* (n 190).

⁷¹⁰ Circulaire du 19 décembre 2008 relative au plan de relance de l'économie française — augmentation des avances sur les marchés publics de l'Etat en 2009 (JO n°296, 20 décembre 2008).

an indication of what contracting authorities ought to do to comply with the cases that are listed, however.

We have thus seen that the positive obligations stemming from the Treaty are not elaborated on in French guidance, although the 2009 *Guide de Bonnes Pratiques* does reference the existence of CJ case law that obliges advertising on account of the transparency principle. This may indicate that additional guidance on this case law will be prepared—but at the time of writing, the French government websites are unique in the sense that they do not even link back to the Commission's *Interpretative Communication* on contracts not covered by the directives. What little discussion there is of advertising requirements solely refers to *national* thresholds and effective public procurement. The CJ case law thus does not seem to have had a substantial impact on guidance issued either as part of the CMPs or as separate documents; even the 2009 *Guide* uses *Telaustria* to explain the source of transparency requirements, but does not elaborate on the CJ's conditions for advertising, such as cross-border effect.

5.4.3.3 Jurisprudence

The concept of “transparency” and how it relates to an obligation to publicize contracts has been cited in a great number of French public procurement cases.⁷¹¹ However, only recently are there explicit references to this principle affecting procurement *outside* of the directives or the CMP and related legislation. What follows are some examples of the types of cases that have been considered.

First of all, the French courts do not hesitate to rely on the transparency principle to annul contracts that have not been properly advertised. In the years since 2004 in particular, the lower administrative courts have produced judgments that come very close to restating the *Telaustria* principle in cases where the contracts in question were not covered by the CMP or related legislation. In these cases, the French courts easily concluded that a complete lack of publicity

⁷¹¹ See, for instance, CE 28 avril 2003, *Fédération française des courtiers d'assurance et de réassurance et autres*, req. n° 233343-233474 and CE 28 avril 2003, *Syndicat national des pharmaciens hospitaliers et praticiens hospitaliers universitaires*, req. n° 237717.

violated the (EU) general principles and subsequently annulled the procurement procedures in question.⁷¹²

Secondly, the courts have built on the general principles established in *Telaustria* by critically assessing the type of publicity used; an example of this is a 2005 Conseil d'État judgment in which the Conseil d'État concluded that advertising in a local journal and on the internet for a total of 15 days did not satisfy the transparency principle in light of the *subject* of the contract (which concerned establishing a 'branch' of the Louvre in Lens).⁷¹³

Thirdly, unlike in other areas of French public procurement law, the French courts do on occasion cite the *Telaustria* judgment itself when discussing cases relating to the general principle of transparency.⁷¹⁴ The Administrative Appeals Court in Versailles in particular makes frequent reference to obligations stemming from Articles 49 and 56 of the TFEU, and how these apply to contracts that are not covered by the CMP (or the directive).⁷¹⁵ Actual references to EU law in French cases are highly unusual—and here, perhaps indicative of the importance of the CJ jurisprudence on this subject.

From a comparative perspective, it must be noted that none of the 'transparency' case law in France deals with below-threshold contracts specifically; we can assume this is because advertising is mandatory for all CMP-covered contracts above 4,000 euros. Consequently, when these types of contract award decisions are set aside, they are set aside on the basis of non-compliance with a particular provision in the CMP, as opposed to on the basis of non-compliance with the general principle of transparency.

⁷¹² See, for instance, CAA Bordeaux 9 novembre 2004, *Sté Sodegis*, req. n° 01BX00381 and CAA Versailles 12 mars 2009, *Cne de Clichy-la-Garenne*, req. n° 07VE02221 (both dealing with development agreements); see also, for instance, TA Orleans 10 février 2004, *Cne de Saint Martin de Nigelles*, req. n° 0202896 (dealing with a below-90000-euros-threshold contract under CMP 2001) and recently, CAA Nantes 20 février 2009, *SAS Usine Rouge*, req. n° 08NT00451 (dealing with direct invitation of 8 bidders for a building works contract that, regardless of value, would have been subject to the CMP and Article 1).

⁷¹³ CE 7 octobre 2005, *Région Nord-Pas-de-Calais*, req. n° 278732; see also CE 1 avril 2009, *Communauté Urbaine de Bordeaux*, req. n° 323585, where it was decided that advertising in several national journals with large readerships was sufficient even if no EU-wide journals were used.

⁷¹⁴ See, for instance, CAA Versailles 6 décembre 2005, *Association Pacte*, req. n° 03VE04081; CAA Paris 30 juin 2009, *Ville de Paris*, req. n° 07PA02380, in which a *Telaustria*-based annulment of a contract was contested because the contract was effectively awarded in-house; and CAA Versailles 15 avril 2010, *Sté SNC GESTEC*, req. n° 08VE03103.

⁷¹⁵ CAA Versailles 15 avril 2010, *ARTEMIS et autres*, req. n° 08VE02791; *Cne de Clichy-la-Garenne* (n° 712).

5.4.4 Conclusion

If the CJ jurisprudence on the general principles of transparency and equal treatment has had an effect on French law, it is primarily in the *courts* that we find evidence of this influence. The jurisprudence in the years since 2004 in particular relies on *Telaustria*-style reasoning, and occasionally even cites relevant CJ judgments.

The advertising requirements in French legislation have been amended several times in the last decade, but it cannot be held that these changes have been introduced in response to CJ jurisprudence. In 2001 and 2004, it appears as though Commission complaints have motivated a change in national legislation; we have seen that the CMP has been revised in part in the 2004 and 2006 because previous versions of it, according to the Commission, did not include advertising requirements for contracts that *did* have to be advertised. However, since 2008, it appears that the advertising thresholds were moved for reasons unrelated to EU law, such as reducing the administrative cost of procurement in order to encourage public spending and stimulate the French economy.

The extremely limited role of guidance on the subject of the TFEU advertising requirements is, given the CMP's very low 4,000 euro threshold for mandatory advertising, perhaps unsurprising. However, even the Commission's *Interpretative Communication* has not had any visible influence on French guidance—unlike the guidance on competitive dialogue and framework agreements, it has not even been reproduced on the relevant government websites. This may be explained, however, by the fact that France (like the UK and the Netherlands) joined Germany in contesting the *Interpretative Communication*.⁷¹⁶

⁷¹⁶ *Commission v Germany* (n 98).

6. DISCUSSION OF FINDINGS

The preceding four chapters outlined a series of measures at the EU level, and then examined national responses to these measures, whether they be specific contract award mechanisms (such as competitive dialogue and framework agreements) or rules that affect contract award more generally (such as the principles of equal treatment and transparency). What remains is providing an answer to the research question: what influence have recent developments in EU procurement law had on the procurement regulation of the three subject countries?

Chapter 6 will address this question posed in five separate parts. First, section 6.1, examines Member States' responses to the directives; section 6.2 will then discuss the influence of less certain obligations (imposed by the directive and the Treaty's general principles respectively); and section 6.3 considers the extent of impact of the EU rules on areas not strictly covered by positive obligations. Section 6.4 then analyzes the national use of the different EU law sources, and section 6.5 the question of further harmonization in the area of public procurement. Finally, section 6.6 will offer concluding observations and suggestions for further research.

6.1 Nature and Extent of Implementation of the Detailed Obligations in the directives

Two areas of study in this thesis were selected because they offer a clear examination of the EU procurement directives' role in national procurement regulation. Competitive dialogue was included as a new procedure that Member States could make available for complex procurement. Framework agreements were also examined—these were already included in the 1993 Utilities Directive, but from 2004 have been made available in the Public Sector Directive.

The detailed implementation of these procedures was discussed in Chapters 3-5; section 6.1 will summarize findings and compare implementation of the procedures in each of the countries examined.

6.1.1 Nature & Extent of Implementation of Competitive Dialogue

As discussed in section 2.2, competitive dialogue was a new procedure in the 2004 Public Sector Directive; it is also characterised by being an optional award procedure that has quite explicit conditions for use—namely, the existence of a particularly complex contract—and various unclear elements of execution, including the extent to which bids can be discussed at various stages of the process.

The EU-level hard and soft law on competitive dialogue is, at the time of writing, comprised of the provisions of the directive (found in Articles 1(11)(c) and 29) and an *Explanatory Note* issued by the Commission; the CJ has not dealt with questions about the competitive dialogue procedure at this time.

6.1.1.1 Contracts Covered by the Directives

On the nature of implementation of competitive dialogue, we can be brief: the 2004 Public Sector Directive in its entirety, and this includes competitive dialogue procedure, has been implemented by legal transposition into national law in all three countries studied. The extent of implementation is more interesting to discuss at this stage, largely because the approach taken in the subject countries is similar in many ways and yet different on some key points.

Above the directives' thresholds, all three Member States examined made the procedure available to all contracting authorities; this is the most notable development in France, where not all contracting authorities are covered by the main national procurement law, and thus an explicit choice had to be made to also make the procedure available for other bodies governed by public law (see section 5.2.3.4). In addition to not being restricted per users, the procedure is also not restricted for specific contracts—none of the countries examined, for instance, restricted the use of the procedure to large value procurement or works procurement only. In France, section 5.2.3.4.2 highlighted that competitive dialogue was specifically made available as the default procurement procedure for DBFO-style PPP procurement.

Not only was the procedure not restricted, but it also was not amended in a notable manner in any of the countries studied. Legal uncertainties found in the directive (discussed in section 2.2.5) were not dealt with through either changes or supplements in law. While minor changes took place in all countries, these primarily related to numbering and word choice.

One area where there are differences in national approach is the regulation of the use of bid payments (an option not exclusive to competitive dialogue). France permits bid payments for competitive dialogue bids in legislation and offers suggestions on how to award them, whereas the UK and the Netherlands permit the bid payments in legislation and yet discourage or rule out aspects of the use of bid payments through guidance or policy. Generally, however, the above-threshold implementation of competitive dialogue looks the same in all three of the countries examined.

6.1.1.2 Contracts not Covered by the Directives

More interesting is the approach to competitive dialogue taken for those contracts not covered by the directives. As explained in section 2.1.4, the EU directives do not apply to all types of procurement contracts that may be concluded by contracting authorities. Below-threshold contracts, works and services concessions, and Part II-B services contracts do not have to be awarded using any of the procedures in the directives. Finding that in some of the countries examined in this thesis, the directive's rules on competitive dialogue are being used to regulate the award of these contracts indicates that EU law has had a significant influence on national procurement regulation.

The UK has no legislation on these contracts, though there are also no rules prohibiting the use of competitive dialogue for contracts not covered by the directive. UK guidance encourages the use of the procedure for any type of complex contract, and there are no indications that competitive dialogue is *not* being used to award contracts that are not covered by the procurement directives;

examining formal legal regulation alone may thus not provide a comprehensive picture of the UK approach to competitive dialogue regulation outside of the directives.⁷¹⁷

Similar observations can be made about the Dutch approach to service and supplies contracts not covered by the directives, where again no legislation either forbidding or allowing the use of competitive dialogue exists. On the other hand, the Netherlands does have legislation in place that makes competitive dialogue generally available for below-threshold works contracts, regardless of their complexity. This added flexibility introduced by the Netherlands can be contrasted with the French legislative approach, as from December 2008 onwards, France has made competitive dialogue available under the exact same terms as it is available for contracts that are covered by the directives (ie, it can only ever be used for particularly complex contracts).

An interesting consequence of the UK's non-regulatory approach here is that if 'competitive dialogue' is used for contracts not covered by the directives, it is not as a regulated procedure with specific legal steps that have to be followed—competitive dialogue would merely act as an "inspiration" to practice. This can be contrasted with the Netherlands and France, where the existence of legal rules requires use of the procedure *as stated* in legislation, and any breach of the procedural rules is subject to legal remedies.

Having seen how competitive dialogue has been implemented, it is worthwhile to consider for a moment the subject countries' historical approaches to regulation.

The UK has historically, as was discussed in section 3.1.2, not regulated procurement through legislation; and when this became mandatory at the EU level, the UK's approach has consistently been to implement to the bare minimum required. We can see that they have maintained this approach when implementing competitive dialogue.

⁷¹⁷ Braun 2001 (n. 287) found that a modified, competitive dialogue-like version of the negotiated procedure was used for PFI concession procurement, which is outside of the directives.

Similarly, the Netherlands has added rules on competitive dialogue beyond what the directive requires in the field of works, but has not done so for services or supplies; the same approach to procurement regulation has existed since the 1970s, as discussed in section 4.1.3.

The real surprise here, however, is France, which historically has created its own procedures to supplement those in the directives, and has worked to make these national procedures compliant with the directives. As of 2006, however, the national procedure that most resembled competitive dialogue has been scrapped, and the directive's rules are copied out in the CMP for both above-threshold and below-threshold contracts, as well as for other types of contracts that are regulated outside of the CMP.

There are various possible explanations for this; one is a desire, alluded to in section 5.1.5, to condense and simplify the CMP. Implementing only the EU rules and removing similar rules results in both space saving and greater simplicity. Another possible explanation takes into account the number of infringement procedures started against France by the Commission in recent years, all relating to the improper implementation of the directives; it is possible that the French government has become concerned about the accuracy of the earlier approach of trying to integrate the directive into pre-existing French law, and is now trying a different approach. A third possibility is a simple acknowledgement of the fact that since 1993 in particular, the EU procurement rules and requirements have become much more substantial, and so perhaps there is simply less need to develop detailed 'national' procedures. While this thesis cannot provide a definitive explanation for the change in regulatory approach, it is worth noting that the change is visible not only with regards to competitive dialogue, but also with framework agreements, as discussed in the next section. It thus appears that this is not an incidental approach to competitive dialogue, but instead a possible indication of a general change in the French regulatory approach.

6.1.1.3 Summary: the Influence of EU Law

The influence of EU law in the national implementation of competitive dialogue in all three Member States is substantial. All three countries examined have made the procedure available, and have effectively copied out the rules in the directive on the procedure without any significant changes. The few changes made relate to bid payments, and only in one of the three countries examined is that apparent from the legislation; where France changed the law, the Netherlands and the UK used guidance and policy to establish the national approach to bid payment use.

Also striking, when assessing the influence of EU law in national approaches to competitive dialogue, is that where the procedure is introduced voluntarily for contracts that are not covered by the directives, again, the wording and approach of the directive are generally preserved. Illustrative is the Dutch approach, which does away with a requirement of 'complexity' before competitive dialogue can be used, but procedurally keeps the procedure identical.

EU jurisprudence currently plays no role in shaping national regulation of competitive dialogue; to date, there has not been a case before the CJ that considers the procedural requirements of competitive dialogue. National courts have seen a few competitive dialogue disputes, but these generally concern award criteria and/or lack of compliance with the general principle of transparency, rather than the choice or use of competitive dialogue as an award procedure.

Whereas we will see below (in section 6.2) that in the implementation of the general principles of equal treatment and transparency case law play a significant role, in the implementation of competitive dialogue only the EU directive has thus far had a significant impact.

The role of EU-level guidance is also minimal. It has not affected national legislation in any perceivable way—the rules directly mirror those of the directive without being supplemented by suggestions from the Commission's *Explanatory Note*—and is not referenced in any jurisprudence to date. Even more interesting is that the EU guidance is barely referenced in national-level guidance; only in the UK is the guidance a combination of the EU suggestions and national suggestions, but in other countries, the Commission's document is cited separately (if at

all). This finding will be discussed further in section 6.4, when the role of soft law is compared to the roles played by binding instruments of EU law.

6.1.2 Nature & Extent of Implementation of Framework Agreements

The second formal procurement mechanism that was considered in this thesis was framework agreements under the 2004 Public Sector directive. While new in the 2004 Public Sector directive, framework agreements were available under the Utilities Directive since 1993, and as Chapters 3-5 discussed, the Member States examined in this thesis had national approaches to public sector framework agreements before 2004.

The United Kingdom and the Netherlands did not legislate on framework agreements prior to 2004, but through a combination of jurisprudence and guidance established that certain types of framework arrangements, at least, could be used under the public sector directives; interesting here is the Netherlands' determination to separate those arrangements with binding obligations (considered 'framework contracts') from those that did not have binding obligations (actual framework 'agreements') and its conclusion that only the former type were formally covered by the public sector directives of 1993.

France has a different history in regulating framework agreements, in that from the 1960s onwards it has had detailed rules on various types of framework arrangements in its legislation. These arrangements were of the 'framework contracts' variety; all placed binding obligations on public authorities. However, the rules applicable prior to 2004 were very different from the ones introduced in the 2004 directive—framework 'contracts' in the public sector were treated as exceptional and only made available in very limited circumstances.

The introduction of the 2004 directive had an impact on the legislative rules in all three of the countries studied. Where there was no formal legislation before in the Netherlands and the UK, both countries implemented the directive's rules on framework agreements in national legislation where the directives apply. The Netherlands has gone further by also making

framework agreements available for works contracts that fall below the directive's thresholds, thus extending the influence of the EU rules.

These approaches are identical to the approaches taken to implementing competitive dialogue, discussed in section 6.1.1. above; the approach taken for contracts not covered by the directives is also identical in both cases, in that again we see that the UK's guidance makes it clear that framework agreements can be concluded also for those contracts, while the legislation remains silent. In the Netherlands, as with competitive dialogue, there are no further rules on framework agreements for below-threshold services and supply contracts—furthermore, there is also no guidance specifically encouraging use of framework agreements for these contracts.

The most notable changes have taken place in France, where all pre-existing rules on framework arrangements have been replaced by the EU rules on framework agreements; previous restrictions applying to framework 'contracts' have thus been eliminated, and the use of non-binding framework style arrangements has now been explicitly allowed. These types of arrangements (both binding and non-binding) can also be concluded below the EU procurement thresholds according to the CMP. As we also saw in section 6.1.1 with regards to competitive dialogue, it appears that the EU procurement rules have directly influenced all French procurement regulation of framework agreements, at the expense of pre-existing national rules.

The possible reasons as to why this has happened are similar to those suggested in section 6.1.1.2 with respect to competitive dialogue: there have been ongoing initiatives in France to simplify the CMP, and there have been ongoing efforts to reduce the number of Commission complaints about French implementation of the procurement directives. However, as indicated in section 6.1.1.2, this thesis cannot provide a definitive reason for the change; these suggestions are speculative.

Generally, as was noted in section 6.1.1.2 as well, the fact that there is no legislation in place for framework agreements not covered by the directives in the UK means that in practice, any such 'framework agreements' concluded are inspired by, but not restricted by, the rules of the

directive. In France and in the Netherlands (for works), on the other hand, the copy-out approach to below-threshold regulation of framework agreements means that contracting authorities must apply all the stated rules, or risk being subject to legal remedies.

6.1.2.1 Summary: the Influence of EU Law

The EU directives have had a visible influence on the regulation of framework agreements at the national level; in all three countries examined, the rules of the directive have been implemented without significant change. The changes made are in word choice, as they were with competitive dialogue (see section 6.1.1.1). The influence of the directive also extends to areas outside of the directive in France and the Netherlands, where contracts not covered by the directive are subjected to rules identical to those in the directive; this finding too is similar to the finding about competitive dialogue regulation in the subject countries.

EU jurisprudence is again less visible in the national regulatory regimes, but then—as is true for competitive dialogue—there has not been any significant case law on framework agreements since 2004. The national courts have, however, reinforced the rules in the directive (as implemented) by applying and interpreting those in various judgments.

As was observed in relation to competitive dialogue, EU guidance is more difficult to detect in the national legal order. In the UK and France, EU-level guidance is cited and worked into national guidance pieces to an extent, but this was not seen in the Netherlands. The UK is further the only country in which EU guidance has been referenced in case law, though this finding must be put in context: it has only been cited in one case to date, and as there is very little case law in the UK, this is hardly evidentiary of a trend. In the Netherlands in particular, the EU guidance is merely cited on procurement websites, but has not influenced legislation or jurisprudence in any perceivable manner.

6.1.3 Conclusions

In examining a completely new procedure and a procedure only new to the public sector, we find that the influence of the EU directives is substantial, albeit tempered by national traditions in procurement regulation in some ways. In the national regulation of competitive dialogue and framework agreements, the Public Sector Directive has had a significant influence in two ways: a) by replacing all previous national legislation, where existent, for contracts covered by the directive; and b) by replacing all previous national legislation, where existent, for contracts not covered by the directive. However, in none of the countries examined did the directive result in legislation on competitive dialogue or framework agreements for contracts that had previously not been subject to national legislation *at all*—this is most clearly demonstrated by the UK, which did not introduce new legislation on, for instance, the use of framework agreements for below-threshold contracts. Similarly, in the Netherlands the rules were only introduced for below-threshold works contracts, which were already subject to national legislation.

It is clear that the most substantial impact of the 2004 directive has been felt in France, where national rules on procedures similar to framework agreements and competitive dialogue have been effectively replaced by the rules in the directive—even where this was not required.

Important to highlight here is that the stricter, pre-existing rules on framework agreements in France were not incompatible with the directive; France made a conscious choice to adopt the directive's wording instead. In the UK and the Netherlands, on the other hand, there were no previous rules in legislation on public sector framework agreements or competitive dialogue; the 2004 directive thus introduced rules that did not previously exist.

It is also interesting to note that CJ jurisprudence on competitive dialogue (which does not exist) and on framework agreements play essentially no role in national regulation. This can be contrasted with the general principles of equal treatment and transparency, discussed in section 6.2, where jurisprudence (at both the national and the EU level) is the primary source of regulation. In explanation, it must be noted that there is barely any EU case law on framework agreements for the national regulator to draw from; a lack of influence is thus unsurprising.

In the few national cases on framework agreements that have been decided, the courts rely on national legislation for interpretation; as national legislation copies out the directive, the EU's secondary legislation is by far the most influential EU law source on these two procurement mechanisms.

Lastly, Commission guidance on competitive dialogue and framework agreements plays a visible role only in the UK (both) and France (framework agreements), where EU guidance is incorporated into national guidance and thus forms a part of the regulatory approach. In the UK, the Commission's *Explanatory Note* on Framework Agreements was additionally consulted in one case to date. In the Netherlands, the influence of EU guidance cannot be found in legislation, national guidance or national jurisprudence; however, it is important to remember with regard to all three subject countries that although the influence may not be visible in existing legal rules, we certainly cannot rule out that it heavily influences procurement practice.

6.2 The Influence of Less Certain Obligations

The second general area of EU law that was considered in this thesis was how the subject Member States responded to unclear obligations, represented in public procurement law by the Court of Justice's general principles of equal treatment and transparency. These have now been included into the directives and apply to all aspects of a procurement procedure, but the obligations stemming from the general principles have only been specified by the CJ in a few areas.

The same general principles also apply to procurement outside the directives, as has been established by a line of CJ jurisprudence that started with *Telaustria*; however, the jurisprudence has still not specified the exact positive obligations that national procurement authorities have to comply with. The thesis has also examined how Member States have dealt with the existence of obligations outside of the directives. The next two sections will discuss summarize and compare findings.

6.2.1 The General Principles in the Directives

As discussed in section 2.4.2, the general principles of equal treatment and transparency have, since 2004, been explicitly stated in the procurement directives. However, while it is now clear that all parts of procurement procedures covered by the directives are subject to equal treatment and transparency obligations, the CJ has only sparingly commented on specific instances where these principles are triggered—the national legislator thus has substantial scope to expand on the principles in national legislation by encouraging or prohibiting certain types of behaviour.

Perhaps unsurprisingly given the findings in section 6.1 above, the Netherlands and the UK have not amended their national legislation in any perceivable way in response to the general principles. While the general principles are restated in national implementing legislation, there are no added provisions in national legislation that demonstrate a specific response to the existence of the general principles (ie, by introducing a ban on late submissions of documentation out of concern for equal treatment of tenderers).

Instead, awareness of the general principles has been found primarily in national jurisprudence, with guidance forming a supplement (albeit to a limited extent). The national courts have applied the general principles with regularity, using them to prohibit behaviour relating to lack of transparency (such as failing to clearly identify weightings and scorings mechanisms) or equal treatment (as in recent cases dealing with time limits for receipt of tenders).

French procurement legislation, on the other hand, contains at least one concrete rule not found in the directive but that could be attributed to the general principles; in France, tenders and requests to participate that are submitted after a stated deadline have to be rejected according to the CMP. However, it is unlikely that this rule is directly linked to the existence of the general principles in the 2004 directive as it can be traced back in French legislation to pre-2001 versions of the French CMP. Also noteworthy about France is that public bodies not covered by the CMP do not have to reject late tenders or requests to participate; the thesis cannot account for this difference in approach.

As with the other Member States studied, there is very limited French guidance dealing with the obligations that can stem from the general principles under the directive. In French case law, some influence of EU law is slowly becoming visible, however. The French courts have historically relied on, in particular, a general principle of transparency to condemn a failure to comply with advertising requirements in the CMP, or to force exclusion of bids that are submitted too late, but the Conseil d'État has been very consistent in alluding to the 'national' origins of this principle. However, as of 2009 onwards, it can be suggested that the *ATI/Lianakis* cases in particular have had an impact, as for the first time we can see that cases relating to the publication of award criteria and sub-criteria are being decided using "general principles". Unfortunately, it is difficult to determine if CJ case law has influenced these recent French decisions, as the French courts have not cited the EU cases that first required transparency in award and selection criteria.

The influence of the general principles on national regulation is thus very difficult to state with certainty; while the national courts acknowledge and apply the principles (even where the CJ itself has not yet commented on their applicability), the national legislator and relevant guidance issuers have not responded to their existence to any visible degree. In part this can be explained by the fact that the principles are very broad, meaning that specific obligations stemming from them are potentially limitless; it may be difficult to decide where to start and where to stop legislating, and offering guidance can only be done with certainty where the CJ has already pronounced on a particular issue. In contrast with the more specific procedures and rules discussed in section 6.1, the general principles appear to be too 'general' to have substantial influences on national legislation or guidance; the only Member State examined here that has used general principles to create additional rules in its national legislation is France, and it has seemingly done so independently of EU law.

Even more uncertain is the role of the general principles under contracts covered only by the TFEU, which has been the subject of much academic debate and a number of cases before the CJ. What has become clear in recent years is that there is an obligation to provide a degree of advertising in procurement procedures outside of the directives where there is cross-border interest, but both the concepts of 'a degree of advertising' and 'cross-border interest' have been largely left undefined. National law responses were thus examined to see to what extent this line of CJ jurisprudence has influenced national regulation.

The findings presented in Chapters 3-5 are perhaps the most interesting out of those discussed so far, in that all three countries examined responded in a different manner and to a different extent.

In the UK, where the Westminster government traditionally does not regulate through hard law outside of those obligations stemming from the directives, there is no general legislative response to this line of jurisprudence. In Scotland, which has the devolved right to determine its own procurement policy, the principles found in *Telaustria* are repeated in the legislation—but given that the CJ cases have direct effect, such a legislative response actually contributes very little. Actual regulation of contracts not covered by the directives is thus found primarily in the UK's limited number of cases on contracts not covered by the directives (where CJ jurisprudence is frequently cited, and in one instance, the Commission's *Interpretative Communication* has been referenced), as well as governmental guidance and policy, the latter of which is department-specific rather than general. It is unclear whether or not such statements of policy are legally enforceable; it is possible that the EU legitimate expectations principle here plays a role and would require the contracting authority to comply with its own policy, but this is speculative. Without enforcement, the UK's policy-based approach to the advertising requirement is a non-binding form of regulation.

In the Netherlands, we saw that the proposals to change Dutch procurement law were highly interesting in light of the CJ's jurisprudence. At the time of writing, Dutch procurement regulation only covers works contracts not covered by the directive—services and supply contracts are, much like they are in the UK, not subject to any specific legislation. However, plans to reform the Dutch procurement law in 2006 proposed a threshold of 50,000 euros, above which all contracts (works, services and supply) would have to be advertised and awarded competitively. The Explanatory Memorandum to the proposed law indicated that this was done both for the sake of uniformity and because of an awareness of the EU jurisprudential developments. This law was rejected by the Dutch parliament in large part because of the 50,000 euro threshold, which was perceived as being far too burdensome. We saw that national priorities of value for money at the time took precedence over any existing concerns about compliance with EU case law.

In 2009, a second proposed new procurement law was submitted to the Council of State. In this new proposal, the positive obligations under the Treaty are spelled out; Article 1 states that the general principles also apply to contracts *not* covered by the directives. This follows a similar approach to that taken in Scotland, but the Dutch proposal adds that positive obligations only exist where there is likely 'cross-border interest', thus demonstrating an awareness of recent CJ jurisprudence.

To offer an explanation of this change in approach, it should be remembered that while the first proposed procurement law was being developed, the CJ in *APERMC*⁷¹⁸ suggested that setting thresholds below which advertising is not required is contrary to the TFEU. It is possible that this jurisprudence, in addition to the negative response to thresholds in the earlier proposal, have deterred the Dutch legislator from incorporating advertising thresholds into the second proposal; instead, an explicitly stated obligation for contracting authorities to *consider* cross-border interest when advertising contracts has been included there, and is a more limited—but no less visible—response to CJ jurisprudence on Treaty obligations.

⁷¹⁸ *APERMC* (n 197).

Aside from a lack of current legislation for non-works contracts not covered by the directives, section 4.4.3.5 also revealed that there is no guidance on the consequences of the general principles for procurement not covered by the directives in the Netherlands; the national courts thus so far seem to be alone in developing and reproducing the CJ's jurisprudence in the Netherlands. Like one UK Court, one Dutch court has also referenced the Commission's *Interpretative Communication* on procurement outside of the directives in deciding a dispute.

The French response to this line of case law is much more difficult to summarize, primarily because there were already extensive rules on advertising and competition for contracts below the EU thresholds in France prior to the seminal *Telaustria* case; even services concessions were subject to mandatory advertising rules from 1996 onwards. What was generally examined in this thesis was therefore not if rules were introduced because of EU law, but rather whether or not the rules were responsive to EU law development—for instance, by introducing the concept of cross-border interest into national legislation, or by amending the thresholds.

Section 5.4.3.1 saw that the French legislator appears to have moved the thresholds on advertising independently of EU law. Illustrative is the French 2008 legislative effort on economic stimulation, through which the thresholds at which advertising becomes mandatory were moved from 4000 euros to 20000 euros. Regardless of how this relates to compliance with the CJ's case law, it is clear that the reasons for adjusting the thresholds were not motivated by EU law developments.

Even more interesting is that in early 2010, the Conseil d'État struck down the 2008 modifying decree that moved the threshold up to 20,000 euros, because it was deemed incompatible with the general principles of transparency and equal treatment, as stated in the CMP 2006.

While it can reasonably be argued that an advertising threshold of 20,000 euros should be perceived as of little significance, as only very few contracts falling beneath it would be of cross-border interest to begin with, the highest French administrative court nonetheless perceived such a rule as being incompatible with the general principles of transparency. All that mattered

was that *some* contracts may have been of cross-border interest, but would not be advertised under the changed threshold.

As of May 2010 the threshold is back at 4000 euros, and the Conseil d'État has enforced CJ case law (and particularly, *APERMC*⁷¹⁹) on the general principles to an extent that we did not see in the other two countries investigated. Additionally, the Conseil d'État and other French administrative tribunals are also regularly setting aside national award procedures on account of a failure to comply with TFEU advertising or transparency requirements—occasionally while citing the CJ jurisprudence—origins of these rules and obligations.

The influence of EU law on the French legislation thus appears minimal; much like the Netherlands, France opted to introduce and amend additional rules for below-threshold procurement for *national* reasons, and not in response to the CJ case law. In other ways, the Netherlands and France are also similar: guidance plays no notable role in implementing this line of case law, and the courts do at this time very actively use the principles to decide cases relating to contracts not covered by the directive.

To summarize these findings, it can be observed that in all three countries it was found that legislation is not particularly responsive to these developments at the CJ; instead, awareness of the CJ's jurisprudence is primarily found in guidance (in the UK) and jurisprudence (in the Netherlands and in France, and more limitedly in the UK).

It is important to note, however, that the CJ has itself determined (in *Wall*) that the general principles do not *have* to be responded to in national legislation so long as contracting authorities are compliant, and consequently the approaches taken cannot be criticized. Instead it should be remembered that a lack of legislative response can also be seen in national responses to the general principles and their applicability to the directives. It is thus more likely that uncertain obligations are generally left for individual contracting authorities to comply with and for the

⁷¹⁹ Ibid.

national courts to police on a case by case basis, with guidance and legislation playing a far smaller or even no role at all.

6.3 The Role EU Plays Law in Areas without Specific EU Law Obligations

In addition to examining the national-level responses to different EU law materials, the thesis also more generally considers the extent to which EU law influences those areas in which there are as of yet no specific EU law obligations, such as for contracts that fall below the EU thresholds, or services concessions and Part II B services contracts. This has been addressed in parts in Chapters 3-5, discussing award procedures and CJ case law that could potentially affect national regulation for contracts outside of the directives or the Treaty, and has also been hinted at in sections 6.1 and 6.2 above; however, a clear overview will be helpful in demonstrating the different effects EU law has had in different Member States.

In the UK, as this thesis will have demonstrated, it is very difficult to generally comment on the role that EU law has played in areas where EU law is not mandatory. This is in large part due to the manner in which the UK has historically regulated public procurement, and continues to do so in areas where there is no mandatory EU law present. Sections 6.1 and 6.2 have already highlighted that the UK does not regulate in legislation unless the EU directives require it to; consequently, EU law has no additional influence on legislation where the directives do not apply.

What we did find, however, is that there is substantial guidance to supplement the UK procurement regulations. The OGC has been the most active central government department overseeing procurement in terms of the volume of guidance it has issued; the guidance has also been the most specific, as there are stand-alone guidance documents that discuss competitive dialogue, framework agreements, and (through procurement notices, and to a lesser extent) the general principles of equal treatment of transparency. The guidance offered is not specific to procurement covered by the directives and thus applies to non-covered procurement as well. It is important to note here that the guidance issued by the OGC (as well as, in the case of competitive dialogue, other relevant public bodies), seems to be partially influenced by EU

materials—commonly Commission guidance. We saw this through references in the guidance on framework agreements and competitive dialogue specifically, discussed in section 3.2.4 and 3.3.3.2. However, generally, the guidance primarily discusses those parts of public procurement that are not addressed by EU law at all, such as best practice and project management surrounding complex procurement in the case of competitive dialogue.

Despite the existence of significant amounts of guidance, it should also be stressed that the majority of all non-EU procurement regulation still takes place at the level of individual procuring entities, developing internal policy rules. It proved beyond the scope of this thesis to evaluate all of these internal policies in order to examine the role that EU law has played in shaping this type of policy—examining only a few central government departments may have provided an inaccurate picture, and examining all central and local authorities was too big a task. From what was examined in this thesis, then, it appears that EU law has had some influence on UK central government procurement guidance for contracts outside of the directives; further conclusions cannot be drawn on the basis of the study conducted.

In the Netherlands, we have seen in section 4.1 the long-standing national tradition of having additional legislation for works procurement below the directives' thresholds, but not establishing such legislation for services and supplies. Noteworthy is that even though below-threshold works contracts have been traditionally regulated, the 2004 directives have had a visible impact on the rules applicable to these contracts: competitive dialogue and framework agreements have both been incorporated into the below-threshold regulatory regime. What is specific to the Netherlands is that where possible, the procedures have been made more freely available and more flexible for below-threshold works procurement—this can be clearly seen in the removal of the need for contracts to be 'particularly complex' before contracting authorities can use competitive dialogue. EU law here thus has had an influence on legislation, but the legislator has considered national needs and amended the EU-originating procedures to suit low-value procurement more.

In contrast to the UK, EU law has no marked influence on national-level guidance in the Netherlands. This finding has to be contextualized, however, by noting that national-level guidance only recently has started emerging in the Netherlands; we saw in section 4.2.6 that guidance on competitive dialogue was newly introduced in 2009. The few guidance documents that do exist, however, exist quite separately from EU-level guidance and law, and generally focus on best practice rather than legal clarification.

However, as guidance plays a far smaller regulatory role in the Netherlands than it does in the UK, the fact that legislation for non-directive works procurement has been influenced by the EU rules is more illuminating on the role that the EU rules play in Dutch procurement regulation. Nonetheless, as section 6.2 discussed, this influence of EU law is tempered by a strong fear of ‘getting it wrong’—so in areas where there may not be obligations to legislate, but the EU has established rules that may not be entirely clear (as the CJ has with the general principles of equal treatment and transparency), the Dutch legislator has proven reluctant to address these rules in national procurement legislation. *Clear* EU rules were thus found to have an influence even where they did not have to—but less certain rules, or developing rules, may be less influential on national regulation.

France has the most legislation-based procurement regulatory system examined in this study. As of 2006, we have seen that in many instances, the directive’s rules have been adopted even for contracts that are not covered by the directives. We thus saw in section 5.2.3 that, in addition to having made competitive dialogue available for contracts covered by the directives, the French legislator has also made it available for below-threshold procurement and for all public-private partnership agreements falling under the 2004 PPP ordinance. Similarly, as section 5.3.3.1 discussed, the French legislator abolished all pre-existing national rules on framework agreements in 2006 in favour of adopting the EU’s rules on framework agreements; this adoption took place for both procurement covered by the directives *and* procurement not covered by the directives. This is a marked change from earlier French approaches to regulation, wherein EU rules were implemented *around* the existing national legislation, without removing national legislation where there was no obligation to do so.

In French guidance, much like in the Netherlands, EU law plays little to no role with the exception of recent guidance on non-binding framework agreements, which was influenced by the Commission's *Explanatory Note* on the same subject. That said, guidance may be of more limited importance in France than it is in the UK because of the extensive legislative obligations that exist in the CMP and the other laws covering public procurement, as discussed in Chapter 5.

In summary, the role that EU law has played in regulation where there are no detailed and explicit EU law obligations is very different in each of the countries studied. The most general conclusion that can be drawn about these three countries is that it appears that countries that have legislation that goes beyond the EU requirements to begin with seem more likely to also use EU rules where these are not mandatory, but this is a very cautious conclusion and one that cannot be assumed to be applicable to other EU Member States.

6.4. The Relative Role Played by Different EU Instruments

Having examined three different instruments of EU public procurement law throughout the thesis, it is also possible to discuss what the relative effect of these three instruments has been in the procurement regulation regimes studied.

6.4.1 The Role of Directives

As will have been clear from sections 6.1-6.3, the 2004 Public Sector Directive has played the most direct role in influencing national procurement rules; this can in large part be explained by its mandatory implementation in law, and the fact that all three countries examined have opted to implement by transposing the EU rules into a national law. In addition, it is striking that in France and in the Netherlands, this directive has also had a notable impact on procurement that is not covered by the directives—procedures in the directive have also been adopted in legislation for below-threshold contracts (generally, in France, and for works, in the Netherlands).

A secondary interesting point to consider is that there is very little divergence in how the directives are implemented. Despite slight word changes and reordering in each Member State, the content of the directive is virtually unchanged on most of the points examined. One clear exception is found in the rules on bid payments, where France has legislated in more detail, and the UK and the Netherlands have not—but it must be stressed that one area of clear divergence in all the procedures examined is a very small finding.

6.4.2 The Role of CJ Jurisprudence

Whilst the role that the directive has played is clearly visible in the national legal orders examined, the role of CJ case law is not as apparent in national regulatory systems. As discussed in section 6.3, seminal CJ cases are not generally incorporated into national legislation. In the Netherlands, unlike in the UK and in France, the fact that the case law develops constantly and does not always result in clearly applicable rules is cited in the *Explanatory Note* to the BAO as a reason as to why the legislation does not change concurrently with developments in CJ jurisprudence (see section 4.4.3.1).

However, current proposals to revise Dutch procurement quite clearly *aim* respond to CJ jurisprudence on the Treaty: as discussed in section 6.2.2, these proposals require advertising for all below-threshold contracts where *cross-border interest* can be demonstrated. This concept is not defined in the proposal, however, meaning that individual contracting authorities will have to determine what cross-border interest is and when it exists; the Dutch approach taken thus still illustrates that unclear CJ jurisprudence is very difficult to implement in the form of specific rules.

It should be stressed that CJ jurisprudence is not wholly ignored on the formal legal level; rather, responses are simply found elsewhere than in legislation. An examination of soft law in the countries included in this thesis demonstrates an awareness of the direction that CJ case law is going; in some countries, like the Netherlands and France, dedicated procurement websites that

follow and summarize CJ case law to procurement professionals have even been set up. These guidance websites are possibly more useful than the existing guidance documents, which rarely go beyond a general caution to individual procuring entities that they themselves need to be aware of these developing rules and ensure compliance with them; an argument could be made that such non-binding and non-policy-creating suggestions do not quite amount to soft law, in that they alert procuring authorities rather than regulate them (see section 6.4.3 below).

The largest impact of CJ case law, at the national level, is seen in the national courts. These both apply and, where relevant, directly cite CJ jurisprudence; perhaps the most surprising find on this level is that even the French administrative courts, known for their reluctance to cite non-French jurisprudence, have quoted *Telaustria* in a few cases that concern a violation of the general principle of transparency. It was noted in section 2.1.4.1 that 'implementation', by some definitions, does not stop with formal legal transposition, but also considers how the national judiciary applies EU law; it is submitted that this same importance should be attributed to national courts' citing of CJ jurisprudence. Without the courts applying and citing CJ-developed principles, it is very possible that CJ-developed rules such as the general principles of equal treatment and transparency under the TFEU remain distant and never fully integrate into national legal orders. The frequency with which *Telaustria* and related cases are cited in the UK and the Netherlands, however, has meant that CJ jurisprudence plays a substantial role in the overall legal regulation of public procurement at the national level, even despite the limited role it plays in shaping national legislation. As indicated above, a similar 'trend' of citing relevant CJ jurisprudence may be emerging in France; however, with only a few cases as evidence, we cannot conclude this with certainty.

6.4.3 The Role of Soft Law

The inclusion of EU soft law in this thesis is a choice that had to be justified in Chapter 1, as soft law is not traditionally considered to be part of a doctrinal evaluation of legal regimes. Section 1.4 thus aimed to highlight that soft law plays a very distinct role in the European legal order in general, and Chapter 2 revealed that it has to date already been the subject of frequent academic

discussion in the field of public procurement law. However, despite the existence of a significant amount of Commission guidance on competitive dialogue, framework agreements and contracts outside of the directives, as well as an ongoing academic debate about these guidance pieces, the findings of this thesis do not support that they have significantly influenced legislation, guidance or jurisprudence in the countries examined in this thesis.

This finding arises on three distinct levels. Firstly, when examining the legislative provisions in the national procurement laws that implement the directive, their wording follows the directive literally even in cases where Commission guidance offers further suggestions on what the directive means. In fact, there is no trace to be found of the Commission's guidance in any country's provisions on framework agreements or competitive dialogue, despite explanatory notes on both types of procedures.

Secondly, in examining national level guidance, the Commission's guidance is usually treated as wholly separate. Only the UK's OGC guidance documents generally refer to EU guidance where appropriate, but in the other nations examined (with the exception of one piece French guidance on framework agreements, see section 5.3.3.2), the EU guidance examined in this thesis is usually referenced only as a bibliographical note in national-level guidance, or listed separately on the national procurement websites. While this could be considered a sign of influence of EU law, the fact that the Commission's guidance is not particularly highlighted in the substantial pieces of national guidance produced—for instance, the Dutch guidance on competitive dialogue in PPP projects—might suggest that it is not considered to be of great importance.

This general impression is arguably supported by the fact that all three countries studied in this thesis supported Germany's challenge to the Commission's guidance on below-threshold procurement, arguing that the Commission was engaged in illegal law-making: if the Commission's perspective is disagreed with to this extent, it seems unlikely that the national legislator is will promote its views in national-level guidance documents.⁷²⁰

⁷²⁰ See *Germany v Commission* (n 98).

Thirdly, when examining the role that EU soft law plays in national case law, there is not enough 'evidence' to speak of a general influence. In the Netherlands, Commission guidance on contracts not covered by the directives was considered in a single case. In the UK, similarly, we have seen one instance of the *Explanatory Note* on Framework Agreements being cited, and one instance of the *Interpretative Communication* on contracts outside of the directives being cited—but as the UK sees so few procurement cases, this finding cannot be generalized. In France, Commission guidance has not been cited in the courts; the brief format of French judgments *may* explain this finding, but a more likely reason for the exclusion of EU soft law in judicial considerations is that it is not considered to be a relevant authority.

Aside from in the UK, the EU guidance documents examined in this thesis were thus not found to have generally had a substantial impact on the laws (hard or soft) of the Member States selected for case studies. These findings have to be contextualized, however; firstly, it cannot be held that the Commission's guidance documents on competitive dialogue, framework agreements and procurement not covered by the directives have no influence on national procurement whatsoever—this thesis has not examined procurement practice, and EU-level guidance may play a significant role there. Secondly, these findings cannot be generalized to "EU soft law" in general, or even "EU public procurement" soft law; only a few guidance documents were studied in detail, and other guidance materials from the Commission may have an impact on practice, legal regulation, or both.

Thirdly, it is worth questioning if the content of EU guidance materials has an impact on what is included in *national* guidance materials. Sections 6.1 and 6.3 discussed that the guidance issued in the UK in particular, but also in the Netherlands and France on competitive dialogue, focuses on 'best practice' rather than law. One possible explanation for this is the fact that EU guidance covers legal uncertainty to the extent that national guidance would; and consequently, referencing EU guidance means that national guidance no longer needs to cover these legal uncertainties in detail.

The last question to consider is to what extent the examined recent developments at the EU level have harmonized procurement regulation in the three Member States considered in this thesis. Similar research conducted in 1993⁷²¹ found that the harmonizing effect of EU law was severely limited by the fact that it was not applicable to all parts of national procurement regulation, and where national regulation could continue to exist, it did—resulting in very different procurement regulation in the Member States examined.

This updated analysis, on the other hand, shows that far greater harmony has been achieved in the years since 1993. We first have seen, in Chapters 1 and 2, that generally, since 1993 the scope of coverage of EU law has increased significantly. The 2004 directives, despite promising more flexibility, have introduced more detailed rules than the 1993 directives contained, and their coverage has also been extended greatly. This has been illuminated by recent CJ case law, in which the CJ stated explicitly that the procedures found in the directives are exhaustive for contracts covered by the directives; it thus rejected the existence of an ‘alternative’ French procedure which was not found in the directives.⁷²² National discretion has thus been limited to an unprecedented extent by the existence and development of EU law, which has automatically led to greater harmonization in national procurement regulation.

However, some of the harmonization appears to be more voluntary. Not all procedures in the 2004 directives *have* to be made available to national contracting authorities, but all three Member States examined made the optional procedures studied (competitive dialogue and framework agreements) available to their contracting authorities. Moreover, they made the procedures available essentially *without changing them*—the procedures are not limited or amended to any great extent for contracts covered by the directive. The adoption of this ‘copy-paste’ approach of legislation is particularly interesting in a country like France, which until 2006 developed national procurement rules even for contracts that were covered by the directive.

⁷²¹ Fernandez-Martin (n 10).

⁷²² Case C-299/08 *Commission v France*, judgment of 10 December 2009, at paras 32-34.

This may be indicative of a trend developing at a more European-wide level; while beyond the scope of this thesis, it can be noted that the implementation of competitive dialogue in other EU states has also been 'copy-paste' where there previously were very detailed national rules on procedures.⁷²³

Especially interesting from the perspective of harmonization is the finding that France and the Netherlands have actually used procedures in the directive and made them available in legislation for contracts not covered by the directive. We have found this to be the case for both competitive dialogue and framework agreements, with respect to below-threshold (works) contracts. The application of procedures in the directive is at this point wholly optional, and no regulation at all is necessary; discovering that two out of the three Member States examined thus also copy-pasted the rules in the directive for below-threshold contracts reveals a significant extent of voluntary harmonization.

In terms of regulatory approach taken, rather than regulatory content, however, we continue to see great national divergences. In the UK, as the preceding sections have shown, guidance and policy continue to play great roles in national procurement regulation, even with an increase in national-level legislation on procurement. The existence of CJ cases such as *Telaustria* has not suddenly induced a UK effort to introduce below-threshold legislation that mimics above-threshold legislation. This fits in with the UK's historic approach to procurement regulation, which was very much administrative rather than legislative (see section 3.1).

In the Netherlands, from 2007 through to 2010, a movement to change the manner in which procurement is regulated can be observed—but one key reason as to why the revision process of the national procurement law has been so slow is national resistance to a greater administrative burden by introducing mandatory rules for contracts that are currently not subject to additional rules (such as below-threshold services and supplies contracts). Revised proposals in 2010 do not in any manner reflect upon an increased general influence of EU law; however, these

⁷²³ Papers presented at the recent Global Revolutions IV conference on procurement (Nottingham, 19-20 April 2010) reveal that similar copy-out approaches have been adopted in Denmark, Germany, and Spain; conversely, however, the Italian and Portuguese implementations have made significant changes to the provisions in the Directive.

proposals do suggest that ARW 2005-‘like’ regulation may come into place for services and supplies contracts. If those proposed rules are to *resemble* the ARW 2005, this would lead to a situation where all Dutch procurement regulation (above and below threshold) essentially ‘copies out’ the directives’ rules; it will thus be interesting to see how these proposals materialize in the coming years.

In France, we have already observed a change in regulatory approach; as section 6.1 highlighted, some national procurement rules, such as the procedures that preceded competitive dialogue, and the earlier forms of framework agreements present in the CMP 1964, have been replaced in their entirety by new EU rules on similar subjects. However, the French regulatory tradition is not necessarily swayed by new EU law—as stated in section 6.2, the EU-originating general principles seemingly have not changed French law so much as reaffirmed it. The ongoing existence of French ‘national’ procurement procedures such as the *procédure adaptée* (which does not contravene EU law) also suggests that there are potentially limits to the extent to which France will substitute its national procurement rules for EU rules. Since 2006, we have merely seen that national rules that are very similar to EU rules have been substituted by these EU rules; whether or not this will take greater effect, and lead to greater harmony in approach between France and countries like the UK and Netherlands is impossible to say.

In summary, it is difficult to say with certainty to what extent national procurement rules are becoming more harmonized on account of the EU law developments studied in this thesis. We have seen that in terms of regulatory coverage, there is increasingly more harmony, primarily because of the copy-out approach adopted for the formal procedures in directive 2004/18EC by all three countries examined. We have further seen that in France and in the Netherlands, rules in the directive have been copied out for application in areas where this is not required to be done at all (either because the procedure is optional to begin with, or because the procedure is being copied out to apply to contracts not covered by the directive). As raised in section 1.3.3.2 of the thesis, the (admittedly limited) findings do support that, much as with general principles of EU administrative law, there are visible signs that EU procurement rules are having an impact on national procurement regulation even when this is not required.

One last interesting issue to consider here is whether or not harmonization is a 'goal' of EU procurement regulation. Chapter 1 and section 2.1.2 noted that the EU does not have the power to legislate purely for the sake of creating harmonized procurement rules, but rather that EU rules on procurement exist to support the creation of a European common market. However, these 'cross border trade' style rules may nonetheless have had as a consequence that a degree of harmonization has come to exist in national-level procurement regulation. As Chapter 1 suggested, this degree of harmonization may, effectively, be helping establish cross border trade on a practical level: it is presumably easier to trade in another Member State that has nearly identical procurement rules than in another Member State that does not.

6.6 Conclusions

This thesis has examined the extent to which recent developments in EU procurement law have influenced procurement regulation in three Member States. Findings have demonstrated that above the thresholds of the directives, a significant degree of convergence can be found, both in terms of regulatory content and regulatory approach.

Below the directives' thresholds, different countries have taken different approaches; this is the area in which the degree of harmonization of approach and content is most limited, if not fully absent. France, here, is still typified by a regulatory approach that is focused on legislation, where many of the directive's procedures and rules are also applicable to contracts not covered by the directives. The UK, on the other hand, still primarily uses guidance and policy to regulate procurement not covered by the directives—there are no 'binding' rules in legislation applicable to these contracts to this date. The Netherlands has, for the past five years or so, been debating a different approach to procurement regulation—with an increasing role for legislation in the regulation of procurement not covered by the directives—but, as of the summer of 2010, has not managed to adopt a procurement law that produces additional binding rules for, inter alia, low value services and supply contracts. In terms of content, much like in the UK, there are no rules applicable to services and supplies procurement not covered by the directive in the Netherlands;

in line with procurement history, however, the Netherlands does maintain legislation for works contracts not covered by the directives. As of 2005, this legislation effectively copies out the procedures from the 2004 directives; below-threshold procurement in France is subject to very similar regulation.

In examining three different types of EU legal materials, a few further observations can be made. One general impression gained from this analysis is that if the Commission wishes to pursue a further role for EU law in the field of procurement regulation, directives are the most effective EU law source to achieve this goal; other legal sources are not integrated into the national legal order to the same extent. This is the key finding presented by examining the below-threshold responses to CJ case law on the general principles of equal treatment and transparency, as no significant legislative responses were discovered that could be specifically attributed to EU law.

The role of EU soft law in procurement regulation was not clarified to a great extent by this research. It is apparent that EU soft law has had little impact on national procurement legislation, but its impact on jurisprudence and national guidance is left unclear. It was also beyond the scope of the thesis to examine what role EU soft law potentially plays in creating legal effects in *practice*—all of these issues would be suitable for further research, as the current thesis has raised more questions about the role soft law plays than it answers.

More generally, as a continuance of the findings of this thesis, it would be worthwhile to pursue a socio-legal investigation into whether or not the relative roles played by these EU law sources, as discussed in this thesis, are perceived in the same manner by the legislators that actually shape the national legal regime. Related research—taking the findings of this purely legal study and examining the attitudes of practitioners to these various sources of EU or national law—could also be pursued, and may be of particular interest to the Commission, the national legislator, and academic procurement community at large.

SELECT BIBLIOGRAPHY

Books

- Arrowsmith, S., *The Law of Public and Utilities Procurement* (2nd edition) (Sweet & Maxwell: London 2005)
- Arrowsmith, S. (ed), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* (West: Eagan 2009)
- Arrowsmith, S. and A. Davies, *Public Procurement: Global Revolution* (Kluwer: The Hague, 1998)
- Arrowsmith, S. and P. Kunzlik (eds), *Social and Environmental Criteria in EC Procurement Law: New Directives and New Directions* (CUP: Cambridge 2009)
- Arrowsmith, S., J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International: The Hague 2000)
- Berg, M. van den (ed), *Hoofdstukken Bouwrecht: Aangenomen Werk* (Tjeenk Willink: Den Haag 2003)
- Bovis, C., *EU Public Procurement Law* (Edward Elgar: Cheltenham 2008)
- Chabanol, D., J-P. Jouquelet, and F Bourrachot, *Le régime juridique des marchés publics : Droits et obligations des signataires des marchés de travaux* (Le Moniteur: Paris 2007)
- Corvers, S., F. van der Klauw-Koops, and W. Damste, *Een nieuwe Europese aanbestedingsrichtlijn voor de klassieke sectoren* (SDU: Den Haag 2007)
- Craig, P., *Administrative Law* (6th ed), (Sweet & Maxwell: London 2008)
- Craig, P. and G. De Burca, *EU Law: Text, Cases and Materials* (4th edition) (OUP: Oxford 2008)
- Essers, M., *Aanbestedingsrecht voor Overheden* (Elsevier: Den Haag 2006)
- Fernandez-Martin, J.M., *The EC Public Procurement Rules: A Critical Analysis* (OUP: Oxford 1996)
- Jans, J. H., R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing: Groningen 2007)
- Laubadère, A. de, F. Moderne and P. Delvolvé, *Traité des contrats administratifs* (2nd ed) (LGDJ: Paris 1984),
- McCrudden, C., *Buying Social Justice: equality, government procurement and legal change* (OUP: Oxford 2007)
- Meent, G. W. van de, *Overheidsaanbestedingen: de EG-rechtelijke context* (Kluwer: Deventer 1995)
- Meulenbelt, M. and W. Wedekind, *Kernteksten Aanbestedingsrecht* (SDU: Den Haag 2009)
- Pijnacker Hordijk, E. and G. W. van de Bend, *Aanbestedingsrecht: Handboek van het Europese en Nederlandse Aanbestedingsrecht* (1^e druk) (SDU: Den Haag 1996)
- Pijnacker Hordijk, E., G. W. van de Bend and J. F. van Nouhuys, *Aanbestedingsrecht* (4^e druk) (Sdu: Den Haag 2009)
- Prechal, S., *Directives in EC Law* (OUP: Oxford 2006)
- Richer, L., *L'Europe des Marches Publics* (LGJD: Paris 2009)

Richer, L., *Droit des Contrats Administratifs* (LGJD: Paris 2010)

Schwarze, J. (ed), *Administrative Law under European Influence: on the Convergence of the administrative laws of the EU Member States* (Sweet & Maxwell: London 1996)

Senden, L., *Soft Law in European Community Law* (Hart: Oxford 2004)

Trepte, P., *Regulating Procurement: Understanding the Ends and Means of Procurement Regulation* (OUP: Oxford 2004)

Trepte, P., *Public Procurement in the EU: A Practitioner's Guide* (OUP: Oxford 2007)

Treumer, S. and R. Nielsen (eds), *The New EU Public Procurement Directives* (Djof: Copenhagen 2005)

Turpin, C., *Government Procurement and Contracts* (Longman: Guildford 1989)

Weiss, F., *Public Procurement in European Community Law* (The Athlone Press: London 1993)

Book Chapters

Arrowsmith, S., "An Evaluation of the Legal Techniques for Implementing the Public Procurement Directives", Chapter 24 in P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (Kluwer Law International: London 1998)

Arrowsmith, S., "Methods for Purchasing On-Going Requirements: The System of Framework Agreements and Dynamic Purchasing Systems Under the EC Directives and UK Procurement Regulations", Chapter 3 in S. Arrowsmith (ed), "Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century" (West: Eagan 2009)

Folliot-Lalliot, L., "The French Approach to Regulating Frameworks under the New EC Directives", Chapter 4 in S. Arrowsmith (ed), "Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century" (West: Eagan 2009)

Hunja, R., "The UNCITRAL Model Law on Procurement of Goods, Construction and Services and Its Impact on Procurement Reform", Chapter 5 in S. Arrowsmith and A. Davies, *Public Procurement: Global Revolution* (Kluwer: The Hague, 1998)

Kunzlik, P., "Green Procurement under the New Regime", Chapter 8 in S. Treumer and R. Nielsen (ed) *The New EU Public Procurement Directives* (Djof: Copenhagen 2005)

Larsen, M., "The New EU Public Procurement Directives", Chapter 1 in S. Treumer and R. Nielsen (ed) *The New EU Public Procurement Directives* (Djof: Copenhagen 2005)

Pijnacker Hordijk, E., "Aanbestedingsrecht na de Parlementaire Enquete Bouwnijverheid", Chapter 9 in M.

Van den Berg (ed), *Hoofdstukken Bouwrecht: Aangenomen Werk* (Tjeenk Willink: Den Haag 2003)

Rubach-Larsen, A., "Competitive Dialogue", Chapter 5 in R. Nielsen and S. Treumer (eds), *The New EU Public Procurement Directives* (Djof: Copenhagen 2005)

Theses

Fraisie, A., "Accords-Cadres: l'introduction d'un dispositif souple et reactif dans notre system d'achat?", Master Thesis, Universite Lumiere Lyon 2, 2006 (available at http://doc.sciencespo-lyon.fr/Ressources/Documents/Etudiants/Memoires/Cyberdocs/Masters/MSPCP/fraisie_a/pdf/fraisie_a.pdf)

Braun, P., "The practical impact of E.U. Public Procurement Law on PFI/PPP Projects in the United Kingdom", Doctoral Thesis, University of Nottingham, 2001 (available at http://www.nottingham.ac.uk/pprg/documents/phdtheses/phd_peter_braun.pdf)

Articles

- Arnould, J., "The reform of French public procurement law postponed again" (2000) 9 PPLR CS78
- Arnould, J., "French Public Contracts Law after the reform of March 2001" (2001) 10 PPLR 324
- Arnould, J., "Secondary Policies in Public Procurement: the Innovations of the New Directives" (2004) 13 PPLR 187
- Arnould, J., "The French Council of State and the reform of the Public Contracts Law of 2001" (2004) 13 PPLR NA6
- Arrowsmith, S., "Developments in Compulsory Competitive Tendering" (1994) 4 PPLR CS153
- Arrowsmith, S., "Protecting the Interests of Bidders on Public Contracts: the Role of the Common Law" (1994) 53 Cambridge Law Journal 104
- Arrowsmith, S. (ed), *EC Measures on Public Procurement and their Implementation in the Fifteen Member States* (1996) (300 pp); prepared for EuroStrategy Consultants
- Arrowsmith, S., "Framework Purchasing and Qualification Lists under the European Procurement Directives: Part 1" (1999) 8 PPLR 115
- Arrowsmith, S., "Framework Purchasing and Qualification Lists under the European Procurement Directives: Part 2" (1999) 8 PPLR 161
- Arrowsmith, S., "The European Commission's Proposals for New Directives on Public and Utilities Procurement" (2000) 9 PPLR NA125
- Arrowsmith, S., "An Assessment of the New Legislative Package on Public Procurement" (2004) 41 CMLRev 1277
- Arrowsmith, S., "Framework Agreements and Dynamic Purchasing Systems: the EC Directives and the perspective of the UK", paper presented at conference Public Procurement: Global Revolutions III (Nottingham, June 2006)
- Arrowsmith, S., "Implementation of the New EC Procurement Directives and the *Alcatel* Ruling in England and Wales and Northern Ireland: a Review of the New Legislation and Guidance" (2006) 15 PPLR 86
- Arrowsmith, S., "The Past and Future Evolution of EC Procurement Law: from Framework to Common Code?" (2006) 35 PCLJ 337
- Avarkioti, F., "The application of EU public procurement rules to "in house" arrangements" (2007) 16 PPLR 22
- Badcoe, P., "Best Value-an overview of the United Kingdom's Government Policy for the Provision and Procurement of Local Authority Services" (2001) 10 PPLR 63
- Bailey S., "Judicial review of contracting decisions" (2007) (Autumn) Public Law 444
- Beunen, R., W. van der Knaap, and G. Biesbroek, "Implementation and Integration of EU Environmental Directives: Experiences from the Netherlands" (2009) 19(1) *E.P.G.* 57

Boch, C., "The Implementation of the Public Procurement Directives in the UK: devolution and divergence?" (2007) 17 PPLR 410

Bovis, C., "The New Public Procurement Regime of the European Union: a critical analysis of policy, law and jurisprudence" (2005) 30(5) ELRev 607

Boyle, R., "Critique of Commission's Proposals for a New Directive on the Co-ordination of Procedures for Public Contracts COM(00)275 final, as updated by the discussions in the Working Group" (2001) 10 PPLR NA65

Braun, P., "A Matter of Principle(s)—The Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives" (2000) 9 PPLR 39

Braun, P., "The practical impact of E.U. Public Procurement Law on PFI/PPP Projects in the United Kingdom", Dissertation 2001, University of Nottingham, School of Law, 2001 (available at http://www.nottingham.ac.uk/pprg/documents/phdtheses/phd_peter_braun.pdf)

Braun, P., "Addressing the competitive advantage of an incumbent provider: Evropaiki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission (Case T-345/03)" (2008) 17 PPLR NA140

Brown, A., "The Impact of the New Directive on Large Infrastructure Projects: Competitive Dialogue or Better the Devil You Know" (2004) 13 PPLR 160

Brown, A., "Transparency obligations under the EC Treaty in relation to public contracts that fall outside the procurement Directives: a note on C-231/03, Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti" (2005) 14 PPLR NA153

Brown, A., "Seeing Through Transparency: the requirement to advertise public contracts and concessions under the EC Treaty" (2007) 16 PPLR 1

Brown, A., "Application of the Directives to Contracts with Not-For-Profit Organisations and Transparency under the EC Treaty: a note on Case C-119/06 Commission v Italy" (2008) 17 PPLR NA96

Brown, A., "The obligation to advertise betting shop licences under the EC principle of transparency: Case C-260/04 Commission v Italy" (2008) 17 PPLR NA1

Brown, A., "The European Commission fails to prove that an Irish contract for Part B services was of cross-border interest: a note on Case C-507/03 Commission v Ireland" (2008) 17 PPLR NA35

Brown, A., "The Commission loses another action against Ireland owing to lack of evidence: a note on Case C-532/03 Commission v Ireland" (2008) 17 PPLR NA92

Brown, A., "EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement Directives" (2010) 18 PPLR 169

Brown, A., "Changing a sub-contractor under a public services concession: Wall AG v Stadt Frankfurt am Main (C-91/08)" (2010) 19 PPLR NA160

Brummelkamp, R.N., "E.E.G.-regels voor de overheidsopdrachten voor de uitvoering van werken" (1978) 15 Bouwrecht 533

Cirell, S. and J. Bennett, "Best Value: Law and Practice" (Sweet & Maxwell, looseleaf)

Cox, A., "Implementing the 1992 Public Procurement Policy: Public and Private Obstacles to the Creation of the Single European Market" (1992) 1 PPLR 139

Englisch, J. and A Schutze, "The implementation of the EC Parent Subsidiary Directive in Germany - recent developments and unresolved issues" (2005) 45(11) *Euro. Tax.* 2005 488

- Fernandez-Martin, J.M. and O. Stehmann, "Product Market Integration v. Regional Cohesion in the Community" (1991) 16 ELRev 216
- Gery, P. De, "À l'origine de l'accord-cadre : les marchés à bons de commande" (2007) 66 CP-ACCP 32
- Glazener, P., E. Pijnacker Hordijk en E. van der Riet, "Application in The Netherlands of the Directives on Public Procurement" (1990) 4 SEW 194
- Gormley, L., "The New System of Remedies in Procurement by the Utilities" (1992) 1 PPLR 259
- Harden, I., "Defining the Range of Application of the Public Sector Directives in the United Kingdom" (1992) 5 PPLR 362
- Hunter, A., "Family members: an analysis of the implementation of the Citizens Directive in UK law" (2007) 21(3) J.I.A.N.L. 191
- Kennedy-Loest, C., "What Can be Done at the Preferred Bidder stage in Competitive Dialogue?" (2006) 15 PPLR 317
- Kotsonis, T., "The Extent of the Transparency Obligation Imposed on a Contracting Authority Awarding a Contract Whose Value Falls Below the Relevant Value Threshold: Case C-195/04, Commission v Finland, April 26, 2007" (2007) 16 PPLR NA119
- Kotsonis, T., "The nature of award criteria and the subsequent stipulation of weightings and sub-criteria: Lianakis v Dimos Alexandroupolis (C-532/06)" (2008) 17 PPLR 128
- Kotsonis, T., "Italian law on the automatic exclusion of abnormally low tenders: SECAP SpA v Commune di Torino (C-147/06)" (2008) 17 PPLR NA268
- Knibbe, J., "Commission v Italy (Case C-412/04): classification of mixed works/services contracts, the treatment of below threshold contracts, and the rules on aggregation of works" (2008) 17 PPLR NA135
- Krugner, M., "The Principles of Equal Treatment and Transparency and the Commission Interpretative Communication on Concessions" (2003) 12 PPLR 181
- Manunza, E., *Effectiviteit van de communautaire regelgeving inzake overheidsopdrachten voor de uitvoering van werken, een evaluatie van de openstelling van de markt voor overheidsopdrachten voor de uitvoering van werken in het licht van het gelijkheidsbeginsel: juridische aspecten en praktijk* (1993) rapport Transferpunt Vrije Universiteit Amsterdam
- Mars, S. de and R. Craven, "Competitive Dialogue in the EU", presented at Global Revolution IV in Nottingham, UK on April 19 2010
- McGowan, D., "Clarity at last? Low value contracts and transparency obligations" (2007) 16 PPLR 274
- McGowan, D., "Commission v Ireland: post offices, proof and transparency" (2008) 17 PPLR NA48
- McGowan, D., "Exclusion of bidders on grounds of holding media interests: Michaniki AE v Ethniko Simvoulío Radiotileorasis and Ipourgós Epikratias (C-213/07)" (2009) 18 PPLR NA79
- Neumayr, F., "Value for Money v. Equal Treatment: the Relationship Between the Seemingly Overriding National Rationale for Regulating Public Procurement and the Fundamental EC Principle of Equal Treatment" (2002) 22 PPLR 215
- O'Loan, N., "Implementation of the works, supplies and compliance Directives" (1992) 2 PPLR 88

Peters, F., "Onder Een Helm", *Parool PS*, Wednesday 3 April 2002

Pijnacker-Hordijk, E., "Tenuitvoerlegging van de nieuwe EG-richtlijnen inzake overheidsaanbestedingen binnen de Nederlandse rectorde" (1992) 2 *Bouwrecht* 101

Pijnacker Hordijk, E., and M. Meulenbelt, "A Bridge Too Far: Why the European Commission's Attempts to Construct an Obligation to Tender outside the Scope of the Public Procurement Directives should be Dismissed" (2005) 14 *PPLR* 123

Pongérard-Payet, H., & T. Bangui, "La procédure de l'accord-cadre: un nouvel instrument du droit de la commande publique" (2007) *AJDA* 1055

Ponsot, S., "Public procurement in France: transposition of the "Remedies directives"" (1996) 5 *PPLR* 29

Reynaud, T. and J. Lérout, "Pour un dialogue compétitif équitable dans la passation d'un contrat de partenariat: retours d'expérience et amorce de méthodologie" (2006) 47 *BJCP* 236

Riet, E. van der, "Rechtsbescherming voor aannemers onder het Europese aanbestedingsrecht" (1992) 2 *Bouwrecht* 117

Ross, A., H. Nass and C. Reid, "The Implementation of EU Environmental Law in Scotland" (2009) *Edin. L.R.* 224

Schooner, S., "Desiderata: Objectives for a System of Government Contract Law" (2002) 11 *PPLR* 103

Tobler, R.C., "Encore: 'Women's Clauses' in Public Procurement under Community Law" (2000) 25 *ELR* 618

Treumer, S., "Competitive Dialogue" (2004) 13 *PPLR* 178

Treumer, S., "The Field of Application of Competitive Dialogue" (2006) 15 *PPLR* 307

Treumer, S., "Technical dialogue and the principle of equal treatment – dealing with conflicts of interest after *Fabricom*" (2007) 16 *PPLR* 99

Trybus, M. and T. Medina, "Unfinished business: the state of implementation of the new EC Public Procurement Directives in the Member States on February 1, 2007" (2007) 18 *PPLR NA* 89

Valadou, P., "Contracts of 'Mixed Economy' companies and competitive procedures in France" (1992) 1 *PPLR* 376