COMPETITIVE DIALOGUE IN PORTUGAL AND SPAIN

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ABSTRACT

The competitive dialogue procedure is a new public procurement award procedure first introduced by the Directive 2004/18 for the tender of particularly complex contracts, when contracting authorities consider that the use of the open or restricted procedures do not allow for the contract to be tendered. It is not intended to be adopted freely as the open or restricted procedures, but contracting authorities may use it only when the need arises and specific grounds for its use are fulfilled. The procedure was introduced with the stated objective of increasing the flexibility of procurement, which had been already identified as a shortcoming of previous existing EU procurement framework.

This thesis studies how the competitive dialogue has been implemented in Portugal and Spain. It covers both the legal transposition and aspects of its practice in these countries., through the use of empirical research methods.

Through his research, the author has found that the procedure was implemented very differently in Portugal and Spain with consequences on its use. This study has tried to highlight similarities and differences in the transposition, illustrate how the competitive dialogue is being used in Spain and explain why it is being used only sparingly in Portugal.

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Chapter 1 - Introduction

1. Introduction

The aim of this research project is to study how competitive dialogue has been implemented in Portugal and Spain. It covers both the legal transposition and aspects of its practice in these countries. The competitive dialogue procedure is a new public procurement award procedure first introduced by the Directive 2004/18 for the tender of particularly complex contracts, when contracting authorities consider that the use of the open or restricted procedures do not allow for the contract to be tendered. It is not intended to be adopted freely as the open or restricted procedures, but contracting authorities may use it only when the need arises and specific grounds for its use are fulfilled. The procedure was introduced with the stated objective of increasing the flexibility of procurement, which had been already identified as a shortcoming of previous existing EU procurement framework. Academics researching the procedure at EU-level have found a number of potential issues that may affect its usefulness regarding the stated aims. It can be argued that those issues may be relevant in any Member State that transposed the competitive dialogue.

2. Research question(s)

The main question the author wants to address is the phenomenon of competitive dialogue's implementation in Portugal and Spain. This can be defined as the analysis of the legal concept of competitive dialogue as introduced by the Directive 2004/18, the extent that it is used and the way it is used in Portugal and Spain.

The author did not start his research wanting to validate a theory developed beforehand but with the desire of studying the implementation of competitive dialogue in these countries. As no previous study has been carried on this field in these countries, the current research has an exploratory nature. This has had an impact in the choice of methods employed in this research (doctrinal legal analysis, empirical research, comparative legal analysis and interviews with law makers in Portugal), which will be explained in detail in the next chapter.

By researching the implementation, the author intends to assess firstly, the way the procedure was *transposed* into national legislation. Secondly, the author wants to study the *practice* relating to, and perceptions of, legal rules. By practice, the author means the way participants in the procedure interpret, apply and perceive competitive dialogue legal rules in Portugal and Spain. It does not mean the entire practice relating to competitive dialogue, although where potential non-legal issues (such as the monetary cost or the duration of the procedure) were referenced in literature, they were studied.

It can be thus said that the primary aim of this research project is to examine the "law in books" and the "living" procurement law in the area of competitive dialogue in Portugal and Spain, so as to increase the understanding of the procedure.

As will be explained in further detail in Chapter 4, competitive dialogue is a new public procurement award procedure, regarding which academics have raised a number of questions at EU level. It was introduced by the Directive 2004/18 as a novelty and allegedly important innovation for public procurement. Since thorough research at the national level regarding competitive dialogue's implementation is yet to be conducted, one can argue that a need exists for studies to be carried out, with a particular focus on exploratory research.

To achieve the stated aim, one should understand firstly *why* competitive dialogue procedure has been introduced by the Directive 2004/18. What were the motivations behind its creation? What needs was it supposed to address? What were its objectives? In what circumstances was it supposed to be used? The answers provided to these questions in Chapter 4, create a framework that provides a backdrop for the study of the phenomenon in Portugal and Spain. More so, the category of "particularly complex contracts" defined as the scope of application of competitive dialogue in Directive 2004/18, and the examples set forth by the European Commission in its various documents, allows for an anchor to be devised which will then render possible the comparison between the target countries. With that blueprint in mind it is thus possible to conduct research in the target countries identifying the common ground and any differences between them and the original idea.

This research will analyse the cases where the procedure has indeed been used in practice and situations where the procedure might have been used - in face of the aims set forth in Directive 2004/18 and by the European Commission for it - but other options may have been adopted. This approach covers, firstly the anticipated use of the procedure in the target countries, secondly its use outside those situations and finally, its non-use in anticipated projects.

There are three compelling reasons for selecting Portugal and Spain for this research, with a fourth subjective reason playing part also. Firstly, their legal regimes are usually not researched abroad or published in other languages, in particular in English. Therefore, national experience or solutions locally developed are not known externally and arguably deserve to be studied so as to inform decision makers elsewhere. In procurement in general, both countries have a rich history and practice of procurement rules dating well before their accession to the

European Union. Since both countries have awarded "particularly complex contracts" before 2004, and arguably been faced the same issues that led to the creation of competitive dialogue, then it may be relevant to assess if a tool that has been developed at EU level is of use in them.

Secondly, due to the novel nature of competitive dialogue procedure, as we have mentioned above in this section, at this stage no research involving mixed methods (doctrinal legal analysis and empirical research) had been undertaken.

The third reason is connected with the close relationship between both countries. They are geographically close, sharing a border and semi-isolated from the rest of continental Europe through the Pyrenees. Both have transitioned to democracy in the 1970s after fourty years of authoritarian rule. As we will see in Chapters 5 and 8 Portugal and Spain share a common heritage regarding public procurement. One could arguably expect some differences but not huge discrepancies in their transpositions of competitive dialogue. However, they have transposed the procedure in markedly different ways. Portugal opted for a very detailed transposition with law makers tuning the procedure to fit it in the national framework, whereas Spain has followed a more straightforward path. In addition to these differences at legislative level, it is appropriate to assess if common ground and differences can be found at the practice level when competitive dialogue is being used for awarding contracts.

These have sparked a number of academic questions for the author. Is there legal uncertainty on each transposition? Is competitive dialogue useful or used at all in either country? How does it fit in the existing national frameworks or procurement culture? Have any strategies been developed to conduct the procedure within possible limitations? Do stakeholders perceive this procedure as a positive in-

novation or a lost opportunity to tackle procurement problems? Is it being used as anticipated at the time of its creation?

Fourthly, and arguably a minor reason to shape the research undertaken albeit still relevant, the author has a keen interest in public procurement issues in both countries. Such interest is due to his experience as a lawyer in Portugal and Spain. Furthermore, the contacts and knowledge provided by the professional experience of the author proved useful in subsequent stages of the research.

In consequence of the above the research questions the author will address in this research are the following:

1. How was competitive dialogue implemented in each target country?
2. Why is it not being used more in Portugal?
3. What are the legal issues surrounding the procedure?
4. What other issues, if any, can be found in practice?
5. What best practices, if any, can be found in practice?

3. Research objectives

Having exposed the research questions of this project in the previous section, it is necessary to provide a further explanation of its objectives. As no previous study has been carried on this field in these countries, it is expected that the information produced in the course of the research will help understand the value and problems of the procedure in Portugal and Spain and how it fits alongside alternatives available to contracting authorities in these countries.

From a *lege data* perspective, the information gathered can help develop case law in the target countries and guide the interpretation of the procedure in its real world use. In Spain, it may inform the guidelines that procurement advisory bod-

ies may issue. Furthermore, it may be helpful for practitioners, contracting authorities and private companies participating in competitive dialogue procedures in these countries. In fact, the author's research was met with a degree of interest by respondents in Portugal and Spain that have requested him to submit them the findings.

From a *lege ferenda* point of view, the findings of this research may be of use for informing future legislation in the target countries, giving the law makers access to data that they would otherwise not have. Outside the target countries, this research may have a similar usefulness for other member States in the process of transposing competitive dialogue or intending to review it in future legislation.

At EU level the product of this research may be of use by providing information about the value and problems of the procedure. Upcoming reviews of the Directive 2004/18 can also benefit from the data collected in this research.

4. Structure

This thesis is comprised of 11 chapters, including the present introductory chapter.

Chapter 2 will present the methodology adopted in this thesis. It will explain and discuss the methods (doctrinal legal analysis, empirical research, interviews with the Portuguese law makers and comparative law) used during this research. It is divided into different sections, one for each method used (doctrinal legal analysis, interviews with the law makers, empirical research and comparative law).

Chapter 3 is focused on providing an overview of the public procurement framework in Europe. It is divided into five main sections. It covers the public procurement evolution in the Europe Union, the principles, treaty provisions and Directives applicable to public procurement.

Chapter 4 deals with the competitive dialogue as it is included in Directive 2004/18. It is divided into four main sections. It will detail the characteristics of the procedure in the EU framework and the main issues with the procedure raised by academics.

Chapter 5 provides an overview of the current procurement in Portugal and its procurement history. It is divided into three sections. It will explain the public procurement framework in the country and its main characteristics. The main focus is on the current Public Contracts Code (Law 18/2008).

Chapter 6 details how the competitive dialogue has been transposed in the Portuguese legislation. It is divided into six main sections. It presents the procedure, its main features and also the most relevant issues. Furthermore, the results of the interviews with the persons involved in the draft of the Public Contracts Code are included in this chapter, since they were taken into account when drafting it.

Chapter 7 will present the findings of the empirical research stage on Portugal. It is divided into 15 sections by type of issue detected by the author.

Chapter 8 covers the procurement framework in Spain and its characteristics. It is divided into four main sections. The principal focus is on the current Law on Public Sector Contracts (Law 30/2007).

Chapter 9 explains how the competitive dialogue has been transposed to the Spanish national legal framework. It is divided into four main sections. As with Chapter 6, it presents the procedure, its main features and most relevant issues.

In Chapter 10 the findings of the empirical research on Spain will be discussed. It is divided into 21 sections. As with Chapter 7 it is also divided by type of issue detected by the author.

Finally, in Chapter 11 we will recap and compare the findings in both countries, as well as answer the five research question presented above.

5. Conclusion

In this chapter we have introduced the research question(s) the author wants to answer. We have briefly seen what is the competitive dialogue procedure and why it is relevant to research it in Portugal and Spain. In the next chapter we will see the methodology and methods employed by the author in this research.

Chapter 2 - Methodology

1. Introduction

This chapter explains the methodology adopted for this research project. Section 2 exposes the methods adopted and methodology followed. This section is subdivided by each of the methods used, doctrinal legal analysis, interviews with the law makers, empirical research and comparative law.

2. Methods employed

The research undertaken by the author has an exploratory nature. It was set to investigate a specific phenomenon in depth, which is the implementation of competitive dialogue in Portugal and Spain. No previous research had been conducted in these two countries on the procedure. As such, issues, answers or theories were yet to be identified or developed.

To achieve the stated aim of analysing the implementation of competitive dialogue in the target countries, the research could not be focused only on a legal analysis of the "law in the books". This is still a very much needed method in the research conducted due to the data it provides.[1] However, further methods are necessary to provide a more complete picture of the procedure. As such, a mixed method approach was adopted. Adopting more than one method allows for an holistic assessment of the procedure. In particular it makes possible to check how it was transposed and used in practice.

The fact that the nature of the research is exploratory frames the choice of the methods to use. The author has adopted both qualitative and comparative meth-

1. In Portugal, in particular, where the law makers opted to elaborate further than the regulation included in Directive 2004/18. In this country the legal analysis conduct was extremely important.

ods as the most appropriate ones to undertake the current research, for the reasons that will now be explained.

On an exploratory study, research is concerned with the depth of the investigation[2] and not its breadth. It is more relevant to investigate in more detail a specific phenomenon than to find patterns across multiple phenomena. This balance between depth and breadth of research is a critical trade-off between what methods to adopt in research.[3] With the focus clearly in the depth of investigation, the methods to use could only be the ones more likely to provide purposeful answers to the research questions proposed.

Quantitative methods were also considered by the author at the development stage.[4] However, for the goals of this research - to examine a phenomenon in depth for the first time - quantitative research would not be adequate as it is primarily concerned with the measurement of a wide range of phenomena and noting frequencies or pattern distribution across data.[5] It is more interested with numbers and averages rather than meaning or content,[6] aiming to generate statistical data, discovering patterns and formulating rules allowing future behaviour to be predicted through statistical tests of significance.[7] These are not the aims of the present research. It was anticipated that the priorities of this research and its exploratory nature would be better served by means of a qualitative research.

Qualitative research, on the other hand, is more geared to such inquiry as it allows for individual experiences to be harvested and processed.[8] Since this is an exploratory study, it is more important to understand correctly the issues raised

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2. Patton, *Qualitative evaluation and research methods* (Sage Publications, 1990), p. 165-166.
3. Ibid., p. 162-163.
4. On quantitative research please see, Denscombe, *The good research guide* (3rd ed, Open University Press, 2007), Bryman, *Social research methods* (Oxford University Press, 2004).
5. Black, 'The boundaries of legal sociology' (1972) 81 *Yale Law Journal*, p.1086.
6. Bryman, *Social research methods* (Oxford University Press, 2004), p. 266.
7. Denscombe, *The good research guide* (3rd ed, Open University Press, 2007), p. 198-200.
8. On qualitative research please see, for all, Mason, *Qualitative researching* (Sage Publications, 2002), Bryman, *Social research methods* (Oxford University Press, 2004).

than to find its patterns. True, numbers are still relevant in a qualitative research such as this one. It is important to know the total number of competitive dialogue procedures on each country, for instance. But that is not the focus of the research. Its focus is to find how competitive dialogue was implemented and used, thus revealing potential problems and practices developed by the direct participants in the target countries.

It should be stated that after exploratory research has been conducted, quantitative analysis is relevant for a subsequent development study to provide further information on the topic. After this initial stage where competitive dialogue has just been transposed, quantitative methods could be used, for instance to provide statistics on the number of procedures initiated and concluded or economic benchmarks to assess the savings obtained by contracting authorities who have adopted it.

Further to its exploratory nature, the author started his research with no prior theory he wanted to test during the empirical phase. It was expected that from data analysis emerging categories could be found and the data collection phase refined as permitting such theories to gradually develop grounded in the data.[9]

To close the circle of analysis, as two countries are being researched and there is an EU model of the procedure involved as well, it was necessary to include a comparative perspective. Comparative law research is undertaken to improve knowledge of the law and also to understand the law in context.[10] This perspective al-

9. This means the approach adopted by the author is close to some of the key tennets of grounded theory, such as the theory to be developed through empirical data analysis (and not purely doctrinal legal research), the key issues of research being allowed to evolve during the research phase according to the data collected, and the data collection process to be concluded only when data saturation is achieved, that is, the new data recently collected is not yielding new information. As such, it is impossible to foretell the exact number of interviews that will be conducted. On grounded theory please see, for all,Charmaz, *Constructing grounded theory* (Sage Publications, 2006), Strauss and Corbin, *Basics of qualitative research : techniques and procedures for developing grounded theory* (Sage Publications, 1998) and Glaser and Strauss, *The discovery of grounded theory* (Aldine Publishing Company, 1967).

10. Örücü, 'Developing comparative law' in Örücü and Nelken (eds), *Comparative law : a handbook* (Hart, 2007), p. 53.

lows for the demonstration of the similarities and differences between each country and the EU and between the countries themselves."

Finally, and although it was not anticipated at the outset of the development of this project, it was decided to conduct interviews with Portuguese law makers to explain the numerous differences between the national transposition and the EU version of the procedure. Having carried these interviews before the start of the qualitative research dispelled some of the author's uncertainties and focused the subsequent research on more pressing issues.

(1) Doctrinal legal analysis

Research started by conducting a legal analysis of available sources. Doctrinal studies of law use interpretive methods to examine different sources of law, with the aim of discovering its rules and principles to then systematise and employ them on a descriptive analysis and normative evaluation.[12] Through this process, both primary and secondary sources were examined at EU and national levels.

Regarding primary sources, research was conducted firstly by analysing EU Directive 2004/18, the relevant articles of the EU Treaty, as well as the Commission's Green Papers and Explanatory Note on competitive dialogue, to frame regulation at European level.

Subsequently, the laws of the countries were also analysed where relevant for the purposes of this study. It led to the identification of competitive dialogue characteristics in each country and a preliminary listing of potential issues related with the transposition of the procedure.

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11. On comparative law, for all, please see Zweigert and Kötz, *Introduction to comparative law* (Oxford University Press, 1998) and Bogdan, *Comparative law* (Kluwer Norstedts Juridik Tano, 1994).
12. Banakar and Travers, 'Law, Sociology and Method' in Banakar and Travers (eds), *Theory and method in socio-legal research* (Hart, 2005), p.7.

In addition to primary sources, available literature in the form of books and journals was also reviewed[13] (secondary sources). Once more, this was carried at both EU and national levels, by accessing both electronic resources and printed materials. Documents were researched in English, Portuguese, Spanish, Catalan and French.

Since competitive dialogue was originally established at EU level in 2004, before transposition to the national legislations in 2007 and 2008, it was anticipated more literature would be available at EU level. This insight was proved correct. However, the few secondary national sources found were analysed as well.

Doctrinal legal analysis was particular important in the Portugal. As we will see in Chapter 6, the transposition of competitive dialogue was very detailed and the law makers introduced a number of differences in relation to the Directive's version.

Most of the issues brought to the qualitative or empirical research phase were found in this process of legal analysis. Some of the potential issues previously identified were then dropped in the subsequent empirical research when not grounded in the collected data.

(2) Interviews with law makers

At the beginning of 2009, after the bulk of the doctrinal legal analysis had been concluded, it appeared that the very detailed transposition adopted by Portugal raised a number of questions such as why to forbid the phased elimination of candidates or mandating the drafting of a common set of specifications at the end of dialogue stage. From this process, it appeared that further explanations were

13. Such as Public Procurement Law Review (PPLR), European Law Review (ELR), European Public-Private Partnerships Law (EPPL) or Common Market Law Review (CML).

needed to better frame and maximise the outcome of the empirical research phase. In addition, as gaining access to the persons involved in the drafting process was possible, it was decided to interview these respondents.

A gatekeeper[14] in the drafting team was approached and this person was key to identifying further respondents who might be available to speak on the record about the implementation of competitive dialogue in the Public Contracts Code. In total, four relevant persons were identified and invited for interviews.

These four persons can be divided into two groups. Two persons were members of the legal consultant team who actually drafted the law. The other two interviewees were members of different Government departments and participated in the drafting process from the political side, offering suggestions, amendments or criticisms to the successive working drafts. Both of these respondents have law degrees and occupy legal advisory posts. Although the formal law maker of the Public Contracts Code is the Portuguese National Government, as the body that approved the law, these individuals are the ones who most significantly shaped competitive dialogue in the legislative process. One can say they are the material authors of competitive dialogue in Portugal.

Of the four persons, one declined to speak on the record. To preserve anonymity, it was then decided not to identify any of the respondents in the text. Furthermore, all data gathered by the conversation off the record were used only as input for the remaining interviews.

These interviews were conducted in late March 2009 and tape recorded, with notes taken. The notes were subsequently expanded as quickly as possible after

14. By gatekeeper the author means in this thesis any person he personally knows that could introduce or put him in touch with prospective respondents.

the interview had ended. The guide for conducting the interviews can be found at the end of this thesis as Annex III.

The interviews undertaken at this stage were not part of the empirical research phase *per se*, but were needed to inform the author of the best path to follow in his research. The insights gathered from them much improved the author's interpretation of the Portuguese law and provided useful information for the subsequent phase of empirical research. Furthermore, they allowed for the development of an important network in Portugal, which facilitated the process of identifying research participants for the empirical research.

There are two reasons for the same type of interviews not to have been conducted in Spain. First and foremost, Spain has not further elaborated on the Directive regarding competitive dialogue, thus reducing the anticipated value of potential insight to be gathered from a similar process. The scope for information to be harvested was much smaller in comparison with Portugal. There was also less need of searching for explanations from the law makers.

Secondly, the author contacted a small number of academic experts in public procurement in Spain who were unanimous in stating that the Law on Public Contracts was drafted exclusively by civil servants within the National Government without recourse to external experts. This reduced the potential number of people available to interview. Furthermore, the said academics informed the author it would be difficult to pinpoint the exact civil servants who might have information to impart. Based in their own negative experience, they advised against reaching such key personnel. In face of the difficulties and the anticipated lack of relevant information that could be accessed, it was decided not to conduct a similar process in Spain.

(3) Empirical research

In order to conduct the qualitative research a technique for the collection of data had to be chosen. The choice of technique is dependent on the type of information best suited to achieve the aims of the study and potential constraints that may limit the availability of techniques.

In face of the aims of the research, the process that was deemed that could provide more relevant data to be analysed would be the interview of people with direct experience in the use of procedure. It was expected that conducting semi-structured interviews[15] with experts involved in the use of competitive dialogue in the target countries would yield thick data for the subsequent analysis.

This approach has been adopted successfully in the past years in research projects developed within the Public Procurement Research Group.[16] The current project benefited from the accumulated experience from those pathfinding projects.

Since this research was conducted as part of a Ph.D. two major constraints were present. Firstly, time was of the essence and of the total of three years, roughly half was reserved for the collection and analysis of empirical data. Secondly, costs had to be taken into account and it was set an approximate budget of 1000 pounds for the interviews. These costs were covered by the School of Law of the University of Nottingham.

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15. The differences between structured, semi-structured and unstructured interviews is explained in detail in the section (c) hereunder.

16. The projects were undertaken by Braun, *The practical impact of E.U Public Procurement Law on PFI procurement practice in the United Kingdom* (2001) and Pachnou, *The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece* (2002). The first project was focused in assessing the impact of EU law on PFI procurement practice in the UK during the 1990's, obtaining a complete picture of PFI practice in the light of the apparent divergence between the law and commercial procurement requirements. The second project analysed side by side bidder remedies in the UK and Greece to assess the extent that a system of bidder remedies is an effective mechanism to enforce procurement rules.

Therefore, it was decided to adopt interviews as the method for gathering data from the field. At the start of the research, a tentative goal of 30 interviewees per country was considered appropriate to prepare the empirical research phase.

(a) Choice of participants

To conduct empirical research through interviews, one needs firstly to identify within the wider population the research participants targeted by it. As we have mentioned in the previous section, the population of research participants of this project in general would be competitive dialogue participants in the target countries.

Three categories of potential respondents[17] were identified: contracting authorities, lawyers and public procurement advisory bodies.[18] It was anticipated members of these categories could provide answers relevant to the research. Another category - private companies - was initially considered, but was excluded due to the need to carry out the research within the time and cost constraints. In addition, it was felt respondents from the other categories would provide more answers related to legal issues surrounding the implementation of competitive dialogue. Furthermore, contracting authorities have a more important role in those legal issues since they not only apply the legal rules but also determine how the procedure will develop. Having said this, the author believes that knowing the opinion of companies that have participated in competitive dialogue is relevant since they could provide information on why they did or did not apply for judicial review. However, such research will have to be carried out in another project.

17. All respondents are mentioned in the male form irrespective of gender.
18. Public procurement advisory bodies were only interviewed in Spain as we will see in detail in Chapter 8.

From the categories of potential respondents selected - contracting authorities, lawyers and public procurement advisory bodies - it is necessary to check who are the key persons who can provide useful information about the implementation in practice of the procedure. This is, however, an iterative process.[19]

(b) Sampling

In a broad sense, sampling of participants is a principle and a set of procedures to identify, choose and gain access to relevant data sources.[20] Samples in qualitative research tend not to be chosen randomly[21] or be representative[22] of the wider population as with quantitative studies.[23]

In face of the stated aims of this research of identifying in depth a phenomenon which has not been researched previously, the most suitable method for sampling is purposeful or theoretical sampling.[24] Theoretical sampling is concerned with constructing a sample which is meaningful at theoretical and empirical levels,[25] as this type of sampling builds in certain characteristics with the aim of developing and testing the theory.

By this process, the researcher collects, codes and analyses his data to decide where to gather data next.[26] Theoretical sampling involves starting with data, de-

19. Cassell and Symon, 'Stakeholder analysis' in Cassell and Symon (eds), *Qualitative methods in organizational research : a practical guide* (Sage Publications, 1994), p. 196.
20. Mason, *Qualitative researching* (Sage Publications, 2002), p. 121.
21. Ibid., p .120.
22. Ibid., p. 125.
23. Ibid., p. 123 and Strauss and Corbin, *Basics of qualitative research : techniques and procedures for developing grounded theory* (Sage Publications, 1998) p. 214.
24. On this kind of sampling in general, Charmaz, *Constructing grounded theory* (Sage Publications, 2006) 96-113, Mason, *Qualitative researching* (Sage Publications, 2002) p.120-125, Strauss and Corbin, *Basics of qualitative research : techniques and procedures for developing grounded theory* (Sage Publications, 1998) p. 201-215, Patton, *How to use qualitative methods in evaluation* (Sage Publications, 1987) p. 51-69 and Glaser and Strauss, *The discovery of grounded theory* (Aldine Publishing Company, 1967) p.45-78
25. Mason, *Qualitative researching* (Sage Publications, 2002), p. 124.
26. Glaser and Strauss, *The discovery of grounded theory* (Aldine Publishing Company, 1967), p. 45.

veloping tentative ideas about such data and checking them through further research.[27]

This is a mainly inductive process. It allows the theory to be gradually developed according to the data collected from the field, which analysis is conducted while collection is still taking place.[28] These characteristics make for an iterative process of theory development. As such, the findings and potential emerging theories are tested against the data that is still being collected.[29]

The theory is considered conceptually adequate when data saturation has been achieved, that is, when the data collection process is no longer providing new information and is simply reinforcing the theory developed.[30]

To carry out the present research, a theoretically meaningful sample had to be defined. To do so, the author had first to identify the experts or key people in each part of the wider population of research participants. The use of experts within the wider population ensures that available means for the research are focused on the participants who can provide the most useful data.

(i) Sampling in Portugal

As mentioned above, the original research plan was to interview experts with experience in applying competitive dialogue procedure. However, as Moltke would say, *"no campaign plan survives first contact with the enemy."* In Portugal, the lack of use of the procedure led to a necessary adaptation of the research project to the reality in the field. The sampling was thus focused on experts with and without experience in the use of the procedure.

27. Charmaz, *Constructing grounded theory* (Sage Publications, 2006), p. 102.
28. It can be said that theoretical sampling is in this sense, emergent, Ibid., p. 104.
29. Ibid., p. 103 and Strauss and Corbin, *Basics of qualitative research : techniques and procedures for developing grounded theory* (Sage Publications, 1998), p. 203.
30. Glaser and Strauss, *The discovery of grounded theory* (Aldine Publishing Company, 1967) p.6.

Firstly, it was deemed relevant to approach the few contracting authorities which have used competitive dialogue procedure as to identify the key decision makers who were responsible for the choice of the procedure and the persons within the structure in charge of the procedure itself. Depending on the responses, the author then proceeded to interview these persons, all internal legal advisers. The author interviewed three contracting authorities that had experience using competitive dialogue. Out of the remaining two, one declined to take part and the other was too far from concluding the procedure to provide useful information.

Secondly, as we have mentioned before, the number of competitive dialogue procedures held in Portugal during the course of this research was extremely limited. Therefore, to have a more complete picture of the reality it was necessary to broaden the scope of experts to interview. Since we are now standing on hypothetical premises - situations where competitive dialogue might have been used but was not - a more purposeful sampling is needed and this is where theoretical sampling comes into play. It was then decided to include the leading lawyers in procurement - the ones expected to know about competitive dialogue and to have a legal opinion on most of its issues - and contracting authorities that although they had not used the procedure, could have been expected to. This would allow the author to come close to the tentative target of 30 interviews in Portugal.

As such it is important to define what are those hypothetical situations and who to contact. Since the procedure is potentially available to all contracting authorities, entities from each type of contracting authorities had to be considered. National Government, autonomous regions governments (two), local authorities (317) and bodies governed by public law (whose number is impossible to quantify) were thus considered.

In face of the numbers involved, theoretical sampling was used to define the participants of the population that would probably yield more useful information.

Since competitive dialogue is a procedure which is geared for the award of complex contracts, the National Government, which awards a number of complex projects, was considered a safe place to start. Furthermore, during the law makers' interview phase at the beginning of 2009, one of the respondents informed the author that it was envisaged that some complex projects - mainly public-private partnerships - where competitive dialogue might have been used in theory would be awarded by other procedures. This respondent acted as a gatekeeper and pointed out the key decision makers in the relevant departments or ministries inside the Government. The author interviewed the head of procurement of one Ministry that is known to award contracts that one could theoretically consider as complex.

Autonomous Regional Governments (from the Madeira and Azores islands) were also considered as probable to award complex contracts. As the author was acquainted with a legal advisor in one of those, such advisor was approached and acted as a gatekeeper to identify the complex contracts awarded by the Regional Government and the key decision makers responsible for the non-use of competitive dialogue when it could have been used. However, with the passing of time it became clear it would be impossible to secure an interview.

The large number of local authorities made it impossible to establish contact with all of them. Therefore a balance had to be struck between the ones with the biggest budgets and a higher probability of awarding complex contracts and smaller local authorities. The author identified gatekeepers in eight different local contracting authorities and also cold called a few more. It was not possible to secure any interview either through the gatekeepers (who were not even able to in-

troduce the author) or through the author's own efforts. However, since some of the lawyers interviewed advise local authorities, the answers they have provided are relevant also for practice in these authorities due to their importance in the conduct of procurement in such entities.

Since the number of bodies governed by public law is impossible to quantify in advance, the research had to be focused on a selected few, again following the same line of thought developed for the local authorities. The author was able to conduct seven interviews in such contracting authorities. These operated in various sectors and included three authorities in the utilities sector,[31] one major hospital, one university and a regulatory body.[32] Five of the respondents were internal legal advisers, one was the director and the other the head of procurement. In one of the entities the director and the internal legal adviser were interviewed since they had different outlooks on the procedure.

Finally, the expertise of lawyers in general was needed to complement the dataset. Theoretical sampling had also to be employed to select the research participants. To achieve this, making use of the author's own experience as a lawyer in the field of public procurement and the Legal500 guide (http://www.legal500.com/c/portugal) in 2009 it was possible to identify the law firms which tend to participate in procurement. This guide recommended 12 law firms as experts in the field of public law in Portugal.[33] The author contacted all of them with two declining to take part, citing their lack of experience with the procedure. Through these interviews, it became apparent that there were other lawyers (four) with a strong repu-

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31. The actual sectors are not identified since they are the sole entity and it would amount to violate the confidentiality agreement signed with the respondents. Both entities are known to conduct procurement procedures following not only the utilities rules but also the public sector rules as we will discuss in further detail in Chapter 5 hereunder.

32. As with the sectors in the utilities authorities, identifying the sector of this entity would make it very easy to pinpoint the exact contracting auhtority and, eventually, the responden itself.

33. As we will discuss in Chapter 5, in Portugal public procurement regulation derives from public law. Departments in law firms in Portugal tend to be divided by areas of law except smaller "boutique" firms. For instance, from the 12 firms identified, 10 have specific departments of public law and only two have not, as they are smaller and cater specifically to public law.

tation in public procurement that did not appear in the Legal500 guide and were highly regarded by their peers. In two law firms it was deemed appropriate to interview two lawyers since they had extensive non-overlapping expertise and potentially differing views on the procedure. In total, the author has interviewed 16 lawyers in Portugal. The lawyers had between 7 and 25 years of practice experience. All of them were either partners or senior associates in their respective law firms.

In total the author conducted 27 interviews in Portugal: 16 with lawyers, eight with contracting authorities without experience using competitive dialogue procedure and three with contracting authorities who have used it. It became apparent after the first round of interviews that the ones with lawyers were yielding more relevant data for the purposes of this investigation. This was due to the fact that most questions were focused on legal issues,[34] the lack of use of the procedure and the fact lawyers have a more holistic view of national law as they provide services to both private and public entities. It was thus decided to saturate this category of respondents firstly and as the number of contracting authorities that had used competitive dialogue was small, complement the research with a sample of entities that had not used the procedure. The interviews were carried in October 2009, December 2009, March 2010, May 2010 and June 2010.

(ii) Sampling in Spain

Since the total number of competitive dialogue procedures initiated in the country was 30 at the end of 2009, it was decided to keep the sampling focused on the experts with actual experience in using competitive dialogue.[35] The sampling was

34. As can be seen by the interview guide attached as Annex IV.
35. As in the previous sub-section on Portugal, the detailed overview of the respondents will be given in Chapter 7 when the findings are presented.

aimed at identifying the key decision makers who were responsible for the choice of the procedure and the persons in charge of the procedure within the structure itself. This identification process yielded interviews with respondents in managerial positions (two), head of procurement and internal technicians (ten), in-house legal counsel (eight), external lawyers (four) and one consultant.

The author contacted all 28 contracting authorities that had started competitive dialogue procedures in Spain up to March 2010. 19 agreed to take part in the study, four stated the procedure was still in a too early stage for an interview, two agreed to participate by email without ever replying and the remaining two declined. In one of the entities, since it had used the competitive dialogue multiple times, both the former head of procurement and the current one were interviewed.

The author has also interviewed four lawyers that are not employees of contracting authorities. Three of the lawyers belong to reputed law firms in the Spanish market and had been identified by previous respondents. The final lawyer is the head in legal counsel of a Spanish trade association.

Two of the lawyers had not had experience of using the competitive dialogue procedure and their interviews served mainly as pilots of the interview guide to prepare the following rounds of interviews with contracting authorities. The first of these lawyers is a partner in one of the most renowned legal firms in the country. The author was directed to him through a gatekeeper who considered him as a leading expert in Spanish public law. The second lawyer was interviewed by suggestion of the first, as he is the head of legal counsel of a trade association and the author was told he had strong (negative) views about competitive dialogue and that those were based on the opinion of his industry.[36] The other two lawyers had

36. Identifying the industry would make it easy to identify the actual respondent and, thus, the author would be in breach of his duty of confidentiality.

participated in at least one competitive dialogue procedure and had hands on experience advising clients in the use of competitive dialogue. All the lawyers had over 10 years of experience.

Further to the above, in Spain there are public procurement advisory bodies, at national and regional levels, that are entitled to issue guidance in the field of procurement. In total, there are 16 procurement advisory bodies in Spain, one national and 15 regional.[37] Although these bodies do not have a procurement practice and could not be expected to have hands on experience, they have an important influence in shaping procurement through their powers.[38] Collecting data from them was paramount to having a more complete picture of the competitive dialogue procedure in the country. Of the 16 bodies, 6 were contacted with a preference for the regions where the competitive dialogue procedure was in use. Two accepted to be interviewed, two others have declined stating that they had no information to impart (although a gatekeeper had provided their contacts and assured the author the persons were interested in participating) and the last two did not reply neither to emails nor telephone calls.

The author has also interviewed a consultant who, although without a legal background, took part in five procedures and helped design the way those were to be carried out, including administrative clauses. The author feels that if this respondent was singled out in the data it would amount to a breach of the confidentiality agreement included in the authorisation form.[39] Due to this fact, the author has decided to include the consultant's data in the lawyers' subset.

37. Not all of the regions have an advisory body. On those 3 without regional advisory body, the national body acts as sole advisory body.
38. Detailed in Chapter 8 hereunder.
39. Especially bearing in mind the author is only aware of two companies providing technical assistance in the development of competitive dialogue procedures that are not law firms.

In total, the author has interviewed 27 respondents: 20 from contracting authorities, four lawyers, two public procurement advisory bodies and one consultant. Of this total 23 had a direct experience in participating in competitive dialogue procedures.

(c) Type of interview adopted

There are three major types of interviews, available for qualitative research: structured, unstructured and semi-structured.[40] The distinction between them depends on the degree of structuring and standardisation. The option for either type depends on the aims of the research. As mentioned before, the aim of this research is to investigate in depth a phenomenon, that is, the implementation of competitive dialogue in Portugal and Spain and its use (or non-use) in practice.

Structured interviews have a standardised set of questions to be asked to all interviewees in the same order. Having the exact same questions asked to all participants facilitates the work of finding variations and differences among the answers. However, this type of interviews stifles the interviewees' liberty of response, as all answers have to fit into the pre-determined mould.

Unstructured interviews, as the name implies, are the opposite of structured interviews. No pre-determined questions are asked and the flow of thoughts, experiences and ideas of the interviewee is encouraged. This type of interviews is usually used in psychotherapy, where the therapist is most interested in the thick description of the patient's perspective. Such personalised experience makes it difficult to analyse a phenomena across different subjects.

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40. For an overview of the different types of interviews, please see Bailey, *Methods of social research* (Free Press, 2007), Chapter 8, Bryman, *Social research methods* (Oxford University Press, 2004), Chapter 15 or May, *Social research: issues, methods and process* (Open University Press, 2001), Chapter 6.

Semi-structured interviews offer a middle ground for the researcher. On the one hand, they are more flexible than structured interviews, as the researcher has a set of points or issues to query the respondent, but no need to do so in a particular order. On the other hand, the existence of a guide with points to cover assures that a minimum common ground is covered, thus permitting comparisons across the different subjects. The defining trait, however, is that it allows the researcher to adapt the interview to the interviewee and, more importantly, to leave room for him to express his thoughts or give insight in topics or trains of thought not originally forecast by the researcher. On the minus side, this more adaptable interview makes the data analysis process more cumbersome and difficult as the answers' order and content are prone to variability.

Qualitative research is typically associated with the last type of interviews.[41] The reasons for this are straightforward, as it offers an appropriate set of characteristics to achieve the aims of empirical research, particularly when it has a exploratory nature. As this is the case of the present research, semi-structured interviews were deemed the most appropriate type for the harvesting of data from the field and to produce the more relevant input for subsequent analysis. Furthermore, since the interviewees would be experts in the area being researched one can define the subset of interview type to be expert interviews, which in turn influences the way the questions to pose are defined and the way the interviews are conducted.

(i) Definition of interview questions

The definition of interview questions started with the potential issues flagged during the doctrinal legal analysis of relevant primary and secondary sources avail-

41. Bryman, *Social research methods* (Oxford University Press, 2004) p. 319-324 and Mason, *Qualitative researching* (Sage Publications, 2002) p. 62-67.

able. Especially regarding Portugal, a number of questions arising from the way competitive dialogue was transposed were raised. However, since data collection, analysis and theory development is an iterative process in this research, the feedback from interviews was used as input for the creation of new issues to present to subsequent interviewees.

The need to accommodate the experience of two countries with markedly distinct ways of transposing the procedure has led to different interview guides. The fact is that not all the issues are replicable in both Portugal and Spain. It is, for example, useless to ask a Spanish interviewee what he thinks about the two methods of assessing the economic, technical or professional ability of candidates as in Spain only a single method is available. For the same reasons, it makes no sense to ask a Portuguese about the logic of competitive dialogue being the default procedure for the award of public-private cooperation contracts as it is relevant only in Spain.

However, even with the differences, the comparative angle to the study is still assured as its objective is to analyse the implementation of the competitive dialogue procedure in both countries. The fact that reality in the field is different is the sole reason questions and respondents had to be different as well. Even so a common set of issues was indeed identified and common questions could be asked to all participants. This ensures that the reality being compared is the same, thus permitting similarities and differences to be pinpointed. Having said this, the fact that the implementations are so distinct, means that interviews ended up being more focused in the differences between the systems than the similarities.

Since the interview guide was drafted based on the findings of the doctrinal legal analysis - itself focused on the legal issues at national and EU levels - most of the issues discussed in the interviews were focused on legal topics. That is not to say

all topics were legal and non-legal issues such as time, monetary cost or impact in human resources were also discussed. A full breakdown of the issues that were covered in the interviews can be seen in the interview guide (Annexes IV and V).

(ii) Conduct of interviews

As mentioned above, semi-structured interviews were adopted. The author did not follow a questionnaire during the interviews, but had a more fluid set of issues which he wanted to see addressed reflected in an interview guide.[42]

During the interviews the aforementioned guide was followed, not to make sure answers were given in order, but only the major issues were raised during the conversation. The guide was revised through the data collected in interviews and the input gathered applied on subsequent interviews. Therefore, the guide evolved during the course of the research.

It was decided to adopt face-to-face interviews rather than telephone interviews whenever possible, as a means of ensuring maximum reliability in the data collected. Face-to-face interviews allow for more interaction between the parties and make it easier for the interviewer to conduct the interview by looking at the signals of the respondent in contrast with a simple audio feedback through a telephone. Therefore, the author interviewed 25 respondents face to face in Portugal and 14 in Spain. The remaining had to be interviewed by telephone due to agenda issues and the costs involved, especially in Spain where the respondents were scattered all over the country. 14 interviews were conducted over Skype to keep the costs low and one by regular landline due to the impossibility of establishing a good Skype connection on that day.

42. Bryman, *Social research methods* (Oxford University Press, 2004), p. 321.

Before the start of each interview the informed consent form was signed by both parties, each keeping a copy. Some details changed from respondent to respondent, to assuage their fears (like the use or not of the audio recorder) and to ensure they were as comfortable as possible when being interviewed. The draft form on which all changes were then based can be found as Annex I. For the interviews conducted by telephone, a signed informed consent form was sent by email by both parties before the start of the interview.

As a means of maximising data collection reliability, a digital audio recorder was brought to all face-to-face interviews and the interviewee asked at the beginning if he minded talking with the recorder on. The use of an audio recorder ensured that not only all the information got recorded, but also that the interviewer kept focused in the topics at hand. Having said this, as a precautionary measure against any sort of equipment malfunction, abbreviated notes were taken. When the interviewee declined the use of the audio recorder, more extensive notes were kept and were complemented as soon as possible after the interview had ended. In Portugal, 22 respondents agreed to be interviewed with the audio recorder on. In Spain, only seven, all in face-to-face interviews, agreed with the interview being recorded.

Interviews were held in the native language of the respondent. That is, Portuguese interviewees were interviewed in Portuguese and Spanish interviewees in Spanish. Although some of the Spanish interviewees had a second native language (Catalan, Euskera or Galician are all official languages in Spain) all of them kindly accepted to be interviewed in Spanish. The fact that the interviews were only held in the author's native language and another in which he is fluent, reduced the probability of errors during translations or misunderstandings.

The interviews began with general questions about the respondents' work in the field of procurement and their background in general, so as to avoid jumping directly into the core issues. This "introductory context" was particularly important when respondents were not acquainted with the author.

The questions posed to the interviewees were phrased clearly and straightforwardly, being as specific as possible. Care was taken in ensuring they were posed in neither a tone nor using words which could be deemed as threatening or leading by the interviewee.

Although the interviews follow a pre-existing guide, respondents were encouraged to produce additional insight and to go further on more specific topics. This was done through the use of various means available to the interviewer. Open-ended questions were used extensively, as can be seen in Annexes IV and V. The flexibility offered by open-ended questions made them a prime tool in this research, as they encourage the exploration of unknown or uncertain phenomena. The interviewer also offered direct encouragement to the subjects to develop thoughts. Second questions were posed when the interviewer felt appropriate and silence was used as a cue for the interviewee to keep going.

Reliability of answers was tested by reframing questions already posed and by means of summarising what the respondent had already said, thereby asking for confirmation if the interviewer's understanding was correct. This added the benefit of making sure notes were taken correctly and no mistakes in the data were caused by the interviewer misspelling or misinterpreting the interviewee.

The interview duration was not set in advanced, although a rough ballpark figure of one hour was given to interviewees as an indication of the time they would need to set aside in their agendas. The actual duration varied between 45 to 130 minutes.

(iii) Interview analysis

As mentioned above in section (3)(b), when theoretical sampling is used in qualitative research, the different stages of the research project tend to be iterative. Data collection, analysis and theory development moment overlap in time and influence one another.

The analytical process began after each interview was concluded. Where the recorder had not been available, notes were expanded and where it was available, conversations were listened to again to complete the notes taken.

Handwritten notes were anonymised and then moved to a secure drawer in the Ph.D. students' office within the School of Law. Digital audio files from the recorder were extracted to an encrypted sparse image and backed up on an online service through Secure-Socket Layer (SSL) transmission. This ensured the security and reliability of the data collected. The recorder was erased after each interview had been extracted.

To make possible the use of a mind-mapping programme to assist in the data analysis, the expanded notes were copied to a computer and translated to English by the author, when the notes were moved to the mind-map application. The author preferred to use a mind-mapping software in alternative to other programmes commonly used for qualitative analysis such as nVivo as he considered the visualisation and the liberty to rearrange ideas easily in clusters would make it easier to find links in the data.

Afterwards, coding began and data harvested were broken down for analysis. Concepts, themes and ideas sprang and were identified, leading to the formation of categories. These categories grouped similar issues, points of interest or re-

spondents' perspectives. Emerging connections between categories were identified and the core concepts flagged.

(d) Presentation of findings

The findings are presented separately by country. Although the aim of this research is to compare the potentially different experience of the competitive dialogue procedure in two similar countries, and to explore identified differences, to keep the research focused and the findings clearer it was opted to shown them as such. The conclusions chapter has, however, a comparative tone to tie up the findings of each country, where disparities are highlighted.

As such, the findings for Portugal are discussed in detail in Chapter 7 and the findings for Spain in Chapter 10. Respondents are not identified directly in the text. They are grouped by categories according to their type. In Portugal, the categories are divided into contracting authorities with or without experience and lawyers. In Spain, they are divided into contracting authorities, lawyers and public procurement advisory bodies. Furthermore, one consultant interviewed in Spain was moved to the lawyer category as to avoid any potential violation of the confidentiality agreement signed.

(e) Trustworthiness of findings

Empirical research needs to be designed and carried out as to ensure the trustworthiness of its findings. It is not totally clear in the field of qualitative research what are the appropriate criteria to be applied to undertake such assessment,[43]

43. Mason, *Qualitative researching* (Sage Publications, 2002), p.38.

and it has been argued that this kind of research should not be evaluated according to the patterns defined for quantitative research.[44]

From the point of view of qualitative researchers, the worthiness of an empirical study has been measured according to its reliability, validity and generalisability of findings.[45]

(i) Reliability

Reliability involves the accuracy of the methods used in the research and the relationship with the data produced by them.[46] It can also be defined as the possibility of reusing the data gathering procedures without achieving different results.[47] In this sense its goal is to minimise errors and biases during the study which may affect the outcome. To do so, the procedures followed by the researcher need be clear, systematic and well documented, so as to allow a potential replication to be carried.

In the present study the first facet of reliability (reliability of information gathered during the interviews) was ensured firstly through the use of an interview guide, a digital recorder and the taking of notes by the author, which were subsequently expanded. During the interviews themselves, reliability checks were carried out, such as summarising points interviewees had presented to make sure no information was misunderstood, reframing questions using a different terminology or approach, asking for clarifications, inviting corrections to the notes taken,

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44. For a discussion on this topic, please see Denzin and Lincoln, 'The choreography of qualitative research design' in Denzin and Lincoln (eds), *Strategies of qualitative inquiry* (2nd, Sage, 2003) and Seale, *The quality of qualitative research* (Sage Publications, 1999).
45. Murphy and Dingwall, *Qualitative methods and health policy research Social problems and social issues* (Aldine de Gruyter, 2003), defending the application of the principles of construct validity, internal validity, external validity and reliability to all types of qualitative research, Yin, *Case Study Research: Design and Methods* (Sage Publications, 2003), p.33-39.
46. Mason, *Qualitative researching* (Sage Publications, 2002), p. 39.
47. Yin, *Case Study Research: Design and Methods* (Sage Publications, 2003), p.37.

asking interviewees to confirm a certain statement or to reconcile apparently contradictory ones.

On the second facet, reliability was ensured by means keeping an "audit trail" of the data collection phase, to ensure the possibility of the evidence to be evaluated. Informed consent forms, correspondence with interviewees, interview guide, recordings, transcriptions and notes taken in the process were kept in safe storage.

(ii) Validity

The aim of validity is to ensure the correspondence or accuracy between what is allegedly observed or identified and the actual data collected.[48] To achieve this aim, the data source chosen was interviews with stakeholders in the target countries. This was deemed as the most appropriate way of producing information relevant for the aims of this research with the maximum of insight and accuracy by the respondents.

Having chosen interviews as the medium to access data sources, validity was then ensured by means of informing interviewees in advance of the content of the project. During the interviews themselves, bearing in mind that the particular type of interviews adopted was semi-structured, a flexible approach was followed by having an interview guide with topics to evaluate but without a need of going through them in a pre-determined sequence. In the same spirit, interviewees were prompted to take the initiative to add more information. In addition, questions were posed in a way that they were not suggestive of answers and non-threatening to respondents, as to avoid influencing their responses by means of suggesting an

48. Mason, *Qualitative researching* (Sage Publications, 2002), p.39.

answer caused by any sort of bias of the researcher or to make respondents adopt a defensive attitude towards the interview.

Furthermore, when appropriate in face of contradictory statements, cross checking of responses was carried between interviewees.

Sampling strategy is also of relevance to ensure the validity of a research,[49] as defined above. Sampling in this research was carried out to maximise the amount of useful data that could be harvested through the interviews. To achieve the stated aim of the research, a variety of respondents, from contracting authorities (national, regional and local), private parties, lawyers and when appropriate public procurement advisory bodies, were interviewed in order to have a picture of the phenomenon as broad as possible, allowing for the testing of rival explanations or negative cases to be carried.[50]

Finally, whether interviewees may have reasons to falsify their answers needs to be taken into account. In the research undertaken there is no reason to believe that may have happened since participation was voluntary and by invitation with the topic of the interview disclosed in advance. Furthermore, confidentiality was also ensured to all participants.

(iii) Generalisability

The concept of generalisability involves the extent to which it is possible to apply the findings of the research outside the data investigated.[51]

Generalisability of the findings of the present project was sought by the sampling strategy, intended to give the researcher access to the stakeholders with the most

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49. Murphy and Dingwall, *Qualitative methods and health policy research Social problems and social issues* (Aldine de Gruyter, 2003).
50. As a means to ensure further validity of the findings, Patton, *Qualitative evaluation and research methods* (Sage Publications, 1990), p.462-464.
51. Mason, *Qualitative researching* (Sage Publications, 2002), p.39.

experience in the topic being researched, therefore increasing the probability that the findings from this research would be extendable to the wider population of contracting authorities, lawyers, private firms and advisory bodies which were not probed. However, one should exercise caution when extending the findings outside the actual classes of participants. The author is confident that findings on contracting authorities or lawyers that have not used competitive dialogue in Portugal can be extended to respondents that have not been interviewed in the same classes. What should not be inferred is that, in Spain, for instance, answers from respondents with experience in using competitive dialogue are extendable to others that have not used it. In other words, one should not read the findings in Spain as illustrative of *all* contracting authorities but only of those contracting authorities that have used the procedure.

(4) Comparative law

The final method used in the current research project is comparative law. Comparative law research is undertaken to improve knowledge of the law and also to understand the law in context.[52] Comparative law has been described as the comparison between different legal systems[53] as to ascertain similarities and differences between them.[54] Since societies face frequently the same problems or issues,[55] comparative law may function as a tool to assess how different legal systems deal with a certain issue.

Comparative law may be focused at two different levels, macro and micro-comparative, deemed as complementary between themselves.[56] A researcher is con-

52. Örücü, 'Developing comparative law' in Örücü and Nelken (eds), *Comparative law : a handbook* (Hart, 2007), p. 53.
53. Zweigert and Kötz, *Introduction to comparative law* (Oxford University Press, 1998), p.2.
54. Bogdan, *Comparative law* (Kluwer Norstedts Juridik Tano, 1994), p. 18.
55. Örücü, 'Developing comparative law' in Örücü and Nelken (eds), *Comparative law : a handbook* (Hart, 2007), p.51.
56. Ibid., p.56 and Dannemann, 'Comparative Law: Study of similiarities or differences?' in Zimmermann

ducting macro-comparison if he is assessing the spirit of different legal systems, techniques of legislation or the methods of thought and procedures used in the target legal systems.[57] Comparative law may be used to investigate a specific problem, legal institute or conflict of interests, and in this case the researcher is be conducting micro-comparison.[58] For the purposes of the current research project, the author strived to research the implementation of the competitive dialogue procedure in two different countries. This option means the focus is on the micro-comparison level, albeit without forgetting its position within the legal context or framework where it is being applied.[59]

To carry out a comparative work one must find identify clearly what is being compared, as to ensure that the subjects under research are indeed, comparable. It has been argued that comparative law may only be done when comparing institutes with the same functions in the different legal systems.[60] That is, one should identify what institution performs and equivalent function[61] in both systems and avoid resorting to the use legal concepts developed in his national system as a tool of comparison.[62] In the present research the author is not exactly comparing the functional equivalent in the two different countries. As this research is grounded in a legal concept originally developed at EU level, which member States were free to transpose and had some leeway on how to do so, the comparative element is the implementation of the procedure and not a certain function to be performed in both target countries, as they may or not perform the same function.

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and Reimann (eds), *The Oxford handbook of comparative law* (Oxford University Press, 2006), p.387.
57. Zweigert and Kötz, *Introduction to comparative law* (Oxford University Press, 1998), p. 5 and Bogdan, *Comparative law* (Kluwer Norstedts Juridik Tano, 1994), p.18. Macro-comparison has also be defined as the comparison at the level of legal systems, Örücü, 'Developing comparative law' in Örücü and Nelken (eds), *Comparative law : a handbook* (Hart, 2007), p. 57.
58. Zweigert and Kötz, *Introduction to comparative law* (Oxford University Press, 1998), p.6, Bogdan, *Comparative law* (Kluwer Norstedts Juridik Tano, 1994), p.18.
59. Örücü, 'Developing comparative law' in Örücü and Nelken (eds), *Comparative law : a handbook* (Hart, 2007), p. 58.
60. Zweigert and Kötz, *Introduction to comparative law* (Oxford University Press, 1998), p. 34-36.
61. On the functional method, Michaels, 'The Functional method of comparative law' in Zimmermann and Reimann (eds), *The Oxford handbook of comparative law* (Oxford University Press,, 2006).
62. Zweigert and Kötz, *Introduction to comparative law* (Oxford University Press, 1998), p. 34.

The fact that the aim of the research is to find out how it has been actually implemented, makes it difficult to be otherwise. On the other hand, it may be argued that the procedure as envisioned in Directive 2004/18 constitutes a *tertium comparationis*,[63] or a common denominator between the two legal systems.[64]

Comparison should be done at the level of both similarities and differences between the different legal systems.[65] However, during the course of research it is natural to have the focus on either the similarities or the differences. In the present research, since the study is focused on two countries from the same family of law, similar system of government, similar tradition in public procurement and geographically close, where a new award procedure is being implemented at the same time, the emphasis is on the differences. However, the similarities to be found between them are also important when looking at member States of the EU level, for instance.

Furthermore, it has also been mentioned in literature that comparative law studies may go further than simply identifying and exposing similarities and differences.[66] That is, that the research may have as a aim to suggest or point the way to ideal systems. This is not, however, the purpose of the present research, which is to know in depth a specific phenomenon, the implementation of competitive dialogue in Portugal and Spain. That is not to say that the identification of pitfalls or practices perceived by stakeholders as positive are not of relevance for the development of *better* implementations of the procedure, but the author is not trying to answer such questions.

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63. Jansen, 'Comparative law and comparative knowledge' in Zimmermann and Reimann (eds), *The Oxford handbook of comparative law* (Oxford University Press, 2006), p.314.
64. Örücü, 'Developing comparative law' in Örücü and Nelken (eds), *Comparative law : a handbook* (Hart, 2007), p. 48, Bogdan, *Comparative law* (Kluwer Norstedts Juridik Tano, 1994), p.58.
65. Örücü, 'Developing comparative law' in Örücü and Nelken (eds), *Comparative law : a handbook* (Hart, 2007), p.50 and Dannemann, 'Comparative Law: Study of similiarities or differences?' in Zimmermann and Reimann (eds), *The Oxford handbook of comparative law* (Oxford University Press, 2006), p.396-401.
66. Örücü, 'Developing comparative law' in Örücü and Nelken (eds), *Comparative law : a handbook* (Hart, 2007), p.49.

Many potential purposes for comparative legal work have been identified, such as to improve and consolidate knowledge and understanding of the law in context, providing an aid to the law makers (*de lege ferenda*), as a tool for the interpretation of national laws (*de lege data*), as a mean to improve the education of students, as means for the contribution for the unification of law or the development of a system of private law common in Europe.[67]

From the identified possible objectives of comparative law, for the purpose of the present research only the first three are relevant. Regarding the first, by researching the implementation of competitive dialogue the author is concerned with expanding the body of knowledge not only by researching the law in the books, but also to understand the law in context, that is, how competitive dialogue procedure was implemented and how it is being applied in practice.

Regarding the second objective, it is anticipated that this research may be useful for forthcoming reviews of legislation both at EU and national levels, as to increase the awareness and recognition of the perceived pluses and problems identified at both the legal and actual use levels.[68]

The third objective is also relevant to the research herewith carried as the findings of either country may be of use for the interpretation of the procedure in the other by interested parties.

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67. Zweigert and Kötz, *Introduction to comparative law* (Oxford University Press, 1998), p. 16-31. An alternative to this functional approach, based on problem-solving originated from sociology has also been suggested, Örücü, 'Developing comparative law' in Örücü and Nelken (eds), *Comparative law : a handbook* (Hart, 2007), p. 52.

68. It was noted by two of the law makers interviewed that in the Portuguese case, a problem faced during the drafting of the procedure in the Public Contracts Code was the lack of information available at the time of the procedure implementation and use in other member States. They also considered the procedure as too different of the normal in Portugal, thus furthering the need for information from other countries.

3. Conclusion

In this chapter we have the methodology adopted by the for this research project. Regarding methods, we have seen that this research includes doctrinal analysis, interviews with the law makers in Portugal, empirical research and comparative law. On the empirical research, the explanations were focused in the sampling strategy, type of interviews adopted, how the findings were presented and how to ensure the findings are trustworthy.

After discussing the methods and methodology it is time to introduce public procurement in the EU, before analysing the competitive dialogue itself. Therefore, the following chapter will cover the current EU legal public procurement framework.

Chapter 3 - Public procurement in the European Union

1. Introduction

The current chapter will analyse the current EU legal public procurement framework. Public procurement defines the ways the State, through a contracting authority or entity, chooses a contractor to provide works, goods or services. Private enterprises and companies are basically free to contract with whomever they deem adequate, being liable only to their shareholders. The autonomy of States when contracting, on the contrary, is limited by a series of factors. A number of binding principles restrict the States' liberty in this area. These are, for instance, the fulfillment of public interest, transparency, equality or value for money. Some of these principles are set forth in each State's own constitution and laws, while others come from EU law and jurisprudence from the Court of Justice of the European Union (CJEU).

Outlining the EU public procurement framework is relevant for this thesis since it is the basis of the rules for competitive dialogue and because it influences the national laws in the countries in this study. In this chapter, we will present an outline of general principles and EU freedoms relevant to public procurement (sections 2 and 3), the Treaty provisions (section 4)[69] and Directives which constitute the secondary legislation framework applicable to public procurement (section 5).

69. All Treaty article numbers refer to new Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, except where expressly noted.

2. *Public procurement evolution in the European Union*

In the 1957 Treaty of Rome there is no single article dealing directly with public procurement.[70] Some scholars argued that at the time, there was no idea of the impact of public procurement in the economy, while others sustained a completely opposite view, stating the importance of contracts awarded by States was all to clear and it was an obstacle during the Treaty negotiations.[71] It has also been argued that the Treaty was simply a framework defining major principles necessary to establish the common market, leaving for secondary instruments the more specific regulation. At the economic level, the concept of trade liberalisation in the 1950s was limited to the reduction of trade barriers.[72]

Nonetheless, since the common market was the major objective of the then European Economic Community,[73] public procurement was seen as an instrument to achieve such an objective. It was bound by a number of principles set forth in the mentioned Treaty. Principles such as equality and non-discrimination in the basis of nationality (article 18), or the Community liberties: free movement of goods (article 31),[74] freedom of establishment (article 20) and freedom of services (article 49),[75] are all applicable to public procurement[76] and have shaped its development since 1957. These principles bound not only Community institutions, like the Commission, but also the member States.

While the principles stated in the Treaty were not enough to make for the development of a policy by the Community,[77] they have influenced public procurement

70. Except for an indirect mention in article 130, f, (2) of the E.U. Treaty, about the co-operation between undertakings, research centres and universities in the field of national public contracts.
71. See Flamme, *Traité théorique et pratique des marchés publiques* (Bruylant, 1969), p. 272.
72. Fernández Martín, *The EC Public Procurement Rules* (Clarendon Press, 1996) p.6 ss.
73. Treaty of Rome articles 2 and 3, setting the means necessary to attain it.
74. On the free movement of goods, Oliver and Jarvis, *Free Movement of Goods in the European Community* (4th, 2002).
75. Mota de Campos, *Manual de Direito Comunitário* (Gulbenkian, 2000) p. 547-572.
76. Viana, *Os princípios comunitários na contratação pública* (Coimbra Editora, 2007) p. 137.
77. Fernández Martín, *The EC Public Procurement Rules* (Clarendon Press, 1996) p.10.

at multiple levels. They also constitute the groundwork for subsequent development done by the Directives covering public procurement, such as defining the framework for interpretation of such Directives. Furthermore, since the *Telaustria*[78] case, principles like transparency are recognized to be directly applicable to contracts outside the Directives' scope.[79]

3. Community principles applicable to public procurement

A number of European general principles[80] are relevant to public procurement, particularly non-discrimination on grounds of nationality and equal treatment, transparency, proportionality and mutual recognition.[81]

(1) Non-discrimination on grounds of nationality and equal treatment

One of the fundamental general principles stated in the Treaty on the functioning of the European Union is the principle of non-discrimination on grounds of nationality, as stated in article 18. It embodies the EU's very nature of establishing a standard of equal treatment for nationals of any member State. This principle can be considered as one of the most important examples of the equality principle.[82]

This rule aims to reduce not only overt discrimination but all types of indirect discrimination that lead to an unequal treatment. In the realm of public procurement, this principle ensures that tenderers and goods from any member State are

78. C-324/98, *Telaustria v. Telekom Austria* [2000] ECR I-10745.
79. Estorninho, *Direito europeu dos contratos públicos - Um olhar português* (Almedina, 2006) p. 27.
80. On the EU law principles in general, Tridimas, *The General Principles of EU Law* (2nd, Oxford University Press, 2007)
81. Mutual recognition will be referred further down, in connection with the free movement of goods freedom.
82. Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007) p. 7.

given an equal treatment in public tenders carried out by contracting authorities in another member State.[83] The importance of this principle cannot be understated since it acted as the stepping stone for subsequent developments in public procurement.[84] Without this principle, the discriminatory logic of buying national and the protectionism given to national companies, would have rendered the common market objective unattainable, particularly in the field of public procurement.[85]

Since 1963 the CJEU has consistently held that material discrimination under the Treaty consists in both equality before the law and different treatment of equal situations (or its opposite, equal treatment of unequal situations).[86] In other words, both formal (the first) and substantive (the second) elements of equal treatment are covered by non-discrimination. Across the years the Court has also refined the concept and applied it to other topics of the Treaty such as the four freedoms.[87]

A number of other landmark decisions by the CJEU related to non-discrimination in public procurement also deserve a mention. In the *Beentjes* case,[88] the Court ruled that this principle could not be put in jeopardy by the desire of the contracting authority to include social considerations in the award procedure. In the *Walloon Bus* case,[89] the CJEU affirmed the need for the non-discrimination principle to be applied in award procedures ruled by Directive 90/531 (utilities sector). In *Unitron Scandinavia*[90] non-discrimination was extended to entities pursuing public interest activities not considered as contracting authorities by 93/36

83. As it is applicable only to nationals of member States, tenderers from third countries cannot seek redress under its scope.
84. Moreno Molina, *Contratos públicos: derecho comunitario y derecho español* (Macgraw-Hill, 1996) p. 76.
85. It has been applied to the field of public procurement by the CJEU in case C-410/04, *ANAV v Comune di Bari* [2006] ECR I-3303.
86. Weiss and Weiss, *Evaluation : methods for studying programs and policies* (Prentice Hall, 1998) p. 19-23.
87. C-179/90, *Merci convenzionali porto di Genova v. Siderurgica Gabrielli*, [1991] ECR I-05889.
88. C-31/87, *Beentjes v. Holland* [1988] ECR I-04635.
89. C-87/94, *Commission v. Belgium (Walloon Buses)* [1996] ECR I-2043.
90. C-275/98, *Unitron Scandinavia v. 3-S* [1999] ECR I-8291.

EC Directive. In *Telaustria*, the Court considered that public services concessions, which are excluded from the public procurement Directives scope, are nonetheless bound by the Treaty positive obligations. Finally, in *Contse*,[91] regarding an award criteria, if it was more easily fulfilled by a national from the contracting authority member State, then non-discrimination would be put in jeopardy.

The recitals of the current procurement Directives also mention this principle.[92] In the *ANAV* decision[93] the CJEU accepted that such wide interpretation of the equal treatment principle exists, even though it has not stated that equal treatment should apply to all situations.[94] It has been argued that is doubtful that the free movement provisions prohibit all unjustified differentiation.[95]

(2) Transparency

Transparency is not a principle expressly conformed by the Treaty, but more of a consequent principle, derived from non-discrimination and equal treatment and further developed by the CJEU. It was raised to Community-wide principle after the already mentioned *Telaustria* decision by the CJEU[96] and a subsequent communication of the Commission.[97] In *Telaustria*, the Court ruled that all contracting authorities are bound to comply with the Treaty's positive obligations in most public contracts, including the ones not covered by the Directives. In this light, the transparency principle requires that a certain level or degree of publicity shall

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91. C-234/03, *Contse v. Ingesa* [2005] ECR I-09315.
92. Recital 2 of Directive 2004/18 (Public Sector Directive) and recital 9 of Directive 2004/17 (Utilities Directive).
93. Case C-410/04, *Anav v. Comune di Bari* ECR [2006] I-3303.
94. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 198.
95. Krügner, 'The principles of equal treatment and transparency and the Commission interpretative Communication on concessions' (2003) 5 *PPLR*.
96. Even before the *Telaustria* ruling, in the *Unitron Scandinavia* case, the CJEU considered that the principle of non-discrimination on grounds of nationality was applicable to contracts not covered by Directive 93/36 and that it included also a transparency obligation.
97. Commission, *Interpretative communication on concessions under Community law* (2000).

be applied to all public contracts,[98] even those below the thresholds set by the Directives. The objective of this obligation is to ensure the ability to review the compliance with the principle of non-discrimination on the grounds of nationality, even though it's not clear from the ruling exactly what constitutes the obligation of transparency.[99]

In subsequent decisions,[100] the CJEU has maintained this position, even if criticism has surfaced meanwhile.[101] While the reasoning behind the option to promote transparency is clear - to protect the internal market and level the playing field to foster access from foreign firms to public procurement in other member States - it still leaves unanswered relevant questions. This includes, for instance, the uncertainty created by not specifying exactly in what consists the obligation of transparency,[102] which contracts are covered (only concessions or also contracts with values beneath the thresholds) or why should a Community principle be applied to a contract not deemed relevant to be within the scope of the Directives since it has a value below the threshold or is expressly excluded from their scope?[103] The Commission has also taken a stand on this issue in recent years,

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98. This vague obligation was clarified in the *Coname* decision (C-231/03, *Coname v. Comune di Cingia de' Botti* [2005] ECR I-8612, as imposing member States the obligation to give potential foreign bidders information before the concession's award.

99. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 190-191, arguing that the advertising requirement could be satisfied in many cases by using the flexible forms of publicity allowed under the Directive 2004/18 (Utilities Directive).

100. Such as, for instance in Case C-458/03 *Parking Brixen v. Gemeinde Brixen* [2005] ECR I-8612 and the aforementioned *Coname* case.

101. Brown, 'The obligation to advertise betting shop licences under the EC principle of transparency: Case C-260/05 Commission v Italy' (2008) 1 *PPLR*, Brown, 'Seeing through transparency: the European Court's Case Law on the requirement to Advertise Public Contracts and Concessions under the EC Treaty' (2007) 1 *PPLR*, McGowan, 'Clarity at last? Low value contracts and transparency obligations' (2007) 4 *PPLR*, Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007), Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), Hordjik and 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 shoyld be Dismissed' (2005) 3 *PPLR*, Krügner, 'The principles of equal treatment and transparency and the Commission interpretative Communication on concessions' (2003) 5 *PPLR*, Treumer and Werlauff, 'The leverage principle: secondary Community law as a lever for the development of primary Community law' (2003) 24 *ELR*, Braun, 'A Matter of Principle(s) - the Treatment of Contracts falling outside the Scope of the Public Procurement Directives' (2000) 9 *PPLR*.

102. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p.197, Hordjik and 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 shoyld be Dismissed' (2005) 3 *PPLR*, Braun, 'A Matter of Principle(s) - the Treatment of Contracts falling outside the Scope of the Public Procurement Directives' (2000) 9 *PPLR*.

103. Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007) p. 20 and 21.

considering that the obligations under this principle include both advertising and a competition respecting the equal treatment principle.[104]

(3) Proportionality

The principle of proportionally is originally an administrative law principle of German origin that has been included in the Treaty as a Community principle. It is present in a number of other European legal systems including Portugal and Spain. In public procurement, the principle of proportionality is used to assess if a discriminatory action can be deemed as necessary and justified. The action fails the proportionality test if a different action, less offensive to Community rules, can have an equivalent effect in the realisation of the objective.[105]

4. Treaty provisions applicable to public procurement

The lack of specific provisions in the Treaty related to public procurement does not mean that some of its rules related with trade and development of the common market are not applicable to procurement. The influence of articles 31, 41, 20, 49 and 346 in public procurement has long been registered.[106]

The traditional view on the Treaty provisions stated that they imposed only negative obligations to member States. More recently, the CJEU in the aforemen-

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104. In both the Interpretative Communication on Concessions under Community Law, [2000], OJ C121/2 and the Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ 2006 C179/2). These communications does not create new legislative rules, but only guidance and suggestions related with transparency. On the topic of the effects of communications, see the case T-258/06, *Commission v. Germany*.

105. An example of its application by the CJEU is C-331/88, *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health* [1990] ECR I-04023, where it was ruled that a limitation of an economic activity was only acceptable if it passed the proportionality test.

106. On the the topic of Community freedoms, Craig and De Burca, *E.U. Law* (4th, Oxford University Press, 2007) chapters 17 through 22 and Wyatt et al., *Wyatt and Dashwood: European Union Law* (5th, Thomson Sweet&Maxwell, 2006), Part V.

tioned *Telaustria* decision and the Commission[107] have defended that Treaty provisions do include positive obligations for member States. This is particularly relevant for contracts falling outside the procurement Directives' scope.

(1) Free movement of goods (articles 31 and 41)

According to articles 31 and 41 of the Treaty, the EU is based on a customs union, and in consequence three different sets of restrictions to the free movement of goods in public procurement are forbidden: i) quantitative restrictions on imports and exports between member States or direct discrimination;[108] ii) measures of equivalent effect or indirect discrimination;[109] iii) and measures that may restrict trade without being directly or indirectly discriminatory.

Regarding the first aspect, national governments are not allowed to impose quotas on imports or exports on goods from or to other member States. The second aspect, contained in article 41 of the Treaty, is particularly relevant to the field of public procurement, and its elimination has been considered of considerable difficulty.[110] It prohibits both measures clearly discriminating against foreign goods and the ones rendering access to a market more difficult for those goods.

A sub-principle of the free movement of goods is the principle of mutual recognition, another prime example of EU law developed by the CJEU with the objective

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107. Commission, *Communication on the Community law applicable to contract awards not or not fully subject to the provision of the Public Procurement Directives* (2006) and Commission, *Interpretative communication on concessions under Community law* (2000).
108. Prime examples of direct discrimination case law are the C-263/85, *Commission v. Italy* [1991] ECR I-02457, C-21/88, *Du Pont de Nemours v. Unita Sanitaria Locale No 2 Di Carrara* [1990] ECR I-00889, and C-243/89, *Commission v Denmark* [1990] ECR I-00889.
109. Measures have equivalent effect when they hinder, or are capable of hindering, intra-Community trade, as per the CJEU decisions in C-8/74, *Procureur du Roi v. Dassonville* [1974] ECR I-00837 and C-120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR I-00649. In the field of public procurement, C-21/88, *Du Pont de Nemours Italiana SpA v. Unita Sanitaria Locale No 2 Di Carrara* [1990] I-00889, C-45/87, *Commission v. Ireland* [1988] ECR I-4958, C-272/91, *Comission v. Italy* [1994] ECR I-01409 and C-359/93, *Commission v Netherlands* [1995] ECR I-00157.
110. Weiss and Weiss, *Evaluation : methods for studying programs and policies* (Prentice Hall, 1998) p. 23.

of developing the internal market. In *Cassis de Dijon*,[111] the Court considered that a company was entitled to sell its products on a member State if they had been legally produced, sold or supplied in another member State. This principle is relevant for public procurement as it requires contracting authorities to accept tenderers presenting goods that have been legally produced, sold or supplied in another member State.

(2) Free provision of services and right of establishment (articles 43 and 49)

Articles 43 and 49 establish the right of nationals from member States to both establish themselves in the territory of another, directly or by means of an agency or branch and also the offering of their services in any country part of the Community. Thus, a principle of national treatment is due to all nationals (citizens or private bodies) irrespective of their exact member State of origin.[112]

These principles are considered similar and founded in the above referenced principle of non-discrimination.[113] Once more, there is no discussion over the application of these freedoms to the State and public contracting authorities. As a consequence, in public procurement access to public contracts cannot be restricted to non-nationals established either permanently or temporarily in any member State.

As with free movement of goods, these freedoms preclude direct and indirect discrimination.[114] They are also subject to derogation for motives of public morality,

111. C-120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*.
112. It appears that now article 49 covers also measures restricting cross border trade in services where these do not discriminate between national and foreign service suppliers and do not comply with the derogations to this principle or with the principle of proportionality. This has been the position of the CJEU in the Contse decision, for instance.
113. Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007) p. 10.
114. An example of an indirect discrimination happened in Italy, where a national law demanded that contracting authorities reserved up to 30% of their public works contracts for companies based in the

security and policy, in accordance with articles 46 and 55 of the Treaty. In addition to the derogations in common with free movement of goods, free provision of services and right of establishment can be pushed aside in activities connected with the exercise of official authority.

(3) Exemption of defence contracts (article 296/1(b))

Article 296 of the Treaty is one of the major examples of exemptions to free trade within member States. It authorises member States to take the measures deemed as necessary for their essential security, including the procurement of public contracts for military equipment like warships, fighter planes or missiles without respect for Treaty provisions, general principles or the Directives' rules.

The scope of this exemption has produced considerable discussion, as for a long time member States have defended its provisions to exclude from Treaty rules all measures connected with arms, munitions and war material. The CJEU has taken a different view, requiring member States to prove that the restrictive measures are necessary for the safety of their interests.[115] The Commission has also issued a Communication on this topic sustaining a restrictive approach.[116]

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construction area. The CJEU in the case C-360/89, *Commission v. Italy*, [1992], ECR I-3353 ruled that such provisions favoured national firms and, thus were incompatible with article 49. See also, case C-3/88, *Commission v Italy* [1989] ECR 4035.

115. Case C-414/97, *Commission v. Kingdom of Spain* [1999] ECR I-05585. Nonetheless, the CJEU did not make clear how strictly the proportionality test needs to be carried. More recently, in the case C-252/01, *Commission v. Belgium* [2003] ECR I-11859 the CJEU position suggests member States should have a reasonable discretion in procurement related with military and anti-terrorism equipment. Contrary to this lax view, Advocate General Mazál in the Case C-337/05, *Commission v. Italy* [2008] ECR I-02173 (Opinion of 10 July 2007) has defended a more strict approach and a narrower interpretation of the old article's 296(1)b) exemption.

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

5. Directives on public procurement

The present section will carry out an overview of current secondary legislation applicable to European public procurement. Since 1970[117] successive rounds of Directives destined to harmonise public procurement in the different member States of the Community have been adopted. The last round of Directives was adopted in 2004, with the Directives 2004/18 and 2004/17.[118] This legislative package contains the bulk public procurement legal framework and the competitive dialogue procedure, which is the aim of the current research project, was first included in Directive 2004/18.

The Green Paper on Public Procurement[119] of 1996 ignited a serious discussion on the future of Community regulations in the field of public procurement. The original objective of the Commission was not to overhaul the public procurement legal framework, but simply to open a debate on public procurement.[120]

In this paper, the Commission criticised member States for a number of sins. It pointed out errors and excessive time in transposing the Directives, excessive use of negotiated and accelerated procedures and for the imposition of (too) short deadlines. The Commission argued also that Treaty principles on liberalisation were applicable to all public contracts (including those under the Directives thresholds), States had the obligation of transposing Directives correctly and on

117. In this year the so called Liberalisation Directives (70/32 and 71/304), aimed to eliminate restrictions and discriminatory measures, were approved. They were replaced by the Coordination Directives (71/305 and 77/62). The first round of Directives was not considered a success and following the 1998 Cechinni Report, it was deemed appropriate to review them. Between 1988 and 1990 a new set of Directives was approved: Supplies Directive 88/295 and 89/665, Works Directive 89/940 and Utilities Directive 90/531. Finally, in 1992 and 1993 a final round of Directives was approved. These included the Consolidated Public Services (92/50), Public Goods (93/36), Works (93/37) and Utilities (93/38) Directives.

118. Directive 2004/17 and Directive 2004/18. On the legislative history of each Directive, respectively Hebly and van Rooij, *European public procurement: legislative history of the 'Classic' Directive 2004/18/EC* (Kluwer Law Intl, 2007) and Hebly, *European public procurement: legislative history of the 'Utilities' Directive: 2004/17/EC* (Kluwer Law Intl, 2008).

119. Commission, *Public Procurement in the European Union: Exploring the way forward COM (96) 583 final.*

120. Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR* p. 1278 and 1279.

time, that they were liable for infringing Community law and that public contracts should be instrumental to EU policies (such as social and environmental policies).

Two years after the Green Paper, a new communication issued by the Commission[121] admitted the need for new legislation. The reasons voiced by the Commission were two fold: i) to simplify the evermore complex legal regime; ii) to include more flexibility in public procurement. The competitive dialogue was hailed as a possibility, along with other novelties like e-procurement, framework agreements and public-private partnerships to achieve the latter.

In 2000 and 2001 a string of communications from the Commission[122] and projects[123] were published. In 2002 a Regulation on the Common Procurement Vocabulary was approved.[124] In March 2004 the new public procurement Directives[125] replacing Directives 92/50, 93/36, 93/37 and 93/38 were finally adopted. Both Directives avoided touching sensitive issues like public-private partnerships or public services concessions. A Green Paper on Public-Private Partnerships and Concessions,[126] a Communication on the same topic[127] and regulations over the standard format for notices[128] followed in their wake.

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121. Commission, *Public Procurement in the European Union COM (98) 143 final.*
122. Commission, *Interpretative Communication of the Commission on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Environmental Considerations into Public Procurement COM (2001) 274 final*, 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) 0566* and Commission, *Interpretative communication on concessions under Community law* (2000).
123. COM (2000) 275 final for public sectors, merging the works and supplies Directives, and COM (2000) 276 final, for the utilities sector.
124. Regulation (EC) 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary.
125. Directive 2004/17 for the Utilities Sector and Directive 2004/18.
126. Commission, *Green Paper on public-private partnerships and Community law on public contracts and concessions COM (2004) 327 final.*
127. Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (2005) 569 final*, in this Communication, the Commission states that it intends to regulate public-private partnerships and services concessions by means of a new legal instrument.
128. Regulation (EC) 1564/2005 of September 2005.

The new Directives include also include for the first time a specific reference to general principles applicable to public procurement, namely equal treatment[129] and transparency,[130] even though they had been applied by the CJEU to public procurement in the past.[131]

(1) Directive 2004/18

Directive 2004/18 sets the legal framework for contracts that have a value[132] over certain thresholds[133] and are awarded by the contracting authorities covered.[134]

A private contractor awarded[135] a contract covered by this regime has to be picked, in general, after one of the following award procedures: open procedure, restricted procedure, competitive dialogue, negotiated procedure with a contract notice, negotiated procedure without a contract notice.[136]

This Directive unified under the same legal text provisions that were until then in different Public Sector Directives. This means that all works, supplies and services now follow the same rules, although with caveats. The changes brought by the Directive were more important than just a simple unification of different regimes. The main guidelines behind the new legal framework were essentially two: flexibility and simplification.[137] The novelties led to an updated set of provi-

129. As defined in joined cases C-21/03 and C-34/03, *Fabricom v. État Belge* [2005] ECR I-1559.
130. Recital 2 of the Public Sector Directive.
131. For example, in cases C-243/89, *Commission v. Denmark* [1993] ECR I-3353 and C-87/94, *Commission v. Belgium* [1996] ECR I-2043.
132. On the calculation of a contract's value, Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007) chapter 4J.
133. In accordance with Regulation (EC) 1177/2009, for 2010 the thresholds are €125,000 (most central government contracts), €193,000 (most local and regional contracting authorities) and €4,845,000 for works contracts.
134. Article 1(9) of the Directive. The concept of covered contracting authorities has been expanded by CJEU's, action in the last few years, Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) chapter 5.
135. On award criteria in general: Bovis, *EU Public Procurement Law* (Elgar European Law, 2007), Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007), chapters 7D and 10E.
136. On the different procedures in general: Bovis, *EU Public Procurement Law* (Elgar European Law, 2007) chapter 9, Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007) chapters 7B, 7C and 10E and Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) chapters 7-10.
137. Commission, *Public Procurement in the European Union COM (98) 143 final*, p. 3.

sions, which in turn are founded in some new paradigms like the aforementioned social and environmental considerations.'[138]

Regarding flexibility, positive innovations were introduced, such as limiting the application of the utilities rules, through the definition of special and exclusive rights and the exemption of entities in competitive markets (the telecommunications sector), removal of uncertainty over the use of electronic communications and reverse auctions and the addition of competitive dialogue,'[139] framework agreements'[140] and e-commerce.'[141] It has been argued that competitive dialogue, electronic purchasing'[142] and dynamic purchasing systems'[143] may not yield the anticipated results.'[144]

On simplification, positive and negative aspects can also be pointed out. On the one hand, fusing three pre-existing legal public sector regimes is positive and laudable. However, its benefits are hindered in the end by the shortcomings of the new framework.'[145] In addition, some rough edges were left in the new regime. In particular, the alignment of the Directives remains incomplete, the draft is unclear in important areas and further layers of complication have been added with competitive dialogue, availability of auctions for certain services, central purchasing bodies, rules on organised crime or the rules on technical specifications.

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138. Recitals 1, 5, 28 and 34, reflecting the evolution path set by some CJEU decisions. Bovis, 'The new public procurement regime of the European Union: a critical analysis of policy, law and jurisprudence' (2005) 30 *ELR* p. 620 and 621, Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR*. On social and environmental considerations, in general Arrowsmith and Kunzlik, *Social and environmental policies in EC procurement law : new directives and new directions* (Cambridge University Press, 2009).

139. Bovis, 'The new public procurement regime of the European Union: a critical analysis of policy, law and jurisprudence' (2005) 30 *ELR* p. 613-614 and Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR* 1280-1291.

140. Bovis, 'The new public procurement regime of the European Union: a critical analysis of policy, law and jurisprudence' (2005) 30 *ELR* p. 615 and 616 and Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR* 1293-1296.

141. Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007) p. 445-452, Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) chapter 10 and Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR* 1322-1324.

142. Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007) p. 436-445, Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) chapter 11 and Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR* 1296-1301.

143. Ibid. 1301-1303.

144. Ibid. 1323.

145. Ibid. 1323 and 1324.

Finally, a general exaggeration in detail makes the current public procurement rules difficult to interpret and apply.[146]

(2) Directive 2004/17

The scope of the Utilities Directive has also undergone relevant changes.[147] From the perspective of contracts covered, telecommunications were dropped, while postal services are now bound by utilities rules.[148] In addition, utilities operating in competitive markets,[149] joint ventures and affiliated undertakings[150] have also been excluded. This does not amount to a new exemption *per se*, but to the modification of the conditions set forth in the previous Directive.

This Directive is applicable to all public authorities, public undertakings and bodies with special and exclusive rights. However the latter concept has been revised.[151]

The main differences between this Directive and the Directive 2004/18 can be summarised as follows: i) the thresholds are higher in the Utilities Directive, except for works contracts;[152] ii) utilities can freely choose between the open, restricted and competitive negotiated procedures; iii) advertising of contracts is more flexible under the Utilities Directive (through a contract notice, periodic indicative notice, or under a qualification system); iv) in the Utilities Directive specific exceptions are in place for the requirements of advertisement and competi-

146. Ibid. 1324 and 1325.
147. On the new utilities procurement regime, Bovis, *EU Public Procurement Law* (Elgar European Law, 2007) p. 289-366. Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007) chapter 3 and Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), chapter 15 and 16.
148. Article 6.
149. Article 30 and also Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR*, p. 1309-1311.
150. Article 23 and Ibid. p. 1309-1311.
151. Articles 2(3) and 3 of the Directive, Ibid., p. 1306-1309.
152. In accordance with Regulation (EC) 1177/2009, for 2010 the thresholds are €125,000 (most central government contracts), €193,000 (most local and regional contracting authorities) and €4,845,000 for works contracts.

tion;[153] v) more flexible tender deadlines exist in restricted and competitive negotiated procedures; vi) the use of qualification lists by utilities to define what potential bidders may tender a contract is permitted; vii) exclusion of firms may take place in accordance with objective criteria;[154] viii) there are rules on third country offers; and ix) there are more flexible time limits to publish contract award notices.

(3) Remedies Directive

An important reason identified by the Commission in the 1980s for the lack of member States' compliance was the absence of mechanisms for rules enforcement available to companies in some way injured during a public procurement procedure.[155] Bearing this in mind, the Community adopted specific Directives to define legal remedies available to enforce the application of the public procurement framework. Directive 89/665 (Remedies Directive) was adopted to regulate the remedies applicable to contracts covered by Works, Supply and Services Directives. Directive 92/13 (Utilities Remedies Directive) was adopted to rule remedies applicable to contracts under the Utilities Directive. These Directives were recently amended by Directive 2007/66.[156]

The enforcement of public procurement rules can be achieved by two different means: i) action taken by the Commission in the CJEU, in accordance with arti-

153. The new article 30 of the Utilities Directive is a major innovation in this area, allowing utilities to benefit from particularly advantageous business opportunities available only for a short time with prices below normal market rates.
154. Whereas in the Public Sector Directive, potential tenderers may be excluded on the grounds of lack of technical capacity, financial standing and different reasons as criminal convictions or misrepresentation of information. The Utilities Directive does not include an extensive and explicit list of grounds for the exclusion of firms.
155. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p. 139 and 145.
156. On this Directive De Koninck and Flamey, *European Public Procurement Law-Remedies: The European Publiv Procurement Remedies Directives and 15 Years of Jurisprudence by the Court of Justice of the European Communities: Texts and Analy* (Kluwer Law International, 2009).

cle 226 of the Treaty;[157] ii) legal action brought by the injured company before the national courts.[158]

In the first, the Commission takes action on its own or analyses the complaint of an aggrieved tenderer and presents a case to the CJEU. The party to the litigation is the member State and not the contracting authority. Whether or not the Commission follows the complaint, is a matter of its sole discretion.[159] The aggrieved tenderer cannot force the Commission to take action against the Member State.[160]

While all the costs are borne by the Commission, the procedures under article 226 are known to be lengthy, with an average duration for preliminary rulings of over 20 months in 2005.[161] In consequence unless the contract's execution is suspended, it will probably have been performed by the time a decision is produced, reducing the effectiveness of this alternative.[162]

Regarding the second method of enforcement, aggrieved companies will seek redress under national review bodies, as defined by Directives 89/665 and 92/13. These review bodies, while not necessarily courts in the strict sense,[163] have to

157. On the enforcement by the European Commission, Treumer, 'Towards an obligation to terminate contracts concluded in breach of the E.C. Public Procurement Rules: the End of the Status of Concluded Public Contracts as Sacred Cows' (2007) 4 *PPLR*, Pachnou, 'Factors influencing bidders' recourse to the European Commission to enforce EC procurement law' (2005) 2 *PPLR*, Delsaux, 'The role of the Commission in enforcing EC Public Procurement Rules' (2004) 3 *PPLR* and Arrowsmith, 'The Community's Legal Framework on Public Procurement; the way forward' (1999) 13 *CMLR*.

158. On these remedies please see Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007) chapter 9C, 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) 3 *PPLR*, Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) chapter 21 and Pachnou, 'Factors influencing bidders' recourse to the European Commission to enforce EC procurement law' (2005) 2 *PPLR*.

159. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 1451.

160. On this topic, please see CJEU case T-126/95, *Dumez v Commission* [1995] ECR II-2863 and Craig and De Burca, *E.U. Law* (4th, Oxford University Press, 2007) Chapter 12.

161. Proceedings of te Court of Justice and of the Court of First Instance of the European Communities (2005), p.9.

162. Although the CJEU can order the suspension of the contract, by means of awarding interim measures under article 243 of the Treaty.

163. On the meaning of review body, case C-54/96, *Dorsch Consult v. v. Bundesbaugesellschaft Berlin* [1997] ECR I-4961 and case C-258/97, *Hospital Ingenieure Krankenhaustechnick Planungs-Gesellschaft v. Landeskrankenanstalten-Betriebsgesellschaft* [1999] ECR I-1405.

provide effective,[164] rapid[165] and non-discriminatory[166] review and be able to award the remedies of interim measures,[167] set aside decisions taken unlawfully[168] and award damages to aggrieved tenderers.[169] These remedies shall be available to all entities having or having had an interest in tendering for the contract.[170]

The Directive 2007/66 has introduced a mandatory 10 day standstill period between the decision to award a contract[171] and its signing. It has also included a minimum time limit for interested parties to file a review procedure.[172] Provision is also made to ensure that the review body is independent from the contracting authority and has the power to declare the ineffectiveness of the contract[173] for certain violations, including, for instance, the violation of the standstill rules.[174]

Regarding damages, the Directive defines rules for their award to tenderers injured by infringements,[175] but neither specifies which ones to award or calculation methods for such compensation.[176] Nonetheless, the CJEU in case C-275/03, *Commission v Portugal*,[177] was clear to point out that Portugal's burden of proof rules and demand of fault or negligence was not compatible with the Remedies Directive.[178]

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164. Article 1/1 of both Remedies Directives, as amended by Directive 2007/66. On this principle of effectiveness Pachnou, 'Enforcement of the EC Procurement Rules: The Standards Required of National Review Systems under EC Law in the Context of the Principle of Effectiveness' (2000) 5 *PPLR*.
165. Article 1/1 of both Remedies Directives, as amended by Directive 2007/66.
166. Article 1/2 of both Remedies Directives, as amended by Directive 2007/66.
167. Article 2/1(a) of both Remedies Directives, as amended by Directive 2007/66.
168. Article 2/1(b) of both Remedies Directives, as amended by Directive 2007/66.
169. Article 2/1(c) of both Remedies Directives, as amended by Directive 2007/66.
170. Article 1/3 of both Remedies Directives, as amended by Directive 2007/66.
171. Article 2a/2 of both Remedies Directives, as amended by Directive 2007/66, following the CJEU rulings on cases C-81/98, *Alcatel Austrai v. Bundeministerium für Wissenschaft und Verkehr* [1999] ECR I-7671 and C-212/02, *Commission v Austria*, unpublished.
172. Article 2c of both Remedies Directives, as amended by Directive 2007/66.
173. According to article 2d/2 of both Remedies Directives, as amended by Directive 2007/66. Ineffectiveness is a concepted that is to be provided for by national law. On ineffectiveness and the issues surrounding it, Clifton, 'Ineffectiveness-The New Deterrent: Will the New Remedies Directive Ensure Greater Compliance with the Substantive Procurement Rules in the Classical Sectors' (2009) 4 *PPLR* p.166. On the issues of contract termination in general (focused on the case c-503/04 *Commission v Germany*, [2006] ECR I-6885), Treumer, 'Towards an obligation to terminate contracts concluded in breach of the E.C. Public Procurement Rules: the End of the Status of Concluded Public Contracts as Sacred Cows' (2007) 4 *PPLR*.
174. Golding and Henty, 'The New Remedies Directive of the EC: Standstill and Ineffectiveness' (2006) 3, p. 146-154.
175. Article 2/1(c) of both Remedies Directives, as amended by Directive 2007/66.
176. Article 2/7 of both Remedies Directives, as amended by Directive 2007/66.
177. C-275/03, *Commission v. Portugal [2004]* OJ C 300/21.
178. Portugal has reviewed its public liability law, after more than six years with successive projects hanging

6. Conclusion

In this chapter, we have presented a general overview of the EU framework applicable to public procurement. We have covered the general principles and EU freedoms relevant to public procurement, Treaty provisions and the current Directives that regulate the field. In the next chapter we will proceed further by examining how the competitive dialogue was created and its regulation in Directive 2004/18.

in the Parliament. The new Law 67/2007, December 31, states in article 7 that the state shall be liable for the violation of rules during the award phase of public procurement contracts, even the ones under the Directives thresholds. Apparently, this drafting resolves the violation of Community law decide by the CJEU in the aforementioned case. In the end it will depend on the Courts application of the new law. Traditionally, administrative courts have demanded fault or negligence to be proved and refused to award damages for lost profits.

Chapter 4 - The competitive dialogue in European public procurement

1. *Introduction*

This chapter analyses how competitive dialogue has been implemented in Directive 2004/18, which created the procedure and allowed member States to transpose it to their own legislations.[179] First, it will review the historical background of the procedure, from the 1996 Green Paper[180] to the final text of Directive 2004/18, including the influences on its creation. Then we will analyse the grounds for its use and characteristics as set forth in the Public Sector Directive. Finally, an overview of problems identified by academics will follow.

2. *Historical background*

In 1996 the Green Paper *Public Procurement in the European Union: Exploring the way forward*[181] was published by the Commission, launching a lengthy period of discussion regarding European public procurement. This Green Paper did not anticipate the need for changes to the legal regime, aiming instead to fine tune existing regulations. Nonetheless, in 1998 the Communication *Public Procurement in the European Union*[182] the objective of revising public procurement rules was assumed, on the basis of a need to simplify the complex framework and increase flexibility to respond to market developments.[183]

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179. According to Directive 2004/18 recital 16, transposition of framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions and competitive dialogue was not mandatory.
180. Commission, *Public Procurement in the European Union: Exploring the way forward COM (96) 583 final* PPLR
181. Ibid.
182. Commission, *Public Procurement in the European Union COM (98) 143 final*
183. Ibid., p.4.

The Commission accepted the need to facilitate technical dialogue and shortcomings in both the open and restricted procedures, especially for awarding particularly complex contracts,[184] where buyers are aware of their needs but may not know the best solution to meet them. The Commission conceded that it would be appropriate to develop a "competitive dialogue" procedure, envisaged as a standard procedure to operate alongside open and restricted procedures and replacing the existing negotiated procedure.[185] The acceptance by the Commission of the need for a new flexible procedure for complex contracts came from its own policy of public-private partnerships for Trans-European network projects, published in the year before[186] the 1998 Communication.[187]

In May 2000, the Commission presented proposals for two new Directives.[188] One was for consolidating contracts regulated until then by the Works, Supply and Services Directives.[189] The second was for contracts falling under the Utilities Directive.[190] On the first version a new type of negotiated procedure[191] was included to be used in particularly complex contracts. Contracts were defined as particularly complex when the public contracting authority is unable to objectively define the technical or other means needed to meet its requirements and also unable to objectively assess technical or financial solutions available in the market.[192] This procedure included a number of procedural requirements that did not exist in the regular negotiated procedure. Although it was named as a new type of

184. Ibid., p.7.
185. Ibid., p.7.
186. 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 final*, section 2.1.
187. Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007), p.405.
188. On the projects, Boyle, 'Critique of the Commission's proposal for a new Directive on the Co-ordination of Procedures for Public Contracts COM (2000) 275 final, as updated by discussions in the working group ' (2001) 2 *PPLR* and Arrowsmith, 'The European Commission's proposals for new Directives on Public and Utilities Procurement' (2000) 9 *PPLR*.
189. Directives 93/37, 93/36 and 92/50, respectively.
190. Directive 93/38.
191. Articles 29/1(a) and 30 of the project.
192. Which, as we will see in section 4.(2)(a) infra, is identical to the current definition of particularly complex contracts.

"negotiated procedure" the extra conditions clearly transformed it into something different. One can say it was a preliminary draft of what would become competitive dialogue in 2004. The rules on this procedure were strongly criticised on different grounds: (i) they were more restrictive than the rules of the competitive negotiated procedure, and so unsuitable for particularly complex contracts; (ii) some of the rules were not exclusive to the new procedure and could be applied to the competitive negotiated procedure, such as the express provision that allows authorities to make payments; (iii) some of the rules should arguably be applied to the competitive negotiated procedure although probably were not; (iv) the drafting style introduced inconsistencies and doubts on the interpretation of the Directive.[193]

In 2002 a new draft of the Directives was circulated. This draft included a new version of competitive dialogue, which responded to the previous strong criticism.

Finally, in 2004, competitive dialogue was finally included in the current Public Sector Directive, in recitals 16, 31, 39 and 41 and articles 1/11, 29, 38/3, 40, 44/3 and 53/2. In that year, the Green Paper *Public Private Partnerships and Community Law and Public Contracts and Concessions*[194] suggested competitive dialogue might be used for the award of contractual public-private partnerships.

In 2005, an explanatory note on the procedure by the Commission ensued,[195] where major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing were pointed out as areas where competitive dialogue might be used.[196] The major integrated trans-

193. Ibid..
194. Commission, *Green Paper on public-private partnerships and Community law on public contracts and concessions COM (2004) 327 final.*
195. Commission, *Explanatory note - competitive dialogue - classic directive* (2005).
196. Suggesting computer networks are being purchased on a regular basis by both public and private companies and, perhaps, the competitive dialogue should not be used for these contracts, Rubach-Larsen, 'Competitive Dialogue' in R Nielsen and S Treumer (eds), *The new EU public procurement directives* (Djof

port networks where the Commission suggests competitive dialogue might be of use are utilities contracts.

In 2008, the *Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP)* has once more identified competitive dialogue as the award procedure to use if the public-private partnership project faces particular financial or legal complexity.[197]

3. Possible influences in the creation of competitive dialogue

Even though the history and possible origins of the competitive dialogue are not central for this research project, some remarks on this topic are relevant for the overall picture of the procedure.

The need for more flexible procurement procedures was recognised in the United Kingdom for at least 20 years.[198] This is more so in the area of Public Finance Initiative (PFI) contracts,[199] where the complexity of these partnership projects made clear that the standard open and restricted procedures of the Public Sector Directives were not adequate as procurement mechanisms.[200]

Different reasons have been named for the inadequacy of standard procedures for the procurement of complex contracts: i) non-consideration of the particularities raised by complex projects in the drafting of the 1990s Public Sector Directives;[201] ii) need for at least 5 tenderers in open and restrictive procedures, which is un-

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Publishing, 2005) p. 70.
197. Commission, *Commission interpretative communication on the application of Community* (2008), p. 4-5
198. Burnett, *Competitive dialogue - A practical guide* (EIPA, 2010) p.19-21, Farley, 'Directive 2004/18EC and the competitive dialogue: A case study on the application of the competitive dialogue procedure to the NHS LIFT' (2007) 2 *European PPLR* p. 67.
199. COM(2002) 236.
200. Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR* p. 1280, and Brown, 'The impact of the new procurement directive in large public infrastructure projects: competitive dialogue or better the devil you know' (2004) 4 *PPLR* On the fact that two-stage procedures were already existe in procurement frameworks outside the European Union, Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007), p.405, in particular note 105.
201. Braun, 'Strict compliance versus commercial reality: The practical application of EC public procurement law to the UK's Private Finance Initiative' [2003] *ELJ*, p. 577.

reasonable in complex projects where the costs to prepare a final bid are prohibitive; iii) need to define the technical specifications completely from the beginning of the procedure; iv) limited scope for dialogue during the procedure; v) and limited scope for dialogue also after the choosing of the winning bid.[202]

In the light of the open and restricted procedures' shortcomings, the UK Government officially sanctioned the use of the competitive negotiated procedure for the procurement of PFI contracts in a number of its guidelines.[203] The High Court also accepted the use of the competitive negotiated procedure for the procurement of PFI contracts in the *Kathro* case.[204] This case remains its sole ruling on the subject. As a result, procurement practice in the UK of PFI projects pragmatically followed the more flexible and adapted negotiated procedure,[205] even though the grounds for its use were uncertain.[206]

In 2000 the Commission initiated two procedures against the UK[207] but the two were quietly dropped without explanation. As a consequence, the CJEU never reviewed the extensive grounds on which the competitive negotiated procedure was used by contracting authorities in this member State.

It may be argued that the British experience of putting commercial reality in front of strict legal compliance in PFI projects,[208] and thus rendering evident the divergence between law and commercial reality,[209] may have led to the wider recognition of the need to reform the procurement rules of complex contracts.

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202. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 629
203. Namely in, Treasury Taskforce, *How to Follow EC Procurement Procedure and Advertise in the OJEC* (1998), Treasury Taskforce, *How to appoint work and work with a preferred bidder* and Treasury Taskforce, *Step by Step Guide to the PFI Procurement Process.*
204. *R. (on the application of Kathro) v Rhondda Cynon Taff County BC* [2001] EWHCAdmin 4527.
205. Braun, 'Strict compliance versus commercial reality: The practical application of EC public procurement law to the UK's Private Finance Initiative' (2003) 5 *ELJ*, p. 579.
206. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 629 and 630
207. The first was on the project for the redevelopment of the Pimlico School in London, and the second on the provision of community facilities in Ipswich. Commission press release IP/00/869 of July 27, 2000.
208. Braun, 'Strict compliance versus commercial reality: The practical application of EC public procurement law to the UK's Private Finance Initiative' (2003) 5 *ELJ* p. 585.
209. As Peter Braun found in his Ph.D. thesis: Braun, *The practical impact of E.U Public Procurement Law on PFI procurement practice in the United Kingdom* (2001).

Some of the specific questions Braun highlighted as procedural problems perceived in the UK's PFI practice may be interpreted in this light. From the seven situations identified by Braun in his research, three are plausible to be identified as having helped shape competitive dialogue as a mechanism for the procurement of complex contracts: (i) the need to conduct pre- and post-tender discussions;[210] (ii) the need to change specifications in the course of a tender; (iii) the already mentioned inadequacy of open and restricted procedures for PFI projects and the systematic use of the negotiated procedure to procure PFI projects.[211] The widespread use of the negotiated procedure,[212] as a more adapted procedure for the procurement of complex contracts,[213] can be identified as a starting point for the development[214] of competitive dialogue. [215]

It may be argued that the UK's PFI practice experience in the 1990s may have influenced the creation of the competitive dialogue procedure. Firstly, it made clear that the standard procedures as configured by the Public Sector Directives were not adequate to procure complex contracts, giving the Commission an incentive to look into the issue. Secondly, it also made clear that there was a need to include a procurement procedure devised specifically for the procurement of complex contracts, based on the existing competitive negotiated procedure but with more procedural elements. Third, as per the previous reference to Braun, compet-

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210. The restrictions in negotiations with candidates in the open and restricted procedures under Directive 93/37 is summed up by the joint statement of the Council and the Commission on art. 7(4) of the aforementioned Directive:
"The Council and the Commission state that in open and restricted procedures all negotiations with candidates or tenderers on fundamental aspects of contracts, variations which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders of the requirements of the contracting authorities and provided this does not involve discrimination.", in [1994] O.J. L111/114.
211. Ibid. p.85 and Braun, 'Strict compliance versus commercial reality: The practical application of EC public procurement law to the UK's Private Finance Initiative' (2003) 5 *ELJ* p. 577 and 578.
212. Actively endorsed by HM Treasury and Treasury Task-force official guidance and backing, Ibid. p. 581 and 582.
213. Brown, 'The impact of the new procurement directive in large public infrastructure projects: competitive dialogue or better the devil you know' (2004) 4 *PPLR* p.160 and 161.
214. Especially if we consider the competitive dialogue as a negotiated procedure with stronger procedural elements (and thus less flexible) and not a restricted procedure with some extra flexibility.
215. Kennedy-Loest, 'What can be done at the preferred bidder stage in competitive dialogue' (2006) 6 *PPLR* p. 316

itive dialogue's rules seem specifically developed to tackle at least some of the problems identified in that practice.[216]

4. The competitive dialogue under Directive 2004/18

The new competitive dialogue procedure was introduced to be used by contracting authorities wanting to award a particularly complex contract and facing the necessity of developing the most appropriate solution for its needs through discussions with tenderers. Situations existed where the open or restricted procedures' lack of flexibility would not be the most appropriate means to tender the contract. It is aimed, in particular, at PFI projects.[217]

The rules governing the use of competitive dialogue are scattered throughout various articles and recitals of the Directive 2004/18. While article 29 contains most of the rules it by no means contains all the rules related to the procedure. Rules on the procedure can be found in articles 1/11(c), 23/3, 28, 44 to 52 and recitals 31, 39 and 41 of the Directive 2004/18.

On a first reading of article 29, competitive dialogue seems a straightforward procedure. It is light, flexible allowing the contracting authorities a much-needed leeway in the course of the procedure to award a complex contract. In reality it is not that simple and uncertainties on the grounds of use and doubts on its rules exist.[218] The dissemination of rules in different articles and recitals of the Direc-

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216. To such an extent that the the successive changes on the competitive dialogue's drafts from 2000 to 2004 have made more obvious the connection to UK practice and to the HM Treasury guidance.
217. Burnett, 'Conducting competitive dialogue for PPP projects - Towards an optimal approach' (2009) 4 *EPPPL*, p. 190-191, 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) 3 *PPLR*, p. 86 and Commission, *Green Paper on public-private partnerships and Community law on public contracts and concessions COM (2004) 327 final.* Stating that, however, the procedure may not be as useful for these projects as anticipated Farley, 'Directive 2004/18EC and the competitive dialogue: A case study on the application of the competitive dialogue procedure to the NHS LIFT' (2007) 2 *European PPLR*, p. 68, Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p.630.
218. Burnett, 'Conducting competitive dialogue for PPP projects - Towards an optimal approach' (2009) 4 *EPPPL*, p.191, Treumer, 'The field of application of the competitive dialogue' (2006) 6 *PPLR*, p.307, Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p.630-31, Arrowsmith, 'An

tive does not facilitate the task of correctly interpreting the procedure and applying the respective provisions. In addition, the draft of the rules was either not carefully planned[219] or ambiguously laid in on purpose, leaving the definition of important details to the transpositions to national law, practice and courts.

The first part of the present section covers the flow of the procedure as apparent in Directive 2004/18. The analysis of the problems facing competitive dialogue is left for the second part of this section.

(1) Flow of the procedure

According to the article 1/11(c), competitive dialogue procedure allows the contracting authority to carry on a dialogue with the admitted candidates so that one or more solutions to the "particularly complex contract" can be be found and the candidates asked to submit their tenders.

The procedure is initiated with the publication of a contract notice by the contracting authority simply setting out its needs and requirements, as stated in article 29/2 of the Directive.[220] Contrary to the open and restricted procedures, this contract notice does not need to include detailed specifications but only an outline. The contract notice or accompanying descriptive document should also specify if the dialogue will include successive phases to reduce the number of solutions,[221] maximum and minimum number of candidates and objective criteria to

assessment of the new legislative package on public procurement' (2004) 41 *CMLR*, p. 1277, Brown, 'The impact of the new procurement directive in large public infrastructure projects: competitive dialogue or better the devil you know' (2004) 4 *PPLR*, p.160 and Treumer, 'Competitive Dialogue' (2004) 13 *PPLR*, p.178.

219. Which could explain some of the general vagueness permeating the draft of the procedure.

220. Articles 29/2, 35/2 and Annex VII of the Directive 2004/18.

221. Article 29/4 of the Directive 2004/18.

choose admitted candidates and winning tender,[222] since the only award criterion available is the most economically advantageous tender one.[223]

After the contract notice is published, the contracting authority then chooses from the candidates that registered their interest the ones that are technically and financially sound. Those are then carried through to the dialogue phase of the procedure.[224] The assessment of the economic, technical or professional ability of candidates is done in accordance with articles 44 through 52. The contracting authority may shortlist and limit the number of candidates and solutions to discuss in the dialogue phase, as long as it is mentioned in the contract notice, along with the objective criteria for making the selection. To ensure competition, at least three have to be retained for the discussions in the dialogue phase.[225]

The dialogue phase can be used by the contracting authorities to discuss with candidates all aspects of the contract to tender,[226] leaving significant leeway for dialogue after the tendering has commenced. The keyword is flexibility for the contracting authority to structure this phase of the procedure. This is a marked departure from the rules for the open and restricted procedures that restrict discussions after the start of the procedure.

While there are no limits to what can be discussed, the Directive is more strict in relation to how the dialogue should be carried out. According to article 29/3 the contracting authority has to ensure equal treatment and cannot provide information to candidates in a discriminatory way or reveal the confidential information proposed by one candidate without his agreement.

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222. Annex VII, 19 and 20 of the Directive 2004/18.
223. The lowest price criteria cannot be used in the competitive dialogue, articles 29/1 and 53. This appears to be sensible, given the fact that the contract to be awarded will be complex and cannot be reduced simply to a question of who presents the cheapest price.
224. Article 29/3 of the Directive 2004/18.
225. Article 44/3 of the Directive 2004/18.
226. Article 29/3 of the Directive 2004/18.

The dialogue phase can be carried out in successive stages so to reduce the number of solutions to be discussed,[227] including multiple proposal/tendering stages.[228] The elimination of candidates and solutions has to be mentioned in the contract notice and adhere to the pre-defined award criteria. Dialogue shall continue until the appropriate solution or solutions for the need of the contracting authority have been found.[229] With the end of the dialogue phase - assuming that at least one solution was deemed as acceptable - the contracting authority invites candidates to submit their tenders.

The final tenders submitted must include all the elements deemed required or necessary for the performance of the contract[230] and can be clarified, specified and fine-tuned at the request of the contracting authority.[231] This cannot be used by the contracting authority to change the basic features of the tender.

The assessment of the tenders is done in accordance with the award criteria included in the contract notice, which, must be the most economically advantageous tender, as defined per article 53 of the Directive.[232]

After the final tenders have been submitted and the most economically advantageous one selected, the contracting authority may, at its request, ask for clarification of aspects contained in any of the tenders and for the commitments to be confirmed.[233] Again, no substantial aspects tenders can be changed at this stage.

227. Article 29/4 of the Directive 2004/18.
228. Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR*, p. 1277.
229. Article 29/5 of the Directive 2004/18.
230. Article 29/6 of the Directive.
231. Article 29/6 of the Directive.
232. Article 29/7 of the Directive.
233. Article 29/7 of the Directive.

(2) Questions and problems already identified with the competitive dialogue

A number of different problems with the current competitive dialogue draft have already been identified in the literature. For the purposes of this thesis, these have been divided in: i) uncertainty on the grounds for its use; ii) assessment of the economic, technical or professional ability of candidates, iii) dialogue phase; iv) final tender; v) scope for changes and negotiations before and vi) after the evaluation of tenders.

(a) Grounds for use of the procedure

According to article 29/1, the use of competitive dialogue procedure is limited to the award of particularly complex contracts, where the use of open and restricted procedures will not allow the award of the contract. Three points shall be stressed from the definition included this article. Firstly, following the rule of article 28, where the open and restricted procedures are considered as the only standard procedures, competitive dialogue use is limited to these specific sets of circumstances and it has been argued that the procedure has an exceptional nature.[234] Under this view, competitive dialogue is not a standard procedure in the sense the open and restricted are. The opposite view has also been argued, since competitive dialogue is more structured and transparent then the negotiated procedure.[235]

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234. Hjelmborg et al., *Public procurement law : the EU directive on public contracts* (Djøf Pub, 2006), p.283, Treumer, 'The field of application of the competitive dialogue' (2006) 6 *PPLR*, p.313. Arguing for the exceptional nature of the competitive dialogue according to French law, Delelis, 'Le dialogue compétitif' (2007) 3 *Revue du Tresor* p. 280.

235. Farley, 'Directive 2004/18EC and the competitive dialogue: A case study on the application of the competitive dialogue procedure to the NHS LIFT' (2007) 2 *European PPLR*, p. 62 and Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 632-635. Considering competitive dialogue as a "special procedure" and not an exceptional one such as the negotiated procedure, Commission, *Explanatory note - competitive dialogue - classic directive* (2005), p.2.

Secondly, is the impossibility of a contracting authority using the open or restricted procedures to award the contract.[236] If interpreted strictly, then the contracting authority could only use the competitive dialogue if and when it is effectively impossible to draft the specifications as per article 23.[237] A broad interpretation, on the other hand, would also cover situations where the contracting authority, although able to define technical specifications, does not know in advance all the possible solutions for its need and, in consequence, is not sure on what is the best solution.[238]

Thirdly, article 29/1 does not define the legal concept of particularly complex contracts,[239] a fundamental concept if one wants to clearly determine the circumstances for which competitive dialogue is available. Guidance for the definition of the particularly complex concept is to be found only by jointly reading article 1/11(c) and recital 31 of Directive 2004/18. According to article 1/11(c), a contract is deemed as particularly complex when contracting authorities are unable to objectively define the technical specifications capable of satisfying its needs or objectives and/or is unable to objectively specify the legal or financial make up of a project.[240] Therefore, at least one of these three conditions has to be present to enable the use of competitive dialogue. This inability to draft the specifications has to be without fault on the part of the contracting authority.[241]

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236. Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR*, p.1277. One should bear in mind also the trend requiring a more complete disclosure of award criteria, their weighting and sub-criteria set forth by the CJEU in C-532/06, *Lianakis v. Municipality of Alexandropoulis* ECR [2008] I-00251. On this decision, Lee, 'Implications of the Lianakis Decision' (2010) 3 *PPLR*, p. 47-56 and Kruger, 'Superiority in Experience and Skills may Distinguish a Better Tender Bid! Critical Reflections from Norway on the Lianakis Ruling' (2009) 3 *PPLR*.

237. Treumer, 'The field of application of the competitive dialogue' (2006) 6 *PPLR*, p.307 and Treumer, 'Competitive Dialogue' (2004) 13 *PPLR* p. 179.

238. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 634.

239. Arguing the same, Treumer, 'Competitive Dialogue' (2004) 13 *PPLR* p. 178-179.

240. Trepte considers that the use of the word "objectively" suggests the procedure should not be used lightly only because the contracting authority lacks the expertise to define the technical requirements, Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007), p.446.

241. Leaving without an answer the question of what happens when fault from the contracting authority exists. In reality, the contracting authority is barred from using the competitive dialogue, but at the same time it is unable to draft the specifications with the level of detail it would be required in a open or restricted procedure.

Recital 31 sheds some extra light on the concept of "particularly complex" while adding some extra complexity. It states that the contracting authority's impossibility of defining the technical means of article 23, legal make-up and financial make-up has to be objective and the conduct of the contracting authority faultless. On the other hand, recital 31 also adds some examples of what can or can sometimes be considered as particularly complex contracts, namely important integrated transport infrastructure projects,[242] large computer networks or projects involving complex and structured financing in which the legal/financial make-up cannot be defined in advance.

Related with this question is the apparent conflict between article 29 and article 1/11(c).[243] On the one hand, article 29 may be interpreted as implying that the contracting authority has a degree of discretion to consider if the use of the open or restricted procedures will not allow the award of the contract, without further insight on how the contracting authority should reach that conclusion. On the other hand, article 1/11(c), supported by recital 31, stresses the objectivity of the impossibility in defining the technical means or legal/financial make-up and appears to limit the scope of discretion. It has been argued that the first option is the correct,[244] leaving the contracting authority with the ability to assess if its better to define a precise specification from the onset, albeit framed by the objective element of a reasonable procuring entity.[245] The second possibility, of the grounds

242. This field of application is further stressed by the Commission on its explanatory note, Commission, *Explanatory note - competitive dialogue - classic directive* (2005).
243. Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR*, p.1277.
244. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p.634. Assuming only that it "provides a certain amount of flexibility to the Contracting authority", without being entirely clear Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007), p.446.
245. Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR*, p.1277. and Brown, 'The impact of the new procurement directive in large public infrastructure projects: competitive dialogue or better the devil you know' (2004) 4 *PPLR* p. 178. With an opposing view if the Commission views on the original proposal for the new Directive in COM (2000)275 are factored in the interpretation, Treumer, 'Competitive Dialogue' (2004) 13 *PPLR*, p.178.

for use having to be assessed "objectively" and limited by the strict wording by article 1/11(c) and recital 31, has also been argued.[246]

In light of the above, the grounds for use of the procedure will depend on the interpretation given to three abstract concepts present in different articles of the Directive. These concepts are particularly complex contracts, the impossibility of using an open and restricted procedure and the objective inability to define technical means, legal or financial make-up of the contract.

(b) Assessment of the economic, technical or professional ability of candidates

Candidates that are to participate in the dialogue stage have to be selected in accordance with articles 44 through 52 of Directive 2004/18. The contracting authority shall indicate the minimum number of candidates (at least three) and disclose the objective criteria that are to be applied.[247] It has been argued that if less than the minimum number of candidates meets the requirements, the contracting authority may still proceed with the procedure.[248]

(c) Dialogue phase

A number of issues are present in the dialogue phase and are unadressed by the Directive. Problems surrounding confidentiality, use of successive stages, elimination of solutions or candidates, how to organise the dialogue stage and conduct meetings are at play.

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246. Treumer, 'The field of application of the competitive dialogue' (2006) 6 *PPLR* p.313.
247. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p. 640-641, Commission, *Explanatory note - competitive dialogue - classic directive* (2005), p.4-5 and Treumer, 'Competitive Dialogue' (2004) 13 *PPLR*, p.180-182. On selection and award criteria in general, Treumer, 'The Distinction between Selection and Award Criteria in EC Public Procurement Law: A Rule without Exception' (2009) 4 *PPLR*, p. 103-111.
248. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p. 641.

The most important problem in this phase is probably the definition on how to guarantee equal treatment to candidates[249] and ensure that confidentiality is maintained as required by article 29/3 of Directive 2004/18. According to this article, the contracting authority must guarantee equal treatment among all tenderers and abstain from revealing each solution to other participants. "Cherry picking" of the best bits of solutions from different candidates is apparently forbidden,[250] thus limiting the possibility of a contracting authority creating a mixed solution that would be the best suited for its needs.[251] It has been argued that it will be tempting for contracting authorities to set aside cherry picking while searching for value for money.[252] The ban on "cherry picking" may have the caveat of the candidate forfeiting the protection granted by article 29/3 on its own accord, either during the dialogue itself or, perhaps, as a tender condition.[253]

It is debatable how the successive stages authorised by article 29/4 may actually be implemented[254] and if "reducing solutions" means that only solutions may be dropped or the respective candidates are to be excluded from continuing in the dialogue also.[255] It has been argued that the elimination covers not only the solutions but also the candidate,[256] and that this may reduce the transaction costs for all parties involved.[257] However, it has been suggested, since the Directive only mentions the elimination of "solutions" and not of candidates, that only solutions

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249. Ibid., p. 647-648.
250. Charveron, 'Competitive dialogue threatens PFI ' (2007) 18 *Construction Law*, p.29, Brown, 'The impact of the new procurement directive in large public infrastructure projects: competitive dialogue or better the devil you know' (2004) 4 *PPLR* p. 173 and Treumer, 'Competitive Dialogue' (2004) 13 *PPLR*, p.178.
251. The original proposal of the Commission (Article 30(6) of COM(2000) 275) allowed "cherry picking" of solutions by the contracting authority and was met with strong criticism by the industry.
252. Ibid., p.181-182.
253. Ibid., p.181-182. Expressing an opposing view to this possibility, citing this would create a new selection criterion not foreseen in articles 45 through 52 of the Directive 2004/18, Rubach-Larsen, 'Competitive Dialogue' in R Nielsen and S Treumer (eds), *The new EU public procurement directives* (Djof Publishing, 2005), p. 76-77.
254. Brown, 'The impact of the new procurement directive in large public infrastructure projects: competitive dialogue or better the devil you know' (2004) 4 *PPLR*, p.174.
255. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 646-647.
256. Ibid. p.646.
257. Treumer, 'Competitive Dialogue' (2004) 13 *PPLR*, p. 181.

may be eliminated whereas the candidates themselves are to be kept and invited to take part in the tender stage.[258]

Furthermore, one can also argue that the lack of information on how to actually run this stage or to organise the meetings with the candidates may pose relevant questions. How should the meetings be processed? Who should be the first participant and should the order be changed for subsequent meetings or if successive stages are used?

(d) Final tenders

Regarding the final tenders, two related questions arise: the number of candidates to be invited to present final tenders and the state of completeness tenders must achieve at that stage.[259]

According to article 44/4, competition at the tender stage is necessary but only if the number of acceptable solutions allows for it. Therefore, it seems reasonable that two tenders would be enough to ensure competition at this point of the procedure and this number appears to be reasonable in face of the high costs of producing complete bids[260] for complex projects.[261] But it can also be argued that since the required number to initiate a dialogue is three, the number of final tenders should also reflect this minimum. Another potential problem is the possibility of the contracting authority not inviting for the tender stage some of the candidates that reached the end of the dialogue. How can this decision be checked

258. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p.646.
259. Ibid. p. 649.
260. With this opinion, Ibid. p. 649 and Brown, 'The impact of the new procurement directive in large public infrastructure projects: competitive dialogue or better the devil you know' (2004) 4 *PPLR*, p.178.
261. And even one candidate and only a single solution are to be accepted by the contracting authority, if the tenderers have not agreed in raising the limitations of Article 29/4 as it cannot create a common specification, Trepte, *Public procurement in the European Union* (2nd, Oxford, 2007), p.451.

by dismissed candidates, especially if the confidentiality restriction is still in place?[262]

On the second question, it has ben argued that to request a state of completeness in the "final tenders" as it is implied by article 29/6 may not be the best option in complex projects like PFIs as the costs of preparing such bids can be high and dissuade potential candidates of participating in the tender on the first place. In PFI projects, the benefits of competition need to be balanced with the high costs of preparing and evaluating multiple bids.[263]

(e) Scope for changes and negotiations before evaluating tenders

Article 29/6 allows tenders to be "clarified, specified and fine-tuned at the request of the contracting authority". The scope of application of these provisions is debatable.[264]

The clarifications, specifications and fine-tuning of tenders prior to evaluation specified in article 29/6, raises a number of issues regarding the possibilities actually given to companies and contracting authorities. In particular, it can be debated what amendments to improve tenders are acceptable, if non-compliant tenders may be brought to compliance and if further information may be requested from tenderers.

Regarding the amendments to improve tenders, it has been argued that article 29/6 is simply a restatement of a principle already applied to the open and restricted procedures.[265] However, it has been argued that article 29/6 should be in-

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262. Raising a similar issue,Treumer, 'Competitive Dialogue' (2004) 13 *PPLR*, p.178.
263. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 650-65 and Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR*, p.1277.
264. The Commission guidance is fairly strict in limiting what can be discussed at this stage, Commission, *Explanatory note - competitive dialogue - classic directive* (2005).
265. Council and Commission , *Declaration concerning art. 7/4 of Public Works Directive 93/37* (1994).

terpreted bearing in consideration the fact competitive dialogue is to be used for the award of particularly complex contracts.[266] Under this interpretation changes to tenders are acceptable if they are kept within certain qualitative and quantitative means (such as the basic features of the existing tenders[267] or the call for the tender which would be likely to distort competition or to have a discriminatory effect)[268] and equal treatment of tenderers is ensured.[269] Equal treatment may imply treating differently the tenderers if the contracting authority can demonstrate they are in different positions.[270] It has also been suggested that the possibility of improving tenders after their submission may be used by contracting authorities to reduce the amount of information given to the candidates at the end of the dialogue stage, because any outstanding issues may be dealt at this point.[271]

On bringing non-compliant tenders into compliance, it has been argued that the scope of article 29/6 could cover the necessary changes.[272]

The possibility of contracting authorities requesting further information from tenderers relevant for the award of the contract can also be discussed. It has been suggested that it is possible to request such information on an open or restricted procedure.[273] As competitive dialogue is available only for the tendering of particularly complex contracts, it has been argued the increased complexity of these projects should warrant more flexibility for the contracting authority to request information.[274]

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266. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 655-656.
267. Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR*, p.1277.
268. Treumer, 'Competitive Dialogue' (2004) 13 *PPLR* p. 183.
269. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 655-656.
270. Ibid. p. 656.
271. Treumer, 'Competitive Dialogue' (2004) 13 *PPLR* p. 184.
272. Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR*, p.1277, albeit recognising as not clear if the concept should include changes to features that will be compared in the evaluation and Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p. 654-658.
273. Ibid. 543-544.
274. Ibid. p. 657.

Finally, it is not clear if only the contracting authority may request changes to tenders under article 29/6, as apparent from the actual text.[275]

(f) Scope for changes and negotiations after selecting the winner

Article 29/7 allows for the clarification and confirmation of commitments that do not modify substantial aspects of the tender and do not pose a risk of competition distortion and discrimination. The wording of this paragraph is ambiguous and open for interpretation, as "clarify" and "confirm" appear not to allow changes, while the reference to "substantial" seems to imply that there is room for changes as long as they are not-substantial.[276]

This has been suggested that in the case of PFIs in the UK. In this country, typically, some issues are left to be discussed after a winning tenderer has been chosen, like the financial due diligence,[277] planning permissions, the detail of designs and surveys.[278] It as also been argued that the lack of flexibility for negotiations in this stage can put in jeopardy the usefulness of the procedure for PFI practice.[279]

A scenario where the possibility of having changes in the winning tender appears to be possible is when the change arises from a reason external to the contracting authority, as long as competition is not distorted.[280]

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275. Treumer, 'Competitive Dialogue' (2004) 13 *PPLR* p. 184.
276. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p.662, Arrowsmith, 'An assessment of the new legislative package on public procurement' (2004) 41 *CMLR*, p. 1277 and Brown, 'The impact of the new procurement directive in large public infrastructure projects: competitive dialogue or better the devil you know' (2004) 4 *PPLR* p. 175.
277. In Portugal, on the negotiated procedures for the award of public-private partnership contracts for the construction and running of four news hospitals on the last few years, the banks had to commit the funding for the project from the onset and no financial due diligence was done after the winner had been chosen. Furthermore, the banks were part of the consortia.
278. Kennedy-Loest, 'What can be done at the preferred bidder stage in competitive dialogue' (2006) 6 *PPLR*, p.316. With an opposing view, citing the issue of bid creep, Auton, 'It's good to talk' [2009] *Public Finance*26, p. 26.
279. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p.631.
280. Ibid., p.661-662.

Finally, the existence of a general ban on detailed discussions after the submission of tenders (either before or after selecting the winner) may raise the question if it would not have been preferable to simply adapt the scope of the negotiated procedure with prior notification to include the contracts covered by competitive dialogue.[281]

5. Conclusion

In this chapter we have seen the historical background to the competitive dialogue and how it has been introduced by Directive 2004/18. Furthermore, we have analysed the issues it raises, particularly on the grounds for use, dialogue stage and tender stage. From the analysis it is apparent that the current draft of the competitive dialogue at EU level raises a number of questions that are still to be entirely overcome.

After carrying out an overview of at EU level of public procurement in general and of competitive dialogue in particular, in the next chapters we will proceed with the analysis in the target countries. In the following chapter, public procurement in Portugal will be discussed.

281. Rubach-Larsen, 'Competitive Dialogue' in R Nielsen and S Treumer (eds), *The new EU public procurement directives* (Djof Publishing, 2005) p.78.

Chapter 5 - Public procurement in Portugal

1. Introduction

Portugal has a long tradition in regulating public procurement. Procedures for awarding contracts, legal regimes applicable to their performance and review mechanisms have existed for a long time. This tradition dates back to the middle of the 19th century and led to the progressive development of a national public procurement framework during the 20th century as we will see below.

Portugal acceded to the EEC in 1986 and kept improving and updating its existing procurement framework in accordance with each successive rounds of procurement Directives. National laws were restructured, reworded and adapted to accommodate each round of Directives. Currently, the bulk of public procurement framework is part of the Public Contracts Code of 2008.

In this chapter we will set out an overview of the public procurement rules in Portugal.

2. Background to public procurement

(1) Introduction

It is impossible to explain the Portuguese public procurement system without a brief mention of closely associated areas like the distinct legal regimes for the performance of public contracts or the rules regarding administrative and judicial review mechanisms. In Portugal all these issues are interconnected and do not allow for an analysis restricted to procurement. This sub-section will thus be divided into two different parts. The first part will cover the traditional qualification of

contracts according to the different legal regimes regarding their execution, influenced by French law (administrative contracts on one side, and private contracts of the administration on the other). The second part will summarise the more recent EU influence on this topic, in particular the concept of public contracts.

(2) Different nature of contracts entered into by public administration in Portugal

Portuguese public administration and administrative law were heavily influenced by the approach developed in France during the 18th century.[282] A cornerstone of this system was the paradigm that the administration could do no wrong. That is to say, the State could dictate whatever it wanted and have, in general, free reign over the activities it wished to carry out. Administrative law was originally created to maintain this status quo. It has been considered a miracle that the Administration decided to restrict itself by submitting to the rule of law,[283] albeit not the general law but a special or statutory (administrative) law which left it with plenty of room to manoeuvre.

In the field of public procurement the adoption of the French model led to the dichotomy between administrative contracts and private contracts of the administration. According to the traditional view on this issue, each type had a different nature, thus justifying the need for different subsets of rules.[284] The different rules covered the legal regime applicable to the substance of the contract and also the review mechanisms available to the private party.

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282. For a general introduction to the history background on Portuguese public administration, Freitas do Amaral, *Curso de Direito Administrativo* (3rd, 2006), Chapter I and Pereira da Silva, *Em busca do acto administrativo perdido* (Almedina, 1998), Chapter I.
283. Freitas do Amaral, *Curso de Direito Administrativo* (3rd, 2006), p. 160.
284. In particular, the different nature was used to justify the existence of exorbitant powers (*fait du Prince*) held by the public party that would give it leverage to change the contract or apply fines without the agreement of the private party or a decision by a review body.

Administrative contracts were subject to administrative law and to the administrative jurisdiction for reviews. Private contracts of the administration, were subject to private law and to the judicial jurisdiction. It was of paramount importance to assess the legal nature of each contract to determine what sets of rules would be applicable, since the paradigms of each subset are fundamentally different. The existence of actual differences between the two has sparked a long-standing discussion in Portuguese literature.[285] More recently, under the influence of EU law and the national law on the administrative jurisdiction, the differences between the two types have been watered down and the concept of public contracts has emerged.

(a) Administrative contracts

Historically, administrative contracts were considered as a magnanimous concession by the public administration of its powers,[286] as it would be cooperating with a private party to achieve the public good,[287] which had taken the form of contract and not the most typical form of an administrative act. In consequence, such contracts reflected a non-balanced relation of power between the parties.

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285. On this topic, for all see Freitas do Amaral, *Curso de Direito Administrativo* (Almedina, 2001), Chapter 4, Marcelo Rebelo de Sousa, *O concurso público na formação do contrato administrativo* (Lex, 1994), Sérvulo Correia, *Legalidade e autonomia contratual nos contratos administrativos* (Almedina, 1986), Part II and Marcello Caetano, *Manual de Direito Administrativo* (10th, 1973) p. 569 onwards. These authors have defended the autonomous nature of administrative contracts, with the criteria to sustain this position suffering changes and mutations over the years and differences among scholars. For instance, Freitas do Amaral considered that the administrative contract as defined by its submission to an administrative legal regime and the prosecution of an object connected with the core of the administrative function, Freitas do Amaral, *Curso de Direito Administrativo* (Almedina, 2001) p. 516-519, whereas Sérvulo Correia stated that the leading argument justifying the autonomy of the administrative contract was the statutory criteria, founded on the opinion that administrative law is a special area of law, fundamentally different from private law and created to specifically regulate the activity of the administration Sérvulo Correia, *Legalidade e autonomia contratual nos contratos administrativos* (Almedina, 1986), p. 393-406. With an opposing view, Estorninho, *Requiem pelo contrato administrativo* (1988). This author considered the differences as artificial or arbitrary and unjustified. In the absence of legal arguments to sustain the concept of administrative contract, in reality its substantive regime should be governed by private law. More recently, Goncalves, *O contrato administrativo : uma instituicao do direito administrativo do nosso tempo* (Almedina, 2003).

286. Marcello Caetano, *Manual de Direito Administrativo* (10th, 1973), p. 588, defined the concept of administrative contract as *"[...] the contract between the Administration and another body with the objective of associating such body for a period of time to the carrying of an administrative power, by means of supplying goods or services to be paid as agreed and by keeping the power of reviewing for the administrative jurisdiction."*

287. Freitas do Amaral, *Curso de Direito Administrativo* (Almedina, 2001), p. 496-497.

The public body had the possibility of dictating changes to the terms of the contract without consulting the private party or to apply fines without a prior decision from a review body. The review process was also geared to protect the administration. Only "final and decisive administrative acts" could be subject to review and the process included a previous mandatory administrative review before the aggrieved private party could file for judicial review.[288] Public works, public works concessions and public services concessions were considered as quintessential administrative contracts.[289]

(b) Private contracts of the administration

Private contracts of the administration, on the other hand were subject to private law, similarly to contracts agreed by two private parties. In relation to these, the contracting authority has the same rights and obligations as a private party, since the Civil Code makes no distinction on the nature of the parties. The same was reflected in judicial review as the private courts and its respective law were competent to resolve all types of disputes arising from these contracts.

Although the two regimes are still to be totally merged, the most obvious differences (public party powers and jurisdiction for review) have been watered down by influence of the EU public procurement framework and successive developments in the national laws, namely in the administrative court's process,[290] substantive and administrative procedure laws.[291]

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288. Before the reform of 2002.

289. A listing by exemplification could be found in article 178/2 of the Public Procedure Code. The list in this article was not exhaustive, and other contracts could be deemed as administrative if certain conditions were met. The exact content of these conditions depended on the diverse theories developed by scholars. On this topic, Esteves de Oliveira et al., *Código do procedimento administrativo - comentado* (2nd, Almedina, 1999), Estorninho, *A fuga para o direito privado* (Almedina, 1995) and Rebelo de Sousa e Salgado Matos p.263-309.

290. The paramount influence of the administrative court's process laws in the development of administrative substantive law has been recognised, see for all Pereira da Silva, *Em busca do acto administrativo perdido* (Almedina, 1998).

291. In Portuguese law, procedures before administrative authorities and administrative courts represent distinct legal concepts. The first one is translated by the author as "administrative procedure" whereas the

(c) Public contracts

The concept of "public contract" was first introduced in Portugal because of the accession to the EEC in 1986. Due to the obligation to transpose the EU public procurement framework, the award of contracts by public bodies was suddenly subject to broadly the same rules and principles irrespective of the classification of the contract as administrative or private.[292] The introduction of the "public contract" concept reduced the relevance of the traditional division between administrative contracts and private contracts of the administration during their procurement phase. Regarding the substantive legal regimes and jurisdiction empowered to solve disputes, the differences subsisted until recently.

In 1998 the Decree-Law 134/98 transposed into national legislation the Directive 89/665 or Remedies Directive. This law introduced some major changes in the review process of award procedures, in particular: i) a new urgent judicial review procedure only for the issues arising from the procurement procedures of public contracts;[293] ii) interim measures to protect interests of private parties at risk of abuse; iii) rules regarding the State obligation to inform the European Commission and powers of the latter to intervene. Although this law was not included as part of a general overhaul of the administrative court's procedure law, the rules it

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second is hereby translated by "administrative court's process".

292. The first of the national laws regulating public procurement that adopted a neutral view on the dichotomy between administrative and private contracts of the administration was the Decree-Law 55/95, regulating uniformly at the time the procurement of a number of "public contracts", irrespective of their doctrinal qualification.

293. It has built up also on a major change to the Portuguese Constitution during the Review of 1997. On the then new article 268/4 it was finally established that citizens or private parties in general were entitled to a complete and fair judicial review of all activities carried by the administration. The Decree-Law 134/98 did not solve the problem of what were the consequences if an act done by the contracting authority during a public procurement procedure was deemed unlawful, rendering the award to a certain contractor also unlawful, particularly when the judicial decision was taken with the contract already executed.

introduced were so alien to the rest of the existing frameworks that they sparked a long overdue reform of the administrative court's process laws.[294]

The reform in 2004[295] of the administrative court's process law put an end to the difference regarding which jurisdiction had the power to sort out disputes arising from public contracts.[296] The Statute on the Administrative and Tax Courts (Law 13/2002) and the Administrative Court Process Law (Law 15/2002) stated that all issues (including the execution) of all contracts subject to any type of award procedure were to be submitted to the administrative jurisdiction, supporting the public contract concept. Virtually all contracts entered into by the administration are covered by these provisions, irrespective of their doctrinal classification, rendering them subject to the same jurisdiction and to the same rules regarding the review procedure.[297]

(d) Currently

The changes of paradigm mentioned in the previous sub-section have filtered down to the Public Contracts Code adopted in 2008 (Law 18/2008).[298] Under this law, regarding procurement procedures, all and every contract entered into by the contracting authorities covered are public contracts. This law, however, keeps the distinction between administrative and private contracts regarding the performance of the contract.

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294. A reform that would finally, bring in line administrative courts law with the changes to the Portuguese Constitution mentioned in the previous footnote, and not only in regard public procurement but all the State activity.
295. Although known as the reform of 2004, the relevant laws were approved in 2002, with their entry into force deferred until 2004.
296. For a comparative note of different European countries administrative court's process systems and a long history of the Portuguese administrative court's process laws (from 1832 to the reform of 2004), please see Sérvulo Correia, *Direito do Contencioso Administrativo* (Lex, 2005).
297. It should be noted also that the powers of the court to overturn decisions of the administration and to condemn it to decide or act on a certain way were vastly expanded.
298. The Public Contracts Code transposed Directives 2004/17 and 2004/18.

According to article 1 of the Public Contracts Code, the rules on the performance of contracts are applicable only to administrative contracts. Administrative contracts are defined as the willful agreement between the administration and another (private or public) party that establish an administrative relationship.[299]

Public works, goods[300] and services, public works and services concessions are all classified as administrative contracts in the Public Contracts Code and their performance is regulated through the rules contained in it and not private law. On these contracts, the contracting authority is still entitled to unilaterally change clauses for public interest reasons, apply sanctions if they are provided for in the contract (without going to court) and even cancel the contract.[301] The changes to clauses and the cancelation (if founded only in public interest) lead to the compensation of the counter party.[302] The compensation is due to re-establish the "financial balance" of the contract since the counter party is not at fault.

Private contracts of the administration are all the contracts that do not establish an administrative relationship according to the Public Contracts Code and their performance remains regulated by private law such as the Civil Code.

The lines between the two types of contracts are now more clear and reflect differences where they existed all along: in the performance of the contract. The award procedures and judicial review process are unified and oblivious to this distinction. The discussion remains, however, on what is an administrative relationship for the purposes of determining the set of rules applicable to the performance of the contract.

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299. Article 1/6 of the Public Contracts Code states that contracts shall be administrative when: they are classified by law or the parties as such; the performance is subject to rules with an administrative nature; they replace an administrative act; exercise public powers; give special powers over the exercise of State functions; they are subject to a public procurement procedure and the party replaces (even if partially) the contracting authority in the performance of its attributions.
300. Including the renting of goods.
301. Article 302 (c), (d) and (e) respectively of the Public Contracts Code.
302. Articles 314 and 334 of the Public Contracts Code.

(3) Judicial review

Regarding the judicial review process itself, the Administrative Court Process Law includes a section (articles 100 through 103) specific to public procurement judicial review. The rules of this law give ample access to the courts to any interested party, in particular tenderers that may feel aggrieved. For instance, contrary to the previous regime they no longer have to exhaust any administrative review possibilities before being granted the possibility of filing for judicial review on a court. There are no pre-conditions to be met that could be use to limit access to judicial reviews.

Aggrieved tenderers may request from the court the annulment of any decision taken by the contracting authority that affects them negatively. For instance, they may request the annulment of a decision excluding them from the procedure or the award to another tenderer.[303] In addition, bidders may file for an injunction to freeze the development of a tender procedure or even the signing of a contract.[304]

Although the court does not have the power to replace the contracting authority in assessing the actual merits of a tender and to award the contract itself,[305] it has the power to declare illegal and annul the decision if any wrongdoing is found. The contracting authority will have then to re-take the decision without repeating the illegality. If the court considers one award criterion as illegal, for instance,

303. Even the content of technical specifications may be challenged by tenderers, according to article 100/3 of the Administrative Court Process Law.
304. Articles 112 through 127 of the Administrative Court Process Law. Injunctions have a temporary nature and are intended to protect the interests of the requester while the main judicial process is under way. They do not influence in any way the decision of the main judicial process. Even if an injunction to stop a contract being signed was awarded, that does not mean the court will, in the end, judge the award to be illegal and have it annulled.
305. It is still considered in Portugal that assessing the "substantive value" of any decision belongs exclusively to the administration as a margin of discretion and courts cannot overrule decisions taken within it scope.

the decision will have to be re-taken without that criterion being taken into account.

Judicial review in public procurement is classified as urgent in the Administrative Court Process Law.[306] As a consequence, time limits are shorter[307] and it takes precedence inside the court over standard cases.[308]

Furthermore, the process is not completely balanced between the parties, as the contracting authority is forced to send the court all of the relevant data and documents pertaining to the decision being challenged.[309] The aggrieved bidder is then given access to all this data and is entitled to make amendments to the filing.

Transposition of the Directive 2007/66 (Remedies Directive) is still pending.

3. Public procurement in Portugal

(1) Introduction

As stated above, Portugal has a long tradition regarding the rules on public procurement. To be more specific, this tradition dates back to the middle of the 19th century, with the enactment of the Law of July 22, 1850 regarding the rules and principles governing the award of public works contracts (roads only). Until Portugal's accession to the EEC, a number of laws and regulations were published reinforcing the framework, expanding its scope and including innovations such as new procedures.[310]

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306. Article 101 of the Administrative Court Process Law.
307. According to article 101 of the Administrative Court Process Law, the aggrieved party must file for the judicial review, in general, within one month. After the process is started, all the internal time limits of the judicial process are accelerated in comparison with standard cases. For instance, the reply from the contracting authority must be filed within 20 days of notification under penalty of default.
308. Analysing the public procurement judicial review system, Gonçalves, 'Avaliação do regime jurídico do contencioso pré-contratual urgente' (2007) 62, *Cadernos de Justiça Administrativa*.
309. This is due to the principle of transparency permeating all the activity carried out by the Portuguese administration.
310. Such as the the General Regulation of Public Accounts from 1881, the Ministerial Order 7702 from 1933, the Decree-Law 41375 from 1957 or the Decree-Laws 48234 and 48871 from 1968. For a detailed overview of

After acceding to the EEC and before the Public Contracts Code (Decree-Law 18/2008) came into force, procurement rules on different types of contracts were scattered in different laws.[311] After each successive round of Directives was approved, a number of laws would be enacted to transpose them.[312] They followed the classification found in the Directives of public works, services and goods contracts. When the need arose, a new law would be approved to regulate an area not covered by existing laws.[313] Only the Public Contracts Code unified the national procurement regime under the same law.[314] It includes the rules needed to transpose the Directives 2004/17 and 2004/18 and also much more on contracts or topics not covered by these Directives.[315]

The major last round of updates to the national procurement framework before the current Public Contracts Code, occurred between 1999 and 2001. Decree-Law 59/99,[316] transposed Directive 93/37 and regulated the award of public works contracts. A few months later Decree-Law 197/99[317] was approved. It regulated the award of public goods and services, transposing Directives 92/50 and 93/36. This last Decree-Law included also a number of principles[318] that were considered

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Portuguese public procurement history please see for all Olazabal Cabral, *O concurso público nos contratos administrativos* (Livraria Almedina, 1997).

311. The rules regarding damages and judicial review today are still in their own laws. The first in the Decree-Law 67/2007, December 31st and the second in the Administrative Courts Process Law. It makes sense to keep them separated as they are applicable to all the State's activity and not only to public procurement. See, Ibid., p. 65.

312. Such as the Decree-Law 235/86 (transposing the Directives 71/304 and 71/305), Decree-Law 24/92 (applicable to a number of goods contracts), Decree-Law 405/93 (works), Decree-Law 55/95 (goods, works and services). For these laws please see,Andrade da Silva, *Regime jurídico das empreitadas de obras públicas* (8th , Almedina, 2003), Bernardino, *Aquisição de bens e serviços na administração pública* (2nd, Almedina, 2003), Esteves de Oliveira and Esteves de Oliveira, *Concursos e outros procedimentos de adjudicação administrativa* (Almedina, 1998), Olazabal Cabral, *O concurso público nos contratos administrativos* (Livraria Almedina, 1997) and Andrade da Silva, *Regime jurídico das empreitadas de obras públicas* (4th, 1995).

313. As an example, see further down in this section the 2003 Law on public-private partnerships.

314. Although, as we will see further down in section devoted to the Public Contracts Code, not all of the relevant rules on public procurement ended up being included in the Public Contracts Code.

315. As the rules on public works and services concessions or the contracts under the Directives threshold.

316. On this law please see, Andrade da Silva, *Regime jurídico das empreitadas de obras públicas* (8th, Almedina, 2003) and Ferreira, 'Public Procurement Law in Portugal: An Overview' (1999) 5 *PPLR*, p. 225-241.

317. On this law please see. Ibid.

318. Principles of legality and public interest (article 7), transparency and advertising (article 8), equality (article 9), competition (article 10), impartiality (article 11), proportionality (article 12), good faith (article 13), stability (article 14) and responsibility (article 15).

applicable to all public procurement, and not only to the contracts covered by its scope.

In 2001 the law regulating the Utilities Sector was approved (Decree-Law 223/2001), transposing Directive 93/38.

Two years later, in 2003 a law on public-private partnerships (Decree-Law 86/2003) was approved and is still in force today, with amendments introduced by the Decree-Law 141/2006. It defines what is to be considered a public-private partnership, the conditions under which the State can opt to use this contract type and the division of risk. This Decree-Law does not regulate the actual procurement procedure for public-private partnerships, simply stating that the common rules on public procurement shall be followed. It includes, nonetheless, some rules governing the launch of public-private partnerships before the award procedure has started.[319]

Decree-Law 1/2005 established the regime for the procurement of goods, services and electronic communication networks, equipment and related services. It was subsequently revoked when the new Public Contracts Code entered into force in July 2008.

In 2007 Decree-Law 37/2007 created a National Agency for Public Purchases, possibly based on the dynamic purchasing concept as present in Directive 2004/18. It does not seem clear exactly what were the grounds for the Portuguese government to create this Agency. This law is still in force and has not been affected by the Public Contracts Code.[320]

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319. On these contracts, Andrade and Raquel, 'Public-Private Partnership in Portugal - The Legal Structure of the Public-Private Partnership Contract and the Peripheral Contracts' (2010) 5 *EPPPL*, p. 46-53 and Canto e Castro, 'Uma apreciação geral do Regime Jurídico geral aplicável às Parcerias Público-Privadas' [2009] *Revista de Ciências Empresariais e Jurídicas*.

320. Unless it is deemed as contrary to the Public Contracts Code as per article 14(2) of the Decree-Law no 18/2008.

The transposition of Directive 2009/81 on defence and security procurement is still pending in Portugal.

(2) Public Contracts Code of 2008

In 2008 the new Public Contracts Code (Decree-Law 18/2008) was published and came into force. The first draft of the Public Contracts Code was made available in May 2006 for public discussion, with a second one in 2007. This law came into force more than two years after the deadline for the transposition of the Directives 2004/17 and 2004/18.

Portugal does not use guidance or government issued regulations to complement or explain its laws and the Public Contracts Code is no exception to the rule. All the legally relevant matters are included either in decree-laws or laws, both of these instruments sharing the same value level in the pyramid of Portuguese legal rules.[321]

There are, however, rules in the Portuguese legal system with a value inferior to laws, such as government decrees or ministerial orders approved by specific ministries. Their aim is to complement technical aspects of laws and decree-laws and have to abide by them. An example would be forms templates or the publication of hunting permits.

The Public Contracts Code transposes Directives 2004/17, 2004/18 and 2005/51 modernising the national procurement framework and bringing it up to date with

321. The Decree-Law and Law differ in the approval process. The first is approved by the Government either under its own legislative capacity as stated in the 1976 Constitution or by an authorisation by the Parliament. Laws are approved by the Parliament under its general legislative capacity.

the EU Directives on public procurement. For the first time in Portuguese history, public procurement rules are finally unified[322] under the same law.[323]

The Public Contracts Code aims to create a coherent procurement framework not limited to the objective scopes of the Directives. It covers, for instance, contracts such as the concessions of public works and services[324] or public-private partnerships. It also includes award procedures such as the direct award[325] or the open procedure with a negotiated phase, available for contracts not covered by the scope of the Directives. The law makers chose to restructure the content of the Directives to fit with the pre-existing national practice.

The scope of Public Contracts Law is defined by means of a general clause encompassing all public contracts that are or should be subject to competition (article 16 of the Public Contracts Code). It has transposed correctly the EU concept of body governed by public law, contrary to what happened in Decree-Laws 59/99 and 197/99. The number of award procedures has been reduced.[326] Modernisation included the transposition of the new procedures mentioned in Chapter 4, namely competitive dialogue, electronic auctions, framework agreements, dynamic purchasing systems and a "centralised purchasing body" that the Public Contracts Code recital states as a direct import from the Directives. The Public Contracts Code has also divided the assessment of the economic, technical or professional

322. Although with some glaring omissions such as the already mentioned public-private partnerships law, the law on Public Real Estate (Decree-Law 280/2007) or the law on Acquisition, Management and Selling of Goods within the State's Private Domain (Decree-Law 30/94).
323. Please see section 2 of the current chapter.
324. On concessions in Portugal please see, Siza Vieira, 'Regime das concessões de obras públicas e de serviços públicos' (2007) 64, *Cadernos de Justiça Administrativa*, p. 47-54.
325. An almost completely discretionary procedure, available up to the limit of euro 150,000 for public works contracts, euro 75,000 for goods and services contracts and euro 100,000 for other contracts except concession of public works, public services and society contracts, as per Public Contracts Code articles 19 to 21. It is also available in specific circumstances irrespective of the value, such as when a previous open or restricted tender has not produced a contract due to the lack of tenders, qualified tenderers or acceptable tenders, as per Public Contracts Code articles 23 to 27. On this procedure, Raimundo, 'Direct Award of Public Contracts: the new Portuguese Public Contracts Code in light of EU Law' (2010) 4 *PPLR*.
326. The restricted procedure without presentation of candidates or the prior consultation procedure were dropped on the new law.

ability of candidates into two different models, simple and complex, whereas before only a single method of evaluation was present in the national law.

One of the major innovations of the Public Contracts Code are the new award criteria rules. These were developed as a way to reduce the scope of discretion by contracting authorities and to uphold the principles of transparency and competition.[327]

New electronic methods of participation in the procedures were introduced, aiming to reduce the time spent on carrying each procedure. As per the Directives' possibility, social and environmental social policies were adopted. Regarding the costs of a contract, the Public Contracts Code moved from the contract estimated cost to the maximum economic benefit to be obtained by the contractor, thus establishing a cap for the expense arising from each contract.[328]

Of all the innovations introduced by the Public Contracts Code one is central to this thesis, which is the competitive dialogue and the way it has been transposed and used in Portugal. Some of the remaining innovations are also incidentally relevant for this research project as they conflict with or complement the Portuguese transposition of competitive dialogue.

(3) Amendments to the Public Contracts Code

The Public Contracts Code has been amended three times since entering into force. Decree-Law 34/2009 established exceptional measures to tackle the finan-

327. According to the three persons involved in the drafting of the Public Contracts Code interviewed by the author.

328. This represents a substantial departure from the Directives 2004/17 and 2004/18 and shows the need of the Portuguese law makers to curb the national practice of bidders presenting (not abnormal) low tenders to win the contract and try to increase their profit margin during the execution of the contract by means of extra works or charges. The Decree-Laws 59/99 and 197/99 on tender procedures, revoked by the Public Contracts Code, allowed for expenditure increase in awarded contracts without any control on the contracting authority of up to 25%. Therefore, bidders would present lower tenders than otherwise they would and bet on bending the contracting authority during the execution of the contract.

cial crisis, including the reduction of timeframes for the restricted procedure and the possibility of the direct award procedure to be used up to a maximum of two million euros in certain circumstances. This regime is in force until the end of 2010.

The second amendment to the Public Contracts Code[329] has ended the transitional period where contracting authorities could still use paper means and made mandatory the use of electronic means to conduct the procedure.

In October 2009 the Public Contracts Code suffered a third revision[330] to facilitate the procurement of R&D contracts, particularly by research institutions.

4. Conclusion

In the current chapter we have provided an overview of public procurement in Portugal. It was seen that the country has a long tradition in regulating public procurement, dating well before the accession to the EU. This tradition was based in the French model of dividing the contracts entered into by the administration in administrative and private contracts. Recent developments and the appearance of the concept of public contracts have rendered the discussion almost useless. We have also seen how judicial review is processed in the country and the current legal regime regulating public procurement. The Public Contracts Code of 2008 introduced the competitive dialogue procedure into the country and its regulation will be analysed in the following chapter.

329. Decree-Law 223/2009.
330. Decree-Law 278/2009.

Chapter 6 - Competitive dialogue in Portugal

1. Introduction

We have seen in Chapter 4 the rules on competitive dialogue as set by Directive 2004/18. In the current chapter we will analyse how the Portuguese national law implements competitive dialogue and the issues raised by the transposition.

This chapter will be divided into eight main sections. After the introduction we will provide a short overview of how the procedure fits in the current procurement framework. In the third we will present the flow of the procedure. In the fourth the grounds for use will be analysed. In the fifth we will present how the procedure is to be conducted. Finally, a detailed analysis of the phases of the procedure with the highlighting of the major issues will ensue in sections 6 through 8.

The content of this chapter includes both the author's interpretation and the product of the interviews carried out with the three persons that have have participated in the draft of the Public Contracts Code mentioned in Chapter 2.[331] All mentions to interviewees in the present chapter pertain to them only and not to the interviewees from the empirical research stage.

2. Competitive dialogue in the Public Contracts Code

The Portuguese law makers took a conscious option of creating a common legal framework across different procurement procedures.[332] That is, they all start from

331. The interview guide is available as Annex III.
332. According to the people interviewed by the author involved in the draft of the Public Contracts Code.

the common rules found on the open procedure with specific rules only for what is (or should be) different. This drafting style leads to some specific issues particular to the Portuguese transposition of competitive dialogue, such as the grounds of use, the impossibility of eliminating candidates and/or solutions, the need to identify a single solution and mandatorily draft a common set of specifications, and eventually, the lack of specific rules on discussions before or after the preferred bidder has been chosen.

The original draft of competitive dialogue was less detailed and much closer to the Directive's blueprint.[333] After an initial public discussion phase of May 2006 it was substantially changed and eventually taken out of the working drafts. It ended up being included by political decision in the end of 2006[334] but with many changes to adapt it to the national framework. According to the respondents interviewed, this was done to mold the procedure to national practice and culture, where a margin of discretion and discussions with participants are uncommon.

The rules on competitive dialogue are divided into three different sections of the Public Contracts Code. In Part II, Title I, Chapter III (articles 30 and 33(1)(2) of the Public Contracts Code) the grounds for its use are to be found, in parallel with the special circumstances in which other procedures can also be adopted.[335] In Part II, Title III, Chapter V (articles 214 to 218 of the Public Contracts Code) the general rules on the use of the procedure are defined. Since article 204 of the Public Contracts Code states the subsidiary application of the restricted procedure rules, Chapter III, articles 162 to 192 of the Public Contracts Code on this procedure have to be taken into account.[336] Finally, some articles from the rules

333. According to two of the respondents.
334. As confirmed by two of the interviewees. Dynamic purchasing systems were also brought back as it was considered it was worthwhile to make them available also.
335. The general rules on defining the appropriate procedure for each contract are on Chapter II and they depend essentially on the value of the contract.
336. For a detailed overview of the interplay between the competitive dialogue and locally developed alternatives for the award of particularly complex contracts, please see Telles, 'Competitive dialogue in

regulating the open procedure are also applicable, such as articles 92, 93 and 99 of the Public Contracts Code on negotiations after the tender stage and confirmation of commitments.

Law makers opted to include in the transposition a number of supplementary rules on competitive dialogue that are not based in Directive 2004/18. Some of these rules restrict the grounds for use of the procedure in the Public Contracts Code. Others limit the numbers of solutions a candidate can provide to the contracting authority or do not allow for the exclusion of candidates during the dialogue. The Portuguese law also mandates the draft of a common set of specifications and tenders to be based on them and not the solutions developed during the dialogue stage. Discussions before and after choosing the winner also appear to be very limited.

Finally, the Public Contracts Code regulates competitive dialogue with the rules from articles and recitals of Directive 2004/18.

3. Flow of the procedure

Before analysing in depth competitive dialogue in Portugal, and as means of rendering easier for the reader to understand what is discussed in detail in subsequent sections, this section will briefly cover the flow of the procedure.

The competitive dialogue in the Portuguese Public Contracts Code is divided into three different phases. The first phase covers the presentation of candidates and the assessment of the economic, technical or professional ability of candidates. The second covers the proposal of solutions and the dialogue itself and the third the analysis of tenders and the award of the contract.

Portugal' (2010) 1 *PPLR*, p. 1-32.

The procedure starts with the publication of the notice in the official journals and the presentation of the potential candidates, who will then have their economic, technical or professional ability assessed. This is done either through a simple or a complex system.[337]

After the candidates have been assessed and before the start of the dialogue itself, they are invited to submit a single interim solution. The contracting authority analyses each candidate's solution and eliminates the candidates whose solution is not adequate to fulfill its need before the dialogue starts. Dialogue then ensues with the qualified candidates who had their solutions accepted, with the aim of discussing all the issues related to the execution of the contract and to create a common set of technical specifications.

Dialogue with the candidates lasts until either one solution that best meets the needs of the contracting authority is identified or all are considered as inadequate. The contracting authority then notifies the candidates of its decision. If a solution has been found, it will used as a basis for the technical specifications under which all candidates will tender.

The candidates are invited to submit their tenders and the contract awarded to the most economic advantageous tender. There is no phase similar to the fine-tuning stage of article 29/6 of the Directive 2004/18, although the contracting authority may request information from the tenderer as it would in the open and restricted procedures. After the preferred bidder has been selected, it is possible to confirm commitments and limited amendments to the winning bid, again under the same circumstances as in any open or restricted procedure.

337. The differences will be explained in detail in section 8(1) of the current chapter.

From the flow of the procedure it is clear that in Portugal, after the submission of tenders, competitive dialogue is identical to the open or restricted procedures, since no specific rules for competitive dialogue exist.

4. Grounds for use

In both the EU and national frameworks the procedure is to be used for the award of complex contracts, when it is impossible to define the technical, legal or financial make-up of a contract. Three major differences between the two frameworks can be highlighted. The first is that in Portugal, the grounds for use appear to be more limited than the scope theoretically admitted by Directive 2004/18, as the Public Contracts Code is more demanding in the filling of the requirements for the use of the procedure. Secondly, the Public Contracts Code excludes the use of the procedure for the award of some contracts on the utilities sector. Thirdly, in Portugal, the procedure may be used freely to award contracts of a value inferior to the thresholds as long as they fulfill all the substantive requirements.

The rules on the grounds for use can be found in articles 30 and 33 of the Public Contracts Code which we will proceed to analyse now.

(1) General rules on the grounds for use

According to article 30/1 of the Public Contracts Code, competitive dialogue can be used for the award of any type of contract[338] as long as it is particularly complex and the complexity renders impossible (and not only inadequate) the use of the

338. This includes public works, goods and services, works and services concessions, society and public private partnership contracts.

open or restricted procedures. This appears to limit the use of the procedure in Portugal to those situations where defining the specifications at the onset is impossible, seemingly adopting a strict view[339] on the grounds for use of this procedure.

Paragraph two of article 30 of the Public Contracts Code is akin to article 1/11(c) of Directive 2004/18. It explains what is deemed as a particularly complex contract. The Directive states that a contract is particularly complex when the contracting authority is *"not objectively able"* to define the technical means, legal or financial make-up of a contract. For the purposes of the Portuguese law, however, a contract shall be deemed complex if for the contracting authority is *objectively impossible* to define either the *technical solution*,[340] technical means[341] or financial or legal make-up of the contract.[342] Therefore, it appears that if the Portuguese contracting authority is able to define a technical solution (even if not the best, since it is no longer *objectively impossible* for a solution to be defined) it may not use competitive dialogue to award the contract.

Two of the respondents stated that the subtle change in both the wording of article 30/1 and 30/2 of the Public Contracts Code was done consciously for two main reasons. Firstly, the draft was adopted as a signal to contracting authorities that they should not overuse the procedure. This care and apparent fear of abuses by contracting authorities is present throughout the draft of competitive dialogue in the Public Contracts Code.[343] Secondly, according to one of the respondents, it was also adopted because the objective of the dialogue is to draft a common set of specifications and not have a competition of different solutions at the tender

339. As we have discussed above in Chapter 4, section 4, on the different interpretations of the grounds of use.
340. Article 30/2(a) of the Public Contracts Code.
341. Article 30/2(b) of the Public Contracts Code.
342. Article 30/2(c) of the Public Contracts Code.
343. One of the respondents declined to comment on this topic.

stage. According to this source, competitive dialogue shall only be used when the contracting authority is unable to draft the technical specifications.[344] This opinion confirms the idea suggested above that in Portugal competitive dialogue is only available when it is actually impossible to use the open and restricted procedures.

If the view exposed in the previous paragraph is correct, it will not be possible to use competitive dialogue in situations where the contracting authority is able to draft specifications but the use of the open or restricted procedures would not lead to the discovery of the best solution for its needs. It could be argued that not only the strict interpretation limits the theoretical scope of situations where competitive dialogue could be used, but also that it leads to the use of procedures that may not be tailored to find the best solution for the contracting authority's needs.[345]

Further to the above, the procedure is only available if the contracting authority is unable to identify the technical means needed for the performance of the contract.[346] However, if the contracting authority is able to express clearly the performance or functional needs it wants to address,[347] then it is considered that it may produce technical specifications detailed enough to launch an open or restricted procedure. In consequence, competitive dialogue seems to be unavailable in these situations.

Article 30/3 of the Public Contracts Code has a provision limiting the use of the procedure to cases where the objective impossibility of defining the technical so-

344. Kirkby, 'O diálogo concorrencial' in *Estudos da Contratação Pública - I* (Coimbra Editora, 2008) p.303-306, thinks the correct interpretation is to consider the limitation in the light of the Directive 2004/18 and the Commission's Explanatory Note on the competitive dialogue. This author accepts a more liberal interpretation than apparent by the letter of the law.
345. As argued by Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 634.
346. Article 30/2(b) of the Public Contracts Code.
347. These are set by article 49/2(c) and (d) of the Public Contracts Code. They are similar to the rules on performance and functional requirements set forth by article 23/2(b), (c) and (d) of the Directive 2004/18.

lutions, technical means, financial and legal make up is not due to fault of the contracting authority. This is similar to the position found in the first part of Recital 31 of the Directive 2004/18. This recital states that *"[c]ontracting authorities, which carry out particularly complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs (...)."* While the recitals of Directives are useful to interpret the content of articles, the Portuguese law makers opted to elevate what was in Directive 2004/18 as a recital to the same level of the dispositions found in article 29 of this Directive. In Portugal, competitive dialogue may only be used lawfully if the objective impossibility has not been created by an action or omission of the contracting authority.

The last paragraph of article 30 of the Public Contracts Code states that the objective of the procedure is to discuss with potential tenderers all issues stated in article 30/2. No significant changes from what is on the second part of article 29/3 of the Directive 2004/18 are to be found, apart from the express mention of environmental and horizontal policies. It is strange, nonetheless, to find this paragraph in article 30, since the chapter of the Public Contracts Code to which it belongs is dedicated only to the grounds of use of award procedures and not their content. It seems out of context and organisationally speaking it would make much more sense to find this paragraph integrated in the section of the Public Contracts Code where the procedure is discussed in detail.[348]

(2) Rules for utilities contracts

It would be expected to find all the relevant *contextual* rules for competitive dialogue grounds of use in article 30 of the Public Contracts Code. However, in the

348. Articles 204 through 218 of the Public Contracts Code.

chapter immediately following (Chapter IV, "Other rules to choose a procedure") there is a potentially major limitation regarding the grounds of use of competitive dialogue. Article 33/1/2 of the Public Contracts Code states that competitive dialogue cannot be used at all if the contract is directly and fundamentally connected with any activity in the utilities sectors (water, energy, transport and postal services) and the contracting authority is mentioned in article 7/1 of the Public Contracts Code.[349]

In the Directive 2004/17, competitive dialogue is not mentioned as a procedure available but there is no provision forbidding its use. The Public Contracts Code, on the other hand, expressly disallows the use of competitive dialogue for the contracts in the utilities sector.[350] According to one of the respondents, since the Directive 2004/17 did not mention competitive dialogue, it made no sense to allow its use. However, the Commission in its Explanatory Note[351] mentions some utilities sector contracts such as major integrated transport networks where competitive dialogue might be of use.

It must be said that the aforementioned exclusion does not cover all the contracts that are considered by the Directive 2004/17 as utilities contracts, since the defining element for the Public Contracts Code is not only the type of contract but also the contracting authority. The objective of the law makers was to make sure that the contracting authorities were covered by the scope of Directive 2004/18[352] always used the procurement procedures established in this Directive and not the lighter procedures of the Directive 2004/17.[353] In consequence, in

349. Article 7/1 of the Public Contracts Code lists the contracting authorities in the utilities sector.
350. It seems possible for the contracting authorities mentioned in article 7/1 of the Public Contracts Code to use the competitive dialogue for the award of contracts not specifically and fundamentally linked with the utilities sector activities. Since the main business activity of such authorities is exactly connected with *utilities*, it seems difficult to think of an example of a particularly complex contract that they might want to tender under the competitive dialogue.
351. Commission, *Explanatory note - competitive dialogue - classic directive* (2005) p.3.
352. Article 1/9 of the Directive 2004/18, transposed with similar content by article 2/1 and 2/2 of the Public Contracts Code.
353. Medeiros, 'Âmbito do novo regime da contratação pública à luz do princípio da concorrência' (2008) 69,

Portugal, State, regional or local authorities, public institutes, public foundations,[354] public associations and associations composed by one or more of the previous, have to award their contracts as per the general rules of public procurement even if the contract itself is objectively a utilities contract.[355] The nature of the contracting authority is relevant to determine which set of rules is applicable.[356] Therefore, Portuguese rules for utilities contracts cover only the utilities contracts awarded by *some* contracting authorities, namely the ones referred to in article 7/1 of the Public Contracts Code:

- Any body not covered by article 2 of the Public Contracts Code, even if established for the specific purpose of meeting needs in the general interest with industrial or commercial character and operating in the utilities sector and subject to a dominant influence by any of the entities mentioned in article 2;
- Any body not covered by article 2 of the Public Contracts Code benefiting from special or exclusive rights not awarded after a procurement procedure with international publicity whereas such rights:
    - Reserve to those bodies (by themselves or in conjunction with other entities) the exercise of activities in the utilities sectors;
    - Substantially affect the capacity of other entities to operate in the same sectors;
- Any body incorporated exclusively by one of the contracting authorities mentioned above or by them financed, for the most part; or subject to management supervision; or having and administrative, managerial or supervisory

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Cadernos de Justiça Administrativa p.28-29.

354. With the exception of the ones mentioned in the Law 62/2007.

355. Where these bodies' for the most part finance, subject them to management supervision or appoint more than half of the administrative, managerial and supervisory boards of such associations.

356. This is a marked departure from the previous legal regime covering utilities contracts. Until the Public Contracts Code, the defining element was the objective scope of the contract. For more information, see Ibid. and Medeiros, 'A contratação pública nos sectores com regime especial: água, energia, transportes e telecomunicações' (Paper) (2004).

board, more than half of whose members are appointed by such contracting authorities, destined for the exercise of activities in the utilities sectors.

The contracting authorities above mentioned are clearly covered by the utilities rules in the Public Contracts Code and, thus, forbidden from using competitive dialogue to award a contract in the utilities sector, as per article 33/1/2 of the same law. What is not so clear is if the bodies governed by public law[357] are also covered by this limitation, and arguments can be found supporting both theories. On the one hand, since article 12 of the Public Contracts Code extends the utilities regime subjective scope to include the entities referred to by its article 2/2 - the bodies governed by public law - one could argue that they are also bound by article 33/1 and 33/2 of the Public Contracts Code and, thus, unable to use competitive dialogue to award contracts in the utilities sector. On the other hand, article 33/1 makes an explicit reference to the contracting authorities of article 7/1 of the Public Contracts Code only, without mentioning the authorities of article 12. In addition, one could argue that if the law makers would have wanted the authorities of article 12 to be covered by all the rules on the utilities sector, then it would have included them directly in article 7/1. Even so, none of the arguments seems to be decisive and it is still to be concluded if the contracting authorities of the article 12 of the Public Contracts Code, which as we have seen are the bodies governed by public law, as envisaged by the Directive 2004/18, are covered by the limitation on the grounds for use of competitive dialogue.

Irrespective of the precise scope of entities covered, the Portuguese law makers introduced an arbitrary limitation to the use of competitive dialogue in article 33/1 and 33/2 of the Public Contracts Code. One could imagine that a contracting authority awarding a contract under the scope of the Directive 2004/17 could devel-

357. As defined by article 1/9 of the Directive 2004/18.

op a negotiated procedure with similar characteristics to competitive dialogue. In Portugal it seems that such option is not possible. Furthermore, the negotiated procedure has its own structure, with four specific phases that are mandatory: presentation of candidates and assessment of the economic, technical or professional ability of candidates; presentation and analysis of preliminary tenders; tender negotiation; analysis final tenders and award.[358] The structure may appear similar, but the inclusion of a proposals *negotiation* phase, albeit without any sort of limitation whatsoever, seems to imply that the objectives of this phase are different than the dialogue phase of competitive dialogue, thus leading to the discussion of the exact contents of the concepts *negotiation* and *dialogue*. It does not seem farfetched that dialogue (as configured in the dialogue phase of competitive dialogue procedure) could be construed as a form of negotiation and, in consequence, lead to the availability of competitive dialogue's dialogue phase under the negotiated procedure guise. But that does not entail that such negotiated procedure is a competitive dialogue as each procedure has its own specific sets of rules.

It can be argued that in face of Directive's 2004/17 more flexible framework, the relevance of competitive dialogue would be limited. Even so, in Portugal a contracting authority covered by article 7/1 of the Public Contracts Code may not use competitive dialogue to tender utilities contracts.

(3) Contracts under the thresholds of Directive 2004/18

Finally, regarding the grounds for the use of competitive dialogue in Portugal, and in the absence of any provision stating otherwise, this procedure can be used to award contracts under the thresholds of Directive 2004/18, provided the condi-

358. Articles 193 through 203 of the Public Contracts Code.

tions established in the national law are followed. Whereas typically the award procedures have been divided in prior national laws and in the Public Contracts Code by the value of the contract,[359] competitive dialogue has no grounds for its use based in *value*. All its grounds for use are based in substantive factors without a minimum value. Therefore, whatever the cost, if the contract is deemed as particularly complex and all the legal conditions are met, there is no reason limiting the use of this procedure. As an example, if for an IT system for the control of warehouse stocks valued around €100,000[360] the complexities in its development warranted that all the substantive conditions for the use of competitive dialogue were met, there is no legal reason for the contracting authority not to use this procedure.

(4) Public-private partnership contracts

As mentioned above in Chapter 4, the Commission has pointed to public-private partnership contracts[361] as being a prime example of an area where competitive dialogue procedure might be used.

In section 2 of the current chapter we have seen that competitive dialogue cannot be used for the award of utilities contracts by certain contracting authorities. Furthermore, as explained elsewhere,[362] contracting authorities are used to award contracts not covered by the scope of the Directive 2004/18, including public-private partnership contracts, through the open procedure with a negotiation phase.

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359. From the open procedure as default procedure for all contracts above a certain national threshold to the direct award to all contracts under also a national threshold.
360. It is a value below the current thresholds. In accordance with Regulation (EC) 1177/2009, for 2010 the thresholds are €125,000 (most central government contracts), €193,000 (most local and regional contracting authorities) and €4,845,000 for works contracts.
361. On these contracts, see Andrade and Santos Raquel, 'Public-Private Partnership in Portugal - The Legal Structure of the Public-Private Partnership Contract and the Peripheral Contracts' (2010) 5 *EPPPL*, p. 46-53 and Branco, 'Portugal: A Closer Look at Public-Private Partnerships' (2000) 4 *EPPPL*.
362. Telles, 'Competitive dialogue in Portugal' (2010) 1 *PPLR*, p. 1-32.

For all other public-private partnerships, competitive dialogue is in theory available. However as mentioned in Chapter 5 above, Decree-Law 86/2003 that regulates these contracts in Portugal is still applicable and has not been revoked by the Public Contracts Code. The compatibility of its legal regime with competitive dialogue has been questioned, in particular the need to make a thorough assessment of the technical and financial viability of the project before the formal launch of the tender.[363] In addition, the said law presupposes that the launch of the actual tender will include detailed technical specifications, thus precluding the possibility of competitive dialogue being used.[364] Therefore, it can be argued that until Decree-Law 86/2003 is updated it will not be possible to use competitive dialogue to award public-private partnerships in Portugal. However, it has been argued also that the Decree-Law is not applicable to the tender stage and its rules cover only the preparatory stage of the contract.[365]

5. Conduct of the procedure

According to article 204/1 of the Public Contracts Code, when no specific rules exist, competitive dialogue procedure follows the rules of the restricted procedure with prior assessment of the economic, technical or professional ability of tenderers with the necessary adaptations.[366] As an example, the assessment of the economic, technical or professional ability of candidates, for instance, will be done according to the rules established in articles 167 through 188 of the Public Contracts Code.

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363. Kirkby, 'O diálogo concorrencial' in *Estudos da Contratação Pública - I* (Coimbra Editora, 2008), p. 307.
364. Ibid., p. 307.
365. Ibid., p. 310.
366. Prior to the Public Contracts Code two different types of restricted procedures were present in national legislation: one with prior assessment of the economic, technical or professional ability of candidates and another without. The second was dropped in the Public Contracts Code. Although the descriptive name was maintained it now expresses what is defined in Directive 2004/18 as the restricted procedure.

The second paragraph of article 204 contains two limitations regarding the conduct of the procedure. Firstly, the use of electronic auctions during a competitive dialogue procedure is prohibited. Secondly, contracting authorities are not permitted to include a negotiation phase, such as the one established in article 149 of the Public Contracts Code for the open procedure with a negotiation phase. This might indicate that the dialogue stage is to be taken as a stage to have discussions and not negotiations.[367]

6. Jury for the procedure

The competitive dialogue procedure is managed by the jury for the procedure on behalf of the contracting authority. The rules for composition, functioning and powers are identical to the open or restricted procedures.[368]

The jury will have an odd number of members with a minimum of three. Directors or employees of the contracting authority are not barred from serving as members.

Decisions by the jury are taken by majority and abstention is not admitted.[369] Any voting declarations are to be included in the minutes of meeting.[370] If deemed appropriate, the jury may hire experts or consultants to assist it in the decision making process. Experts and consultants are entitled to take part in the meetings without voting rights.[371]

The jury is empowered to assess the economic, technical or professional ability of candidates and also the tenders submitted. It is also responsible for drafting the

367. The author was told by one of the respondents that the concept of "negotiations" was to be interpreted strictly and was to be available only for the open procedure with a negotiated phase or the negotiated procedure. Negotiations should not happen during the dialogue stage.
368. Articles 67 through 69 of the Public Contracts Code.
369. Article 69/3 of the Public Contracts Code.
370. Article 69/4 of the Public Contracts Code.
371. Article 69/6 of the Public Contracts Code.

respective reports on these assessments. The jury does not take a final decision on any of these matters, as this power remains in the contracting authority.[372]

Specifically to competitive dialogue, the jury will also have to draft the report on the dialogue stage and suggest to the contracting authority which solutions is the winning or if none is good enough to meet the needs of the contracting authority.[373] It is debatable if the contracting authority may delegate to the jury the decision on the winning solution as it is not expressly forbidden by the Public Contracts Law. However, it can be argued that the act of selecting the winning solution may have an impact on candidates not totally dissimilar to an exclusion.[374] Further to this point, if the decision is that no solution is good enough to meet the needs of the contracting authority, then it effectively ends the procedure and is similar to excluding all the candidates.

7. Tender documents

Tenders in Portugal traditionally have two different sets of documents which are disclosed to potential candidates at the beginning of the procedure. One is the set of "tender documents" consisting mostly of legal rules and procedural notes. The other is the "technical specifications" where the exact conditions on what is being procured are defined.[375] Regarding competitive dialogue, the Public Contracts Code kept this division, with one article on the descriptive document and another on technical specifications.

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372. Article 70/1 and /2 of the Public Contracts Code. According to paragraph 2 of article 70, the contracting authority is not entitled to delegate the final decision on the assessment of the economic, technical or professional ability of candidates or the award of the contract.
373. Article 215 of the Public Contracts Code.
374. Selecting a winning solution does not mean the remaining candidates have been excluded since they are to be invited to the tender stage. However, the remaining candidates may consider this represents a disadvantage and decide not to submit a tender.
375. Although the border line is not clearly defined and the same content may appear in both sets of documents.

Tender documents of a competitive dialogue (article 206/1 of the Public Contracts Code) shall include all the elements that are needed for the restricted procedure with prior assessment of the economic, technical or professional ability of tenderers (article 164 of the Public Contracts Code) identifying both the contract and the contracting authority.

If payments for the development of solutions are to be made to candidates, this information has to be included in the notice[376]

As per article 44/3 of the Directive 2004/18 the minimum number of candidates to admit to the dialogue stage is three.

Award criteria for the contract have also to be disclosed at this point. As in the Directive, if the contracting authority cannot disclose the exact values of the criteria it will have, at least, to order them from the most to the least important.[377]

On the technical specifications, as competitive dialogue shall be used in particularly complex contracts where at least one of the elements making up the contract cannot be defined beforehand, no detailed technical specifications have to be clearly set before the ending of the dialogue phase. At this point, contracting authorities have to define an outline or guide to include in the descriptive document. The Portuguese Public Contracts Code reflects this in article 207/3. In article 207/2 it mandates the disclosure of information such as the website or electronic platform where information is to be found. It also includes a reference to administrative duties that have to be done by the contracting authority, such as taking note of the name and email address of the interested parties that have requested those materials (article 133/4 of the Public Contracts Code).

376. Article 29/8 of the Directive 2004/18 has no provisions on the moment the information on the payment of solutions should be made to the candidates.
377. Article 206/4 of the Public Contracts Code.

8. Phases of the procedure

In the Public Contracts Code competitive dialogue is divided into three phases:[378] i) presentation of candidates and assessment of the economic, technical or professional ability of candidates; ii) presentation of solutions and dialogue with qualified candidates; iii) presentation of tenders and award.

(1) Presentation of candidates and assessment of the economic, technical or professional ability of candidates

The competitive dialogue procedure starts with the publication of the notice in the national Official Journal (*Diário da República*) according to article 208/1 of the Public Contracts Code. In the event that the contract to be awarded through a competitive dialogue is a public works, public works concession, goods or services contract then the notice has always to be published also in the Official Journal of the European Union, irrespective of the base price defined in the technical specifications.[379] This seems to be a sensible solution by the law makers to increase awareness on the contract outside the country, thus potentially raising the number of candidates interested in participating in the dialogue.

The reference to "price estimation in the technical specifications" by article 208/2 of the Public Contracts Code may be construed as a mistake by the law makers since no "technical specifications" are to be published with the contract notice, but only a descriptive document[380] which can be much less detailed than the "technical specifications" used at the beginning of an open or restricted procedure. It also makes no sense to presuppose a price at this stage since we are

378. Article 205 of the Public Contracts Code.
379. Article 208/2 of the Public Contracts Code.
380. Articles 29/2 of the Directive and 207 of the Public Contracts Code.

talking of a particularly complex contract which, by design, the contracting authority is unable to fully determine at the beginning of the procedure. In some cases, the contracting authority may be unable to determine a price at this point, if for instance, it does not know the exact scope of the contract or the legal and financial make-up. It seems thus strange, and probably difficult, to demand the contracting authority to disclose a price in these circumstances.

(a) Systems available for the assessment of the economic, technical or professional ability of candidates

The assessment of the economic, technical or professional ability of candidates is done in accordance with articles 168 through 188 of the Public Contracts Code. Two different methods are, in theory, available to the contracting authority, one "complex" and another "simple". These methods share most of their provisions. The common rules are present, namely, in the articles 167 through 178 and 182 through 188 of the Public Contracts Code. The specific rules on the complex method are stated in articles 181 and 184/3 and the ones on the simple method in articles 179 and 180. Directive 2004/18 in articles 44, 47 and 48 does not have any details on which method to adopt if more than one is available to the contracting authority.

Two of the interviewees explained that there was no intention of limiting the options of the contracting authority at this stage.

(b) The complex system

The complex system is based on a selection model founded on the criteria of best technical and financial ability (article 181/1/2 of the Public Contracts Code). At

the beginning of the competitive dialogue procedure, according to articles 164/1(m)(ii) and 206/2 of the Public Contracts Code the contracting authority must state the number of candidates that it will qualify, which cannot be less than three. However, one of the interviewees saw no problem in carrying out with the procedure even if less than three were qualified. The criteria to evaluate the candidates have to be disclosed at this point. These criteria imply the application of a demanding evaluation model similar to the one used to evaluate tenders on open procedures when the contract is to be awarded based on the most economically advantageous criteria.[381]

In the preliminary report[382] candidates achieving the minimum standard will then be ranked according to their score. Per articles 164/1(m)(ii) and 206/2 of the Public Contracts Code, this method allows for the exclusion of some candidates, as long as at least three are invited to take part in the next phase of the competitive dialogue procedure.

In accordance with article 181/3 of the Public Contracts Code, the contracting authority is bound to select the higher ranked candidates until it reaches the number pre-defined in the technical specifications (open and restricted procedure) or descriptive document (competitive dialogue).[383] The contracting authority is twice bound in the qualification of candidates: to the number candidates previously chosen and to the order of the ranking. In no way can a contracting authority decide at this moment to re-define the number of candidates to carry out to the following phases of the procedure, nor to pick a candidate deemed as suitable but classified lower in the ranking.

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381. Article 139 of the Public Contracts Code. All interviewees were clear in heralding the demanding new proposals' evaluation model as one of the landmark advances of the national law.
382. Presumably also in the final report.
383. Two of the respondents confirmed this when asked which of the candidates should be carried to the next phase, were clear in answering that the best and only the best. That is, if five are deemed suitable, and a limit of three had been pre-defined, then only the best three are to be invited.

The pre-determination of the number of candidates to be carried forward leads to another problem. Such a system is geared for the restricted procedure where the contracting authority is well aware of the needs it is procuring and has to produce at the beginning of the procedure a detailed technical specification. With competitive dialogue the contracting authority may have doubts on what exactly it wants to procure either at a technical, legal or financial level. With this in mind, the contracting authority does not have to provide detailed specifications at the beginning of the procedure, but only a descriptive document which does not need to be as detailed as the technical specifications for a restricted procedure. According to article 164/1(m)(i) the selection model in which the complex system is based has to be published at the onset of the procedure, which makes sense for the restricted procedure. However, that article expressly demands an extremely detailed selection model to be disclosed including criteria, sub-criteria, weightings, scales and mathematical formulae. The issue here is that this level of detail may not be achievable by the contracting authority in all competitive dialogue procedures as the procedure is to be used in situations where the contracting authority is unsure about certain conditions of the contract to tender. It is not farfetched to think of an example where the contracting authority may have opted for the complex method and drafted the evaluation model accordingly only to find out during the dialogue that it had picked the three best candidates to provide solutions for the wrong need. On the other hand, if the contracting authority has done some previous research on its needs, maybe it will be able to draft an adequate selection system. That is why the author deems this system may or may not be adequate, mainly depending on the starting point of the procuring entity.

(c) The simple system

The simple system of article 179 of the Public Contracts Code states that *all* candidates with the necessary technical and financial ability are entitled to submit tenders. Candidates are considered as financially able simply if a bank statement is produced in accordance with the model supplied in Annex VI of the Public Contracts Code. No rules are present on how to evaluate the technical ability of candidates.

The distinguishing feature of this system is that all candidates fulfilling the minimum requirements set forth by the contracting authority have to take part in the procedure and numbers cannot be limited in advance. This makes sense in a restricted procedure for which the rule on article 179 was originally devised. However, when applied to competitive dialogue the impossibility of restricting the number of candidates with this model may have the consequence of fostering dialogue stages where an extensive number of candidates take part, increasing the transaction costs for the contracting authority. In addition, in Portugal contracting authorities are barred from excluding solutions or candidates during the dialogue stage.

Article 206/2 of the Public Contracts Code, however, has a provision stating that the number of candidates to qualify may be limited to a minimum of three.[384] This provision is completely incompatible with the simple model as described above because the assessment made by the simple system is a binary test: the candidate either has or does not have the qualities required by the contracting authority to take part in the procedure. This would not be a problem if the simple system allowed for the marking of candidates on a list, from the best to the least

384. As article 44/3 of Directive 2004/18 does.

suited, as the complex system does. *Alas*, it does not. In consequence, ***all*** candidates making the cut have to be invited to take part in the dialogue stage. Article 206/2 is to be interpreted then as being applicable only to the complex system.

One can argue that the simple system is adapted to facilitate and speed up the tendering of straightforward contracts. As competitive dialogue shall be used only in the case of complex contracts and the specific qualities or characteristics of the candidates will determine the quality of the discussions during the dialogue phase and not only prospective tenders. It seems logical that the previous assessment of the economic, technical or professional ability of candidates shall be done in accordance with the method that better pursues the objectives of competitive dialogue. If one compares both systems side by side, it seems that the complex system - albeit more cumbersome - is more geared to the needs of competitive dialogue. The complex system allows for the ranking of candidates and the exclusion of qualified candidates, whereas the simple does not. The complex system also thoroughly checks the abilities (technical and financial) of any candidate through an evaluation model similar to the tenders evaluation, determining in the process which candidates are the best qualified for the tender, whereas the simple system for the financial ability only demands the compatibility of candidates with a set of minimum requirements.

(d) Rules common to both systems

Whatever the method that the contracting authority uses, a preliminary report must be drafted stating which candidates will probably be admitted and which will probably be excluded. As per the Portuguese tradition, between the preliminary report and the final decision the candidates are entitled to present their opinion to the contracting authority (articles 184 and 185 of the Public Contracts

Code).[385] After the final report, the contracting authority is then bound (according to the epigraph of article 187 of the Public Contracts Code) to select the qualified candidates within 44 days of the start of the selection process. The qualified candidates are then carried to the next phase of the procedure on an equal footing (article 187/2 of the Public Contracts Code).

Whereas article 44/3 of the Directive allows for a smaller number of candidates to be qualified as long as genuine competition is ensured, there is no such provision in the Portuguese law. Article 206/2[386] clearly states the minimum number is three without any sort of exceptions and does not provide a clear path to the contracting authority to continue the procedure if only two candidates are considered suitable.

(2) Presentation of solutions and dialogue

After the contracting authority has assessed the economic, technical or professional ability of candidates, the ones deemed as suitable are then simultaneously invited to present their solutions.[387] The invitation has to comply with some formalities, namely by providing invitees with the identification of the procedure (including the reference number attributed by the national and European Official Journals), the deadline to submit solutions and what foreign languages are to be admitted in the dialogue if any.[388]

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385. What constitutes a form of mandatory standstill. If the decision changes by influence of the candidates position - the contracting authority is not bound to upheld them - then a new preliminary report shall be issued with the revised probable decision and a new period of consultations is opened. This can be repeated as many times as needed to have a final decision that is identical to the preliminary report.
386. The article 206/2 of the Public Contracts Code includes a provision specific to the competitive dialogue, whereas the use of the rules from the restricted procedure, such as the reference to article 164/1(m)(ii) are only to be applied subsidiarily, that is if no specific rule regarding the competitive dialogue exists.
387. Article 209/1 of the Public Contracts Code.
388. Article 209/2 of the Public Contracts Code. When queried one of the respondents said this rule was here to make it similar to that of article 58/1 of the Public Contracts Code. It is of worthy note that he then proceeded to say that if he were drafting today he may have had a more open opinion regarding the possibility of accepting solutions drafted in other languages.

The solution has to be drafted in Portuguese[389] following the rules stated by article 62 of the Public Contracts Code for tenders in general. The jury will then produce a preliminary report where it will justify the admission and exclusion of solutions to be carried to the dialogue. According to article 212/2 of the Public Contracts Code the jury shall propose the exclusion of solutions if any of the following occurs: i) were presented after the deadline; ii) did not follow the rules on form of article 62 of the Public Contracts Code; iii) were drafted in a non-accepted language; iv) or were "manifestly inadequate" to fulfill the needs of the contracting authority.

(a) Presentation of a single solution by each candidate

Each admitted candidate can present only one solution,[390] in what seems an arbitrary limitation imposed by the Portuguese law makers. On the one hand, this may reduce the scope of possible solutions to be found during this procedure. On the other hand, it can be argued it will focus candidates' efforts on what they consider their best solution for the need of the contracting authority and on improving such solution. It may also keep costs down since each candidate can only put resources into developing one solution. However, under specific circumstances where only few companies have the expertise in a certain field, it could be more productive having them developing and delivering more than one solution. For instance, in an IT project, a company may have two different products that may suit the contracting authority but it is limited from the beginning to choosing one to present in competitive dialogue. It seems an unnecessary limitation by

389. Although some of the documents may be delivered in a different language if allowed by the invitation, article 211 of the Public Contracts Code.
390. Article 210/2 of the Public Contracts Code.

the Public Contracts Code that may harm the dialogue effectiveness in specific situations, or even collide with the principle of competition.

The reason for this limitation may be due to the fact that the interim solution presented by the candidate will be assessed at the start of the dialogue stage.

Further to the issue of restriction to a single solution, it should be added that the Public Contracts Code also disallows the possibility of the contracting authority side-stepping the mentioned limitation by means of admitting variant solutions. Articles 210/2 and 59/7 of the Public Contracts Code read in parallel make it clear that the intention of the law makers was to limit the discussion to a single solution per candidate. The first article limits from the onset the possibility of having more than a single solution in competitive dialogue and the second[391] clearly states that in the absence of a reference to the possibility of having variant proposals in the tender documents, they cannot be presented. All interviewees said that the decision was taken as to make competitive dialogue as similar as possible to the open and restricted procedures and forcing candidates to play their best hand in the solution they choose.

(b) Evaluation of preliminary solutions

The jury will recommend to the contracting authority which solutions should be carried to the dialogue phase and which should be dropped. It is not clearly resolved by the Portuguese law how those preliminary solutions are to be evaluated. In other words, the law does not specify what criteria should be used to assess them. The assessment of economic, technical or professional ability of candi-

391. Although it is a rule present in the Chapter regarding open procedure, it shall be applicable to the competitive dialogue as the rules on the open procedure are applicable subsidiarily to the restricted procedure and, in turn, the rules on this procedure are subsidiarily applicable to the competitive dialogue. Variants are, however, admitted at the tender stage.

dates[392] and final tenders are bound to a number of specific rules reducing the contracting authority's discretion during the evaluation. On the admission or exclusion of interim proposals, article 212 of the Public Contracts Code has a number of formal rules for the contracting authority to comply with, but nothing on how to evaluate the *substance* of the solutions. One could argue that the descriptive document should include some specific rules on the evaluation of the interim proposals, and nothing in the Public Contracts Code forbids the contracting authority from including such details, although there is no legal obligation to do so or guidelines on how to include this content in accordance with the national law. In the event no such specific rules are included, the solution can only be to apply the award criteria for the assessment of final tenders which has to be disclosed in the descriptive document.[393] This solution mirrors article 29/4 of Directive 2004/18 which states that in the event of successive stages taking place to reduce the number of candidates, the award criteria disclosed in the contract notice or descriptive document shall be applied.

After receiving each candidate's solution, the jury will then produce a preliminary report where it will justify their admission or exclusion. It should be noted that the grounds for exclusion are limited to the ones mentioned in article 212/2 of the Public Contracts Code and applicable general principles.[394] All of the reasons listed in article 212/2 of the Public Contracts Code are simply formal conditions,[395] apart from one - the test of adequacy of a solution which is a substantial condi-

392. Especially if complex system of assessing the economic, technical or professional ability of candidates is employed as discussed above.
393. Articles 206/3, /4 and 164/1(n) of the Public Contracts Code.
394. One of the interviewees admitted the possibility of the contracting authority imposing other exclusion grounds in the tender documents. It seems reasonable to admit that the descriptive document could include some specific rules on the evaluation of the interim proposals, as nothing in the Public Contracts Code forbids the contracting authority from including such details, although there is no legal obligation to do so or guidelines on how to include this content in accordance to the national law.
395. These are the presentation of the solution after the deadline; not following the formal rules on how to submit the solution; using a foreign language that has not been declared previously as acceptable; and if the solution is "manifestly inadequate" to fulfill the needs of the contracting authority.

tion. This assessment of clear inadequacy is the only moment in the whole procedure where contracting authorities are allowed to exclude solutions. Thus, this feature may have a paramount importance to the good application of the procedure, especially if the simple method of assessing the economic, technical or professional ability of candidates is used. Furthermore, as no rules whatsoever are given to guide the contracting authority in this process, this seems inconsistent with all the interviewees opinion that care was taken in the transposition drafting to reduce the contracting authority's discretion to a minimum and which can be clearly seen elsewhere, as for instance the option to have only a common set of specifications at the end of the dialogue, allowing the demanding award criteria rules to be applied at tender stage.

After consulting candidates prior to the final decision, the jury will submit a final report to the contracting authority with the list of solutions to admit and/or exclude. This report is not binding and the contracting authority has the discretionary power to agree or not with the findings of the jury.[396] On this point the Portuguese solution seems to have added a supplementary rule to what is in Directive 2004/18. In fact, it has created a new decision point in the procedure before the beginning of the dialogue phase. There is no doubt that in Directive 2004/18 the contracting authority can have successive stages in the procedure to eliminate interim proposals put forward by the candidates.[397] The Portuguese law, however, defines the moment *before* of the start of the dialogue as the sole one where a solution may be excluded, and only if it is "manifestly inadequate". The candidates present a solution[398] subject to evaluation *before* the beginning of the dialogue phase, thus potentially reducing the number of candidates to have discussions

396. Article 212/4/5/6 of the Public Contracts Code.
397. Article 29/4 of the Directive.
398. Without any information given on what details should be given in the proposal.

with during that phase. What seems unavailable is the elimination of solutions (and in consequence candidates) *during* the dialogue itself.[399] There is also no express provision in the Portuguese law on the criteria to evaluate the proposals submitted before the beginning of the dialogue.[400]

(c) Dialogue itself

The dialogue itself starts after the contracting authority notifies all candidates on the decision about the solution each has put forward.[401] The dialogue between the candidates and the contracting authority is aimed, in the Public Contracts Code, to discuss the elements present or absent on each admitted proposal and that are relevant for the drafting of detailed specifications.[402]

Dialogue is subject to a number of formalities. Minimum notification periods,[403] rules on what should be included in the minutes of meeting,[404] rules on who can be present in the meetings and is entitled to represent the candidate,[405] cautions regarding equal treatment between candidates,[406] and the ban on transmitting confidential information[407] are all present in the Portuguese law.

The option to include and clearly state formalities is typical of the Portuguese legislative system in general, which tends to take regulation to minute detail.[408] Even so, this shows that during the transposition of competitive dialogue this

399. Although elimination is still admitted at the end of the dialogue phase, according to article 215 of the Public Contracts Code.
400. All the grounds for the jury to propose an elimination are essentially formal, apart from the "manifestly inadequate" one.
401. Article 212/6 of the Public Contracts Code.
402. Article 213 of the Public Contracts Code.
403. Three days, according to article 214/1 of the Public Contracts Code.
404. Articles 214/3 and 120/3/5 of the Public Contracts Code.
405. Article 214/6 of the Public Contracts Code.
406. Article 214/2 of the Public Contracts Code.
407. Article 214/3 of the Public Contracts Code.
408. Regulating what information shall be carried in the minutes of meeting seems a little too overboard but even so can be explained in the way judicial review of tenders is done in Portugal. According to the Administrative Courts Process Law, the contracting authority (such as all administrative bodies), when challenged by an aggrieved party has to produce the administrative file, containing everything connected to the tender, including all decisions and minutes of meeting that led to and sustain such decisions.

procedure was not simply bolted on to an existing framework but that it was adapted to fit within the national practice.

Dialogue is to be carried out until a single solution[409] best suited for the contracting authority's needs is found or all solutions are deemed as incapable of meeting them. When such solution is found or no solution has been forthcoming, the jury will end the dialogue and produce a report justifying its decision and submit it to the contracting authority.[410] It is up to the contracting authority to decide whether to follow the jury's recommendations.[411]

(d) Impossibility of eliminating candidates during the dialogue

There is no doubt that in Directive 2004/18 the contracting authority can have successive stages in the procedure to eliminate interim proposals put forward by the candidates.[412] In Portugal, however, the Public Contracts Code does not provide a legal basis for successive stages in competitive dialogue.

As mentioned in subsection (b) of the current section, the Portuguese law defines only one moment in the procedure when to eliminate solutions, which is this moment *before* of the start of the dialogue. Candidates present a solution[413] to be assessed *before* starting the dialogue phase, thus potentially reducing the number of candidates to have discussions with. What it is clearly unavailable is the elimination of solutions (and in consequence candidates) *during* the dialogue itself.[414] This was one of the most discussed points with the interviewees.[415] One said no proper

409. Only the singular is present in article 214/5(b) of the Public Contracts Code, without a plural contrary to what is in Article 29/5 of the Directive 2004/18.
410. Article 215/1 of the Public Contracts Code.
411. Article 215/2 and /3 of the Public Contracts Code.
412. Article 29/4 of the Directive.
413. Without any information given on what details should be given in the proposal.
414. Although elimination is still admitted at the end of the dialogue phase, according to article 215 of the Public Contracts Code.
415. Themselves admitting that it was also one of the thorniest issue they faced during the transposition. The final decision taken was more legal than political, as the Government did not influence the outcome of this point.

solutions were found to make this possibility work without leaving too much discretion in the hands of the contracting authority. Another mentioned he was not comfortable with the solution set forth in article 29/4 of the Directive for the elimination of candidates - the use of the criteria set forth in the descriptive document - as in his view it made no sense to apply award criteria to the elimination of candidates.[416]

The consequence of being impossible to eliminate candidates or solutions during the dialogue is that we may have dialogue stages which start and end with an unexpectedly large number of candidates. This issue is particularly acute if the assessment of the economic, technical or professional ability of candidates has been done through the simple system. Under this system all candidates considered as suitable, have to be invited to take part in the subsequent stages, irrespective of their number. In consequence, if a significant number of candidates decides to take part, it may lead to longer and more expensive dialogues.[417]

As a way out, one could argue that the contracting authority and the candidate may agree to stop discussing or developing the inadequate solution. This seems reasonable, especially bearing in mind that at the end of the dialogue a common set of specifications will be developed, as we shall discuss in section (3) hereunder.

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416. However, the Public Contracts Code, as we have seen, allows the use of the award criteria for other purposes than to choose the best tender. For instance, in a competitive dialogue where the complex method of assessing the economic, technical or professional ability of candidates was used, the contracting authority as to decide which are the best candidates based on the prospective award criteria. Furthermore, as we have seen in sub-section (b), at the beginning of the dialogue there is some discretion for the contracting authority to eliminate solutions which are in its view inadequate.

417. When queried, one of the respondents said that, at the time of drafting, the scenario of having too many candidates and/or discussing inadequate solutions was not taken into consideration.

(e) Ban on sharing confidential information

The issue of confidential information is not as thoroughly detailed as other areas of competitive dialogue in Portugal. According to article 214/3 of the Public Contracts Code, information is to be treated as confidential by the contracting authority if the candidate classifies it as confidential during the communication.[418] It appears that all the information disclosed by a candidate as confidential, will have to be treated as such by the contracting authority, without it being entitled to oppose.

It remains to be seen what happens when candidates transmit information that is clearly in the public domain and classify it as confidential for whatever reasons they may have. One could mention, for instance information on a solution that has been leaked to the press and therefore made public or information already public before the start of the procedure.

The Portuguese law steered clear of outlining what should be considered as confidential, for instance, information protected by intellectual property laws. In addition, information that is considered as confidential can only have such a condition lifted if the candidate expressly allows it in writing.[419]

Article 214/3 of the Public Contracts Code appears to be drafted in injunctive terms and it seems that the contracting authority will not be able to establish in the descriptive document the forfeiture of this protection as a condition of participation in the procedure. The law states in strong terms the confidentiality

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418. Article 29/3 of the Directive 2004/18 states that *"[c]ontracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement."* On this topic,Rubach-Larsen, 'Competitive Dialogue' in R Nielsen and S Treumer (eds), *The new EU public procurement directives* (Djof Publishing, 2005), p. 76 and Treumer, 'Competitive Dialogue' (2004) 13 *PPLR* p. 181-183.
419. Article 214/3 of the Public Contracts Code.

obligation and furthers that it can only be lifted with written and express consent *after* the information has been transmitted to the contracting authority. It would be impossible for the candidate to expressly lift the confidentiality condition on information that is yet to be transmitted to the contracting authority.[420]

As an alternative to the current legal regime on confidentiality, Portuguese law makers might have opted to extend the rules on secrecy of tenders to the dialogue stage.[421] According to article 66/1 of the Public Contracts Code, the tenderer may request that the tender or parts of it may be classified as secret for reasons of commercial, industrial, military or other types of secrets "in the terms of the law". That is, the tenderer has to be very specific on what he requests protection for and his request must be founded on substantial laws which protect, for instance, trade secrets. In addition, the contracting authority ultimately decides to grant or withhold the request.

Confidentiality raises another major problem specific to the way competitive dialogue procedure is conceived in the Portuguese law. As the dialogue stage leads to the development of a common set of specifications and not to tenders based on each candidate's solution, what should happen if confidentiality was raised by the candidate whose solution was considered as the most appropriate? How can that "confidential" solution be used as basis for technical specifications for all candidates to tender on? When faced with this unintended consequence, one of the interviewees replied saying that if confidentiality had been raised during the dialogue and the candidate was not available to reconsider it at the end of the dialogue, then it was not an appropriate solution and, thus, should be excluded. Considering the actual draft, the author does not agree with this view for two ma-

420. One of the interviewees, however, did not find a problem with the possibility of a "blanket authorisation" condition to be present in the descriptive document.
421. These rules were first noted to the author by one of the respondents.

jor reasons. One, it would make confidentiality a dead letter protection. Two, the Public Contracts Code does not allow solutions to be excluded after the dialogue has started. A potential way out might be that confidentiality is only applicable to the *solutions* and that, arguably, the *technical specifications* are no longer a solution and by definition need to be public. This, however, seems once more as an ingenious way of rendering the protection given by confidentiality as useless and is a consequence of the lack of foresight in the way the procedure was drafted.

However, although the ban on sharing confidential information is clearly present on the Public Contracts Code the fact contracting authorities will have to draw a common set of specifications at the end of the dialogue stage leads the author to wonder if it is as important in this case as in the situations where candidates end up tendering based on their own solution. If the candidate is tendering based on his own solution, then any confidential information shared to another candidate during the dialogue will have an immediate detrimental effect on the competitiveness of his own tender. In Portugal, however, the objective of the dialogue is to draft a common set of specifications and if it is possible for the contracting authority to draft them with elements from various solutions,[422] then having more information on the specifications can arguably increase the competitiveness of a candidate's tender. It must be said though it is not clear if Portuguese contracting authorities are authorized to draft common technical specifications with elements from more than one solution. In the case specifications are based on a single solution, then confidentiality is as important as when candidates tender based on their own solutions.

Confidentiality leads to a final issue in the Portuguese law, namely, its relationship with judicial review. In Portugal, for the purpose of judicial review, since

422. This will be discussed in further detail in sub-section (3)(a) of this Chapter.

2004 access to documents from public bodies relevant to support a certain decision is very liberal. When faced with judicial review, the public body is mandated by law to surrender all and every document relevant to the case to be reviewed by the plaintiff and the court. The issue here is what should the contracting authority do if faced with the judicial review court procedure of a dialogue where confidentiality has been raised. Should it give all the documents pertaining to the plea, including the ones that are confidential?[423] Or, should it withhold them?[424]

(3) Presentation of tenders and award

After the end of the dialogue stage, the phase to submit tenders ensues. This phase is called presentation of tenders and award in the Public Contracts Code.

The contracting authority notifies all qualified candidates whose solutions have been admitted of the end of the dialogue and invite them to present tenders. This letter of invitation includes the award criteria model, technical specifications (or the website where they are to be found)[425] and time limit, no less than 40 days, for candidates to submit the final tender.[426]

It is clear that the contracting authority will have to send the candidates a common set of technical specifications for them to tender on. Fig. 1 hereunder explains how passing from the dialogue to the tender stage occurs.

423. The same remarks could be raised on the tender secrecy rules of article 66/1. These, however, are more limited and the request has to be founded in the law, whereas confidentiality of article 214/3 is automatic and does not need to be justified.
424. The CJEU in the C-450/06 *Varec vs. Belgium* ECR [2008] I-00581, although not entirely clearly, appears to value confidentiality above transparency and that the review body must keep confidential the information transmitted to it. On this case, Brown, 'Protection of confidential information in procurement cases before national review bodies: *Varec vs. Belgian State* (C-450/06)' (2008) 4 *PPLR*, NA119-123.
425. Article 217/1/2 of the Public Contracts Code.
426. Article 218 of the Public Contracts Code.

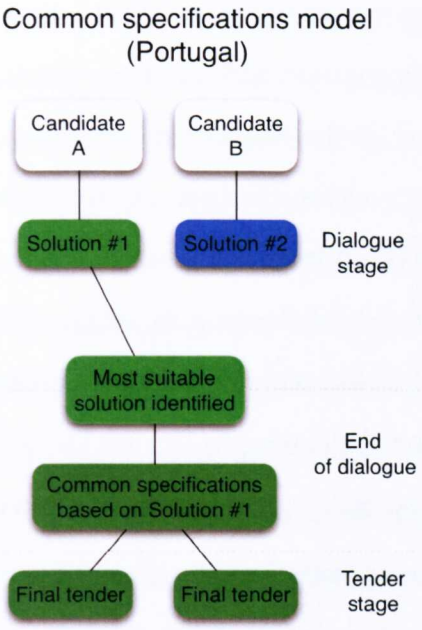

fig. 1

(a) Common technical specifications

At the end of the dialogue stage the contracting authority will have to mandatorily draft a common set of specifications. Candidates will present their tenders based on those specifications and not on the solution they have developed during the dialogue stage. What is not clear in the Public Contracts Code is how the contracting authority will actually draft the technical specifications, hence the different shades of green used in fig. 1 above. Two different interpretations to this issue can be given: i) that the technical specifications will have elements from the winning solution only; ii) that they may have elements from other solutions or developed by the contracting authority.

Under the first, since a winning solution had to be identified by the contracting authority, it will be converted into the technical specifications, without external elements from other solutions or developed by the contracting authority.

Under the second, common technical specifications would be composed with elements from the winning solution and also from solutions presented by the other candidates or developed by the contracting authority. These technical specifications would represent, in reality, the best way to fulfill the needs of the contracting authority. It should be added that the identification of the winning solution is mandated by article 215 (still belonging to section III, which regulates the dialogue stage), whereas the obligation to draft the common technical specifications is specified by article 217 (belonging to section IV, which regulates the presentation of tenders stage) and makes no reference to the winning solution.

Irrespective of the correct interpretation, one can see the merits of the decision taken by the Portuguese law makers of identifying a winning solution and having common technical specifications drafted at the end of the dialogue stage. It makes work easier for the contracting authority as all other solutions developed by candidates are discarded. It also makes comparison between tenders easier and more transparent, facilitating external control, since they are based in the same set of specifications, just as they would be in an open or restricted procedure. And more fundamentally, as all interviewees were keen to point out, it makes possible the application of the award criteria evaluation model set forth in the Public Contracts Code for the open procedure.

From a different perspective, however, the decision to identify a winning solution and develop common specifications leads to other problems. Firstly, it makes all (or almost all) candidates tender based on a solution which is not theirs, thus creating an imbalanced field of competition, particularly if the technical specifications are based on a single solution only.[427] Secondly, it leads to the scrapping of

427. One can argue, however, that the rules are clear from the start of the procedure and is fair commercial advantage that whomever develops the solution reaps the benefits of preparing a tender based on its own work.

much of the development work done during the dialogue. Thirdly, it may also lead to a reduced field of competition in the later stages of the procedure as the candidates with the non-winning solution (or that have not contributed significantly to the winning solution), when faced with the costs of preparing a tender from scratch may simply decide not to do so. Fourthly, as we have seen above when discussing the ban on confidential information it is hard to render protection of confidentiality compatible with a common set of specifications.

If the second interpretation suggested above is correct, then an extra set of issues may be raised. Namely, it would imply that cherry picking is possible according to the Public Contracts Code. When asked about this problem, two of the interviewees seemed unaware of it. They conceded, however, that cherry picking of different solutions to develop a common set of specifications is not forbidden in the Public Contracts Code, although one mentioned limitations due to commercial secrets.[428] In addition, contracting authorities may have the incentive to guide candidates during the dialogue stage to a convergent solution that will end up serving as the base for the technical specifications, especially bearing in mind the restrictions on discussions after the end of the said dialogue stage.

Whatever the correct interpretation, the option adopted by the Portuguese law makers raises two more questions. As we have seen, candidates carried to the dialogue depend on the merits of the preliminary solution they have developed and not their own ability to execute a set of specifications. This may lead to situations where candidates who were capable and interested in submitting a tender based on the specifications that are drafted at the end of the dialogue, but as they were not carried to the dialogue due to shortcomings on their own preliminary solution will not be invited to participate. As the Public Contracts Code is clear in stating

428. Specifications would still have to comply with the neutrality demanded by the CJEU's Unix case (C-359/93, *Commission v. Netherlands* [1995] ECR I-157).

that only candidates who had solutions admitted may be invited to participate at the tender stage. One must ask what is the difference then between having the solution excluded at the beginning or the end of the dialogue if the actual tender will not be based it? From a competition point of view it also makes no sense, since the Public Contracts Code is reducing the level of competition at tendering stage. On the flip side, this may be construed as allowing candidates which had dropped of the dialogue stage for whatever reason to come back.[429] This may increase competition but also the risk of one or more candidates with admitted solutions stalling the development to save costs thus offloading the development cost over to other candidates.

Finally, if the objective of the dialogue is to develop a common set of specifications just as in the open or restricted procedure,[430] why not allow any potentially able company to tender based on those specifications and limit the common set of specifications to the participants in the dialogue stage?

(b) Candidates to be invited to submit a tender

Articles 215/1 and 216 of the Public Contracts Code state the need to identify the single solution at the end of the dialogue. In addition the contracting authority is obliged to notify the qualified candidates whose solutions have been admitted. Article 215/1 further demands the jury to *"clearly and distinctly"* identify *the* solution most adapted to fulfill the contracting authority needs. This leaves no margin for doubt that the Public Contracts Code wants only one solution to be carried to the tendering phase.

429. As noticed by one of the interviewees.
430. As expressly admitted by one of the interviewees.

Article 217 of the Public Contracts Code states that if a solution to fulfill the needs of the contracting authority has been found, then the candidates which have passed the assessment of the economic, technical or professional ability of candidates and had their solutions *admitted* shall be invited to submit tenders, presumably following the technical specifications supplied by the contracting authority at that point.[431] Apparently, all candidates who had their solutions admitted to the dialogue will be invited to tender based on a common set of technical specifications, irrespective of their solution having been considered as viable to fulfill the needs of the contracting authority.

(4) Award

Even though the apparently relevant section of the Public Contracts Code is headed *"Presentation of tenders and award"*, no rules on the award are to be found there. Those have to be sought in the subsidiary rules applicable to competitive dialogue, that is the rules from the restricted procedure. Since the restricted procedure also has no rules on the award phase, one has to check the subsidiary rules applicable to this type of procedure. These are the rules on the open procedure.[432] As such, the rules on the award are to be found between articles 139 and 154 of the Public Contracts Code.[433] This means that after tender submission, the rules applicable to competitive dialogue are exactly the same ones as for the open and restricted procedures.

To end the procedure, the contracting authority will have to evaluate the tenders and award the contract. Article 139 of the Public Contracts Code establishes the

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431. Article 217/3 of the Public Contracts Code.
432. Article 162/1 of the Public Contracts Code states that the rules on the open procedure are subsidiary for the restricted.
433. Excluding articles 140 to 145 of the Public Contracts Code on the electronic auction and articles 149 through 154 on the negotiation phase.

rules on tender evaluation, namely the contents of the evaluation model and in particular the requirements to draft an appropriate model to find the most economically advantageous tender.[434] As before, after the tenders have been received, a preliminary report must be issued and the tenderers are invited to present their views on the proposed decision,[435] followed by the final decision.

(5) Lack of a fine-tuning phase

Article 29/6 of the Directive 2004/18 allows for a fine-tuning phase before the choosing of a preferred bidder when, with some limitations, amendments can be made to the tenders presented by the candidates.[436] Under this article, it may be possible, for instance, to ask for minor amendments or improvements to the tenders - as long as the principle of equal treatment is not violated and the basic features remain untouched - like improvements to the cost structure of a part of the contract, bringing non-compliant tenders into compliance or to seek further information to be supplied by the tenderers.[437]

In the rules specifically pertaining to competitive dialogue, the Public Contracts Code does not seem to allow even for such small changes to be made. However, two of the interviewees argued that article 99 of the Public Contracts Code, allowing for the possibility of fine-tuning after the tender stage for the open procedure, was applicable. During the interviews, both accepted the view that the tunings were more limited in scope than what is admitted in article 29/6, as they

434. Mathematical formulas should be used when possible and no data may be dependent on the tenders to be submitted by the other tenderers, thus ruling out relative qualification schemes.
435. Articles 146 and 147 of the Public Contracts Code.
436. On this topic see,Verschuur, 'Competitive dialogue and the scope for discussion after tenders and before selecting the preferred bidder - what is fine-tuning etc' [2006] *PPLR*, Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p.655-660 and Treumer, 'Competitive Dialogue' (2004) 13 *PPLR* p. 184.
437. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p. 655-657.

depend on public interest and may not lead to a different final classification.[438] Notwithstanding the opinion of the interviewees, the author begs to differ, as in reality article 99 (and also article 94 on the confirmation of commitments) of the Public Contracts Code are not relevant to replace the lack of a fine-tuning phase as this is done *after* a bidder has been chosen and not *before* as allowed by article 29/6.

Portuguese law, however, allows the contracting authority to request further information from tenderers in all types of procedures. Article 72 of the Public Contracts Code states that the contracting authority may request any further information it considers necessary for the analysis of the tenders. This information may not change any feature of the tender or even bringing a non-compliant tender into compliance.[439] In addition, all new information supplied by tenderers will have to be made available to its competitors.[440]

One can argue that this limitation may lead to a reduced usefulness of the procedure, as it will be more stringent and less flexible than intended by Directive 2004/18. However, it can also be argued that this limitation may be beneficial, since it forces the contracting authority and the candidates to discuss all the issues during the dialogue stage and not procrastinate over serious issues hoping they will be easier to deal with later. Potentially, this lack of post-dialogue discussions may have the effect of forcing the candidates to submit very detailed and complete bids. In this case, this ban would have a beneficial effect at the project management level by avoiding what has been described as "bid creep"[441] when dis-

438. One of the interviewees said this was done to avoid excesses by the contracting authority, as for instance, according to his own experience, in the case of public-private partnerships in the past, it was commonplace to have detailed discussions at this stage that altered substantially the contract in respect to the original technical specifications. One can argue that, in the end, the foreclosed possibility actually may improve the quality of the tender and value for money.
439. Article 72/2 of the Public Contracts Code.
440. Article 72/3 of the Public Contracts Code.
441. Auton, 'It's good to talk' [2009] *Public Finance*26, p.26.

cussions are allowed after the tenders have been submitted. The detailed bids from more than one candidate could, however, increase the transaction costs of the dialogue stage and eventually dissuade candidates of submitting bids, thus reducing competition.

The lack of specific rules for competitive dialogue similar to the ones found in article 29/6 of the Directive 2004/18, may point out that Portuguese law makers wanted this procedure to be run as an open or restricted procedure after the dialogue stage.

Taking into consideration the impossibility of making small changes as allowed by article 29/6 of Directive 2004/18, it seems that bigger specification changes after bids are submitted are also disallowed for in Portugal. For example, after the final tendering stage, the contracting authority might have decided to make some changes to the specifications[442] like risk allocation or the aims and objectives of a IT contract, as to maximise the benefits from the procurement procedure. The Public Contracts Code is silent regarding such a possibility[443] and as it does not allow for smaller changes it seems that the possibility of accepting theses changes without restarting the procedure is also precluded.

(6) Apparent lack of a final phase of amendments and discussions

Article 29/7 Directive 2004/18 also allows for a final phase of amendments and discussions with the preferred bidder[444] to take place after he has been selected, allowing for some flexibility in finishing the details and clarifying the legal obliga-

442. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 658-660.
443. On the conclusion of the interview, one of the interviewees again referring to the lack of negotiation culture in the country, said Portuguese public administration is used to dictating not negotiating. One of the respondents also mentioned different cultural traditions of the UK and systems based on the Napoleonic public administration such as the Portuguese.
444. On this topic see, Kennedy-Loest, 'What can be done at the preferred bidder stage in competitive dialogue' (2006) 6 *PPLR*, Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) and Treumer, 'Competitive Dialogue' (2004) 13 *PPLR* p.183-185.

tions of both parties. Bearing in mind the ambiguous wording of the Directive, however, the exact scope of what is allowed or not is convoluted.[445] As examples of what could be allowed, one could mention changes needed to be carried due to external changes of circumstances like modifications demanded by the planning authority during the application for a planning permission.[446] The Public Contracts Code does not have a specific stage for amendments and discussions specifically for competitive dialogue. Contracting authorities may discuss issues with the winning bidder at this point under the same rules as in any other procedure. The draft of article 99 appears to be more limited than what is allowed by the article 29/7 of Directive 2004/18 but, nonetheless, leaves some room to accommodate changes needed.

As with the lack of scope for discussing tenders, it can be argued that this is either positive or negative. Since competitive dialogue is to be used for awarding particularly complex contracts, it can be argued the maximum of flexibility should be present. On the other hand, this ban on extensive changes may have positive effects. At this stage, where the bidder no longer faces competition it is in a better bargaining position and can be expected that it will try to extract concessions from the contracting authority. Not having this possibility may once more force contracting authorities and candidates to settle as many issues as possible during the dialogue stage.

9. Conclusion

We have seen in this chapter how the Portuguese national law implements competitive dialogue and the law makers opted to include in the transposition a num-

445. Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005) p. 660-663.
446. Ibid. p. 662.

ber of supplementary rules that are not based in Directive 2004/18. Furthermore, it became apparent the transposition into Portuguese law has raised various issues. In particular, issues such as the grounds of use, the impossibility of eliminating candidates and/or solutions during the dialogue, the need to identify a single solution and mandatorily draft a common set of specifications, and also the lack of specific rules on discussions before or after the winner is chosen are raised. Finally, it appears that a competitive dialogue is to be run as an open or restricted procedure after tenders are submitted.

The issues described provide ample points for discussions with the interviewees at the empirical research stage. The next chapter is focused on the findings of these interviews.

Chapter 7 - Empirical findings on Portugal

1. Introduction

In Portugal, the competitive dialogue procedure present in Directive 2004/18 was transposed by the Public Contracts Code of 2008.[447] Contrary to what happened in Spain, law makers opted to include in the transposition a number of specific rules on competitive dialogue that are not specifically based in the Directive. For instance, the grounds for use of the procedure in the Public Contracts Code are more demanding or narrow as they limit the numbers of solutions a candidate can provide, do not allow for the exclusion of candidates during the dialogue, require the draft of a common set of specifications and tenders based in these specifications and do not include a phase for fine-tuning of tenders. In addition, the Public Contracts Code regulates competitive dialogue with both the rules that can be found in the body of Directive 2004/18 and those in its recitals.

Competitive dialogue has been used five times in Portugal. Consequently, one of the most obvious questions to ask had to be why it is not being used more. In face of this lack of use, the author's focus has been on the leading lawyers in procurement and also contracting authorities that one could expect to use competitive dialogue.

This chapter will be divided into various sections. Section 2 explains the situations where the competitive dialogue procedure was used. Sections 3-14 are each dedicated to a category of issues that were discussed in the interviews. In section

447. It came into force in June 2008.

15 the issues that may be at play in the lack of use of the procedure in Portugal are discussed.

2. *Actual use of the procedure*

The competitive dialogue has been used only five times in the country, with the last procedure being launched in March 2010.[448] Three were tendered by local councils, one by an hospital and the last by a public undertaking. No contracting authority has used the procedure more than once.

Two contracts were tendered for awarding bicycle renting schemes, one for IT services (workflow management and development of an internal network), one for consultancy services and one for hospital cleaning. All of these contracts are relatively small value contracts. While the two bicycle renting schemes do not have an estimated value, the others were advertised with a maximum price of 200,000 - 250,000 euros.

Out of the five procedures, four were advertised in the Tenders Electronic Daily website.[449] One of the bicycle schemes was not advertised there, notwithstanding the fact that article 208/2 of the Public Contracts Code mandates the publication in the Official Journal of the European Union of all competitive dialogue procedures for the award of public works, public works concession, goods or services contracts. The explanation might be that the contracting authority might not be sure if it would end up with a services or a public-private partnership contract and considered they did not have to publish it on the Official Journal of the European Union.

448. Data from the Tenders Electronic Daily website and the Portuguese Official Journal.
449. http://ted.europa.eu/TED/browse/browseByBO.do.

As of September 2010 only one of the five procedures has been concluded. It was launched in 2007 by the hospital to hire cleaning services. The hospital applied the rules of the Directive 2004/18 directly as it could do so at the time.

The author was told by two of the contracting authorities[450] that have used competitive dialogue that their projects were supposed to conclude during October 2010.

Although the numbers are simply too small to conduct a detailed analysis,[451] the absence of infrastructure or major IT projects tendered in Portugal by means of a competitive dialogue should be noted.

3. Grounds for use

(1) Introduction

As we have seen in Chapter 8 before, the grounds for use of competitive dialogue procedure in Portugal are mainly set in article 30 of the Public Contracts Code. According to article 30/1, competitive dialogue may be used when the contract to award is particularly complex and renders impossible the use of the open or restricted procedures. This concept of *impossibility* is key to understanding the scope of the grounds of use of competitive dialogue in this country. Article 33 excludes the use of the procedure in the field of utilities and its analysis will take place in this section also.

Article 30/2 proceeds to explain what can be considered a particularly complex contract in a similar fashion to article 1/11(c) of Directive 2004/18, that is, when it

450. Identifying the projects would might put in jeopardy the confidentiality agreement signed by the author with his respondents.
451. For a breakdown of the use of the procedure on different member States please see, de Mars and Craven, (Paper) (2010) Use of Competitive Dialogue in the European Union: an Analysis from the Official Journal.

is objectively impossible to define the technical, legal or financial make up of a contract. The two remaining paragraphs of article 30 further refine the objective impossibility of the previous paragraph and the scope of the dialogue itself.

As we have seen in Chapter 6, the Portuguese law makers had adopted a stronger wording regarding the grounds for use of the procedure than what is in Directive 2004/18. For the author, the key difference seems to be the words chosen by the Portuguese law makers in article 30/1. By specifically using *impossibility*, the law makers made it clear it wanted to restrict the use of the procedure to a bare minimum.[452] This wording was expressly accepted by people involved in the draft of the law as a conscious decision. The author was told by these interviewees that they wanted to make clear competitive dialogue was an exceptional procedure, not to be used lightly by contracting authorities. Concern was expressed about contracting authorities abusing the procedure if drafted on more ambiguous terms.

The author asked the interviewees of the empirical research stage how they interpreted the grounds for use of the procedure in Portuguese law.

(2) Data: grounds for use of article 30 of the Public Contracts Code

It remained to be seen if in practice the interpretation of the grounds for use would follow a similar line to the one assumed by the Portuguese law makers. The interviews conducted have produced a very clear preference for interpreting competitive dialogue's grounds for use restrictively and exceptionally. 14 have consid-

452. A similar change can be found in article 30/2 that transposes article 1/11(c) of Directive 2004/18. The Directive states that a contract is particularly complex when the contracting authority is "not objectively able" to define the technical, legal or financial make-up of a contract. The Portuguese law states that a contract is particularly complex when it is "objectively impossible" to define the technical, legal or financial make-up of a contract.

ered it an exceptional procedure and only two have said it was not exceptional. Interestingly most lawyers expressed views on this topic, whereas only four contracting authorities produced an answer. One of the public sector respondents said it had been stated in a number of workshops he had attended that the procedure was exceptional.

Eight have also qualified the grounds for use as limited[453] or that those should be interpreted narrowly. Furthermore, nine respondents have interpreted the rules regarding the impossibility mentioned in article 30 paragraphs 1 and 2 as an objective impossibility, thus concluding that the more generous interpretation of the grounds of use allowed by Directive 2004/18 according to some is not possible in Portugal.[454] For these respondents it is not possible to use competitive dialogue when open or restricted procedures are simply inadequate for the objectives. Furthermore, the same logic of interpretation has been applied to the impossibility of defining the technical/legal/financial make up of a contract (article 30/2(b)) and lack of means of the contracting authority (30/3).

However, a minority of five respondents have stated otherwise and defended a more liberal interpretation of the grounds for use of the procedure. For these interviewees, the grounds should be interpreted in accordance with the Directive 2004/18 and amount to an area of discretionary decision by the contracting authority, subject to *ex post* control. It has been argued by a lawyer that, for instance, the lack of means of a contracting authority can only be assessed under the conditions of the said entity and cannot be interpreted objectively. A contracting authority with a huge budget may be expected to keep a pool of able personnel where it can have enough manpower to classify as unjustified the use of competi-

453. How of this total six had also considered an exceptional procedure.
454. Furthermore only three respondents, all lawyers, suggested interpreting the grounds in accordance with the Directive 2004/18.

tive dialogue. It has been argued by some interviewees that this is the case with public companies operating in the utilities sector which, originally, were part of the State direct administration and were spun off in the last few years. A smaller authority with a smaller budget, however, should not be expected to have such manpower readily available. One can argue that consultants can be hired to compensate for the shortfall, and that article 30/3 wants to restrict the use of the procedure as a means of avoiding getting free consulting. One interviewee offered a thoughtful and considerate opinion on this subject matter. On his view, the test of article 30/3 is simply impossible as the contracting authority when launching the procedure is automatically assuming that it does not have the necessary means to develop the solutions in house. Even so, it was counter argued that the ultimate objective of competitive dialogue is to consult the market and thus assess the opinions and ideas of the same consultants that could be hired directly in the first place.

Regarding contracting authorities that have used the procedure, two have argued that they did not have a problem in considering that their own specific situations were covered by the grounds for use of the procedure as stated in the Public Contracts Code. One of them argued, however, that in theory he feels it is hard to define in which situations the procedure might be used.

On the drafting of article 30, 11 respondents have considered it not to be clear. In their view, this article is hard to understand and interpret.[455] This may be due to the use of undetermined legal concepts[456] or excessive use of adjectives and adverbs.[457] It may also be due to the decision taken by the law makers to adopt a legal drafting technique with multiple cross references.[458] Finally, it may be

455. Three others have stated they are clear and do not pose any sort of problem.
456. Such as "particularly complex" or "objectively impossible" from article 30 paragraphs 1 and 2.
457. "Objectively impossible" (article 30/1), "most adequate" (30/2/a), "sufficiently clear and precise" (30/2/c), "effective" (30/3), "due diligence" (30/3).
458. As we have seen in Chapter 5, this is pervasive to the whole law. Regarding the competitive dialogue, for

connected to the restrictive interpretation taken by respondents to the grounds for use, that is to say, they may be adopting preemptively a cautious approach regarding the grounds for use due to the uncertainties they face when interpreting them.

(3) Data: utilities sector exclusion of article 33 of the Public Contracts Code

Article 33 of the Public Contracts Code excludes the use of competitive dialogue in the utilities sector. As has been explained in Chapter 6, this limitation covers only public undertakings and not the State itself when conducting procurement in areas within Directive 2004/17's scope. Therefore, the scope of this limitation is more limited than could be anticipated at first sight.

The Public Contracts Code drafters interviewed by the author said that since the Directive 2004/17 did not expressly include a reference to competitive dialogue, the correct interpretation would be it was not available for contracts covered by it.

When asked about the restriction, the response was almost unanimous in disagreeing with the option by the law makers, with a single lawyer supporting the legal draft. Respondents considered this limitation as arbitrary. The response was similar when interviewees were asked about the reasons of said restriction. None bar one could find a reason. One lawyer said this limitation was due to a lack of confidence by the State, and in consequence by the law makers, in the public undertakings operating in the utilities sector. The State might be afraid the proce-

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instance, its specific rules end when the dialogue stage is concluded. As article 204 remits to the rules of the restricted procedure, one must check in the respective section of the Public Contracts Code on what rules are applicable after finishing the dialogue. As no rules are to be found there one must then hop to the rules on the open procedure which, in the end, are the applicable rules to the procedure after the dialogue has been concluded.

dure might be misused by those contracting authorities, while at the same time wanting to keep access to it when procuring in the utilities sectors.

The single lawyer supporting the current draft said that the utilities sector had specific requirements[459] and competitive dialogue was not suited to address those requirements.

(4) Conclusion

Of all the topics of research focused upon during the interviews, the grounds for use are probably the most important as respondents' views shed light directly on the reasons why competitive dialogue is having seldom use in Portugal.[460] We have previously seen that the grounds for use were drafted with the aim of limiting the use. From the data gathered there is a clear trend across respondents of interpreting them narrowly, arguably more narrowly than in Directive 2004/18. It is the author's belief that these two factors are key to explain the lack of use of the procedure in Portugal at this stage. Furthermore, the fact experts such as the lawyers interviewed are clearly interpreting the grounds narrowly may cascade down to the the entities they advise (either private or public) thus potentially enlarging the effect detected here.[461]

In addition, it could be that contracting authorities considering the use of the competitive dialogue procedure are perceiving its use as heightening risks such as judicial review and opting not to take their chances.

However, contracting authorities that have actually used the procedure have had no problems in considering their situation warranted the use of the procedure.

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459. No actual specific requirement was pointed by the interviewee.
460. It will be discussed in more detail in the section 15 hereunder, in conjunction with the other factors that may be at play.
461. This is not to say the author believes clients will follow lawyers advice blindly, but that they will take them into consideration in their decision making process.

Finally, the decision taken by the law makers to exclude the use of competitive dialogue in the utilities sector - albeit smaller in scope than anticipated at the start - adds further difficulties to the use of the procedure in Portugal.

4. Contract value estimation

(1) Introduction

Article 208/2 of the Public Contracts Code imposes that any contract notice for projects tendered under competitive dialogue,[462] irrespectively of estimated price, has to be published in the Official Journal of the European Union. This article, it may be argued, thus mandates the contracting authority to estimate the value of the contract to tender by competitive dialogue. This issue had not originally been included by the author in the interview guide and was first raised by a respondent at the very end of the first round of interviews in October 2009.

(2) Data

Respondents were asked if they thought this rule was mandatory. The answers collected indicate that the nature of this rule[463] is not clear in the Portuguese law. Four respondents have clearly stated it is not mandatory and offered evidence of open or restricted procedures where a value was not given at the start of the procedure.[464]

462. If it is a public works, public works concession, goods (including renting) or services. Services concessions and public-private partnerships appear not to be covered by this obligation.
463. This rule is similar to what can be found for the other procedures, thus allowing respondents to draw on their actual experience with the open or restricted procedure, for instance.
464. However, for budget purposes and expense authorisation the contracting authority may have to come up internally with a value. For instance, if a service in a Ministry thinks a contract will be more expensive than the threshold its director is authorised to spend, they will need to clear it with the Minister.

Regarding competitive dialogue, four respondents suggested that defining a price at the start depended on circumstances, thus reinforcing the idea that it is not a straightforward mandatory obligation to define a number at that point. For these interviewees, the most appropriate moment to define a valeu would be when the technical specifications are drafted at the end of the dialogue stage, which is the analogous moment to the start of the open and restricted procedures.

It was said that the rule, if mandatory, made sense as giving a ballpark figure for both the contracting authority and the companies to aim for.[465] However, for competitive dialogue in some cases - mainly when the contracting authority does not know the technical solution - it is impossible to establish a value in advance.[466]

(3) Conclusion

Apart from the fact there is considerable doubt on the validity of the claim of the mandatory nature of establishing a value of the contract from the outset, no clear trends could be identifiable. If establishing a starting ballpark figure may be considered helpful to focus the candidates on producing solutions within certain budgetary constraints, it was counter-argued that in some cases setting a limit at the start of the procedure may be simply impossible due to the fact the contracting authority has simply no idea about it.

Analyzing the notices of competitive dialogue procedures posted on the Tenders Electronic Daily website, it is possible to see that only two of the four competi-

465. This was suggested by two respondents, since there could be excellent ideas to solve the contracting authority's need but are simply too expensive.
466. It can be argued, however, that stating a maximum cap on what the contracting authority is willing to spend may force the candidates to offer solutions that fit within the budget available.

tive dialogue procedures launched in Portugal there advertised have an estimated price.

5. Payment of solutions

(1) Introduction

In article 206/1 of the Public Contracts Code, as in article 29/8 of Directive 2004/18, contracting authorities may specify prices or payments to be made to candidates. This option has to be expressly included in the contract notice or descriptive document.

(2) Data

This topic is another area where a clear trend has been observed. All respondents but one have supported that paying for solutions is a positive incentive to prospective candidates and would encourage competition among firms. This was observed across both lawyers and contracting authorities who stated they supported these payments.[467] Furthermore, as developing detailed solutions is potentially very expensive, this may help ease the financial burden. 12 even considered the payments to be key to competitive dialogue's success by fostering participation and showing the market that the contracting authority is serious about the contract and does not want to get consulting for free. Three remarked that the payments may be helpful to reduce the potential for judicial review. Two suggested these payments would justify the acquisition of the rights of the best solution that will end up in the technical specifications at the end of the dialogue stage.

467. One contracting authority remarked, however, that it supported the payments "in theory". In practice, the interviewee argued, "it would be very difficult to justify the extra cost and thought it would raise the financial cost of the contract.

The only differing view came from a lawyer who considered these payments to be contrary to competition. To him, they hinder competition by not making candidates as desperate to win the final contract as they would otherwise be.

In Portugal, payments to tenderers have been used a few times in the utilities sector with the open procedure with a negotiation phase. Traditionally, either a limited number of tenderers or the tenderers who present a tender within x% of the winning bid are compensated for their efforts. Respondents who had a previous direct experience with this system have all sided with the positive view on the topic.

A respondent stated that contrary to the open procedure with a negotiation phase, the leading candidate should get paid for his efforts, since when the technical specifications are drafted, one does not know the identity of the winning bidder. It can be the case that who provides the solution ends up losing the contract to another tenderer who puts in a more favourable bid. If he were not compensated for developing the solution then it would be a double blow for this company.

In the few situations where competitive dialogue was actually used, however, contracting authorities have never actually paid for the costs of developing solutions.

(3) Conclusion

A clear trend was identified in the data. Respondents in Portugal consider the payment of solutions as positive to competitive dialogue. It must be stated however that, most of these respondents were talking without a previous experience of paying for solutions.[468]

468. Only two of the contracting authorities interviewed had paid for them in the past in other procedures.

Highlighting the difference in perspective of the respondents, on the few situations where competitive dialogue was used, no contracting authority offered any payment.

6. Assessment of the economic, technical or professional ability of candidates

(1) Introduction

According to the Public Contracts Code (articles 167 through 188), Portuguese contracting authorities can adopt one of two different methods to assess the economic, technical or professional ability of prospective tenderers in all award procedures. Both simple and complex methods are available. As we have seen in Chapter 6 these two methods are clearly distinct and may lead to different outcomes when used on a competitive dialogue procedure. The complex method allows for the limitation on the number of candidates, although it is more demanding and may foster litigation by excluded candidates. The simple method is a binary system where candidates are either approved or not and does not allow for the number of candidates to be limited in advance.

(2) Data

Interviewees were asked about which system they preferred and the perceived qualities and shortcomings of both. No clear preference among respondents was found. Eight think the complex model is more adequate. Six have stated a preference for the simple model. Eight have said they had no preference for either.

The complex model was considered to allow the contracting authority more control over the procedure. It was argued by some it might lengthen the proce-

dure,[469] be too complex and a potential focus for judicial review as it implies the exclusion of candidates. It was deemed particularly appropriate for scenarios where a significant number of potential candidates was identified before the start of the procedure, such as public works. The respondents who expressed a particular preference for this model said that it was more adequate to their perceived complexity of competitive dialogue.

Some respondents have said the simple model was more adequate in specific circumstances. For instance, when the pool of potential candidates is known in advance to be small, such as in cutting edge technology contracts or sectors where only a handful of known vendors operate. It was also argued by the respondents who showed a preference for this model that the complex model may be wrongly used (being too demanding for candidates) and lead to procedures without candidates. However, the same interviewee considered an identical tightening of conditions could happen with the simple procedure and that it had been used by contracting authorities in the past.[470] Contracting authorities wary of excluding candidates at an early stage of the procedure may also opt for this procedure to reduce the risk of facing judicial review.

Two lawyers professed no preference for any of the models. They added the remark that neither model was particularly tuned to the needs of competitive dialogue. For these respondent, the complex model was too cumbersome to use while the simple model did not provide the level of control (*ie*, limiting the number of participants in the dialogue) needed by the contracting authority. Furthermore, one suggested a hybrid model blending characteristics of the two, that is a

469. In comparison with the simple model.
470. A different interviewee quoted an example he knew first hand of a tender where the conditions were so demanding a well known Portuguese company expected to comply with was found to not meet the specific financial requirements set forth by the contracting authority.

sufficiently simple system that still allowed the contracting authorities to limit the number of candidates.

In practice, the three contracting authorities applying competitive dialogue interviewed have all followed the simple model to assess the economic, technical or professional ability of candidates. They alleged that the number of prospective candidates that might be interested in their project was small. One also said he did not want to risk any potential litigation by excluded candidates if they had used the complex system.

(3) Conclusion

Regarding this issue, although no particular trend was identified, the interviews produced interesting insight. We have seen that the answers can be divided into three groups: preference for the complex model, preference for the simple model, no preference whatsoever. We have also seen some reserves or perceived drawbacks of either method of assessing the economic, technical or professional ability of candidates. Both systems appear to be appropriate for specific situations

7. Evaluation of solutions

(1) Introduction

The Public Contracts Code,, contrary to Directive 2004/18 (article 29/4) does not have a provision for contracting authorities to exclude candidates or solutions during the dialogue.[471] However, it includes an evaluation phase before the start of the dialogue stage. Article 212/2 of the Public Contracts Code requires contract-

471. This difference will be discussed further down on section 10.

ing authorities using competitive dialogue to assess the solution[472] presented by each candidate before starting the discussions. This article sets the conditions under which solutions can be excluded. Of the four conditions established, three are simply formal and only the last one is substantial. Under this last condition, solutions can be excluded if they are deemed "manifestly inadequate" by the contracting authority.

(2) Data

Nine respondents considered the evaluation of solutions at the start of the dialogue as a positive introduction by the Portuguese law makers, bringing flexibility to the procedure, especially bearing in mind the impossibility of excluding during the dialogue.

Six interviewees, including two contracting authorities, thought this was a negative innovation and that it may open the door to judicial review. For them this would add complexity to the procedure and be a possible point of contention. Furthermore, as the only substantial condition is extremely vague, it may lead to abuse by contracting authorities.

It was expressed by three lawyers that this will probably be an uncontentious capability that will be rarely used. Two have remarked this resembles a similar possibility available for other procedures that, after a period of extensive use, contracting authorities no longer use. However, a respondent remarked that if used, courts would find it difficult to assess the legality as the exclusion is based on an indeterminate concept and left to the contracting authority to make its own judgment over the adequacy of the solution.

472. Candidates are limited to presenting a single solution only. This issue will be discussed further down on section 8.

Apart from two contracting authorities that have expressed a negative view, all of the remaining have not voiced any opinion on this issue.

Two of the contracting authorities that have used the procedure have not used this feature. One of them said the thought never crossed their mind whereas the other asked how could a contracting authority decide at that point if a solution or was not manifestly adequate.

(3) Conclusion

From the data gathered it appears the jury is still out regarding if this is a positive or a negative addition by Portuguese law makers. It remains to be seen in practice if the fear of having judicial review due to exclusions at this point shown by some interviewees is indeed real or not.

8. Single solution

(1) Introduction

Directive 2004/18 does not have any express rules on the number of solutions each candidate can present to the dialogue. The Public Contracts Code (article 210/2) has taken a different approach, setting a limit of a single solution for candidates to present at the start of the dialogue. This single solution is the one being assessed at the start of the dialogue stage.

(2) Data

Interviewees were asked what they thought about this option by the Portuguese law makers. 13 respondents, including two contracting authorities that have used

the procedure, have answered with mainly negative comments, showing dissatisfaction with the legal draft, considering it a potential limitation to the creativity of candidates.[473] Some of the words used by respondents with a negative outlook were very strong. One said this amounted to perverting the logic of the whole idea of competitive dialogue. Two others said simply it was an "absurd" option and a "stupidity" by law makers.

Important nuances were, however present and should be mentioned. Five interviewees considered it as a positive introduction. Three deemed it as a way to focus the dialogue, avoiding the spreading of resources (both public and private) across multiple solutions that needed discussion and development. Three suggested it would reduce transaction costs of the procedure by having the candidates develop only the solution they consider most feasible.

(3) Conclusion

We have seen from the data gathered that there is a strong body of respondents considering this innovation of the Portuguese law makers as bringing more harm than benefit. Having said this, the ideas of helping the dialogue be focused and reducing the transaction costs for all the parties involved have their merits. Furthermore, since it is impossible to exclude candidates or solutions during the dialogue itself in Portugal, having a single solution that can be assessed at the start of the stage seems to be the only way for the contracting authority to exclude solutions.

473. One contracting authority said it had happened in the past in open procedures, where variants were admitted that the winning tender came from the variants and that in his experience having variants had led to a better contract in the end.

9. Detail of solutions

(1) Introduction

Further to the issue of candidates only being able to present a single solution and having that solution evaluated at the start of the dialogue, one of the lawyers interviewed in October 2009 suggested a practical problem was the level of detail solutions are to provide. This is not a rule expressly provided by the Public Contracts Code but is a logical requirement to define as the solutions are going to be evaluated at the start of the dialogue (to assess if they are not "manifestly inadequate") and also at the end of the dialogue stage. The lawyer was particularly worried with: i) what should be the level of detail in the solutions; ii) if it could have variants/sub-solutions; iii) have proprietary elements.[474] This is an interesting point that had not originally been considered by the author. It can be added that it raises issues connected eventually with the need of demanding a similar level of detail from candidates when submitting their preliminary solution for evaluation and also during the dialogue stage to ensure the compliance with the principle of equal treatment and the non-discriminatory rules of article 214 of the Public Contracts Code.

Interviewees were asked three questions. The first was about the level of detail in the solutions. The second was on the admissibility of having variants/sub-solutions. The third was on the possibility of a solution having proprietary elements.

474. The interviewee suggested an example where a candidate would suggest a financing model that only he could provide. Without going into too much detail as to avoid breaching the confidentiality agreement, the scenario included the financing model being dependent on the candidate leveraging existing relationships with the contracting authority.

(2) Data

Regarding the about the level of detail in the solutions the answers did not provide a clear indication of a trend. Interviewees were puzzled by the question, and in hindsight that could be expected as it is not a legal question (in the sense it is addressed in legislation) but something more practical that only experience may provide an answer for.

Regarding the admissibility of having variants/sub-solutions, four respondents have said variants and sub-solutions were admissible, but only for the dialogue stage. They considered it would be beneficial for the purposes of the procedure to give candidates some flexibility to provide variants or sub-solutions. No interviewees said it was not possible to have sub-solutions or variants during the dialogue stage.

No clear trend was found regarding the possibility of a solution having proprietary elements.

(3) Conclusions

The appropriate level of detail in the solutions seems to be a practical issue that is not possible to assess fully through empirical research without actual experience in the country. The data has produced a slight indication that candidates may offer sub-solutions or variants during the dialogue itself, but not at the start of the dialogue stage when the single solution is to be assessed by the contracting authority.

10. Impossibility of excluding candidates or solutions during

the dialogue stage

(1) Introduction

According to article 29/4 of Directive 2004/18, contracting authorities are allowed to define in either the contract notice or descriptive document the possibility of conducting the dialogue in successive stages in order to reduce the number of candidates or solutions. The Public Contracts Code does not allow for that in Portugal. In this country, all candidates with a solution admitted to the dialogue stage[475] have to be invited to participate in the dialogue stage.

Furthermore, although the Portuguese law does not allow for the exclusion of candidates or solutions, it does not forbid the possibility of the contracting authority and candidates reaching an agreement to stop developing a solution.

(2) Data

A clear trend was observable with 12 of the respondents exposing a critical view of the limitation. It was argued that it rendered the dialogue more complex as the contracting authority might be forced to discuss with a reasonable number of candidates and could not focus on the more promising solutions. Furthermore, it was also argued that without having the fear of being discarded during the dialogue, candidates may not feel pressed to present their best effort.

It must be said though that a minority - four lawyers - supported the decision made by the Portuguese law makers. One of the respondents stated that allowing for the exclusion of candidates would make the contracting authority produce a report on its decision which would have to include valuations of not only the ex-

475. In other words that has not been excluded on formal grounds or because being "manifestly inadequate" at the preliminary evaluation.

cluded solution but all the others. This would make the contracting authority evaluate the other solutions during the dialogue. It would imply also having to hear the excluded candidate as per the national law, thus leading to more delays and potentially to litigation.

Another lawyer stated that the Portuguese market is too small and the number of potential candidates limited for this limitation to be of any relevance.

Interviewees were also asked about their views on the possibility of the contracting authority and the candidate reaching an agreement during the dialogue stage to stop developing the solution. A significant number of 12 respondents considered it possible and legal. Further to this point, article 216 of the Public Contracts Code states the need for the contracting authority to invite all the candidates which had their solution admitted to the dialogue. Of those 12, eight considered that the candidate had to be invited to present a tender.[476]

(3) Conclusions

Two clear trends could be identified regarding the exclusions of candidates during the dialogue. Firstly, there is a wide negative take on the decision of the Portuguese law makers for not allowing the exclusion of candidates. Secondly, there is a similar level of support for the possibility of the contracting authority and the candidate reaching an agreement to stop the development of a solution during the dialogue stage.

476. Two considered the agreement to amount to a self exclusion, thus implying the candidate was turning down the possibility of presenting a tender.

11. Confidentiality

(1) Introduction

Article 29/3 of Directive 2004/18 states that the contracting authority may not reveal to other candidates a solution or piece of information that has been transmitted with reserve of confidentiality. Article 214/3 of the Public Contracts Code includes a similar rule.[477] How to treat confidentiality within competitive dialogue in the Public Contracts Code is of special importance as after the end of the dialogue the contracting authority will have to create common technical specifications for the final tenders. Therefore, confidentiality may or may not have implications further down the procedure after the dialogue stage.

Confidentiality of solutions presented by candidates and the content of discussions with the contracting authority - along with the grounds for use and the draft of the common specifications - was one of the most contentious issues during the interviews held in Portugal. A lot of interview time was spent around this issue.

Interviewees were asked about the characteristics of confidentiality and their views on it. They were also asked if the rules of article 66 of the Public Contracts Code on the confidentiality of tenders could have been an alternative solution to the confidentiality problem.[478] Finally, a subset of interviewees with experience in the utilities sector was also asked about their actual experience with problems of confidentiality in that sector. In the first round of interviews in October 2009 the author also asked if confidentiality could be excluded at the start of the dialogue as a condition of participation in the procedure.

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477. With a further reference to the need of authorisation to be given in writing.
478. This does not mean the current Public Contracts Code draft accommodates such a view. The question was asked in anticipation as a possible alternative in the case the law is reviewed in the future.

(2) Data: confidentiality as currently set in the national law

The author was unable to identify a clear trend regarding a common interpretation of confidentiality as set in the Public Contracts Code. Relevant ideas were floated by the interviewees, but scattered in many different directions without a unifying theme. The most important information may be the importance given to confidentiality by interviewees and the fact it was one of the most discussed items in the interview guide and is seen as a major issue without a clear interpretation to overcome legal insecurity.

Most of the interviewees considered confidentiality to be important within the procedure but were at odds on how to interpret its characteristics. Responses were widely varied. They ranged from a respondent considering that the contracting authority had the possibility of vetoing the classification of confidentiality set by a candidate,[479] to confidentiality not ending at all for the elements deemed as confidential by a candidate that had not been transposed to the common set of specifications.

Six interviewees offered a view that can be categorized as a functional interpretation of confidentiality. For these respondents, confidentiality shall be kept only for the period it makes sense (*ie*, the dialogue stage) and afterwards only for the information that actually needs to be considered confidential, that is, all the information deemed confidential that has not been included in the common set of specifications. Two lawyers said it should be maintained until the end of the procedure. It must be mentioned though that one of the respondents considered this to be far from optimal as it only benefits whomever has the solution(s) that end

479. As it is the case for the tenders, as per article 66 of the Public Contracts Code. However, it seems difficult to sustain that article 214/3 supports this interpretation.

up in the common set of specifications by giving this candidate more time to prepare its tender. Others considered that confidentiality simply had to end at the closing of the dialogue stage or else the procedure just did not make sense.

Only one lawyer said he liked how confidentiality had been dealt in the national law and that no changes were needed. However, when asked to make compatible his opinion with the common sef of specifications and his support for cherry picking of elements from different solutions he stated that the compatibility would depend on the specific circumstances of the situation.

A lawyer offered a thoughtful opinion on the topic, suggesting article 214/3 to be almost unnecessary. In his view, the general law regulating administrative procedures (Decree-Law 442/91, with subsequent changes) implies that all information transmitted to an administrative body (such as a contracting authority) has to be considered confidential until the end of an administrative procedure.[480] Said lawyer added that he interpreted the rules of article 214/2, which forbid discriminatory treatment of candidates, as including a non-explicit protection of confidentiality. This lawyer, however, suggested that contracting authorities should include in the tender documents a rule stating that any information transmitted during the procedure (including information deemed as confidential) could be used to create the common set of specifications. The same lawyer put forward another interesting question: what is the consequence if confidentiality is violated? Can it affect the validity of the contract or gives right only to a compensation for damages?

One of the contracting authorities that have used competitive dialogue has opted to consider all the information transmitted during the meetings as confidential. Another said confidentiality should only cover the author of the solution and not

480. Procurement procedures in Portugal have the nature of an administrative procedure.

the technical data itself, particularly when that technical data is not exclusive to that candidate.

(3) Data: could the rules on secrecy of article 66 have been a viable alternative?

The author asked interviewees if the rules of article 66 of the Public Contracts Code could be a viable alternative. A slight majority (five agains three) considered this to be a more balanced approach but others have rejected it outright as it does not cover all the interests that may warrant protection under the confidentiality clause now in place.

(4) Data: actual experience in the utilities sector

As the author had the opportunity to interview five lawyers and three contracting authorities who had experience operating in the utilities sector, where the open procedure with a negotiation phase[481] has been extensively used for more than 10 years, he asked if confidentiality was ever a problem in those procedures. Although the situations are not identical, as in the dialogue a solution is being discussed whereas in the open procedure with a negotiation phase the tender is the object of the discussions, the author thought they had enough similarities (interests by candidates/tenderers to protect their commercial secrets and competitive advantages of their solution/bid) to justify a question about their particular experience with confidentiality in the open procedure with a negotiation phase. All interviewees stated that confidentiality was not a deal breaker issue in this procedure with it being asked for rarely. In fact, collectively only two cases of a

481. In this procedure, tenderers present their tenders and the two best classified are invited to further negotiate their terms with the contracting authority.

confidentiality request were mentioned, one of them in a purchase of hard military equipment.

(5) Data: exclusion of confidentiality at the start of the dialogue

In the interviews this question was asked, there was a clear response[482] that the rules in article 214/3 of the Public Contracts Code are mandatory and thus cannot be put aside in the contract notice or descriptive document. In face of this position, subsequent interviews were focused on the the remaining issues related with confidentiality.

(6) Conclusion

The data gathered has shown that confidentiality is a contentious issue for the interviewees at this point, without a clear indication on how its rules should be interpreted. It raises a number of questions (such as its scope or duration) that are still to be fully answered. This state of affairs contributes to the legal uncertainty surrounding competitive dialogue, and may be a factor dissuading contracting authorities from using it.

12. Common set of specifications

(1) Introduction

The Public Contracts Code states that at the end of the dialogue stage, the contracting authority shall identify the best solution to meet its needs and then proceed to draft a common set of technical specifications. The tenders of all candi-

482. Although two interviewees accepted it could be legal as long as the rules were clear at the start.

dates that have participated in the discussions will then be based on these common specifications and not the solutions they had been discussing with the contracting authority.

The issue of the common set of specifications and its implications for competitive dialogue was one of the most contentious topics of the interviews held in Portugal. It was also the topic on which most time was spent during the interviews.

Interviewees were probed about their opinion on how the common set of specifications was to be drafted, *ie* with elements of only one solution or with parts of different solutions. They were also asked how it could be compatible with possible patent or intellectual property issues or if they thought it would adversely impact competition. The author asked them to agree or disagree with the possibility of having a "minimal" or vague set of specifications or alternative specifications tailor made to each candidate (assuming the solutions were comparable).

(2) Data: possibility of cherry picking parts of different solutions

A trend in responses can be identified (with important deviations): 15 of the respondents, including two contracting authorities have used the procedure, have said clearly that cherry-picking of solutions to create the specifications is acceptable, even though the Public Contracts Code states that the "best solution" must be identified at the end of the dialogue. Respondents said the procedure made no sense if the contracting authority could not create the best framework to have tenders on. Furthermore, if the technical specifications reflected only the best solution, the other candidates would lose out and probably feel a decision had been already made about who would end up winning the contract.

Three respondents have said, though, that cherry-picking was illegal since the Public Contracts Code makes the contracting authority identify the best solution to fulfill its needs. If allowed, cherry-picking would render this legal imposition useless. Furthermore, for one of these respondents (a contracting authority) it could also jeopardise competition, by sending the wrong messages to prospective candidates that may decide then not to participate at all in the dialogue.

Two interviewees stated that while they did not know if cherry picking was legal or illegal, they rhetorically challenged anyone to use it as they felt it would increase the risk of a judicial review and problems with the Audit Court.

As a way to bring flexibility into this phase of the procedure, two interviewees have suggested the possibility of drafting regular technical specifications but with the possibility of tenderers submitting variant bids.

(3) Data: patents, intellectual property and trade secrets

Regarding solutions eventually protected by patent or intellectual property laws, no identifiable trend was found apart from an obvious preoccupation by the respondents with this issue. They were aware of this possibility and worried about its implications. Two lawyers raised the question of what should happen if at the end of the dialogue stage a preferred solution is found but due to the aforementioned patent issues only one candidate can actually implement it. Can the contract be awarded directly without competition? The Public Contracts Code in its article 24/1(b) only allows the transition from a competitive dialogue to the direct award procedure if all tenders (though not the solutions) have been excluded. In the same article 24 however, paragraph 1(e), if only an entity can perform a contract, then awarding the contract directly is possible. The respondents have

stopped short of going to the point of stating this last paragraph should be the way out.

Two other interviewees suggested that whatever was put forward by candidates in their solution had to be considered as licensed by the company for the purposes of drafting technical specifications. The interviewee linked this to the payment of solutions and especially the payment to the developer of the winning solution. They also suggested stating in the contract notice or descriptive document this licensing as to make clear the rules of the game.

(4) Data: vague technical specifications

Regarding this possibility, no identifiable trend was found, with answers falling at either end of the scale: possible or impossible (illegal). The same happened with the possibility of having alternative technical specifications tailor made for each solution discussed during the dialogue. At this stage the most important point to make is that not only respondents were aware of the issues raised by having a common set of specifications but that they were also interested in discussing ideas to overcome those issues.

(5) Data: identifying a winning solution

Two of the contracting authorities that have used competitive dialogue said that the need to identify a winning solution at the end of the dialogue stage raised practical problems. In particular, respondents were worried on how (and also why) to choose a "best" solution when faced with very similar solutions. Furthermore, they suggested that choosing one solution might alienate the other candidates and lead to reduced competition at the tender stage.

(6) Conclusions

The option by the Portuguese law makers to make mandatory the drafting of common technical specifications at the end of the dialogue stage proved polarising. Many respondents think the national law allows for the possibility of the cherry picking of solutions to draft those technical specifications. However, legal risks appear to be associated with this option.

Furthermore, the common technical specifications raised doubts in the respondents on how to deal with eventual patents, intellectual property or trade secrets contained in the winning solutions.

One of the risks the common technical specifications raise in Portugal is that, although the contracting authority will have to identify a winning solution at the end of the dialogue stage, the fact that a common set of specifications has to be drafted, may entice the contracting authority to cherry pick even during the dialogue stage and guide the candidates to develop solutions ever more similar.

13. Lack of a stage to fine tune tenders

(1) Introduction

According to article 29/6 of Directive 2004/18, it is possible for the contracting authority to request clarifications, further specifications or the fine-tuning of tenders before the preferred bidder is selected. The Public Contracts Code however, does not include a similar provision and only allows for the contracting authority to request limited information about the tender, as it could do for any other procedure.

It was explained to interviewees that the Directive 2004/18 allowed for such a phase and then asked if they thought this stage would be useful in competitive dialogue procedure and what were the benefits or disadvantages of having it.

(2) Data

A clear trend was identified with 14 of the respondents, including two contracting authorities that have used competitive dialogue procedure, stating it made no sense to exclude such a phase. In a procedure where the exact content of a contract was unclear, the contracting authority should have access to all the help it could have, including discussing elements of the tenders before the selection of a preferred bidder. It was also strongly stated that the contracting authority would benefit more from this phase than tenderers.

A minority of interviewees has defended a different view. Seven respondents[483] have stated strongly that in practice this possibility of suggesting changes to the tenders at this stage would entail opening a door to abuse and contracting authorities could use it to nudge contracts to a firm of their liking.[484] One of these interviewees considered that admitting changes at this stage would violate the principle of tender stability.

Of the respondents with practical experience in the field of public-private partnerships, it is worth noting though that two lawyers argued about the existence of a practice in that field of asking for changes to tenders after they had been submitted.

No respondent made any reference to article 72 of the Public Contracts Code that includes the possibility of the contracting authority requesting further infor-

483. Only one from a contracting authority.
484. One suggested it would be similar to having negotiations.

mation from the tenderers, but not changes to feature of the tender or to bring a non-compliant tender into compliance.

(3) Conclusion

From the data one can argue that there is a strong criticism to the decision taken by the law makers to exclude the possibility given in article 29/6 of Directive 2004/18 to have some tuning of tenders before choosing the preferred bidder. A minority was quite vocal in defending the opposing view, considering this a welcome change. In addition, no respondent mentioned article 72 of the Public Contracts Code.

14. Stage to request clarifications from the preferred bidder

(1) Introduction

Article 29/7 of Directive 2004/18 includes the possibility of the contracting authority requesting further clarifications or the confirmation of commitments contained in the tender as long as substantial aspects are not changed. The Public Contracts Code does not have a specific rule for competitive dialogue. It has, however, a general rule in article 99 valid for all procedures where multiple tenders have been evaluated. This rule appears to be similar to the one found on article 29/7, albeit with some further refinements regarding the limitations of what can be discussed at this stage. According to the national law, changes to the tender need to be grounded in the public interest and cannot include anything present in another tenderer's bid or one the technical specifications. Respondents were asked about what they thought could be done on this phase.

(2) Data

No clear trend in how respondents interpreted this rule could be identified. Four respondents have considered that this phase allowed for the for the confirmations of previous commitments to be done (as specified in the law). They focused the possibilities of discussions on financial and insurance-like issues. One contracting authority was adamant that the so called "financial closing" held at this stage had been misused in the past and could continue so in the future. He stated in clear terms that banks would strong arm the contracting authority and the tenderer to transform clauses that were mandatory in the technical specifications in simple statements of intentions.[485]

Five interviewees, including two contracting authorities that have used the procedure, considered the scope for alterations to be very small at this stage. Only minor points, or simple adjustments that do not violate the principle of competition, should be brought up for discussion. As an example, a respondent suggested the confirmation of previous bank commitments. Another interviewee, on the other hand, said the parties could discuss everything as long as it was not covered by the tenders, award criteria and technical specifications.

Finally, another respondent considered that the parties could discuss anything they were allowed to change during the performance of the contract. In his view, this stage was nothing more than the anticipation of the unilateral powers of mandating changes to the contract awarded in specific cases to the contracting authority.

485. The interviewee provided anecdotal evidence drawn from his experience. Furthermore, at the end of 2009 the Portuguese Audit Court refused to vouch for 6 highway contracts tendered by means of an open and restricted procedure because banks aggravated the financing terms between the first and the final tenders leading to more onerous contracts.

(3) Conclusion

It was not possible to identify a trend in this topic. Maybe with actual practice of the procedure it will be able to assess the usefulness of this stage and the ways it is actually used.

15. Potential reasons for the lack of use

(1) Introduction

Bearing in mind the limited use of competitive dialogue in Portugal,[486] one of the most pressing questions was to know why it had not been used more. The reasons herewith exposed are grounded in the findings from the interviews carried and the author's own interpretation of the data gathered.

This section is divided on various paragraphs, each addressing one potential reason behind the lack of use of the procedure in the country. Sub-section (1) deals with the relationship between competitive dialogue and public-private partnership contracts in Portugal. Sub-section (2) looks into the limited grounds of use of the procedure in the country. Sub-section (3) exposes other legal uncertainties. In sub-section (4) one can find the cultural issues potentially involved. Finally, sub-section (5) suggests lack of information may be a factor at play too.

(2) Inadequacy for public-private partnership contracts

One of the areas where competitive dialogue was most expected to be used was the sector of transport, in particular for the construction of Trans-European Net-

486. Only five times so far, as mentioned in section 2 of this Chapter.

works[487] and public-private partnerships.[488] These may be done with different sorts of involvement from private parties, with them providing finance, for instance. In Portugal a legal framework regulating public-private partnerships is in force since 2003.[489] This legal regime was considered by interviewees as unaffected by the Public Contracts Code.

The author interviewed five lawyers and four contracting authorities that operate in the utilities sector. These, along with two other lawyers, have extensive experience with the use of public-private partnerships as configured in the national law.

The author inquired about their view on competitive dialogue being used for tendering public-private partnerships contracts. A very clear trend was identified with all but one of the respondents saying that it was not appropriate for three main reasons. First and foremost (only for the utilities sector), contracting authorities may tender by using an open procedure with a negotiation phase since the 1990s and are happy with it and the results it produces. Under this procedure, the specifications are defined at the start (as in any other procedure) and tenders submitted according to those specifications. The two best classified tenderers are then invited for a negotiation phase to further refine their bids. Respondents have clearly stated this procedure caters well for the contracting authorities' needs[490] and also that private parties are used to it.

Secondly, the public-private partnerships law states that the contracting authority must compare the cost of doing the project with public or with private funding and can only use a public-private partnership if it is more economic to do so. For the respondents this forecloses the possibility of using competitive dialogue to

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487. According to Recital 31 of Directive 2004/18 and Commission, *Explanatory note - competitive dialogue - classic directive* (2005).
488. According also to Ibid. and Commission, *Commission interpretative communication on the application of Community* (2008) p.4-5.
489. Decree-Law 86/2003, altered by the Decree-Law 141/2006).
490. One even said they are getting more and more streamlined and standardised as time goes by, with negotiations covering less and less ground.

tender public-private partnership contracts as it implies knowing in advance what to do and how to do it, be it at the technical, legal or financial level.[491]

Thirdly, in specific sectors where the State has traditionally operated, such as water, electricity, road or rail, there is a still a wealth of technical knowledge in contracting authorities, both in the State (Ministries) and public undertakings.

One of the respondents of this subgroup has expressed a different opinion. According to this interviewee, this alleged capability is a "myth" and pointed to the decision on the location of the new Lisbon airport[492] and the fact no one has ever built a high speed train line in Portugal. This respondent and another have suggested the use of the competitive dialogue procedure for public-private partnerships contracts.

(3) Limited grounds for use and restrictive interpretation

As we have seen in section 3 above, eight interviewees have expressly pointed to the limits of the grounds for use when asked why it was not being used more. However, when respondents were asked on how the grounds for use should be interpreted, 14 considered that the use of the procedure should be exceptional and a further two that the grounds for use were limited. That is to say, a higher number is actually interpreting the conditions for the use of the procedure restrictively than the ones who connect their interpretation to the question of why is not being used more. Therefore, although only eight respondents pointed to the grounds for use as a reason for the lack of use, their implication in the current

491. Kirkby, 'O diálogo concorrencial' in *Estudos da Contratação Pública - I* (Coimbra Editora, 2008) has expressed a different view, however.
492. It was originally set to be built at Ota, some 50kms north of Lisbon by studies carried in-house by the Government. Later studies carried and sponsored by private parties have shown that an alternative location (Alcochete, on the Tagus south bank) would be more beneficial. After intense pressure the Government ended up changing its decision and the airport will in the end be built in Alcochete.

lack of use may be more widespread since 16 have said the procedure had an exceptional nature or the grounds for use were limited.

For the author, it is very clear that the mainstream interpretation of the grounds of use is that they are exceptional and competitive dialogue should be used in very specific cases only. In other words, for Portuguese lawyers and contracting authorities, competitive dialogue use, due to its own design, has to be limited. This finding dovetails with data gathered by the author in three interviews held with people involved with the draft of the Public Contracts Code about competitive dialogue. The author was told that the grounds of use were more restrictive than those found in Directive 2004/18 on purpose. They wanted to restrict its use in Portugal to a bare minimum,[493] due to a fear of corruption or foul play by contracting authorities.[494] Not only are the actual numbers extremely limited in the almost two years the Public Contracts Code has been in force, but the prevailing view in the leading procurement lawyers and the contracting authorities interviewed is that competitive dialogue has very narrow grounds of use.

Furthermore, it may be the case that this interpretation may be connected with a perceived risk of judicial review of using this procedure as mentioned hereunder in subsection (5).

(4) Other legal uncertainties

Respondents have also cited a number of different issues at play that can be categorised as "legal uncertainties". In this category we can find issues related mainly with confidentiality (how to ensure it, when or if to end it, what information to

493. Hence the already mentioned exclusion of its use by some contracting authorities in the utilities sector.
494. The author was also told that in one of the interim versions of the draft the competitive dialogue was dropped. It was afterwards reinstated by political decision, since the Government felt the need to transpose all the tools in Directive 2004/18's toolkit.

transmit to candidates, to hand out or not minutes of meeting) and with the common set of specifications (how to draft them, with cherry-picking or with a single solution).

Confidentiality was one of the most contentious issue during the interviews. Both lawyers and contracting authorities expressed difficulties in explaining exactly its characteristics and how to render it compatible with the need to draft a common set of specifications. Furthermore, confidentiality is an opposing principle to the principle of transparency that, for instance, mandates the need to debrief the losing tenderers of the reasons why they lost the bid. Transparency is paramount in the other types of procedures such as the open or restricted procedures. How can a contracting authority sustain the decision to pick a solution as the best if it perceives that parts of this solution or another are covered by confidentiality and should not be transmitted to the remaining candidates?

Another point where many interviewees were not able to express a clear interpretation was on the possibility of the contracting authority cherry picking parts of different solutions when drafting the common set of specifications. Although the possibility of cherry picking was admitted by the majority of respondents, the fact the Public Contracts Code in its article 215 mandates the contracting authority to identify the preferred solution may be creating a reasonable doubt in their mind regarding what can or cannot be done.

These legal uncertainties remain unresolved through guidance, soft law, further regulation, workshops or even actual practice in the country. We may be facing a case of "when in doubt, do not use it".

(5) Perceived risk of judicial review

Perception of a potential judicial review risk by adopting the procedure may also be influencing contracting authorities. As we have seen above in Chapter 5, access to courts by aggrieved bidders looking for remedies is easy.

Contracting authorities and lawyers are unsure on the exact content of certain rules pertaining to competitive dialogue in national law. This insecurity in interpretation - and lack of practice or routine use - may also be leading interviewees to consider that courts will face the same dilemma and thus have a chance of adopting a different view. One lawyer challenged rhetorically anyone to be confident enough on a certain interpretation of the grounds of use to go through with it and eventually face the courts. That is not to say the risk was expressly mentioned by many respondents, but from the interviews an "unspoken subtext" was identified by the author that the answers given were perhaps hiding this risk.

Furthermore, some contracts are subject to *ex-post* review by the National Audit Court. In late 2009, the National Audit Court ruled five concessions contracts (tendered by the open procedure with a negotiated phase) where the price had been revised upwards at the negotiation stage as illegal and refused to give its agreement for the contract to be signed. This was widely reported in Portuguese media at the time and some of the interviewees may have had this situation present when being interviewed by the author.

(6) Cultural issues

Another category that has been appearing in the data can be classified as "cultural issues". These are issues pertaining to the country that do not derive directly from the law. In this category we find different issues such as the inertia of con-

tracting authorities, traditionally used to order, lack of experience in negotiation, the fact that it may be considered "shameful" for personnel in the contracting authorities to publicly admit they do not know the best solution and thus need to carry out a competitive dialogue and the lack of political marketing on behalf of the procedure.

Firstly, regarding inertia of contracting authorities it can be said they have been dealing with "particularly complex contracts" since procurement became regulated in the country[495] and have developed in house practices to deal with it that may be difficult to overcome. As we have seen in Chapter 5, for public-private partnerships in the utilities sector contracting authorities have been using the open procedure with a negotiation phase and are happy with it. Contracting authorities may not consider that they are launching tenders with insufficient detail or without setting the best solution for its need as it is the only way they have practice of doing. Furthermore, two lawyers said that contracting authorities when they do not know how to draft the technical documents for a project usually consult some companies off the record, perhaps where they know someone.[496]

Secondly, contracting authorities are traditionally expected to *decide*, no to discuss or ask for help in defining the best solution for its needs. One must not forget the matrix of public administration is French[497] and that for a long time there was more knowledge and information on the public than on the private side.

Thirdly, contracting authorities do not tend to have a lot of experience in negotiating. They are used to following very specific sets of rules that make clear to all involved every step from the start to the finish of an award procedure.[498] The au-

495. The problem of how to deal with particularly complex contracts was not born in 2004 with the Directive 2004/18.
496. This goes in line with the author's previous experience in the country as well.
497. As we have seen in Chapter 5.
498. The Public Contracts Code has 277 articles devoted to award procedures for a reason.

thor was told that negotiating or even discussing with companies in the clear (as would happen on a competitive dialogue procedure) is frowned upon and could be seen as pandering to private interests or being accused of violating transparency and equal treatment.

Fourthly, one of the most interesting cultural issues put forward by a respondent (a lawyer) was that civil servants may frown upon having to publicly "confess" not knowing the best solution for a need and have to openly request assistance from private companies. This may be considered shameful and hard for them to explain to their superiors, who themselves may have superiors to respond to.. In a sector - public administration - which is traditionally used and expected to *order*, having to be humble and accept its own limitations may be hard to do.

Fifthly, a lawyer suggested competitive dialogue is lacking "political marketing" and publicity as a viable procedure for particularly complex contracts. He has suggested the political calendar in the last few years has not been kind for competitive dialogue since both local and national elections were held in 2009 and the use of the procedure (longer and for more complex contracts) is not attuned to produce results in a short time frame.

(7) Lack of information

Finally, lack of information may be at play also. The author asked respondents if they felt well informed about the procedure and if the amount of information available was sufficient to allow for the use of competitive dialogue. Although the overwhelming majority have answered "no" to the first question, one should not read too much on this result as the way the question was posed can be considered as an exercise in humility and respondents may have felt the "no" was the most polite answer. The second question however has produced similar results with re-

spondents stating that there was a lack of case studies, doctrinal work and workshops on the topic.[499] They have also stated that in the numerous workshops and seminars held about the Public Contracts Code competitive dialogue was not as thoroughly addressed as other procedures. Furthermore, some have also stated that in workshops competitive dialogue was "dismissed" as a procedure "not to use".

(8) Conclusion

From the data gathered with the interviews it appears that a conjunction of factors may be involved in the lack of use of the procedure in this country. To the author, while analysing the data, two categories have appeared to be more relevant to explain the lack of use of competitive dialogue in Portugal than the rest: the limited grounds for use and the restrictive interpretation being made by the leading experts in the country amount to the most important factors in justifying the lack of use. In addition to these two categories, the author also thinks a perceived risk of judicial review by contracting authorities may be almost as important as well. That is not to say they are the only ones or if they were the only factor the situation would remain the same. The author believes the other factors unearthed by the research are also at play and should not be put aside.

16. Conclusion

In this chapter we have discussed in the detail the findings from the 27 interviews carried out in Portugal. We found not only new issues not forecast in advance,

499. Multiple respondents asked the author to submit them his findings and, if possible, to present his research in their institutions, further compounding the need for more qualified information on the subject.

such as how to deal with apparent need of estimating the contract value at the start of the procedure, but we have also gathered insight relevant to the issues presented in Chapter 6. From the data it appears that the draft of the grounds for use was not only modified on purpose from what is on Directive 2004/18 but that experts in the field are also interpreting them restrictively. This, in the author's view is the major cause to explain the lack of use of the procedure in Portugal, although it is far from the only one.

Other issues from the implementation of competitive dialogue in Portugal appear to be obvious, for instance, the way confidentiality is treated or the need to find a winning solution at the end of the dialogue stage and draft a common set of specifications.

Finally, it seems that the procedure in Portugal is to be run as an open or restricted procedure after the submission of tenders as the rules are identical for all procedures.

After concluding the analysis of competitive dialogue in Portugal, the next chapters will focus in Spain and the same structure (division in public procurement, legal rules and finally findings from the empirical research stage chapters) will be adopted.

Chapter 8 - Public procurement in Spain

1. Introduction

Spain, as Portugal, has a long tradition in public procurement. It developed a detailed legal framework to regulate procurement by the State long before acceding to the EC in 1986. After accession, Spain kept updating its public procurement legal framework, incorporating the required EU rules as they came into force. The bulk of legislation applicable to public procurement in Spain at present is contained in the Law on Public Sector Contracts (Law no 30/2007, October 30th) which transposes Directive 2004/18.[500] This law was most recently updated in August 2010 to accommodate the changes imposed by Directive 2007/66 (Remedies Directive). Directive 2004/17 on Utilities Sector procurement was transposed by Law 31/2007 (October 30th). The transposition of Directive 2009/81 on defence and security procurement is still pending.

In the transposition of Directive 2004/18, Spain opted to include the new competitive dialogue procedure. Its legal analysis being deferred to the next chapter.

In this chapter we will provide an overview of the procurement legal framework in Spain. The chapter will start with a short introduction on the country's administrative organisation, followed by a brief analysis of its procurement history and concluding with a more detailed overview of the current Law on Public Sector Contracts, focused on its innovations and particularities. As we will see, the Spanish law makers did not limit themselves to transposing the Directives 2004/18 and

500. More than a year after the deadline set by the Directive itself. The Law on Public Sector Contracts has been the object of several amendments by means of Royal Decree 817/2009, Order of the Ministry of Economics and Finance 3497/2009, Royal Decree-Law 6/2010, Royal Decree-Law 8/2010, Laws 14/2010 and 15/2010 and Law 34/2010.

2004/17, but also included other innovations, some arising from CJEU's case law and others specific to the country.

2. *Administrative organisation of Spain*

Before entering into the analysis of public procurement in Spain, both past and present, a short introduction on the country's administrative organisation is needed to frame and explain some of the options or content of Spanish laws on public procurement. This will be focused solely on the current administrative division of the country for its relevance to understanding the Law on Public Sector Contracts in general, and competitive dialogue in particular.[501]

With the approval of the current Constitution in 1978, during the transition from Franco's regime to a democracy, the Spanish state was divided into autonomous regions, each with legislative and executive powers, thus decentralising the administration. No longer did it make sense to talk about the "public administration" (the State administration) but it was more correct to talk of "public administrations" (the State, Regional and Local administrations).[502]

Bearing in mind the administrative division of the country, the national parliament can enact laws which are applicable in all of Spain and the Regional parliaments can approve laws enforceable only within each region. National laws can include both rules directly applicable in all the country or what is called "basic legislation", that is, legislation that may not regulate thoroughly an issue, leaving to each Region a certain scope to detail and refine it. Regional Governments have thus some room to manoeuvre to adopt specific rules under the "basic legislation"

501. For a more detailed overview of the administrative structure of Spain, please see Cosculluela Montaner, *Manual de derecho administrativo* (19th, Thomson Civitas, 2008), chapters 7 through 12.
502. Although it is common to use the expression "public administration" as a reference to all public administrations.

umbrella, as long as these rules are not contrary to the requirements set forth at the national level. The exact content of the "basic legislation" concept and its boundaries have been and still are a matter of open discussion by Spanish scholars.[503]

In relation to public procurement in particular, according to article 149/1(18)(a) of the Spanish Constitution, the national Parliament has the power to enact basic rules to regulate public procurement. In the current Law on Public Sector Contracts, and competitive dialogue for that matter, most of its content is deemed as "basic regulation", as per final disposition seven.[504] Non basic regulation can be overruled by laws enacted by each Autonomous Region. The only known case of a regional law in the field of procurement is in the Navarra Region, where since 2006 a Regional Public Procurement Law is in force.[505]

A further point on the administrative organisation of Spain is worth mentioning. In 1961, the country created a national consulting body for public procurement, the public procurement advisory body[506] which assists the State in the matters of procurement. With the division of the country in different Autonomous Regions, it is within the scope of each Regional Government to establish a similar body with equivalent attributions, although not all have decided to do so.[507] The public procurement advisory bodies, both national and regional ones, are entitled to create general rules with the aim of improving administrative, technical and economic aspects of procurement. They are also entitled to issue recommendations ei-

503. See, Ibid., p. 85-89.
504. Although a huge number of exceptions is listed in the said article, only one is relevant for the competitive dialogue. According to this list, article 296 on the accompanying body that will help the contracting authority during procedures held by state administrations, is not a basic law. Its consequences will be discussed in detail in the following chapter.
505. Foral Law 2006/6. Its subjective scope includes the Regional Parliament and Government, local authorities and bodies governed by public law based in the region.
506. 7It is currently regulated by the Royal Decree 30/1991, January 18th and article 299 of the new Law on Public Sector Contracts.
507. Only the Governments of Andalucia, Aragon, Basque country, Canarias, Cantabria, Castilla y León, Catalonia, Extremadura Islas Baleares, Galícia, La Rioja, Madrid, Murcia, Navarra and Valencia have established a Regional Public Procurement Advisory Body. The Regions of Asturias and Castilla-La Mancha have not.

ther to a single contracting authority or more generally if they consider appropriate to do so. However, public procurement advisory bodies rulings and recommendations are applicable only to the authorities of the same administration. That is to say, the public procurement advisory body for Catalonia, for instance, is relevant only to Catalan regional authorities but not the national or local ones. Furthermore, bodies and entities governed by public law, such as state owned companies are also not covered.

3. Public procurement history in Spain

As mentioned in the introductory chapter of this thesis, Spain has a long tradition of regulating public procurement. Although, some traces of a legal regime can be found in the 19th century,[508] historically, the development of public procurement in Spain can be divided into two major periods: before 1965 and afterwards.[509] In 1965 the Law on State Contracts entered into force (Decree 923/1965), which revoked part of the Law of Administration and Accounting of the Public Treasury from 1911 (itself based on a Decree from 1852). This law aimed to provide a general regulation of all contracts of the administration, without ever achieving the goal as it only had a sparse regulation covering essentially procurement procedure and rules on the form of the contract. It was also applicable only to the procurement of public works and services, thus excluding all other contracts.[510] This law was reformed by the Law from December 20th 1952 that laid

508. For instance, in what relates to the execution of public contracts, in particular public works, as successive governments approved different regimes.
509. Spain followed the French model of public procurement, dividing contracts awarded by public bodies in administrative and private contracts of the administration. On the historical evolution of public procurement in Spain see García de Enterría and Fernandéz, *Curso de derecho administrativo* (14th, Thomson Civitas, 2008) and Boquera Oliver, 'Los contratos de la Administración desde 1950 a hoy' (1999) 150 *Revista de Administración Pública*.
510. For a general overview of this period, please see Meilán Gil, 'La actuación contratual de la administración publica española. Una perspectiva histrica' (1982) 99 *Revista de Administración Pública*, p. 7-35.

the groundwork for the Law of State Contracts from 1965.[511] This year marks the start of the consolidation of the Spanish public procurement legal regime, with the entry into force of the Law on State Contracts (Legislative Decree 923/1965, April 8th). This law regulated public procurement in Spain for 30 years,[512] until revoked by the Law of Public Administrations Contracts (Law 13/1995) in the 1990s. The Law on State Contracts kept the traditional distinction in the execution regime between administrative contracts and private contracts of the administration[513] and has created a common procurement framework for both types of contracts, irrespective of their precise classification as administrative or private.

The Law on State Contracts was replaced in 1995 by the Law of Public Administrations Contracts.[514] This was the last law regulating Spanish public procurement[515] before the entry into force of the current Law on Public Sector Contracts, Law 30/2007, October 30th. Most of its content was considered as "basic legislation" in the terms we have seen above in the previous section, in relation, for instance, to procurement by local authorities. Regarding its subjective scope, this law covered all public administrations, although the exact content of this concept was in reality restrictive. In addition Spain was declared three times by the CJEU

511. It said nothing though about issues arising from the procurement or the validity and nullity of such contracts.

512. Albeit updated in 1973 (Law 5/1973) and 1986 (after acceding to the EC as to render the legal framework compatible with EC law)

513. The first includes some special rights or powers for the contracting authority regarding the interpretation, modification and resolution of the contracts, including the power to execute such special rights without the need of a judicial decision. The second follows the Spanish legal regime for regular private contracts, similar to what we have seen in Chapter 5 for Portugal.

514. This law was extensively revised during the period it was in force. In 1999, the Law 53/1999, December 28th deeply reformed the existing law leading to the publication and entry into force in 2000 of a "Consolidated Text" by the Royal Legal Decree 2/2000, June 16th. This "Consolidated Text" did not introduce any changes but merely put on a single law all the successive changes made to the 1995 law. In 2003 a new law modified the Law on Public Administrations Contracts, mainly due to comply with rulings from the CJEU, namely the cases C-463/00 and C-98/01 *Commission v. Spain* CJE/03/37 and C-283/00 *Commission v. Spain* [2003] ECR I-11697, both for not having extended the review mechanisms to the awards made by public companies that should be considered as contracting authorities. In addition, the 2003 revision included also an extensive regulation of the public works concession contract. A final revision of the law entered into force in 2006 (Law 42/2006) to comply with the CJEU's decision on case C-84/03 *Commission v. Spain* [2005] ECR I-00139.
related with the exclusion of public companies from the list of contracting authorities.

515. For a critical analysis of the original version of the law, please see Ruiz Ojeda, 'The new Spanis Public Contracts Act: no answer to old problems' (1996) 1 *PPLR*, CS31-36

not to have complied with EU law,[516] as the subjective scope of the Law of Public Administrations Contracts did not include public companies as contracting authorities subject to public procurement rules. Regarding the objective scope, the Law included as a major innovation the express regulation of the different types of services contracts. From an organisational point of view, a trademark of the Law on State Contracts was the division into two major parts, which was a marked departure from the drafting structure from the 1965 law. The first part included general rules applicable to all public procurement, whereas the second part regulated the execution of administrative contracts (public works, management of public services, goods and public works concessions). This structure would be dropped in the new Law on Public Sector Contracts.

4. Law on Public Sector Contracts

(1) Introduction

The main objective of the Law on Public Sector Contracts (Law 30/2007) [517] was to transpose Directive 2004/18 into Spanish law.[518] It revoked the Law on Public Administrations Contracts[519] and brought the public procurement framework in line with the current EU rules.[520] As we have mentioned in the introduction of the current chapter, the transposition was made by means of a detailed imple-

516. The aforementioned rulings from May 15th 2003, October 16th 2003 C-84/03 *Commission v. Spain* [2005] ECR I-00139.
517. Contrary to the Portuguese law, this law was drafted completely in private, by the Spanish National Government. No public consultations were held during the drafting period.
518. Llavador Cisternes, *Contratación Administrativa* (Thomson Aranzadi, 2008) p.33-35.
519. With the exception of the private financing of public works concessions, regulated still by articles 253 through 260 of the Law on Public Administrations Contracts, until a specific legal regulation is developed.
520. For a detailed overview of this law, please see Arenas Alegría, 'Análisis de las principales novedades en materia de contratación pública' (2008) 73 *Contratación Administrativa Prática*, Cosculluela Montaner, *Manual de derecho administrativo* (19th, Thomson Civitas, 2008), chapters 16 and 17, García de Enterría and Fernandéz, *Curso de derecho administrativo* (14th, Thomson Civitas, 2008) chapter 12 and Llavador Cisternes, *Contratación Administrativa* (Thomson Aranzadi, 2008), Moreno Molina, 'The new Spanish Public Sector Procurement Law (Act 30/2007 of October 30)' (2008) 6 *PPLR*, NA282-297 and Saz, 'La nueva ley de contratos del sector publico. ?Un nuevo traje con las mismas rayas' (2007) 174 *Revista de Administración Pública*, p. 335-366.

mentation of the relevant Directives. The Law on Public Sector Contracts entered into force on May 1st, 2008, more than two years after the deadline set in Directives 2004/18 and 2004/17 for the transposition.[521] Although the major drive to the development of this law was to transpose a new set of Directives, the Spanish law makers also seized the opportunity to carry out a more general reform of the public procurement legal framework in the country, although without creating a new legislative model that simplified the existing complex system.[522] According to its article 3, the Law on Public Sector Contracts regulates the whole of procurement conducted by all public "entities" (Public Administrations and public bodies), including those not covered by the Directives, although the procurement in the utilities sector is regulated by Law 31/2007.

Contrary to the previous Law of Public Administrations Contracts, its structure is no longer divided into two - general and special - parts or books. The current Law on Public Sector Contracts is organised around a completely different structure.[523] This new law is organised around the different types of contracting authorities. It has as Preliminary Title encompassing the first 21 articles and five books. Book I (articles 22 through 92) includes the general rules applicable to procurement, Book II (articles 93 through 120) deals with the preparation of the contract to be awarded,[524] Book III (articles 121 through 190) deals with the procurement procedures and award, Book IV (articles 192 through 290) regulates the execu-

521. With the exception of the temporary disposition 7, which entered into force in the day after the publication of the law, that is October 31st. This article expanded the subjective scope of public procurement to encompass all public bodies considered as contracting authorities by the Directives 2004/18 and 2004/17.
522. Moreno Molina, 'The new Spanish Public Sector Procurement Law (Act 30/2007 of October 30)' (2008) 6 *PPLR*, NA282-297 p. NA284. Considering the law as simply repeating existing legislation, Sosa Wagner and Fuertes, 'La ley de contratos del sector público y el murciélago' [2008] *Actividad Jurídica Aranzadi*.
523. According to recital III of the Law the old structure was not appropriate for the new enlarged scope and the need to separate under the same law the transposing rules of Directives 2004/18 and 2004/17 and remaining rules.
524. Books II and III are divide into Titles that follow the aforementioned structure of different headings for different contracting authorities. Book II, Title I regulates the preparation of contracts awarded by public administrations. The Title II of the same book regulates the preparation of contracts awarded by other contracting authorities. Book III, Title I, Chapter I governs the award procedures run by public administrations. Chapter II governs the award of contracts by other contracting authorities.

tion, effects and dissolution of administrative contracts, and Book V (articles 291 through 309) includes regulation in formal aspects related with the administrative bodies or structures involved with procurement. Finally, the Law on Public Sector Contracts has 33 additional dispositions.

It should be mentioned that the relatively high number of articles in the law (309) does not make for an easy reading of its content. In various articles,[525] the drafting is difficult to read or interpret as the articles are riddled with multiple regulations in the same paragraph, separated by successions of commas[526] or have opposing "subparagraphs" within the same paragraph.[527] The multitude of additional (33), temporary (7) and final dispositions (12) and annexes (3) also do not facilitate reading. In addition, the fact that not all the content of the law is relevant in all situations, with marked differences in applicable rules depending in the classification of contracts or contracting authority,[528] presents an extra layer of complexity in what was already a complex piece of legislation.

(2) Major innovations of the Law on Public Sector Contracts

The Spanish Law on Public Sector Contracts includes a number of innovations in comparison with the previous regime and some particularities worth mentioning, such as the classification of contracts (either as administrative or private) or the different jurisdictions (administrative or judicial) where procurement issues can be argued after all the administrative appeals are exhausted.

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525. As we shall see with the articles applicable to the competitive dialogue in the following Chapter 9.
526. As an example, article 165/3 relative to the competitive dialogue has 17 lines divide into only two sentences.
527. Article 165/4 has two unnumbered "subparagraphs". The first deals with the closure of the competitive dialogue stage in the procedure with the same name. The second regulates what happens after the dialogue is finished and the submission of tenders. Adding to the confusion article 166 is epigraphed "Presentation and analysis of tenders", so arguably the second part of article 165/4 would make more sense to be included at the beginning of article 166.
528. As we will discuss hereunder in the next section.

Most but not all of the innovations in the Law on Public Sector Contracts are directly connected with innovations present in Directive 2004/18. The law roughly follows the Directive's objectives of introducing flexibility and simplification in the field of public procurement.[529] As innovations stemmed from the transposed Directive, one can mention a few such as the inclusion of social and environmental considerations in procurement (article 101), and new award procedures or tools like electronic auction (article 132), competitive dialogue (articles 163 to 167), framework agreements (180 to 182), dynamic purchasing systems (articles 183 to 186) and central purchasing bodies (articles 187 to 191).

The Spanish law makers have not limited itself to implementing Directive 2004/18, but has also updated other areas of the national procurement framework in accordance with the case law from the CJEU. For instance, it has included a new fast track administrative appeal (the special administrative appeal, article 37) only for the contracts subject to harmonised regulation[530] including the possibility of awarding interim measures to protect the interests of the private parties facing abuse (article 38).[531] As in the previous legal framework, private parties still have to go through the fast track administrative appeal before being able to file for judicial review on a court.[532]

529. As we have discussed in more detail in Chapter 4.
530. That is, contracts that are covered by the EU procurement rules and a few selected others like the management of public services for a period larger than five years and with a cost of at least 500,000 euros. For remedies arising from contracts not covered, the private parties will have to resort to the slower pre-existing review mechanisms from the Law 30/92, November 26th the ones that were deemed as incompatible with Directive 89/665. These imply firstly an administrative appeal before the aggrieved can start a judicial review procedure before a court.
531. On this review mechanism see, Saz, 'La nueva ley de contratos del sector publico. ?Un nuevo traje con las mismas rayas' (2007) 174 *Revista de Administración Pública*, p. 335-366 p. 364-366.
532. This law was most recently updated in August 2010 to accommodate the changes imposed by Directive 2007/66 (Remedies Directive) and the review mechanisms were extensively updated. However, as this amendments came after the cut off date it was not possible to take them into account for this thesis. In addition, the description of the review mechanisms is now outdated since the amendments came into force in September 2010.

The Spanish law makers has also decided to expressly include general principles applicable to public procurement. Equal treatment, non-discrimination, proportionality, transparency and competition, are now part of the law in its article 1.[533]

There are other novelties unconnected with EU law or its case law. The Law on Public Sector Contracts has updated the concept of public works concession (article 7), for instance. Previously, the public works concession could include either both the works and operation or just the latter. In the new law, the public works concession contract needs to have them both. As an innovation, the merging of the old consulting and assistance contract with the more general services contract or the new contract manager,[534] can also be mentioned.

A major innovation present in the Law on Public Sector Contracts, which is also connected with EU rules is the regulation of cooperation contracts between the public and private sector (article 11). These contracts are not governed by Directives 2004/18 and their regulation at EU level by secondary legislation is still pending.[535] These are the contracts[536] where a private entity is mandated to perform certain tasks necessary to satisfy the general interest for a period of time, with the payments to be made during the performance of the contract under certain circumstances. Cooperation contracts are now a contract type in Spain,[537] placed side by side with public works,[538] public works concessions,[539] public services concessions,[540] goods[541] and services.[542] As competitive dialogue is the default procedure for the award of cooperation contracts, the exact implications for com-

533. Contrary to Portugal, that has withdrawn the mention of these principles from the current Public Contracts Code.
534. Article 41. This person or entity is responsible for the proper execution of the contract.
535. As we have discussed in further detail in Chapter 3.
536. It should be noted though that the cooperation contract can only be tendered if it is clear that alternative procurement arragements are not viable, in accordance with article 118 of the Law on Public Sector Contracts.
537. Article 11 of the Law on Public Sector Contracts.
538. Article 6 of the Law on Public Sector Contracts.
539. Article 7 of the Law on Public Sector Contracts.
540. Article 8 of the Law on Public Sector Contracts.
541. Article 9 of the Law on Public Sector Contracts.
542. Article 10 of the Law on Public Sector Contracts.

petitive dialogue will be discussed in detail in the following chapter.[543] The scope of cooperation contract appears to overlap with existing categories of contracts such as public works concessions, and determining where either is applicable is complex.

(3) Particularities of the Law on Public Sector Contracts

A few particularities of this law are worth detailing. First and foremost, the structure of the Law is organised around the different concepts or types of contracting authorities (public administrations, non-public administrations), with a different legal regime for each, leading to the dispersion of the regulation of each contract to be scattered across the whole law in different chapters.

The most striking particularities to be found in the Law on Public Sector Contracts are the different sets of classifications that can be applicable to the same contract. Depending on the contracting authority, it can be administrative or private. According to its legal definition, a contract can be typical, mixed or atypical. Depending on the scope of the Directive 2004/18, it can be subject or not to harmonised regulation. As an example, a multi-million euro works contract would be typical (article 6) or mixed (article 12), administrative (article 19/1, (a)) if tendered by a public administration or private (article 20/1) if not and subject to harmonised regulation if its value exceeded the thresholds.

In the face of the complexities raised by the law makers' option mentioned in the previous paragraph, some clarifications are in order and we will now proceed with a breakdown of each type of classification.

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543. On cooperation contracts in general, Macho, 'Las formas de colaboración público-privada en el Derecho español' (2008) 175 *Revista de administración pública*, p. 157, Salom, 'El contrato de colaboración entre el sector público y el sector privado' (2008) 18 *Revista General de Derecho Administrativo* and Chinchilla Marín, 'El nuevo contrato de colaboración entre el sector público y el sector privado' (2006) 132 *Revista española de derecho administrativo*, p. 609.

(a) Classification according to the contracting authority

Following the French tradition of segregating administrative and private contracts,[544] public contracts in the Law on Public Sector Contracts can be classified as administrative or private. The difference in relation with the past is that the division no longer depends exclusively on the substance or type of contract but also on the contracting authority awarding it.

A public contract is deemed administrative if awarded by a "public administration"[545] as defined in article 3/2[546] and is included in either the list of article 19/1, a) or the open clause of paragraph 1, b). In the list we can find the works (article 6), public works concessions (article 7), public services concessions (article 8), contracts for goods (article 9), contracts for services (article 10) and public-private cooperation (article 11) contracts, The general clause deems as administrative all the contracts having a special administrative nature, satisfying public needs directly connected with the administrative activity.[547] All other contracts are private, that is, contracts entered into by any other contracting authority[548] (non-"public administration", as a public company, for example), contracts entered into by a "public administration" but falling outside the scope mentioned[549] or contracts

544. On the historical perspective of administrative and private contracts in Spain, please see for all García de Enterría and Fernandéz, *Curso de derecho administrativo* (14th, Thomson Civitas, 2008), p. 690-706.
545. Cosculluela Montaner, *Manual de derecho administrativo* (19th, Thomson Civitas, 2008) p. 416.
546. The subjective scope of the Law on Public Sector Contracts defines "public administration" as all the public administrations we have previously mentioned (State, Regional and Local), Social Security managing bodies, public universities, supervisory bodies with regulatory attributions (Bank of Spain, for instance) and public bodies depending on any of those entities (as long as their main function is not to sell goods or services in the open market or most of their incomes does not derive from such sales).
547. According to article 19/1(b). In light of the description by the law, one would assume though that only administrative contracts can be atypical.
548. Article 20/1.
549. Article 20/1, final part.

entered into by a "public administration" but specifically considered as private by the Law on Public Sector Contracts.[550]

The classification of a public contract in Spain as administrative or private, has implications on the jurisdiction responsible for its review. The administrative jurisdiction is entitled to review all issues arising from an administrative contract, either from its award procedure or from its execution. For private contracts it can only review the award procedure and only if awarded by a "public administration" and subject also to harmonised regulation, never their execution. The civil jurisdiction is entitled to review the execution of private contracts, and also their award procedure if they are neither awarded by a "public administration" nor subject to harmonised regulation.

(b) Classification according to the legal definition

Regarding the legal definition, public contracts in Spain can either be typical, mixed or atypical. Typical public contracts are the ones specified as such in the Law on Public Sector Contracts. Works, public works concessions, public services concessions, goods, services and cooperation between public and private sectors, are all typical contracts (article 19/1(a)). Mixed contracts, as the name implies, share characteristics of two or more typical contracts (article 12). Atypical contracts, on the other hand are contracts which have a special administrative nature, satisfying public needs directly connected with the administrative activity (article 19/1(b)).

550. Article 4/1(p).

(c) Distinction between harmonised and non-harmonised contracts

Public contracts can also be separated between contracts subject or not to harmonised regulation. By harmonised regulation, the Spanish law makers means the contracts subjectively and objectively covered by the rules of the Directive 2004/18. For instance, if the public works example above mentioned had a value over 4,845,000 euro, it would be considered as a contract subject to harmonised regulation,[551] whereas the same type of contract with a value under the threshold would not. This means that across the law, some rules are only applicable to the first, as it happens, for instance, with the new fast track review mechanism from article 37.

One can say that the Law on Public Sector contracts has different levels of detail and application of its rules depending on the contract itself (administrative or private, subject or non-subject to harmonised regulation) and the contracting authority (Public Administration, public body or private body) involved.[552]

Finally, it is also noteworthy to mention that contracts with a value inferior to the EU thresholds, are subject to the general procurement principles,[553] but small value contracts[554] can still be awarded directly by contracting authorities without any sort of competition.

551. As set by the Commission Regulation 1177/2009.
552. For a thoroughly detailed breakdown of the differences and the confusion that may arise see, Saz, 'La nueva ley de contratos del sector publico. ?Un nuevo traje con las mismas rayas' (2007) 174 *Revista de Administración Pública*, p. 335-366, p. 355-364.
553. As discussed in detail in Chapter 3.
554. Contracts with a value lower than 50,000 euros (works) or 18,000 euros (all other types), according to article 122/3 of the Law on Public Sector Contracts. Arguing that the new law may not comply with the EUprinciples of competition, equal treatment and non-discrimination, Moreno Molina, 'The new Spanish Public Sector Procurement Law (Act 30/2007 of October 30)' (2008) 6 *PPLR*, NA282-297, p. NA284-287.

(d) Updates and amendments to the Law on Public Sector Contracts

Although the Law on Public Sector Contracts came into force in 2008, it has already been reviewed and updated five times.

In 2009 Royal-Decree 817/2009 developed partially the content of the law, providing more detail in areas such as the assessment of the economic, technical or professional ability of candidates, the jury for the procedure or how to calculate the award criteria.

In 2010 Royal-Decree Law 8/2010, in response to pressure from financial markets, put in place limitations on expense growth. Regarding public procurement, it has made the recourse to concessions and public-private cooperation contracts more difficult by demanding a prior authorization from the Finance Ministry.

Laws 14 and 15/2010 provided very small alterations to the Law on Public Sector Contracts. The first reduced the performance bond for works concessions to 5%. The second created new rules to make contracting authorities provide faster payment for services and goods rendered.

Near the end of this research project, in August 2010, Spain published a new version of the Law on Public Sector Contracts. This new law brings the Spanish remedies in line with the standard established by Directive 2007/66 (Remedies Directive).

The changes introduced by this law are not taken into consideration in the current research project for two reasons. Firstly, it was published in August 2010 and came into force the following month, both happening after the cut off date (July 2010) set by the author for changes to legal frameworks. Secondly, the changes introduced, although very profound, are not directly relevant to the topic of the re-

search since they are not focused on competitive dialogue but only on the remedies available to bidders.

All references made the Law on Public Sector Contracts in this thesis are to be construed as referring to the original 2007 for all purposes, including numbering and the comments on actual reviews of competitive dialogue procedures detailed in Chapter 9.

5. Conclusion

In this chapter we have reviewed the public procurement regime in Spain, from the administrative organization of the country to the current Law on Public Sector Contracts from 2007 and subsequent amendments.

Having presented the legal public procurement framework in general, in the next chapter we will focus on the implementation of competitive dialogue in Spain.

Chapter 9 - Competitive dialogue in Spain

1. Introduction

The Law on Public Sector Contracts,[555] regulates the competitive dialogue procedure, mainly in Book III, Title I, Chapter I, Section 5, articles 163 through 169. A number of other articles of this law are also relevant, either directly or indirectly, to the regulation of competitive dialogue in Spain. These articles are scattered throughout the Law on Public Sector Contracts.[556]

Although in some instances the level of detail in the Law of Public Sector Contracts is greater than that present in Directive 2004/18 regarding competitive dialogue,[557] one can say that, in general, the procedure has not been regulated in much detail in the Spanish transposition. Most provisions on competitive dialogue are simply direct transpositions of what is already in the Directive with only a few changes added afterwards. The only remarkable novelty of the Spanish law is to make the competitive dialogue procedure the default procedure for the award of public-private cooperation contracts.[558]

The Spanish law makes no distinction between the recitals and articles of the Directive 2004/18, although the purpose of the former[559] is to interpret what is included in the articles.[560] For Spanish law makers, the content of the recitals does

555. Law 30/2007.
556. Articles 11/1, 26, 45/1, 64, 65, 66, 67, 68, 73, 75/5, 93/3, 101/3(b)(c)(d), 118, 119, 120, 122/2, 129/2, 130, 135/3, 147, 148, 149, 150/2 /3 /4 and /5, 154(a) and 296 are all relevant to the competitive dialogue and will be explained in detail further down when applicable.
557. For instance, in the grounds for use of the competitive dialogue one can find a specific rule stating the procedure as the default for the award of public-private cooperation contracts (article 164/3 of the Law on Public Sector Contracts) and the assessment of the economic, technical or professional ability of candidates is also subject to extensive regulation (articles 64 through 68, 147 and 149 of the Law on Public Sector Contracts).
558. Article 164/3 of the Law on Public Sector Contracts.
559. For instance, in recitals 40 and 41 of the Directive 2004/18, where one can find information on the reduction of candidates during the dialogue phase.
560. As we have seen above in Chapter 3.

not seem to have a simply interpretative nature. That is, irrespective, of their specific place within Directive 2004/18, all rules on competitive dialogue were transposed to the Spanish law as having the same value. Consequently, in the Law on Public Sector Contracts, what was originally in the Directive's recitals sits, side by side, with the rules from the articles.

In this chapter we will, first present an overview of the flow of the procedure and then analyse the procedure step by step. The analysis will start with the grounds of use and then progress with the successive phases, with a structure similar to the one previously adopted for Chapter 7.

2. Flow of the procedure

The purpose of this section is to give a brief introduction to the way competitive dialogue is run in Spain, without focusing particularly in any of the potential issues or major differences in relation with Directive 2004/18. Such issues and differences will be highlighted and discussed in detail in the following sections.

The flow of competitive dialogue is remarkably similar to the version present in Directive 2004/18. In the Spanish law competitive dialogue is clearly divided into into three phases: start of the procedure and requests for participation; dialogue with candidates; submission and evaluation of tenders.

The competitive dialogue procedure starts with a notice and descriptive document that are to be published in the Official Journal of the European Union and national, regional or local official journals. The notice will contain the basic information about the procedure needed by the prospective candidates both to submit their participation requests and also to know the rough features of the procedure.

To be considered for the dialogue, prospective candidates shall submit their requests for participation to the contracting authority before the deadline stated in the notice. The contracting authority will then assess which shall be considered as suitable and pick from that pool of candidates the ones it will carry to the dialogue stage.

The dialogue will be carried out by the contracting authority to discuss all aspects of the contract and to find the solutions that best meets its needs. The dialogue stage is no more regulated than in Directive 2004/18. A lot of scope is left in the hands of the contracting authority to organise the dialogue as it sees fit, contrary to the law makers' approach to the open and restricted procedures, which are regulated in extensive detail.

Having found the best solutions for its needs, the contracting authority informs the candidates of the end of the dialogue, inviting them to present their tenders. No details are given on how the tenders are to be presented, that is, if they are to be based on their own solutions or on a common set of specifications.

The tenders submitted will be assessed in accordance with the award criteria established at the beginning of the procedure or at the invitation for the dialogue. Before a decision is taken, the tenderers may supply clarifications, specifications and fine-tune their tenders, at the request of the contracting authority, in line with the scope provided for in article 29/6 of the Directive 2004/18.

After the most economically advantageous tender has been chosen by the contracting authority, it can request from the winner further clarifications or the confirmation of commitments, as long as they do not modify substantial aspects of the tender or call for tender and do not distort competition or causes discrimination. Once again, this provision is in line with what can be found on article 29/7 of Directive 2004/18.

Finally, the contract can be signed between the contracting authority and the tenderer.

3. Grounds for use

(1) Introduction

The grounds for the use of competitive dialogue in Spain can be found in article 164 of the Law on Public Sector Contracts. According to this article, the grounds can be divided into two different sets of circumstances. Firstly, competitive dialogue can be used for the award of particularly complex contracts,[561] along the lines of Directive 2004/18. Secondly, competitive dialogue is the default procedure for the award of public-private cooperation contracts.[562]

According to article 164/1 of the Law on Public Sector Contracts, competitive dialogue can be used as an award procedure if two conditions are met. Firstly, the contract to award has to be a complex contract.[563] Secondly, it is necessary that if the open or restricted procedures were used to award such contract they were not adequate for the purpose. We will now analyse in more detail each of these two conditions.

(2) Particularly complex contracts

Regarding the first condition, a contract is deemed as particularly complex when the contracting authority is objectively unable to either: i) define the technical means needed to meet its needs or objectives; ii) define the legal or financial

561. Article 164/1 and /2 of the Law on the Public Sector Contracts.
562. Article 164/3 of the Law on the Public Sector Contracts.
563. The definition is made in the number two of the same article.

make-up of the contract to award.[564] In respect to the technical means, the Law on Public Sector Contracts provides a more detailed interpretation than the Directive. The Spanish law tries to explain the technical means concept by referring to part of its own rules on technical specifications.[565] Even so, the law does not provide any clear guidance or explain what should be considered as a particularly complex contract. Referring back to Directive 2004/18 and to what we have discussed before,[566] it should be noted though that it also does not clearly define the same concept. On the financial and legal make-up, the Spanish law is completely silent, leaving both concepts open to interpretation.

(3) Inadequacy of open and restricted procedures

According to article 29/1 of Directive 2004/18, competitive dialogue can be used if the contracting authority considers that neither the open nor the restricted procedure will allow for the award of the contract. This might be construed as meaning a complete impossibility of awarding the contract, as happens, for instance when it is impossible for the contracting authority to draft the specifications.[567]

Article 164/1 of the Law on Public Sector Contracts allows for the use of competitive dialogue if the contracting authority considers that neither the open or restricted procedure is *adequate* to award the contract.[568] The express inclusion of

564. Article 164/2 of the Law on the Public Sector Contracts.
565. Article 164/2 refers to article 101 of the Law on the Public Sector Contracts. The reference is not made to all the rules on specifications, but only to number three and paragraphs b), c), d) of said article 101. These paragraphs transpose article 23/3(b)(c)(d) of the Directive 2004/18 almost word by word with one sole exception. According to the Spanish law, environmental considerations or characteristics may only be taken into consideration if the contract impacts or has the possibility of impacting in the environment.
566. Please see Chapter 3.
567. However, as we have seen above in Chapter 4, academics have argued that the competitive dialogue may be used when the open or restricted procedures were available because the contracting authority knew of a solution but not if that was the best solution to its need.
568. The Spanish translation of the mentioned article of the Directive 2004/18 is identical to the English version, so one cannot argue that an error in the translation of the Directive mislead the Spanish law makers of the Law on Public Sector Contracts.

the word "adequate" in the Spanish law is not present in the Spanish translation of the Directive. However, it sheds no specific light on how to determine the boundaries for competitive dialogue's use. How the contracting authority shall carry out the assessment or what shortcomings in the open and restricted procedures are liable to deem them as inadequate for the award of a contract, remains to be seen.

(4) Public-private cooperation contracts

Article 164/3 of the Law on Public Sector Contracts states that competitive dialogue is the default procedure for the award of public-private cooperation contracts. The approach to the definition of this legal concept is not entirely clear, as the law makers gives its explanation in a single phrase spanning 12 lines with only 5 commas for punctuation.[569] The concept can, though, be summarily explained as follows. These are the contracts[570] where a private entity is mandated to perform certain tasks necessary to satisfy the general interest for a period of time, with the payments to be made during the performance of the contract and including at least one of the following operations:

- Construction, installation or transformation of works, equipment, systems and products or complex goods, as well as its upgrade, refurbishment, exploration or management;[571]
- Complete management of complex installations;[572]

569. The definition can be found in article 11 of the Law on Public Sector Contracts. Before launching a tendering procedure to award a cooperation contract, the contracting authority has to exhaust all other possibilities it may have at hand, in accordance with article 11/2 of the same law.
570. It should be noted though that the cooperation contract can only be tendered if it is clear that alternative procurement arragements are not viable, in accordance with article 118 of the Law on Public Sector Contracts.
571. Article 11/1(a) of the Law on the Public Sector Contracts.
572. Article 11/1(b) of the Law on the Public Sector Contracts.

- Goods and services with embedded technology especially designed to supply solutions more advanced than the ones existing in the market;[573]
- Services connected to the prosecution of public and general interest by the State.[574]

The Spanish law has specifically adopted the term public-private cooperation contract and not a more widely used term such as public-private partnerships or concessions, although the long definition covers contracts typically considered as public-private partnerships or concessions, like the complete management of complex installations.[575]

Public-private partnerships is considered an umbrella term at EU level.[576] The reasons for the creation of the public-private cooperation contracts, instead of using public-private partnerships or extending the concept of concessions, are unclear although one could argue that the law makers wanted to define clearly the contracts covered by article 11 of the Law on Public Sector Contracts, thus avoiding terms which could lead to misinterpretation. However, as we have seen in the section 4(3) of the previous chapter, there is considerable scope for discussion on what is exactly a public-private cooperation contract and the exact borders between this type of contracts and the pre-existing concessions are far from clear. Public works and services concessions remain in the Law on Public Sector Contracts[577] and are highly regulated and used extensively in the country. For instance, during 2009 Spain launched 71 public works concessions tenders, 24 services and only 11 public-private cooperation contracts of any kind.[578] These numbers lead to

573. Article 11/1(c) of the Law on the Public Sector Contracts.
574. Article 11(1)(d) of the Law on the Public Sector Contracts.
575. Arrowsmith, 'The entity coverage of the EC procurement directives and UK regulations' (2004) 2 *PPLR*, paragraph 2.16, an hospital run by a private entity can be considered for these purposes as a complex installation run completely by a private party.
576. Ibid., paragraph 2.16.
577. On articles 223 through 250 and 251 through 265.
578. Numbers from a search done by the author on the Tenders Electronic Daily website.

the conclusion the public-private cooperation contract has not replaced the public works and services concessions but is being deployed alongside them.

The novelty of article 164/3 of the Law on Public Sector Contracts of mandating that all cooperation contracts have to be awarded by a competitive dialogue can be interpreted in two ways. It can be interpreted as considering that all co-operation contracts are "complex contracts" for the effect of complying with article 164/1 and /2 and with the Directive 2004/18. Alternatively it can be interpreted as allowing the use of competitive dialogue for awarding procedures that are not particularly complex. The first interpretation would be obvious had the law makers opted to include it as a further element of definition in number 2 of article 164, where the concept of "particularly complex" contract is defined, and not on its own number of the same article. Bearing in mind the fact it has its own number in article 164 and it does not refer to the need to abide by the "particularly complex contract" test, one can argue that the second interpretation is more logical in face of the drafting adopted. In addition to the fact that no reference is made to article 164/2, article 164/3 of the Law on Public Sector Contracts makes a reference to the need to heed article 154/a,[579] so one can also argue that the law makers wanted cooperation contracts to be exclusively awarded by either competitive dialogue or the negotiated procedure. Furthermore, the drafting of article 164/3 is clear in its command: cooperation contracts have to be awarded by either competitive dialogue (preferably) or negotiated procedure. It appears the Spanish law makers have arguably not acted entirely consistently with the Commission's stance and considered that all public-private cooperation contracts are

579. Article 154(a) allows the negotiated procedure to be used after a previous open, restricted or competitive dialogue procedure has been tried but the results were not forthcoming and the original conditions are not substantively changed in the new procedure. The novelty, again, is not the negotiated procedure use after a competitive dialogue as failed, *per se*, but the motives behind the failure that can lead to the use of the negotiated procedure. For instance, according to that article, if the tenders were presented by candidates deemed as unsuitable the contracting authority may resort to the negotiated procedure.

necessarily particularly complex.[580] The caveat with the second proposed interpretation is that it is not compatible with the Directive 2004/18, since that in this interpretation not all of the situations where competitive dialogue may be used are particularly complex contracts.

It may be thus argued that competitive dialogue is the default procedure for all cooperation contracts mentioned in article 11 of the Law on Public Sector Contracts, even if they fail the particular complexity test set forth by article 164/1/2. This could raise the question of compatibility of the law if any of the contracts mentioned in its article 11 are not public-private partnerships or concessions according to EU law,[581] and covered by Directive 2004/18.

4. Phases of the procedure

(1) Introduction

The competitive dialogue in the Law on Public Sector Contracts is divided into three phases: i) start of the procedure, presentation of candidates and assessment of the economic, technical or professional ability of candidates; ii) dialogue with suitable candidates; iii) presentation of tenders and award. In the following sections we will discuss in detail the characteristics of each phase of competitive dialogue.

580. Commission, *Explanatory note - competitive dialogue - classic directive* (2005) p.3, on public-private partnership contracts.
581. Bearing in mind the previously discussed difficulties of defining precisely both terms according to EU law.

(2) Start of the procedure, presentation of candidates and assessment of the economic, technical or professional ability of candidates

(a) Introduction

The start of the competitive dialogue procedure in Spain, does not stray much from what is established in the Law on Public Sector Contracts for the open and restricted procedures, except for some particular points.[582] It also follows closely the Directive 2004/18.[583] There are, however, specific rules regarding the composition of the jury for the procedure.

(b) Jury for the procedure

Article 296 of the Law on Public Sector Contracts states how the jury of the dialogue is to be composed. This jury, contrary to the jury for other procurement procedures must have expert members that may be external to the contracting authority to assist in the development of the dialogue. The jury for other procedures may include only internal members of the contracting authority. This rule has a basic nature. In consequence, any autonomous region may approve its own rules to regulate the composition of the jury in procedures held there. The central Government approved Royal-Decree 817/2009 developed the Law on Public Sector Contracts and has included an article on the jury for the procedure. Article 23 of Royal-Decree 817/2009 states that the jury shall have at least three expert members and that they need to make up at least a third of the jury. This article further details the functions of the jury that include, for instance, if the contract

582. For example, the inexistence of proper specification but only the notice or a descriptive document at the most.
583. With the exception of the notices in regional and local papers.

being tendered is a public-private cooperation contract the comparison between the costs of doing the project that way or under a normal public contract.

During the procedure itself the jury will have to assess the economic, technical or professional ability of candidates, identify the solutions to carry to successive stages (if any) and identify the solution(s) most attuned to solve the contracting authorities' need. Furthermore, it will also evaluate the final tenders and request clarifications or confirmations of commitments from the bidders if appropriate. The final decision on whom to award the contract to remains with the contracting authority and not the jury.

Regional Governments may change this rule if they enact their own procurement regime. So far, only the Region of Navarra has enacted a regional procurement law, the Foral Law 6/2006. In that law, there are no specific rules for the jury for the procedure on a competitive dialogue procedure. However, article 60/2 of the same law allows the jury to include especially qualified external members in exceptional circumstances.

(c) Notice and descriptive document

The competitive dialogue procedure in Spain starts with the contracting authority publishing a notice describing its needs either in the contract notice or in an accompanying descriptive document.

In articles 163 through 167 of the Law on Public Sector Contracts not much is said on what should be included in the notice or the descriptive document.[584] Regarding notice publication, since there are no specific rules applicable to competitive dialogue, one can assume that the publication will be done in accordance

584. The exceptions are article 165/2 (on the minimum number of candidates to invite for the dialogue), 166/3 (on the possibility of successive stages during the dialogue) and 167/2 (on award criteria).

with the general rules of the Law on Public Sector Contracts. Article 126/1 of the same law, the contracts subject to harmonised regulation[585] have to be published in the Official Journal. Additionally, they have also to be published in national, regional and/or local official journals.[586]

The tender notice will include the criteria for the selection of candidates which will be invited to take part in the dialogue.[587] The definition of such criteria is specified in articles 64 through 68 of the Law on Public Sector Contracts. These are related to the financial and technical ability of the candidates. Whereas the financial criteria or requirements are relevant to all types of contracts (public works, goods and services), the technical criteria are divided by type, as in article 48 of the Directive 2004/18.[588] In relation to competitive dialogue, the technical criteria to consider a candidate as suitable will depend on the type of contract to be awarded. The criteria present in the above mentioned articles will allow the contracting authority to determine which candidates are suitable for the dialogue in question.

The notice will also have to include the minimum number of candidates the contracting authority intends to invite, with such number being at least three.[589]

In the event that the contracting authority wishes to have successive stages on the dialogue phase, such possibility must be expressly mentioned in the notice.[590]

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585. Tenders covered by the Directive 2004/18 (articles 13 through 17 of the Law on Public Sector Contracts).
586. With the notice being sent for the Official Journal, before it is distributed to national, regional and local official journals (article 126/1/3 of the Law on Public Sector Contracts). Due to the administrative division of the country into different provinces, which we have seen in Chapter 8, the official journal relevant for each case will depend on the contracting authority awarding the contract. If the contract is being tendered by an Autonomous Province, local authority or public body which depends on them, then the publication in the national official journal can be replaced by publication in the official regional or local journal, respectively.
587. Article 147/1 of the Law on Public Sector Contracts.
588. Content wise, the Law on Public Sector Contracts does not differ at all from the Directive, although from an organisation point of view, the law makers has opted to give the criteria for each type of contract its own article, facilitating the interpretation.
589. As per articles 147/2 and 165/2 of the Law on Public Sector Contracts, and following article 44/3 of the Directive 2004/18. In the notice, the maximum number of candidates to invite can also be specified., as allowed for in Recital 40 of the Directive 2004/18.
590. Article 166/3 of the Law on Public Sector Contracts., as per article 29/4 and recital 41 of the Directive 2004/18.

(d) Presentation of candidates

Any prospective candidate can submit its request for participation on a competitive dialogue, as long as he does so before the deadline established in the notice or descriptive document.[591] To be considered by the contracting authority, the request must abide by a number of conditions set forth in article 130/1 of the Law on Public Sectors Contracts. This article mandates that requests will have to be accompanied with documents supporting the petition of being a suitable candidate for the dialogue. These documents and statements are similar to the ones demanded from companies wanting to tender in open or restricted procedures,[592] although the Law on Public Sector Contracts admits that the contracting authority may demand extra documents or statements.[593]

It should be mentioned that foreign companies wanting to participate in a competitive dialogue procedure in Spain will have to state that all and every claim related to the tender, interpretation or performance of the contract must be brought to the Spanish jurisdiction if the contract being tendered is to be performed in Spain. Foreign companies must thus accept that Spanish courts have exclusive jurisdiction. It should be noted though, that the Law on Public Sector Contracts does not impose the need to accept Spanish law to rule the contract's performance.[594] One may argue, however, that contracting authorities may have the tendency in the contract's notice or descriptive document to define Spanish law as the ruling law for the contract's execution, since it is the law of the country.

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591. Article 148 of the Law on Public Sector Contracts.
592. Article 130/1 of the Law on Public Sector Contracts.
593. Article 130/2 of the Law on Public Sector Contracts.
594. Regarding the procurement procedure, there are no doubts that it is ruled by the Law on Public Sector Contracts.

(e) Assessment of the economic, technical or professional ability of candidates

Having received the requests for participation, the contracting authority will then assess the economic, technical or professional ability of candidates to participate in the dialogue. The criteria for selecting candidates, as mentioned above in (c), have to be objective and non-discriminatory and defined in the notice or descriptive document,[595] as per article 147/3 of the Law on Public Sector Contracts. the minimum number of candidates to invite for the dialogue phase is three.[596] However, it appears that the contracting authority can proceed with the procedure with less than the supposed minimum of three, if not enough suitable candidates are available.[597] In addition, the Spanish Law on Public Sector Contracts makes it clear that neither unsuitable candidates nor companies that did not submit an application can be invited to the dialogue stage.[598] The invitation will have to comply with a number of formalities that are similar to the ones found on article 40 of Directive 2004/18,[599] with the caveat that any other language apart from Spanish admitted has to be identified.

The contracting authority has also to inform all the invitees of any clarifications or further explanations asked by any of the candidates. It has to be done in writing until six days before the start of the dialogue.[600]

595. From the list of admitted criteria specified in articles 64 through 68 of the Law on Public Sector Contracts.
596. Article 165/2 of the Law on Public Sector Contracts.
597. According to article 149/2 of the Law on Public Sector Contracts, the contracting authority can proceed with the procedure if less candidates than the minimum established are considered suitable, but again, this article is drafted with the restricted procedure in mind where the five minimum rule applies.
598. Article 149/2 of the Law on Public Sector Contracts.
599. According to article 165/3 of the Law on Public Sector Contracts.
600. Articles 150/2 through paragraph 5 and 165/3 of the Law on Public Sector Contracts.

After the contracting authority has decided which suitable candidates to invite, invitations are to be sent to all at the same time.[601] The invitation will have to comply with a number of formalities,[602] which merely repeat what is already present in article 40 of Directive 2004/18.[603]

(3) Dialogue with suitable candidates

(a) Introduction

The dialogue phase with the selected candidates ensues after the selected candidates have been invited. The objective of such a phase is to discuss with the candidates the adequate means to meet the contracting authority's needs, meaning that all the aspects of the contract to be tendered can be discussed.[604] The Spanish law does not provide for much more detail regarding this stage than what is already available in the Directive. Therefore, a lot of scope is left for contracting authorities to define as they may see fit. For instance, how they are to organise the meetings or what information should be included in the minutes of meetings are not addressed. This is a marked departure from the tradition in Spanish procurement laws of extensively detailing how procedures are to be carried out and limiting discretion.

(b) Equal treatment during the dialogue and confidentiality

As per article 29/3 of Directive 2004/18, the Spanish law makers states that the dialogue cannot be used to benefit any of the candidates. This article orders that

601. Article 149/1 of the Law on Public Sector Contracts.
602. Listed in sequence in the same paragraph in article 165/3 of the Law on Public Sector Contracts.
603. On the formalities in Directive 2004/18, please see Chapter 4 above, for a detailed breakdown.
604. Article 166/1 of the Law on Public Sector Contracts.

equal and fair treatment between candidates must be assured.[605] The Spanish law does not provide further details regarding this issue, merely restating what is already present in Directive 2004/18.[606] The Spanish law only specifies that information transmitted as confidential has to treated as such. In addition, it provides no extra protection regarding cherry picking. Furthermore, the Spanish law also does not provide any solution to what can be objectively considered as confidential information worth protecting.

(c) Successive stages in the dialogue

As allowed by Directive 2004/18 article 29/4,[607] the dialogue phase of the competitive dialogue procedure may be divided into successive stages,[608] so as to eliminate solutions and focus the discussions on the most promising ones.[609]

It should be noted that the Law on Public Sector Contracts does not mention the elimination of candidates but only of solutions, which leads to three possible interpretations. Firstly, if candidates cannot be eliminated, the law may be read as allowing each candidate to offer more than one solution (as nothing in the Law expressly forbids it). If so, only those extra solutions can be eliminated.[610] Secondly, in the event that candidates submit only one solution it may be read as allowing the elimination of candidates, as the contracting authority is in effect eliminating a solution, with the elimination of the underlying candidate a simple consequence. Thirdly, in a more literal interpretation, even if only one solution is

605. Article 166/2 of the Law on Public Sector Contracts.
606. Please see Chapter 4, above for a more detailed discussion of this topic under the Directive 2004/18.
607. Please see Chapter 4, above for a more detailed discussion of this topic under the Directive 2004/18.
608. Article 166/3 of the Law on Public Sector Contracts.
609. As above mentioned in (c), this possibility must be included in the notice or descriptive document at the beginning of the procedure.
610. In addition, the Law on Public Sector Contracts, on article 166/4, regarding the end of the dialogue makes the distinction between finding the best "solutions" and notify all the "candidates" of the end of the dialogue. This renders clear that in the law both concepts are used with different meanings. Furthermore, since article 166/4 contains both whereas in article 166/3 only "solutions" are mentioned, it could indicate that the law makers wanted to eliminate only solutions and not candidates.

presented by a candidate and it is eliminated, the candidate must still be invited to submit a tender.

According to article 166/3 of the Law on Public Sector Contracts, the criteria to be used in this elimination phase are the ones included in either the notice or the descriptive document. Such a specific remark raises some doubts in the event that the contracting authority did not supply any award criteria in the notice - as article 165/3 of the law seems to allow - or in the case the weightings supplied with the invitation for the dialogue - mandatory by the same article 165/3 - are to be used. Two solutions are arguable. The first, more literal, is that the contracting authority must refer to the award criteria in the notice, disregarding the weightings supplied afterwards (these would only be applicable then in the award of the contract). In the event that no award criteria are supplied from the onset, then the contracting authority would refer to the award criteria included with the invitation for the dialogue. The second solution, would be, perhaps, more logical.[611]

The same article 166/3 has some remarks about ensuring competition in what it refers to as the final phase, presumably of the dialogue stage. Similarly to recital 41 of Directive 2004/18,[612] it would mean then that the contracting authority may not use the successive phases in the dialogue stage to end up with a single candidate and no competition.

(d) Conclusion of the dialogue phase

The dialogue with candidates phase will continue until the solutions meeting the needs of the contracting authority are found, even if that means comparing

611. As per recital 40 of the Directive 2004/18.
612. As we have mentioned before in Chapter 9 the Spanish law makers has included in the main body of the law content from recitals that were intende only to facilitate the interpretation of its articles.

them,[613] bearing in mind the limitations of article 166/2 regarding equal treatment between candidates. After the suitable solutions have been found,[614] the contracting authority will conclude the dialogue and inform all candidates still in it of such a conclusion. At the same time, all candidates are invited to present their tenders.[615] This notification will have to include the deadline to submit tenders, address for delivery and languages admitted, if any, apart from Spanish.

It is not specified in the law if at the end of the dialogue stage the contracting authority may ask candidates to submit tenders based on a common set of specifications similar to what is the mandatory model in Portugal. Bearing into consideration the lack of detail in the law it appears that it is possible to draft common technical specifications at the end of the dialogue stage.

(4) Presentation of tenders and award

(a) Introduction

The competitive dialogue procedure under the Spanish law ends with the submission of tenders by the candidates, their evaluation and the award of the contract to the one meeting the needs of the contracting authority best.

(b) Presentation of tenders

Similarly to article 29/6 of Directive 2004/18, candidates have to submit the tenders with all the elements required for the performance of the contract.[616] The Spanish law does not provide any guidance or explanation on what should be considered a sufficient level of detail for such requirement to be considered fulfilled.

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613. This is similar to article 29/5 of Directive 2004/18, although mentioning only "solutions" in the plural, whereas Directive 2004/18 mentions both "solution" and "solutions".
614. Article 166/4 of the Law on Public Sector Contracts.
615. Once more, from an organisational point of view, it would make sense to include this reference not in article 166 but article 167, as this last article is epigraphed "submission and examination of tenders".
616. Article 167/1 of the Law on Public Sector Contracts.

Similarly to what is stated by article 29/6 of Directive 2004/18, the contracting authority may request from candidates clarifications, specifications, fine-tuning of tenders or further information, as long as they do not lead to fundamental changes or discrimination. Once more, the Spanish law makers decided to closely follow the Directive, forfeiting the possibility of detailing these concepts.

(c) Evaluation of tenders

The evaluation of tenders in a competitive dialogue in Spain is to be made in accordance with the award criteria specified earlier in the notice or descriptive document, or the invitation for the dialogue phase.[617]

After the most economically advantageous tender has been selected, as per Directive 2004/18 article 29/7, the contracting authority can ask for the tenderer to clarify aspects of the tender or confirm commitments contained in it, as long as no substantial aspects of the tender are modified, competition is not distorted or discrimination caused. Yet again, the Spanish law simply repeats the rules already present in Directive 2004/18.

5. Conclusion

We have seen in this chapter the most relevant characteristics of competitive dialogue as transposed into Spain by the Law on Public Sector Contracts. The grounds of use of the procedure appear to be similar to the ones of Directive 2004/18 with the exception of the public-private cooperation contracts. The regulation of the procedure in general has not been elaborated further.

617. Article 167/2 of the Law on Public Sector Contracts. This article further specifies that the price may not the only criteria in awarding the contract, as per the Directive 2004/18 article 29/1.

The issues described in this chapter, although similar to the ones found in Chapter 4, provided relevant questions to discuss with the interviewees at the empirical research stage. The next chapter is focused on the findings of theses interviews.

Chapter 10 - Empirical findings on Spain

1. Introduction

In Spain, as we have seen in Chapters 8 and 9, competitive dialogue was transposed by the Law on Public Sector Contracts of 2007. In this country, contrary to Portugal, law makers has decided to transpose Directive 2004/18 without particular differences.

Arranging interviews in the country has been reasonably easy. In six cases gatekeepers known to the author facilitated a contact with the person who might be relevant for the purposes of this research. In all other situations, the author simply cold called the relevant entity directly.

Interviews were carried between March and August 2010. They were held preferably face to face (14) in a closed room, with the exception of one of the lawyers who had to be interviewed during his lunch break. Due to the geographical dispersion of respondents and the time and costs involved it was only possible to interview the remaining participants by telephone. All the telephone interviews bar one were conducted over Skype. Only seven interviewees, all from face to face interviews, allowed the interview to be recorded. The remaining seven face to face interviewees declined to talk with the recorder on. Of the telephone interviews, the one carried over traditional telephone lines was impossible for the author to record. The others could have been recorded in theory. However, for the first four the author did not have software that made it possible. All the others interviewees declined to have the Skype conversation recorded.

As we have seen in Chapter 2 above, the author has conducted a total of 27 interviews in Spain: 20 on entities that have used the competitive dialogue procedure, four lawyers, two public procurement advisory bodies and one consultant.

The contracting authorities with experience in competitive dialogue that were interviewed had used it 33 times, out of a total of 57 situations where the procedure was used. Of the total of 57, at the end of July 2010, seven had either been recently launched or were still in their early stages. It was considered that they would not be developed enough in time to be analyzed for this research. Therefore, the sample covered is 33 out of 50 procedures or roughly 2/3.

In the following sections of this chapter we will present the findings of the empirical research carried out in Spain. Each class of respondents (contracting authorities, lawyers and public procurement advisory bodies) will be expressly identified when the answers harvested are different from the other classes. Section 2 explains the situations where the competitive dialogue procedure was used. Sections 3-20 are each dedicated to a category of issues that were discussed during the interviews. Section 21 covers general comments made by the interviewees.

2. Actual use of the procedure

As of September 2010 the procedure has been used 59 times in Spain by 32 different contracting authorities.[618] Contracting authorities in most of the regions of the country (14 out of 18) have already used it at least once. It has been used 19 times in the region of Madrid, 12 in the Balearic Islands and 12 also in Andaluzia. Three contracts identified in the Tenders Electronic Daily as competitive dia-

618. This number includes three that were started very recently. Data from the Tenders Electronic Daily website and the Spanish National Official Journal.

logue procedures ended up being tendered by means of either an open or negotiated procedure.

The procedure was used 26 times for the award of public-private cooperation contracts, although nine of them are related to different medical equipment needed by a single hospital in Majorca.

In the medical sector in general, the procedure was used 13 times, by four different contracting authorities.[619] All of them appear to be public-private cooperation contracts, both for the construction and management of hospitals and for specific types of medical equipment needed.

For construction and refurbishment projects the procedure was used 21 times, with 11 being public-private cooperation contracts. Out of this total, five are IT projects related with the deployment of new networks in different areas of the country. Apart from the IT projects, none of the other construction projects represent major works contracts. In fact, the most expensive construction project that is neither an IT project or a public-private cooperation contract is the construction of an oceanic research platform in Canaries valued at around 12 million euros.

The procedure was used eight times for the award of contracts under 1 million euros, 10 for contracts between 1 and 10 million euros, 12 for contracts between 11 and 100 million euros and 5 times over 101 million euros.[620] The most expensive contract was an IT contract (public-private cooperation contract) valued at 662 million euros.

619. The author was told by three different respondents that other contracting authorities in the medical sector were considering adopting the procedure in the future.
620. It was not possible to identify the price of the remaining 24 contracts, as not all of the notices identified a value.

3. Grounds for use

(1) Introduction

As we have seen in Chapters 4 and 9, the grounds for use of competitive dialogue are uncertain, both at EU and national level. The author decided to ask this question as in Portugal it had been found that respondents had a lot of doubts when answering (in theory, in that case) on how to fulfill the grounds for use of the procedure.

(2) Data

The author asked some interviewees (eight) from contracting authorities that had experience with competitive dialogue if they had any doubts when picking the competitive dialogue procedure as the procedure to award their contract(s). The reduced number of respondents is due to the fact that every answer pointed in the same direction. In face of such a overwhelming response the author considered the category saturated and decided to dedicate the time available to other questions.

All of the interviewees have stated that they did not have any doubts regarding the grounds for use of the procedure. Two respondents have argued, however, that they had doubts in the point of deciding to either go for a cooperation contract[621] or a public works concession but not the procedure itself.

621. Which, as we have seen in Chapter 8 above is an exceptional contract and has to be tendered by means of a competitive dialogue.

(3) Conclusions

Bearing in mind his previous experience with respondents in Portugal,[622] the author was not expecting at all this outcome to this question. The immediate answer of "no" to the question also puzzled him. Three different reasons may be involved in explaining this situation.

Firstly, competitive dialogue is the default procedure for cooperation contracts in Spain. It means that for this type of contracts the doubts on the grounds for use revolve around the type of contract selected and not the award procedure itself since it, according to the national law, this has to be competitive dialogue. This idea is further confirmed by the two respondents who said they had doubts regarding the type of contract but not the procedure itself.

Secondly, it may be evidence of the respondents subjectively fulfilling automatically the grounds for used. This theory was (partially) argued by a lawyer interviewed in Portugal.[623] This lawyer argued that contracting authorities using the procedure would always consider the grounds of use to be fulfilled. He suggested that the test on the contracting authority's lack of means would be virtual since the adoption of the procedure would mean automatically that contracting authorities did not have the necessary capabilities available otherwise. In other words, if the contracting authorities are using competitive dialogue is because they consider that they do not have the resources needed to tender the contract through an open or restricted procedure.

622. Although the bulk of respondents there had no actual experience of matching the grounds for use to an actual situation they were facing and, thus belong to a different set of respondents.
623. Please see Chapter 7.

Thirdly, it may point to the contracting authorities not being attuned with potential issues surrounding grounds for use raise, perhaps due to a perceived lack of importance of the issue.

4. Jury for the procedure

(1) Introduction

As we have seen in Chapter 9, according to article 296 of the Law on Public Sector Contracts and article 23 of Royal-Decree 817/2009, the jury for the procedure on a competitive dialogue procedure has to include at least a third of members especially qualified in the topic in hand.

Interviewees were probed for information about how they had composed the jury for the procedure. Their answers made it possible for the author to check if they had composed the jury differently than in open or restricted procedures (by including especially qualified members) and if they had hired external members. By external members the author meant the hiring of expert assistance to participate in the dialogue, irrespective of them being officially considered as actual members of the jury or not. This would make it possible to know that, even if contracting authorities are not complying with the legal obligation to include a certain number of especially qualified members, the actual work was being supported by experts.

(2) Data: internal members

A trend was clear in data regarding internal members. Most of the contracting authorities have not changed their habits on how to compose the jury for the procedure. They stated that they have used the human resources normally attached to

procurement in their institution. In other words, they were not making changes due to the specific nature of competitive dialogue, as required by the Law on Public Sector Contracts. The author had been told by one of the lawyers interviewed at the start of the empirical research phase that this would probably occur. This lawyer classified the legal rule as "useless".

Six interviewees stated that they had created a multidisciplinary task force and their jury had included especially qualified members. These were actual technicians of the contracting authority that usually do not take part in the procurement process and had been asked to take part in it. In two of the cases, the actual heads of the project had had prior management experience in the private sector. One of the lawyers interviewed had participated in multiple procedures and said that the creation of multidisciplinary teams to tackle a project amounted to a "sea change" in the culture of contracting authorities. According to his experience, contracting authorities' departments tend to work separately and not together. "Legal counsels usually produce their legal opinion and then leave the grunt work of making it happen to someone else". He also said it was no coincidence that in the procedures producing positive outcomes the creation of this multidisciplinary teams had happened.

Three interviewees from local councils have remarked that the jury of their procedure included politicians. In two cases, this meant not only politicians from the party in power but also from the opposition. They were asked about the reasons of this inclusion and replied that it reduced the "political risk". In other words, having politicians from the opposition on board and with access to all material ensured the project would not be used as a political tool. Furthermore, it reduced the risk of misrepresentation of the project on the media.

Although the author did not ask most respondents why they had not hired external consultants, most stated they had not done so due to the costs involved. Only one of the contracting authorities said they did not have a need for external assistance and were able to carry multiple procedures successfully.

(3) Data: external members

A clear trend could be identified regarding the use of external members in the jury for the procedure. Only four contracting authorities have stated that they have used external assistance in conducting competitive dialogue procedures. In no cases were they members of the jury and have taken part only at a technical level, that is, the decision making ability remained in the internal members of the jury. In one of these circumstances the external participation was drafted in only at the dialogue stage to help with the discussions. Out of this three respondents, two said that hiring external help was key to the success of their project. They were adamant that it would have been very difficult to achieve a similar outcome without expert assistance.

Furthermore, three of the respondents stated that they have taken the opportunity of using competitive dialogue and composing the jury differently to embrace change in their practice. These changes made the contracting authority create multidisciplinary teams to tackle a project, something similar to what, according to them, can be found in private companies.

(4) Conclusions

The reasons for not using more external help are not clear, although the author would point to the dissonance between the upfront cost of hiring external help

and the deferred and not so clear benefits. Entities that hired external assistance were happy with the results after the procedure had ended, when they could assess the cost to the benefit effectively accrued by the help. Cash-strapped entities[624] may simply look at the upfront cost and decide to go with the cheapest option possible.

5. Work done in advance and detail in the descriptive document

(1) Introduction

Interviewees were asked about work carried out in preparation of the tender and how much detail they had included in the descriptive document. This would allow the author to check if there was any correlation between anticipating the problems beforehand, give detailed descriptive documents and success.

(2) Data

Two clear and opposing trends were identifiable. Nine of the respondents stated they had done work in advance and included a lot of detail in the descriptive document. Eight stated otherwise, that in reality not a lot of detail had been included in the descriptive document, all but one due to lack of doing work in advance. One gave a mixed response.

The first group of respondents has included much detail for two main sets of reasons. Firstly, because they had done work in advance on the technical solution and wanted to pass this information to the candidates.[625] Secondly, they were fully

624. One should bear in mind the the lack of payment for the development of solutions in the country that will be discussed further down in section 6.
625. One of the respondents said that after the first competitive dialogue - where they already had drafted a fairly detailed technical specifications - they tuned down the technical detail in subsequent ones.

aware of the lack of practice in the country with this procedure and thus wanted to convey as much information as possible. They have included a lot of "housekeeping information", for instance, on how the meetings would be held and their sequence, how contacts would be made, whom and how many people might attend meetings, if the meetings were to discuss the entire project or simply parts of it or how the minutes of meeting would be drafted. The respondents that included a lot of detail at the start also indicated they did some work before the procedure was launched. Two, for instance, posted prior information notices to gauge the market's interest in the project. Another one said preparations for the tender started a couple of years before.

Eight of the nine ended up with a positive opinion of the procedure. The same eight respondents have completed successfully their competitive dialogues and were satisfied with the outcome. The deviant case said the procedure ended successfully but that he was not entirely happy with the outcome as only one company was deemed suitable and the discussions were held only with it. Furthermore, one of the lawyers said that although having more information was in general good, one should not put information that could have a negative influence later on. He pointed to detail of award criteria as particularly sensitive area where caution should be exerted.

The second group of interviewees did not include many details in the descriptive documents, either technical or administrative clauses on how the dialogue would be processed, with all but one not doing a lot of groundwork in advance. On the technical part, two interviewees said they had only included either a basic project or something even vaguer. One of these participants said they had not disclosed technical information on purpose, as a way to entice candidates to be more creative and exert more control over the procedure. The same respondent said they

did not disclosed information for the duration of the procedure on purpose.[626] In three cases, regarding the lack of specific administrative clauses, respondents stated that they had only included what was already in the national law.[627] Of this group, three managed to have successful procedures (achieving the aims set forth by the contracting authority at the start). Two were concluded without the contracting authorities being convinced it had been a success. The remaining two were not concluded due to lack of financing from the candidates or needed documents, that is, factors that were external to the contracting authority or the way the procedure had been organised. In this analysis, we should then focus on the first five cases. Of these, three were clearly successful and two were less successful, but the contracting authority still managed to take them to the end and award the contract.

The mixed response was given by a contracting authority that has used the procedure multiple times.[628] This respondent stated that in the first few - started even before the transposition of Directive 2004/18 to Spain - the detail had been sparse, but as time went on they included more detail on the administrative clauses. This covered how the meetings would happen and the contacts between the parties held. Even so, in total not a lot of detail had been included. Some of the procedures were clearly successful - namely the last ones - but some were not, being interrupted during the dialogue stage when prototypes were being tested.

626. In the end, this was one of the reasonably unsuccessful examples of the use of the procedure in the country and where the interviewee expressed most regret on how the procedure had been conducted.
627. In two situations an underlying theme appeared to be present with respondents apparently puzzled by the question as if it was obvious only what was already in the law should be included. This happened in two interviews by telephone, so the impression of the author may not be correct due to the lack of further hints such as body language that could be observed on a face to face interview.
628. The author is not identifying the exact number of times as it would violate the confidentiality agreement since it was the only entity using the procedure that number of times.

(3) Conclusion

The author thinks that there are signs of a correlation between preparing the procedure in advance, producing detailed documents and having a successful procedure where the contracting authority is happy with the end result. That is not to say that they are the sole cause or even the major one since other factors were not assessed. As possible other factors one could suggest, for instance, that these contracting authorities are more careful during the dialogue stage (by giving during the procedure a lot of information to candidates), have better project management skills, hired external assistance or have had candidates who are more attuned to procurement where discussions take part or have had previous experience.

On the other hand, however, one may argue cautiously that it is possible to guide competitive dialogue procedures to their end without supplying a lot of technical and/or administrative information. The caution is due to the two problematic cases and also the limited number (five) of relevant answers involved.

6. Payment of solutions

(1) Introduction

The Law on Public Sector Contracts allows in its article 163/2, as does article 29/8 of Directive 2004/18, for contracting authorities to offer money to offset the cost of developing solutions. Although contracting authorities are not bound to offer these payments, if they decide to do so, it has to be established from the start.

Respondents were probed if they had paid candidates for the development of solutions. If so, they would be asked about how they had calculated the payments.

(2) Data

A unanimous trend was found. None of the contracting authorities interviewed in the course of this research paid candidates for developing solutions. Most of the interviewees said they had dismissed the idea of payments straight away. Two reasons were given. Firstly, they wanted to spend the minimum amount of money possible in the procedure. Secondly, two of the contracting authorities stated that they were sure the relevant companies (well known companies in their field) would turn up. Although it was not asked, of the cases where only a limited number of candidates (one or two) turned up, no respondent linked this fact to the possibility it was due to the lack of payments.

Only one of the respondents said the possibility of paying for the development of solutions but, in the end, decided not to do so. Another one acknowledged that private companies would incur in higher costs in an competitive dialogue procedure than in an open procedure and decided to waive the bond the candidates have to deposit at the start of the procedure. In this case, it was a substantial value since it was a multimillion euro project.

One of the lawyers interviewed suggested payments should not be standard and only considered for exceptional situations. He suggested, for instance, payments should be made available when prototyping or field tests of new items occur as these usually carry heftier costs than simply attaching a team to draft and develop a solution.

(3) Conclusion

From the data gathered it is clear contracting authorities are not interested in offering candidates money to offset development costs. The apparent reason is to save on procedural costs even if one could argue that payments could entice more candidates to participate and, in the end, have a better solution or more competition. Either contracting authorities are not seeing any benefit at all in this possibility or, in a cost-benefit analysis the need to calculate a cost that is certain (the payment) against a possible benefit, the cost outweighs the benefit. As none of the interviewees complained of not having enough candidates in the dialogue, it appears companies are participating in competitive dialogue procedures in sufficient numbers even without payments on the table. However, it may be argued that considering payments would have effects on their commitment to the dialogue. For instance, it may be considered that offering payments under the condition that the candidate develops a solution and submits a tender[629] would improve competition at the tender stage.

7. Assessment of the economic, technical or professional ability of candidates and number of candidates

(1) Introduction

According to articles 147 through 149 of the Law on Public Sector Contracts, the assessment of economic, technical or professional ability of candidates has to be done in accordance with objective criteria. Article 165/2 of the same law states that if a maximum number of candidates is established by the contracting author-

629. See section 20 for a discussion on the non-show of candidates at the tender stage.

ity, it cannot be less than three. Article 149/2 states, however, that if the number of candidates deemed suitable is less than the minimum the contracting authority may[630] carry on.

Interviewees were asked if they had capped the numbers of participants to a maximum and how many candidates had presented themselves.

(2) Data

A clear trend can be identified in the data collected. Only two of the contracting authorities interviewed have limited the numbers of candidates that could participate in the dialogue stage. One of the contracting authorities and two of the lawyers offered the explanation that this could be due to a perception from the contracting authorities that limiting the numbers might have a negative impact on prospective candidates.

Out of the two entities that have actually limited the numbers, only one did exclude candidates from taking part in the dialogue as in the other the number of candidates was smaller than the limit. This contracting authority was then faced with requests for explanations from the excluded companies, but without any filing for administrative or judicial review.

The widespread lack of a cap led to situations where up to 20 candidates have been considered suitable and the contracting authority forced to discuss with them. The contracting authority faced with this high number of candidates admitted it had been very difficult to manage the process. This interviewee said it would have been preferable to limit the numbers beforehand or to have carried out successive rounds during the dialogue. Although this was an extreme case,

630. It does not say it has to.

there were four other contracting authorities that reported having to deal with five or more candidates. The author does not know the exact number of procedures where this has happened as two of these entities have used the procedure multiple times. They have reported, though, that happening to them at least once.

The opposite situation has also been observed in the data. In three cases, the dialogue proceeded with only one candidate. This was acknowledged by the respondents as a suboptimal solution, but they were still able to take the procedure to its end with, in their view, positive results (ie, contract awarded). It was argued by one of them that ending the dialogue because only one candidate turned up would be illegal in his interpretation of the Spanish law. In his view, it would have been akin to a tenderer groundless exclusion. That contracting authority, therefore, decided to carry on but made it clear to the candidate during the dialogue that if it did not produce an acceptable solution they would conclude the procedure at the end of the dialogue stage, as they were legally entitled to, and then open a negotiated procedure.

(3) Conclusion

It is clear from the data that the contracting authorities are not limiting the number of candidates at the start of the dialogue. The reasons are unclear and may be related to fears of lack of competition, or simply lack of foresight from the contracting authorities. However, in most of the procedures held so far not limiting the number of candidates has not been a problem because the actual number of companies is relatively small.

8. Outline solution

(1) Introduction

The author wanted to know how the contracting authorities had organised the start of the procedure, in particular the way they had instructed the draft of the solution. In other words, the author probed the interviewees if they had requested an outline solution from the candidates

(2) Data

A clear trend was observed in the data with 14 respondents saying they had requested outline solutions from the candidates before starting the dialogue stage. This allowed them to have the first meeting knowing already what was the candidate's solution and prepare in advance both questions and suggestions for improvement.

Four respondents said no outline solution was requested. In these cases, contracting authorities had to spend the first meeting of the dialogue stage explaining what the candidates were supposed to present with their solutions. In addition, one of the respondents stated this had been a waste of time since they waited the appropriate time between the invitation to the dialogue and the first meeting for an outline solution to be prepared. As no outline solution was handed at the first meeting, the contracting authority had again to wait the same period before the second meeting.

(3) Conclusion

It is apparent from the data that Spanish contracting authorities have a preference for requesting outline solutions from the outset and to develop them during the dialogue.

9. Exclusion of candidates or solutions during the dialogue stage

(1) Introduction

Both the Law on Public Sector Contracts and the Directive 2004/18 allow for the dialogue to have successive stages with the aim of progressively reducing the number of solutions being discussed with the contracting authority. It is not clear from the law if this exclusion pertains only to the solutions (with the candidates being retained for the tender stage) or if the candidates themselves are actually excluded.

Interviewees were probed if they had forecast this possibility - through its inclusion in the procedure documents - and if they had used it.

(2) Data

Three trends can be observed from the data collected. Firstly, of all the contracting authorities interviewed, none has actually excluded any candidate or solution during the dialogue stage. Secondly, eleven interviewees stated that they did not forecast this possibility. Thirdly, eight interviewees did forecast the possibility of excluding solutions or candidates but decided not to do so. Finally, one interviewee argued that exclusions at this stage affected only the solution and not the candidate itself.

(3) Data: lack of exclusions during the dialogue stage

The absolute lack of exclusions is one of the most clear trends identified by the author in his research. The only reason given by respondents for this widespread attitude was a fear of reducing competition. No other reasons were put forward in the interviews to explain this decision.

Interestingly, however, three contracting authorities argued that losing candidates had expressed a preference to be excluded during the dialogue, before the final tenders were submitted. These candidates, they argued, said there was a price to be paid on their reputation in the market if they submitted non-winning bids, particularly when their bid fared badly in comparison with the winner. In the candidates' view, if the contracting authority thinks their solution is not competitive, they would rather know that before submitting the final tender. One of the respondents added that, from a cost point of view, non-winning participants would have also preferred to be excluded during the dialogue to avoid incurring in the costs of preparing and submitting a complete tender.

Furthermore, some contracting authorities have also said that candidates during the dialogue stage were quitting the procedure. This happened when the contracting authority "raised the bar", as a respondent explained, and updated the requirements for the solution during the dialogue[631] or asked for a certain requirement to be accompanied by a specific price. Candidates were not excluded by the contracting authority but their decision to leave the procedure was based on the more stringent requirements. In one of the cases this was clearly carried through

631. Please see section 14 under for a more detailed discussion on the different Spanish models of dialogue stage seen in practice.

applying successive stages in the dialogue where more and more detail was asked from the candidates.

Regarding the exclusions referring only to solutions or also to candidates themselves the author registered both answers from one respondent each. One of the contracting authorities suggested the exclusions during the dialogue stage pertained to candidates, while one of the lawyers said it was only for solutions and that candidates would have to be retained for the tender stage.

(4) Data: possibility of excluding not exercised

Although eleven respondents considered and included the possibility of conducting successive eliminating stages in the documents of the procedure, none has done so. Of these interviewees, one stated the excluding reasons were simply formal (not showing up to meetings, not supplying information asked for) and had nothing to do with the merit of the solution being proposed. Another one conceded that, although the motives for exclusions included in the documents of the procedure referred to the merits of the solution, they were "very discretionary". No other reasons were put forward in the interviews to explain this decision and the author did not press the point further.

(5) Data: not even considering the possibility of excluding candidates

Out of the eight respondents who stated that they had not included the possibility of excluding candidates during the dialogue stage in the documents of the procedure, only one offered an explanation. For this interviewee, they were expecting limited numbers and thus thought this possibility would not be needed. Two in-

terviewees faced with a number of suitable candidates they deemed, in hindsight, as too large to be managed properly, said they would have preferred to have adopted the possibility of excluding candidates during the dialogue stage. No other reasons were put forward in the interviews to explain this decision.

(6) Conclusion

It is clear from the data that contracting authorities have not been excluding candidates or solutions during the dialogue stage, even in situations where the number of participants is clearly above what the contracting authority would consider optimal. One can argue this may be due - once more - to fears of stifling competition or lack of experience with the procedure.

It is worth noting at this stage the preference expressed by some losing candidates for being excluded during the dialogue stage. One would argue that, in theory, all candidates that endure the dialogue and then submit a bid would accept that not winning the contract is part of the game. What was not expected is that they would actually prefer being excluded during the dialogue to avoid having their tender officialy classified with a low score. One could argue the opposing view that candidates are not bound to present tenders and only do so on their own accord. In addition, they can quit the procedure at any point until the tenders are submitted.

Finally, contracting authorities may be discreetly achieving the same objective of reducing the number of participants by upping the requirements and the candidates deciding to quit the procedure. One could say contracting authorities are not excluding candidates or solutions officially, but that by elevating the demands during the dialogue they are having candidates dropping by their own accord.

This result is being achieved without the risks of an administrative appeal or judicial review.

10. Successive stages during the dialogue

(1) Introduction

The author wanted to know how the contracting authorities had organised the dialogue stage, namely if they had undertaken successive stages. As we have seen in the previous section, no candidates or solutions were ever excluded, so successive stages with the objective of leading to exclusions were not present, but the author did not know this in advance.

(2) Data

As we have seen above, no candidates or solutions were ever excluded at this stage, thus meaning successive rounds were not conducted. However, eight situations were seen where the contracting authority asked for successive revisions of solutions to be submitted, that is, more detailed solutions or changes to already detailed designs. In particular two cases were observed of what contracting authorities described as "cycles", where the requirements of the solution (either technical or financial) and level of detail expected would be increased and some candidates, by their own decision, would retire from the procedure completely. This has had the effect of reducing the number of candidates without formal exclusions.

Furthermore, as during the dialogue stage candidates are not bound by what they offer with their solutions but only by tenders, successive stages are also not being

used to secure definitive compromises in any area where agreement has been reached.

(3) Conclusion

From the data it is clear Spanish contracting authorities are not using successive stages to eliminate candidates or solutions. They are using it, however, to get more detail and to increase the demands made to candidates. In turn, some candidates are quitting the procedure when they feel they can no longer achieve what is being asked.

II. Meetings

(1) Introduction

The Law on Public Sector Contracts does not contain any detail on how contracting authorities are supposed to conduct the dialogue. The author asked the interviewees how they had set up the meetings during the dialogue stage, focusing the questions on the number of meetings held and the participants involved.

(2) Data

First and foremost, all contracting authorities conducted meetings with each candidate separately. No instances were observed of contracting authorities having a first group meeting with all the candidates. Secondly, all meetings were held face to face. No instances whatsoever have been found of meetings held by telephone or videoconference means. One lawyer said it was puzzling contracting authorities insisted on having all the meetings in person when at least the aims of some

could have been achieved through less burdensome means. Not even in the communications between the parties, are contracting authorities adopting tools that could facilitate their work. Only one contracting authority stated that they had created a secure online platform with a common area (where common information would be posted) and a private one for each candidate (where the communications specific to each candidate would take place). All the other contracting authorities are conducting communications using *ad hoc* systems such as telephone or email.

Contracting authorities were probed about how they had organised the order of the meetings, for instance, by following the order of application or its opposite. It was observed that most are not worried about how to set up the meetings, since only three contracting authorities have taken that into account. The remaining have set up the meetings according to the agendas of all involved.

Regarding the number of meetings held, three trends have been identified. Firstly, four respondents have had only three meetings in total during this stage, either by design (limit set in advance to make sure the dialogue would end in time) or consequence (it was deemed sufficient to close the dialogue). Secondly, three interviewees had only one or two meeting with the candidates. Thirdly, the remaining contracting authorities had multiple meetings with candidates, without specifying the exact number.

It was found that most contracting authorities held meetings with all the potential relevant persons from both sides present. Four contracting authorities have created a task force for each relevant area that would meet their counterparts only. The author was told that this made the dialogue more manageable (fewer people to coordinate at each time) and possible to have meetings focused in the problems at hand.

(3) Conclusion

It was observed in the data that, on the lack of detail imposed by the Public Sector Contracts Law, there is a varied practice developed in Spain on how to conduct the meetings for a competitive dialogue procedure. A "one size fits all" approach to the meetings in the dialogue stage was not found.

It is noteworthy to mention that some contracting authorities are having an extremely limited total number of meetings with candidates.

The author also believes that it is worth mentioning the fact contracting authorities are not adopting a more streamlined approach to the meetings. By having all the meetings in person and eschewing any technologies that could be used, contracting authorities may be making it more difficult for companies to fully participate and are increasing the costs (in money, man hours and even the duration of the procedure) for everyone involved. It is one thing to schedule meetings in a city such as Madrid or Barcelona that have good domestic and international transport links, it is another thing to arrange meetings in a small local council in the middle of the country. What may be at play is that this is a new procedure and the word "meeting" conjures in the contracting authorities the idea that it can only mean "face-to-face meeting". Perhaps this could be an area warranting further research as the procedure is used more in Spain, or even to compare with the practice in other countries.

12. Minutes of meeting

(1) Introduction

As with the previous section, the lack of explicit detail in the Law of Public Sector Contracts means that contracting authorities have to decide on how they will keep record of what is discussed in each meeting. The author asked how the contracting authorities kept a record of discussions with candidates and what content was included, that is, especially information classified as confidential by the candidate.

(2) Data

All respondents bar one said minutes of each meeting were kept. They differed widely, however, on the content included. Two clear trends could be identified. Firstly, minutes of meeting were never shown to other candidates, not even after the dialogue had ended. In one case, the losing tenderer asked to have access to the winner's documents (including minutes of meeting). The request was declined by the contracting authority directly and afterwards in an administrative appeal. This tenderer has filed for judicial review and is awaiting decision.

Secondly, most of the contracting authorities have not produced very detailed minutes of meeting, rather preferring to keep details to a minimum to reduce the administrative overhead. Furthermore, one respondent stated they were unsure on how to draft the minutes and have only produced summarised accounts of the discussions.

Regarding information deemed as confidential by the candidate, two contracting authorities have not included any information classified as confidential by the candidate. It was explained to the author that if the information was confidential,

it should not be recorded. On the other hand, five contracting authorities have included confidential information. They considered it relevant for the decision making process and, thus, should be included on the minutes of meeting.

(3) Conclusions

From the data gathered it appears contracting authorities are at least keeping a summarised record of what is being discussed during the dialogue stage. In addition, the information collected is only shown to the appropriate candidate and not to the other competitors. The scenario is less clear regarding confidential information, with some contracting authorities preferring to include it and others not. However, bearing in mind they are not showing the minutes to other candidates is reasonable to question if all the information - including confidential information - should not be included in the minutes of meeting.

13. Confidentiality

(1) Introduction

Confidentiality is regulated in the Law on Public Sector Contracts in article 166/2, in very similar terms to article 29/3 of Directive 2004/18. Therefore, the potential issues we have already covered in Chapters 4, 6 and 7 can also be at play in Spain.

Interviewees were asked how they had dealt with confidentiality, that is, with information that was deemed confidential by the participants.

Various themes could be observed in the data gathered. Firstly, a significant number of contracting authorities have considered all the information transmitted during the dialogue to be confidential. Secondly, a significant number of contract-

ing authorities have also said confidentiality was not a problem at all during their procedure. Thirdly, a relevant number of contracting authorities have made all participants (public and private) sign non-disclosure agreements.

(2) Data: treating all information as confidential

Nine contracting authorities have said that they decided to treat all information received from participants during the dialogue stage as confidential. Even if the candidates had not asked to treat such information as confidential, contracting authorities have done so by their own accord. Two reasons were given to the author. On the one hand, they were worried companies would not take part in the dialogue if confidentiality was not assured even beyond what is requested by law. On the other hand, they feared it could increase litigation during the procedure. The fact all information is considered as confidential by these contracting authorities has not impeded that such information is included in the common technical specifications in the situations where these were used. One lawyer argued, however, that this blanket coverage of all information was happening only during the dialogue stage and that it was difficult when the moment came to draft the technical specifications to convince the companies to accept the use of information they regarded as confidential in the technical specifications.

(3) Data: confidentiality as a non issue

11 contracting authorities have said that confidentiality was not a problem during their competitive dialogue procedures. No company raised any issues related to confidentiality either during the dialogue stage or when the common technical specifications were drafted.

(4) Data: non-disclosure agreements

Four different contracting authorities have dealt with confidentiality by going a step further than simply considering all information confidential. These entities have made both their personnel and companies involved in the dialogue sign non-disclosure agreements. They said this option conveyed a message of seriousness from the contracting authority that confidentiality was being taken as very important and that companies could take part in the dialogue knowing that the information they did not want their competitors to know was kept as confidential.

(5) Conclusion

From the data it appears that contracting authorities are considering confidentiality as a major issue and that not ensuring it during the dialogue could have a negative impact on competition. This would explain why many contracting authorities are offering a blanket confidentiality protection from the onset. The author doubts, however, that this protection amounts to what contracting authorities claim it does. If contracting authorities were adopting a model of organising competitive dialogue where each candidate presented a tender based on its own solution, then the blanket confidentiality protection would make sense. The trouble is many of these contracting authorities, as will be explained in section 14, are in fact developing a master or trunk solution during the dialogue using the inputs from the candidates (that will end up as the common technical specifications). While the candidates think they are working on their solution, in reality, they are composing a master or trunk solution with their best bits cherry picked by the contracting authority. The author feels that for all,the declarations of protection

of confidentiality, in reality protection is only apparent in these situations where a master or trunk solution is being developed during the dialogue stage. Which then leads to a pressing question: what is the point of having confidentiality during the dialogue stage if the objective of the dialogue is the creation of a common solution and technical specifications? It appears to make sense only when the model of each candidate presenting a tender based on its own solution is being used.

14. Models of dialogue stage seen in practice

(1) Introduction

The author did not anticipate that during the interview stage the need to create models to describe how the dialogue was being processed. From the interviews conducted it became apparent that contracting authorities were using three different models to organise the dialogue stage of the procedure. This is not to say that these are the only possible models to run a dialogue stage in Spain but they were the only ones identified by the author. These models are the own solution model, crowd-sourced or common trunk model and the common specifications model. In fig. 2 hereunder it is possible to see the three models side by side.

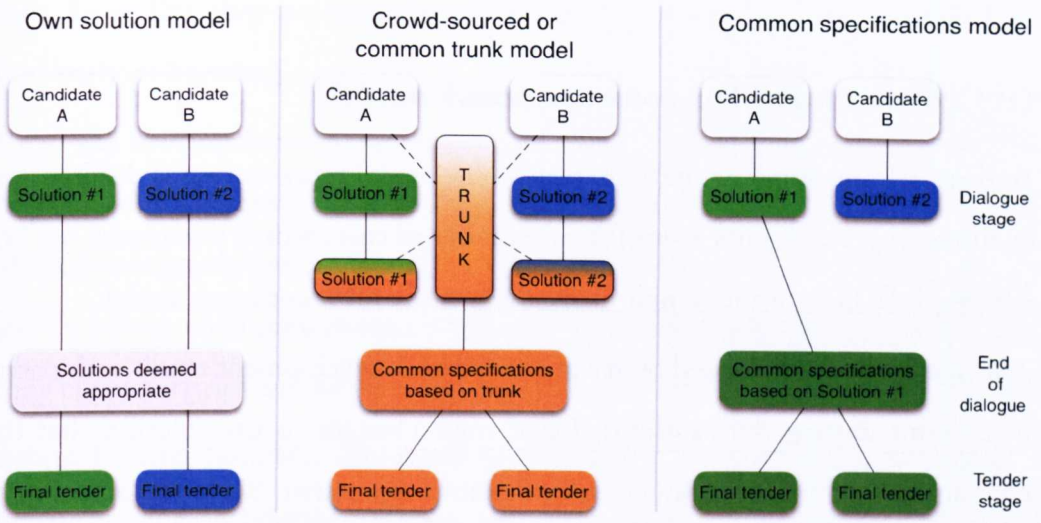

fig.2

(2) Own solution model

Four interviewees stated that they followed the model of having candidates presenting tenders based on the solution they developed during the dialogue stage. In these cases, no common technical specifications were drafted at the end of the dialogue stage and candidates simply presented updated versions of their solutions, eventually including an overall price that had not been discussed beforehand. One of the respondents stated that, according to his interpretation of the Spanish law this is the only model possible and that the others are illegal.

Some cherry-picking of solutions was observed by the author in these instances, as solutions were being developed in parallel with the contracting authority suggesting changes to solutions influenced by discussions with other candidates. One of the respondents affirmed that confidentiality had been assured by not identifying the candidate that had come up with the information being transmitted to other candidates. No candidates complained or filed for administrative or judicial review.

(3) Crowd-sourced or common trunk model

In total, five respondents have used this new model representing 15 different procedures. This represents a substantial number of cases where this model has been deployed. In fact, in the sample analysed, it is the most common model.

This model is characterised by having a common development trunk with participants contributing during the dialogue stage changes to the solution that then ends up in a common technical specifications document. Since the actual development of the common solution is shared among the candidates, with each contributing with some elements, the development process is similar to what can be found in crowd-sourced projects such as Wikipedia.

One can describe the model as follows.[632] The contracting authority has either a pre-conceived idea about a solution for its need that needs confirmation or develops enough capabilities during the dialogue to know exactly what it needs. During the dialogue stage it then proceeds to request changes to the solutions presented by the candidates to fit its developing "master solution". These changes amount to an extreme situation of cherry picking, as candidates are in reality contributing to a common solution and not developing their own, although in appearance they are still doing so. The common solution under development is thus a much better match for needs of the contracting authority than the original solutions and constitutes the "master solution". This progressive unifying development may take some iterations where the candidates end up developing ever more similar solu-

632. It would have been preferable and more clear to present exact scenarios of where this model was used or, at least, hypothetical ones drawn on the practice. However, the first would entail breaching the confidentiality agreement signed with the respondents. The second, although apparently feasible, proved to be more complex than the author anticipated and all the examples he came up with were too drawn on the practice he has seen that it would be extremely easy for any reader to pinpoint exactly what contracting authorities had used it. This could be considered, once more, as breaching the confidentiality agreement. It was thus decided to simply describe the model in theory without providing specific examples, recognizing though these would provide further clarification.

tions. In reality, they are contributing to the development of the "master solution" without knowing.

When the development of the "master solution" reaches a satisfactory stage for the contracting authority, it closes the dialogue and sends out a common technical specification document based on the "master solution" that candidates will have to follow when presenting a tender. In consequence, their tenders will share many characteristics and be very different from the original solutions put forward.

It must be said, however, that neither have candidates complained according to the contracting authorities information, nor have any administrative or judicial review been filed by candidates.

This model may also be a product of the difficulties of keeping information coming from different sources separate to avoid a breach of confidentiality. Two respondents stated it was very hard, even when making a conscious effort, to have discussions with different companies while at the same time ensuring no confidential information was being transferred.

(4) Common specifications model

The common technical specifications model, similar to the mandatory model imposed by the Portuguese law was also found in Spanish practice. In this model contracting authorities draft a common set of technical specifications at the end of the dialogue stage and candidates then submit tenders based on these specifications and not the solution they developed during the dialogue stage. In the sample studied, this model has been used in two situations only.

The author has observed clear cherry picking of elements of different solutions to compose the common specifications by contracting authorities. The difference

between this and the previous model is that no "master solution" was developed during the dialogue stage and the solutions under development during the dialogue stage kept their individuality. In consequence, candidates had to make significant changes to their solutions to make them compatible with the technical specifications.

As with the two models above described, no candidates complained or filed for administrative or judicial review.

(5) Conclusion

The author was not expecting to provide a new matrix system for classifying the practice of conducting the dialogue stage. It must be said though that in many cases the actual model being used in practice is hard to identify since the borderlines between them are blurred. It is hard to come to a conclusion in many circumstances when the organization of the dialogue and development of solutions are not addressed in the tender documents. In those borderline cases, the only way to determine which of the models had been used, would have been to have more extensive interviews with participants in the meetings (not all of the respondents from contracting authorities took part in those discussions) to check how the solution(s) were being developed and eventually the respective minutes of meeting. Furthermore, the development of this classification came only at the end of the empirical research stage in late July 2010.

One should add though, that it may be the case that the most common seen in practice, the crowd-sourced or common trunk model,[633] may be the most appeal-

633. This model was also mentioned, albeit with a different name, by Burnett, *Competitive dialogue - A practical guide* (EIPA, 2010). In addition, a three-tiered classification was also suggested by Racca and Casalini, (Paper) (2010) Implementation and application of competitive dialogue: experience in Italy. These authors called the models as Chinese walls model (similar to the own solution model), mixed solution (similar to the crowd-sourced or common trunk model) and patchwork (similar to the common specifications model).

ing for contracting authorities in many circumstances. If the objective is to have only one solution, the temptation to create a master solution during the dialogue and not keep developing artificially multiple solutions in closed compartments is obvious. In consequence, most borderline cases will probably fit this model more than the others with own solution and common specification models being more marginal.

It can be argued that the crowd-sourced or common trunk model may pose interesting questions about the value of confidentiality during the dialogue stage when all candidates are in reality working in the same solution (albeit not knowing) and adding their inputs to a common trunk. As we have discussed in Chapter 5 in more detail, what is the value of confidentiality during the dialogue stage when a common specification is being drafted either during the dialogue or at its end?

The crowd-sourced or common trunk model may also raise questions about its legality, bearing in mind the confidentiality requirements set forth in both the national law and the Directive 2004/18. What could not be assessed by the current research is to know if this model is having a negative impact on competition by discouraging potential participants from submitting entries. So far, contracting authorities are apparently being able to generate enough interest in their projects to carry them to the end.

It is also very apparent that the practice in Spain is showing extreme situations of cherry picking, but that is not leading to candidates filing for judicial review.

15. Stage to fine tune tenders

(1) Introduction

Article 167/1 of the Law on Public Sector Contracts, similarly to article 29/6 of Directive 2004/18 states the possibility of the contracting authority requesting extra information from the tenderers before selecting the winner. Contracting authorities were asked if they had conducted any sort of discussions at this point and with what content.

(2) Data

Three trends were observed in the data. Eight of the respondents have not used it at all, six have discussed some topics with candidates and three were interviewed before the end of this stage and could not thus provide an answer.

The first set of interviewees stated that they were conducting the post-dialogue stages of the procedure as they would do if it were an open procedure and had thus decided not to discuss any items with the tenderers. In addition, one of these interviewees said any changes to tenders after they had been opened would put in jeopardy the principle of tender stability. None of these respondents stated that he had preferred to have discussions at this point.

The second set of interviewees has taken advantage of the stage to fine tune tenders. One of them had two or three meetings for instance. However, most of the respondents discussed minor points such as the brand (irrelevant for the actual functionality) of equipment to be supplied or asked for clarifications to check if the tender submitted was compatible with the technical specifications. The discussion of any sort of financial issues was mentioned only once.

(3) Conclusion

From the data it appears contracting authorities are avoiding to fine tune tenders or engaging in detailed discussions. Over half of the respondents have had no discussions whatsoever and most of the remaining have kept their discussions to a minimum.

16. Stage to request clarifications and confirmation of commitments

(1) Introduction

Article 167/3 of the Law on Public Sector Contracts, similarly to article 29/7 of Directive 2004/18 allows the contracting authority the possibility of having further limited discussions with the tenderer offering the best tender. Contracting authorities were asked if they had conducted any sort of discussions at this point and with what content.

(2) Data

Three trends were observed. Ten respondents have not discussed anything with the winning tenderer. Four discussed some topics as with the previous section and three did not respond as they were interviewed before this stage.

The first set of respondents again argued that they were running the post-dialogue stages of the procedure as if it was an open procedure. Two of them said that companies wanted changes to contractual terms and they simply told them the time for suggesting those changes was the dialogue and not this stage. One

even replied that the private company appeared to be gearing up for protracted discussions and was "taken completely by surprise" when the contracting authority said the level of detail achieved was enough for the contract to be signed. The contracting authority elaborated by saying the company would lose the bond if it refused to sign on the agreed terms.

The second set of respondents had meetings to discuss some topics. Two of the respondents have discussed financial issues (one on the confirmation of bank commitments), one had discussions to discuss small details not covered in the bid and the last one legal issues such as the reception of the works.

(3) Conclusion

It is very clear from the data that contracting authorities in Spain are refraining from undertaking discussions after the selection of the winning tenderer. Most respondents did not have any sort of discussions with candidates. Furthermore, the ones that had discussions limited them to smaller issues.

17. Administrative and judicial reviews

(1) Introduction

As we have seen in Chapter 8 above, private parties may either file for administrative appeal or judicial review if they feel aggrieved. Contracting authorities were asked if any company decided to use any of these options.

(2) Data

Of all contracting authorities interviewed only two reported administrative appeals to have been filed. One of those said the aggrieved bidder had subsequently filed for judicial review. A third contracting authority stated that all the candidates excluded at the assessment of the economic, technical or professional ability of candidates stage have asked to know the reasons for the exclusion although none filed for either administrative or judicial review.

In the first case, where both the administrative and judicial reviews filed, only two candidates reached the tender stage and the aggrieved company considered that the award criteria were illegal. Furthermore, they wanted to gain access to the information classified by the other company as confidential. Their administrative review was unsuccessful and they have decided to file a judicial review, without a decision as of yet.

In the second case, the company wanted simply to gain access to the confidential information. This was declined by the contracting authority and by the administrative appeal body. The company did not file subsequently for judicial review where this issue could be settled definitively, as it would be interesting to see if a court would give precedence to either the confidentiality or the principle of transparency that governs public procurement.

(3) Conclusion

It was not observed in the data collected that using competitive dialogue is leading to significant litigation. In the sample studied only two cases were reported of aggrieved bidders filing for administrative appeal or judicial review.

It may be the case the companies are genuinely happy with the outcome of the procedure and see no fault in its conduction. On the other hand, it may be a case of them being afraid of being blacklisted.[634] However, as the author did not conduct research with private companies it is not possible to draw substantive conclusions on this topic. This might be an area to consider for future research on the topic.

18. Duration

(1) Introduction

The author asked interviewees about the duration competitive dialogue procedures had or were forecast to have in the case of the entities where the interviews were held before the end of the procedure. This question allowed the author to have an idea about the approximate timeframes involved in a competitive dialogue procedure in Spain. They were also asked whether the procedure had been longer than if an open or restricted procedure had been used.[635]

(2) Data

Six interviewees said their procedures had taken around a year, give or take a month. Five have stated a shorter duration of four or five months. For two, the procedure has taken six months. One has taken seven or eight months and, finally, one lasted for two years.

634. On the topic of blacklisting of candidates please see, Pachnou, *The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece* (2002).
635. This point will also be discussed further in section 20.

Regarding the second question posed, three interviewees have perceived competitive dialogue to be longer than an open or restricted procedure. However, one of the lawyers interviewed stated that in his experience the competitive dialogue procedure was not longer than an open procedure. He grounded his view on the fact that although the perceived duration of an open procedure (from notice to award) may be shorter, this view does not take into consideration the time it takes to draft the technical specifications before the tender is launched. The respondent argued that if one included that extra time in the duration of the open or restricted procedure, then competitive dialogue does not look that much longer.

(3) Conclusion

According to the National Audit Office, the target for the length of PFI procedures in the UK should be between 18 and 24 months,[636] with most of these projects being tendered by competitive dialogue. As one year was the most common response, the answers gathered are actually better than what the author expected in advance. The author also found a significant number of short procedures, with a six month or less duration (seven). This may be a sign of very efficient governance in place or of not knowing exactly what to do in the dialogue stage. This second possibility is further sustained by the finding that a relevant number of entities had only one or two meetings with the candidates during the dialogue stage, as was discussed above in section (II).

636. National Audit Office, *Improving the PFI tendering process* (National Audit Office, 2007)

19. Perceived benefits

(1) Introduction

Interviewees were asked about the benefits they thought adopting competitive dialogue had brought to the project(s). It was anticipated this question would make possible assessing what the contracting authorities considered the competitive dialogue procedure was adding as beneficial in comparison with other procedures.

Three clear trends were identified. Firstly, most respondents have stated at least one benefit of having used the competitive dialogue. Secondly, the most recurrent theme was that the respondents perceived they had ended with a better contract than if an open or restricted procedure had been used. Thirdly, in many cases the contract ended up being cheaper than if an open or restricted procedure had been adopted.

(2) Data: at least one benefit of using competitive dialogue

Of the contracting authorities that had experience using competitive dialogue only two did not find any added benefit of using the procedure, citing the bad experience. All the other ones found at least one positive point on the use of competitive dialogue.

(3) Data: better contract in the end

Nine respondents argued that competitive dialogue makes for a better contract in the end, that is, a contract more attuned to the authority's needs. That does not necessarily mean that they ended up with a cheaper contract, but one where the

actual needs were thoroughly discussed with private parties to find the best solution for whatever problem the authority was facing. For instance, more than one interviewee said that during the discussions they had changed their pre-conceptions on the solution to adopt, clearly stating the dialogue phase had made possible this change of opinion and that the final solution was better than the original.

Two respondents in sectors where technology evolves rapidly, said the author that having a competitive dialogue where the technical solution is thoroughly discussed and decided upon late in the procedure ensures that the tenders submitted are based in the most recent developments available in the market. It was argued that in these areas, using the open procedure leads to the adoption of technologies that are obsolete or at least outdated by the time the contract is awarded.

(4) Data: cheaper contract

Six interviewees said the contract they tendered through a competitive dialogue had been cheaper than anticipated in their own internal calculations and what they could reasonably expect to achieve in an open or restricted procedure. In one case, the difference was so staggering that it allowed the contracting authority to subsequently tender an extra lot for which they thought they would not have a budget.[637] It should be said though that three respondents stated that the better price appeared not during the negotiations - where the companies would say that going any cheaper would be impossible - but only when the final bid was submitted.[638] One of the respondents suggested that this difference might be due to the

637. The same contracting authority asked for clarifications from the tenderer, to make sure it was not an abnormally low offer.
638. This finding is discussed in further detail on the issues sub-section, as the respondents implied they were misled during the discussions.

fact the negotiators on the private side had still to clear with their boards the exact terms the company could offer.

(5) Data: change in the contracting authority's practice

Two contracting authorities and one lawyer interviewed said one that of the biggest benefits of using competitive dialogue has been its ability to change the way contracting authorities work on public procurement award procedures. It has fostered a more dynamic or project-focused attitude in the members of the contracting authority taking part in the procedure. It has forced different areas or departments to work together as a team, something that according to the respondents is not common in public procurement. Furthermore, in two contracting authorities that have used competitive dialogue more than once, internal audit controls were improved in the more recent procedures. Those have also been applied to open and restricted procedures where possible.

(6) Data: general

The respondents provided more insight regarding their perceived benefits that may not classify as trends or themes. Four argued that, for instance, they valued the fact they had discussions with private companies or that the technical specifications had ended up being more detailed than if they had followed an open or restricted procedure. One even said it had allowed them to negotiate with the suppliers and function more as a private company.

(7) Conclusion

From the data it seems contracting authorities are able to find value in the deployment of competitive dialogue as an alternative to the open and restricted procedures.

20. Perceived issues with competitive dialogue

(1) Introduction

Interviewees were asked about what they considered to be the issues competitive dialogue had, according to their own experience and perception.

(2) Data

A number of trends were identified. Firstly, lack of detail in the Law on Public Sector Contracts was singled out as the most common complaint by respondents. Secondly, arguing the lack of rulings from public procurement advisory bodies was an issue was also very common. Thirdly, the excessive duration of the procedure was also singled out. Fourthly, contracting authorities pointed some negotiating tactics by candidates as a negative issue. Various other issues have also been voiced by respondents and are presented in this sub-section.

(3) Data: lack of detail in the law

Thirteen of the contracting authorities with experience using the procedure have stated that the current draft of the Law on Public Sector Contracts does not have the level of detail they consider adequate to guide them through a competitive di-

alogue. Currently, has we have seen in Chapter 9, the Law on Public Sector Contracts is little more than the copy of what is already in Directive 2004/18. The law itself is very detailed in many other areas and, traditionally, contracting authorities are used to either following the law or, if available, secondary regulations that can add further detail.[639]

As we have seen in the section 3 of this Chapter, the current draft of the law has not lead to many questions regarding the grounds for use in the interviewees, since most of them argued they had no doubts on the topic.[640] The area where respondents felt more detail was needed is clearly the dialogue itself. To be more precise, they feel there is a need for regulation setting out, for instance, how the meetings are to be held or how the minutes of meeting are to be drafted (thorough, summarised, with or without confidential information transmitted by the candidates).

As one respondent put it, they want to have more legal certainty on how the procedure is supposed to be carried out. The Law on Public Sector contracts is very detailed regarding the other procedures, whereas for competitive dialogue it is very sparse. With a more detailed law however, flexibility is lost since contracting authorities would have to follow a longer set of rules and would not be able to carve the dialogue to its need.

Six respondents suggested that the lack of detail could be overcome with secondary regulation and not necessarily through changes to the Law on Public Sector Contracts itself.

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639. The author was told by various respondents that there is a two year old draft of a secondary regulation unofficially circulating. The process is allegedly suspended while a new version of the Law on Public Sector Contracts is being readied. The author was unable to secure access to a copy of the aforementioned draft.

640. That is not to say that it is not raising issues in contracting authorities that have not used the competitive dialogue - they may have considered it and not used due to the uncertainties regarding the grounds for use - nor in companies since this study did not cover them.

(4) Data: lack of rulings from public procurement advisory bodies

As we have seen in Chapter 8, Spain has one national public procurement advisory body and 15 regional ones. These bodies can produce opinions *if asked by* contracting authorities and also general advisory rulings. Although they are not mandatory, contracting authorities are wary of disregarding the rulings voiced by an advisory body. However, those rulings are only applicable to certain contracting authorities. For example, the National Government can only request opinions from the national public procurement advisory body. The departments of the Regional Government of Madrid can only request rulings from the Madrid public procurement advisory body. So far only one ruling has been produced by the national procurement advisory body. Although the scope of entities covered by each advisory is limited, the author was told by the two public procurement advisory bodies' respondents that they consult themselves regularly. Furthermore, according to these respondents contracting authorities commonly look to rulings from any advisory body when facing legal uncertainty. From the interviews carried, it appears that there is a certain respect by lawyers and contracting authorities for the work of the advisory bodies. This finding was not supported by specific questions posed but derives from comments received when the respondents were probed about the lack of rulings from these entities. Even the contracting authorities that were not subject to the scope of these rulings (because they were either local authorities or bodies governed by public law) remarked that having such documents would make it easier to apply competitive dialogue.

Five respondents have stated that more rulings from public procurement advisory authorities are needed since they might shed some light on the more ambiguous areas of the Law on Public Sector Contracts or topics where the regulation is

lacking. This trend is not as compelling as the previous one on the lack of detail in the law due to the more limited numbers of answers collected in this trend.

(5) Data: duration of the procedure

Five interviewees have argued that one of the biggest problems they faced was the excessive duration of the procedure. For these respondents, competitive dialogue is longer than an open and restricted procedure and this is perceived as being negative. One of the respondents voiced concerns that the perceived excessive duration of the procedure might even be contributing for the slow uptake of its use in Spain. For this person, contracting authorities in Spain - especially the ones subject to a direct political influence - want to have a contract awarded as soon as possible, even if it means ending up with a worse contract and the need to bend rules regarding changes to awarded contracts afterwards. In addition, a lawyer without experience using competitive dialogue interviewed at the start of this empirical research voiced exactly the same concerns.

One should add, however, that as we have seen above in section 18 most of the competitive dialogue procedures in Spain appear to last a maximum of one year from start to finish, with exceptions. It is interesting to note though that respondents have argued that in their perception the procedure is too long. Their perception is not entirely corroborated by the data collected. As one lawyer argued, it may be the case, respondents are perceiving competitive dialogue as a longer procedure because they may be not taking into account the time needed to prepare the technical specifications of an open procedure. Since the procedure is supposed to be used for the award of particularly complex contracts, it may also be the case the respondents were simply drawing on their accumulated experience of conducting "run of the mill" open procedures and comparing their dura-

tion with competitive dialogue. However, the perception of competitive dialogue as a long procedure is apparent in the authorities that have used it and is a finding worth considering if further research is carried out on a wider sample of contracting authorities that have not used the procedure.

(6) Data: creation of consortia during the dialogue stage

Two of the interviewees with experience in applying competitive dialogue have argued that the possibility of candidates creating consortia during the dialogue stage had appeared in their practice. In one case, this was allowed as the contracting authority had included a specific provision in the descriptive document and considered that it improved competition. In the other situation, the contracting authority did not allow the creation of the consortia because it would reduce the number of candidates in the dialogue to a number it considered negative for competition. Furthermore, one of the public procurement advisory bodies acknowledged the existence of the issue during the interview and said it would be legal as long as competition was not impaired in any way.

(7) Data: companies not clearing negotiations with their boards

According to three of the interviewees, private companies appear not to clear with their boards the terms of a project as it develops. In some occasions, this had the consequence of reducing competition at the tender stage. Candidates are discussing with contracting authorities during the dialogue stage without being completely sure they may commit their company to present a tender under the terms being discussed. It appears the actual decision of committing the company to the project is only taken by senior management at the end of the dialogue

stage and that junior management is given some leeway until that point. This is to say until the exact details of a solution are found and all the economic variables can be established, senior management is not involved in the process. This means the contracting authority may be discussing with people that are not cleared to commit their company. This has been reported in cases involving multinationals.[641]

(8) Data: confirmation of commitments

Two of the interviewees with experience using competitive dialogue and one of the public procurement advisory bodies have voiced concerns over the lack of security of commitments during the dialogue stage. Contracting authorities are trying to get candidates to improve their solutions during the dialogue stage, either by asking for more equipment or a better price for the solution being discussed. They feel let down when candidates either do not present themselves or submit a tender that does not reflect what has been discussed and appeared to have been agreed on during the dialogue stage.

This is due to the fact that in Spain (and also Portugal), due to the principle of tender stability, companies participating in a tender are only bound by their tenders, that is, they cannot afterwards try to change the terms offered. This is not a problem in other procedures such as the open or restricted procedures, since the tender is submitted at the start and the tenderers are bound by it. In competitive dialogue, candidates only submit the tenders at the end of the dialogue stage. Even the classification of their status in the procedure is different: participants in an open procedure are considered tenderers, participants in competitive dialogue

641. The author's experience in Portugal is similar to this. For projects in smaller countries, multinationals are known not to commit higher management to them.

before the tender stage, participants. Hence there is the possibility of them quitting during the dialogue stage on their own accord, or not keeping any promises made.

(9) Data: candidates not submitting tenders

Sometimes, candidates decide not to present a tender even after spending time and money during the dialogue stage developing their solution. This has happened mainly in projects involving public-private cooperation contracts, that is, projects where the candidate is supposed to invest its own money upfront. The cases reported to the author involve both multinational and national companies, big and small. Contracting authorities are finding out that the companies are only searching for credit to participate in the project at the end of the dialogue stage. In one case, all candidates (construction companies) did not submit a tender because none could secure funding and it lead to the end of procedure. In two other cases, multinationals have withdrawn at the end of the dialogue stage citing similar issues, but at least another candidate submitted a bid and the contract was awarded.

As mentioned in the previous sub-section, candidates are not bound by what is discussed during the dialogue stage and are free to present whatever bid they consider appropriate at the tender stage.

(10) Data: companies presenting much improved tenders

Three respondents stated that companies who during the dialogue had made clear they could not achieve a certain price or a technical solution and "dragged their feet" during the discussions according to one of the interviewees, ended up sub-

mitting tenders that were much improved. In one case, the difference was so staggering that the contracting authority had to ask for clarifications just to make sure it was not an abnormally low offer. One respondent stated he felt "lied to" and that companies were not being completely honest during the dialogue stage. He concluded that the contracting authority lacks effective knowledge of the candidate's reserve price (or other condition), that is, the absolute minimum price the candidate is willing to offer.[642] This participant stated that they would have conducted the dialogue differently (ie, including more services in the project since the budget allocated would allow for this) had they known the price would go down. It was argued candidates were playing their cards close to their chest, maybe due to fears the prices would be leaked to the other candidates and they would lose a competitive advantage. One of the lawyers interviewed reported that not giving prices during the dialogue stage was indeed a business tactic since companies, in his view, feared information would be passed to the competition during the dialogue stage and entice them to submit a better tender.

Another interviewee - in one of the situations where the dialogue was not successful - said participants simply declined to divulge any prices (or show designs) during the dialogue stage. He argued that this might have been because they did not do any work in the meantime, were afraid of having their prices transmitted to the competition or just wanted to know the prices and designs of their competitors.

642. On this topic, please see Raiffa et al., *Negotiation analysis : the science and art of collaborative decision making* (Belknap Press, 2002).

(11) Data: lack of prior experience

Two interviewees who only used competitive dialogue once have argued that decisions they took reflected their own lack of experience with the procedure. If they ever used it in the future they would make changes and improvements in accordance with what they had learned. Furthermore, two others said they had made changes in subsequent procedures to reflect their new found expertise. These respondents have refined the descriptive documents and also improved internal audit controls to ensure the discussions were focused on the most important issues and that its duration did not slide in time.

Two respondents added that the lack of experience was obvious also on the private side with companies being admitted to the dialogue stage without having a clear idea on how it was supposed to be carried out.

(12) Data: not ending with a closed technical specifications document

Two interviewees have argued that the discussions they held with the candidates had not produced a "tight" technical specifications document. They felt discussions were too shallow, long and vague. In other words, they considered competitive dialogue as fostering some sort of "discussion creep", where a lot of time is spent discussing but nothing is actually achieved. These respondents were unable to transform their output in a technical specifications document. In their view, the resulting document was less detailed than the technical specifications of open and restricted procedures are.

(13) Conclusion

From the data it is possible to conclude that contracting authorities are perceiving the existence of a number of issues with competitive dialogue in Spain.

Although the trend of pointing to the lack of detail in national law and public procurement advisory bodies guidance as issues is compelling due to the almost unanimous response, the author would like mention that the answers were collected when the interviewees were asked if they thought the law needed more detail and, thus, may be considered a leading question. It should be added also that the interviews were carried out with interviewees that had only a single experience using competitive dialogue and, so far, not a lot of information whether the procedure has been made available through other sources such as academic papers. These could provide some support to contracting authorities trying to apply competitive dialogue without the need to refine the law to include further detail or guidance from the public procurement advisory bodies.

It is also worth mentioning that, as far as the author knows, the practice of presenting a very low price at the tender stage after saying it would not be possible to achieve during the dialogue stage is not widespread in Spain. It is, however, relevant to bring this finding up due to the fact that it has relevant implications in practice. As with the more commonly used open and restricted procedures contracting authorities do not have discussions, its staff is not used to deal with business practices such as this one. Contracting authorities should be advised that this may happen in discussions. This is not to say the attitude by the candidates is illegal in any way, after all, companies and contracting authorities have a common interest in finding a solution for the need but their interests are not aligned on the price as the contracting authority wants the project to be the cheapest it can

be and the candidate the other way around. This is nature of having discussions and negotiations.

21. General comments from interviewees

(1) Introduction

In this section are compiled the more general comments from the respondents on competitive dialogue. They do not reflect perceived issues or benefits from using the procedure but the answers herewith presented are still relevant for the wider perception of the use of competitive dialogue in Spain.

(2) Data: financial costs

Regarding financial costs, interviewees were asked if the competitive dialogue procedures they had participated were financially more expensive in the procedure phase than an alternative open or restricted procedure. Seven respondents stated that in fact the procedure in itself was not more expensive in financial terms than the alternatives. One potential reason for this lack of perceived extra costs may be the fact only a limited number of contracting authorities are hiring external assistance to help during the dialogue stage thus avoiding a direct increase in procedure related costs.

Four respondents have stated that their competitive dialogue procedure was more expensive. Of this group three pointed out that *in reality the* extra financial costs were offset by a better and/or cheaper contract in the end. In the words of one of these respondents "it was a small cost when compared with the benefits reaped".

(3) Data: human resources' costs

Interviewees were asked if this procedure led to increased stress on human resources of the contracting authority in comparison with an open or restricted procedure. Eight said it had increased the workload in relation to the available alternatives. It is interesting to notice that of this number, four had already said it had not been a financially more expensive procedure. This leads to the conclusion that at least these interviewees may not be attributing a monetary value to the extra man hours needed to carry a competitive dialogue. The remaining respondents have not stated that this procedure had been more demanding to their human resources. With the same opinion, one of the lawyers interviewed has stated that competitive dialogue is not more burdensome on the contracting authorities' human resources.

(4) Data: general impression of the procedure

Respondents were asked whether their overall impression of the procedure was positive or negative. Nine have clearly stated they liked the procedure and were happy with the outcome. One even stated that although originally he had a very negative view of the procedure, the experience had been very good and had completely changed his opinion. Out of this group of respondents six work for medium or large sized contracting authorities, either departments of regional (three) and provincial administrations (one) or public owned companies (two). The remaining three worked for small local councils.

Three of the interviewees with a positive view of the procedure have used it multiple times. It may be argued that they have already developed a practice in house to deal with this procedure and are thus able to conduct it competently and to

achieve their desired outcomes. Furthermore, all three belong to large contracting authorities that although they did not hired external assistance had sufficient in house capability to carry out the dialogue (multidisciplinary teams). Two also had a strong management background, having been in the private sector before moving on their current positions. All three entities that had external help have a very positive view of the procedure and have expressly mentioned that these experts were key to the success of their procedures since they either did not have enough man power to carry it out or lacked the necessary experience and capabilities.

Three have expressed strongly negative views of the procedure. One, from a provincial contracting authority, even said contracting authorities "should avoid it at all costs" as his particular experience had been very difficult. One, from a small local council, was very put off by the experience and suggested contracting authorities should keep to what they have been doing for a long time when they are not sure of the technical solution, which is asking another contracting authority that has carried out a similar project for the tender documents. Another respondent said he had a negative view of his own personal experience ("it was a living hell") but remarked clearly this represented a view based on his particular experience. Furthermore, he pointed out it had been a learning experience and that in the future he would be happy to carry out competitive dialogue procedures again and addressing the challenges faced the first time around. Another respondent stated he had a slightly negative view of the outcome of their procedure. That was due to the fact only one company was deemed as suitable and invited to the dialogue.

The remaining interviewees have either not expressed an opinion or voiced a neutral opinion of the procedure. One stated that the procedure was useful and con-

venient, but only in certain circumstances and another that it was not a "panacea".

(5) Data: companies' impression of the procedure

Contracting authorities were asked also if they had obtained any feedback from participating companies on the dialogue. Most replied that they had not collected any feedback worth reporting. Of the few entities that did so, four said the participating companies liked the procedure. One added that in fact, the companies experience with the dialogue led to internal reorganisations[643] to make them more competitive in this business environment where they are expected to have dialogues with the contracting authority and not simply to present a tender. Two respondents have stated the companies involved in their competitive dialogue procedures have not liked the experience and complained it was too long and complex.

The author would like to advise caution before extracting conclusions from the findings of this sub-section as the companies were not asked directly for their opinion and the answers came solely from the perceptions the interviewees - all from contracting authorities - had themselves gathered.

22. Conclusion

In this chapter we have discussed in the detail the findings from the 27 interviews carried out in Spain. We have gathered insight relevant for the issues put forward in Chapter 8 and also found some new issues, such as the different models of

643. In this case, the companies were well known multinationals operating in the medical sector, that also operate in the same business in other EU member States.

organizing the dialogue stage or the creation of consortia during the same issue. In addition, we have also discussed some perceived benefits from using the procedure as the perception contracting authorities have that competitive dialogue is allowing them to either have a better or cheaper contract in the end.

Finally, we have found an interesting practice in Spain surrounding the lack of formal exclusions during the dialogue stage and a preference for conducting the procedure after the submission of tenders as an open or restricted procedure, albeit the inclusion by the Spanish law of stages similar allowing for some scope for discussions to occur.

Chapter 11 - Conclusions

1. Introduction

As mentioned in Chapter 1, the objective of this research is to provide an overview of the implementation of competitive dialogue in Portugal and Spain. The purpose of this chapter is to recap the research undertaken, compare the findings across the two countries, answer the research questions and highlight certain points that warrant further study.

This chapter has seven sections apart from this introduction, with one dedicated to each of the five research questions, a section on the models of dialogue stage seen in practice and a final section on concluding remarks.

2. First question: how was competitive dialogue implemented?

As we have seen above in chapters 6 and 9, both Portugal and Spain have transposed competitive dialogue directly into national legislation and have included content from both the articles and recitals of Directive 2004/18. Each country's law makers has, however, implemented the procedure differently.

In Portugal, law makers decided to elaborate further on the framework set by the Directive 2004/18. The objective was to adapt this procedure to national practice and culture.

Due to a subtle but purposeful change in the wording of article 30 of the Public Contracts Code, the grounds for use are tighter than those found in the Directive. The actual drafting implies that the procedure is only to be used when it is impossible to use an open or restricted procedure. In other words, it is to be used only when the contracting authority is not able to draft technical specifications.

If it can draft some specifications then an open or restricted procedure must be used. Furthermore, according to article 33 of the Public Contracts Code, competitive dialogue may not be used for the award of contracts in the utilities sector. It should be stressed though actual scope of the utilities sector rules in Portugal is more limited than the Directive 2004/17. For instance, if the contract to build a railroad is tendered by a public owned company then it is covered by utilities sector rules and cannot be tendered through a competitive dialogue. If the same contract is tendered by the State, then it can adopt the competitive dialogue procedure.

Transposition to the Portuguese law has brought other changes. For the author, the most important one appears to be the mandatory model imposed on contracting authorities to identify a winning solution and draft common technical specifications. The purpose of this change was to allow the use of the award criteria rules and to increase competition at the tender stage as all candidates would be submitting tenders based on the same technical specifications, thus levelling the playing field.

Among the remaining changes, one should highlight the exclusion of a phase to fine-tune tenders before the preferred bidder is chosen (as expressly admitted by Directive 2004/18) and the restriction of post-award discussions to the exact same (limited) grounds as any other procedure. Also worth mentioning are the lack of exclusions or candidates during the dialogue stage, the need for candidates to submit only one solution and be assessed on it at the start of the dialogue stage.

In Spain, law makers have decided to copy the text of Directive 2004/18 regarding competitive dialogue, including both the content of recitals and articles in the body of the Law on Public Sector Contracts.

Regarding the grounds for use, these were copied directly from the Directive. Article 164 of the Law on Public Sector Contracts appears to be a direct translation from the English draft of the Directive and not the Spanish text. Contrary to Portugal, it may be argued it is possible in Spain to adopt a competitive dialogue procedure when the contracting authority is unsure of the best solution to its needs.

There is, however, a significant change to the grounds for use of competitive dialogue in Spain, as this procedure is the default procedure for the award of public-private cooperation contracts. The exact content of this type of contract (and the boundaries with similar contracts such as public works concessions) in Spanish law is debatable, but it broadly follows the lines of public-private partnerships. If an exact match between the Spanish public-private cooperation contracts and public-private partnerships as described by the Commission[644] exists, one should point to the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, where it argued that the procedure should be made available for the award of these contracts but that did not meant it should be used every single time. In Spain, it seems, all public-private cooperation contracts are thus "particularly complex".

The specific rules on the jury for the procedure are worth noting also. According to article 296 of the Law on Public Sector Contracts, the jury for the procedure must be composed of members of the contracting authority and also external members, who are supposed to provide the expertise necessary to assist the contracting authority in the conduct of the procedure. For other award procedures, Spanish contracting authorities may only create the jury with persons from the contracting authority itself.

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644. Commission, *Green Paper on public-private partnerships and Community law on public contracts and concessions COM (2004) 327 final* (2004).

The rest of Spanish legal implementation is quite similar to the Directive and warrants no further details.

One final point should be mentioned. Due to Spain's administrative organisation and particularly its division on different regions, each with its own Regional Government, it was possible to find a regional public procurement law applicable only to the regional and local contracting authorities of Navarra. Regarding competitive dialogue, its draft, however, also follows Directive 2004/18.

The author was told by one of his respondents that at least one other region in the country is considering approving its own regional public procurement law and the plans current at the time of drafting this chapter are to address some of the perceived shortcomings of the current national legal implementation of competitive dialogue.

3. Second question: why is it not being used more in Portugal?

Although the original plan was to focus the empirical stage on the practice of the procedure in both countries, it became apparent with the passage of time that in Portugal competitive dialogue would not be used widely enough for the author to have sufficient data to analyse. In face of the reality the most pressing question regarding Portugal became: why is competitive dialogue not being used more?

Taking into consideration the data provided by the interviews with leading lawyers and contracting authorities in Portugal, the author's view on this question is that the lack of use of competitive dialogue in Portugal is due to the accumulation of three main reasons and a multitude of minor ones. The three main reasons are: more limited grounds for use, general perception of lawyers and contracting authorities that grounds for use have to be interpreted restrictively, and the per-

ceived legal risk of using an unknown procedure with many legal uncertainties when bidders are granted easy access to remedies in national courts and the contract may be analysed *ex post* by the National Audit Court.

As minor reasons the author would point to the myriad of smaller legal issues found in national transposition, such as two different models of assessing the economic, technical or professional ability of candidates, limitation to a single solution, analysis of preliminary solutions, treatment of confidentiality, lack of exclusions in the dialogue stage, the need to identify a winning solution and mandatorily draft common technical specifications, lack of a fine-tuning stage and limited scope for discussions after the award of the procedure. Not found in the transposition but still relevant as a legal issue is the apparent incompatibility between the current public-private partnerships framework and competitive dialogue.

It should be noted that for contracts such as public-private partnerships or concessions not covered by the scope of Directive 2004/18 the existence of a locally developed alternative procedure called open procedure with a negotiation phase has taken at least part of the theoretical scope where competitive dialogue might be of use (for instance, in the transport or energy sectors). Not only are there over ten years of practice in Portugal in applying this procedure - that is getting more and more standardised as time goes by - but also, the interviewees that have participated in at least one were, in general, happy with the experience.

Cultural issues may be playing a part in the limited uptake of the procedure also. The public administration is traditionally used to ordering and not discussing or negotiating with private companies. The open procedure with a negotiation phase has an exceptional nature and is, indeed, used only exceptionally. It may be the case - as voiced by one of the interviewees - that there is a degree of shame in

using competitive dialogue as it entails a confession to someone higher in the hierarchy that the contracting authority no longer knows the subject matter well enough to launch an open procedure. Furthermore, the open procedure is considered the gold standard of procedures in Portugal and people are, for better or worse, used to awarding particularly complex contracts within its limitations. That does not mean they end up awarding the best contract they could possibly do in theory. It means they will award the contract they can by using a tried and trusted method where the perceived risk is low. In addition, resistance to change may be at play also. Finally, administrative laws in Portugal are traditionally very detailed (the current Public Contracts Code with almost 500 articles is a prime example) and contracting authorities are used to following step-by-step instructions on how to run the public procurement procedures. As competitive dialogue does not include such detailed instructions for the dialogue stage it may be the case of procurement officials playing safe and avoiding having to think in the best way of actually carrying a dialogue stage.

In addition the lack of case studies (role models) and qualified information about the procedure may be at play. On the first, it is clear that none of the first five uses of competitive dialogue has been deemed as successful enough to entice other contracting authorities in using the procedure. In Spain, on the contrary the author has seen in the medical sector that contracting authorities have expressed an interest in knowing the procedure after seeing it being successfully deployed in similar areas in other regions. On the second, there are only two articles published by academics about the procedure in Portugal (one by the author himself). According to the interviewees it is apparently a common trend in workshops and seminars to either not mention competitive dialogue or for it to be mentioned only briefly with the caveat "that it is not to be used" as more than one respondent has argued. The lack of information on the procedure is so clear that virtual-

ly all the respondents have asked the author to forward to them his research with a few (mostly lawyers) even asking if it would be possible to arrange a presentation of the findings.

4. Third question: legal issues

A number of legal issues surrounding the implementation of the competitive dialogue procedure in both Portugal and Spain have been discussed in chapters 6, 7, 9 and 10 above.

(1) Portugal

The author considers the most important legal issues are the grounds for use, how to draft the common technical specifications, lack of formal exclusions, confidentiality and the reduced scope for discussions after the submission of tenders.

The grounds for use have been addressed in detail in the second question section above, and need not be considered again here.

Regarding common technical specifications, Portugal has decided to impose a mandatory model of having such document drafted at the end of dialogue stage. This "one size fits all" approach has left some legal issues unresolved. The most pressing is to know how they are supposed to be drafted. The Public Contracts Code states the need for the contracting authority to identify the winning solution at the end of the dialogue stage. Does this mean that the technical specifications have to include only information from that solution? What if there is no winning solution and all are similarly adequate to meet the needs of the contracting authority? What if the best solution presented by a candidate is not the best solution overall? Is this model better or worse for competition? So far, these ques-

tions remain unanswered and may warrant further research. In addition, a significant number of respondents have said that the common specifications may include elements from different solutions, thus suggesting the cherry picking of solutions at least after the end of the dialogue stage to be legal.

In Portugal, as we have seen above, it is impossible to exclude either candidates or solutions. In consequence, it is not possible to have successive rounds during the dialogue stage as allowed by Directive 2004/18. On the one hand, the question of the exclusion at the dialogue stage covering only the solution or also the candidate is sorted: neither is the answer. The exclusions of preliminary solutions before the start of the dialogue implies the exclusion of the candidate as it is not admitted to the dialogue stage. On the other hand, this may lead to dialogue stages where the contracting authority is forced to discuss with a large number of candidates even ones where there is no interest in doing so. If this happens, it will increase the transaction costs for everyone involved, both companies and contracting authorities. However, it should be noted that in Spain, where the possibility of having successive rounds is available, no contracting authority has taken advantage of it.

How to deal with confidentiality was a problem at EU level and is still, in theory, a problem, as the Portuguese law does not solve this issue. This issue may be particularly acute due to the fact the contracting authority will have to draft the common technical specifications at the end of the dialogue stage and has the incentive to cherry pick elements from different solutions either during the dialogue or when drafting that document. The lack of practice in the procedure does not allow for a practice-based solution to be offered. The author would like to mention though that from an incentive point of view the issue of confidentiality is different in the mandatory Portuguese model of having common specifications

drawn at the end of the dialogue stage and one where each candidate tenders based on its own solution. In the latter, the advantage given to a candidate during the dialogue stage by supplying confidential information equals an identical disadvantage to the other candidate. Since the tender will be based in the solution of each candidate, if he can improve it with information gathered from other candidates, its chances of winning are increased. The situation is different in the Portuguese model where the purpose of the dialogue stage is, in reality, to allow for the common technical specifications to be drafted. If the technical specifications are to include elements from more than one solution, it can be argued that to maximise the possibility of winning the tender it is in each candidate's best interest to have as much input as possible in the drafting of the technical specifications. It must be said though that on the open procedure with a negotiated phase, as far as the author could gather information on it, confidentiality has not been pointed out as being an issue.

The final legal issue worth mentioning is the clear restriction on discussions after the tenders are submitted. There is no similar provision to article 29/6 of Directive 2005/18 allowing for the fine-tuning of tenders before the preferred bidder has been chosen. Furthermore, any discussions after the preferred bidder has been picked are limited to the same grounds and conditions as any other award procedure in the country. Bearing into consideration the lack of use of the procedure, it remains to be seen if these restrictions are beneficial or an hindrance.

(2) Spain

In the previous chapters we have seen a number of issues related to the legal draft of competitive dialogue in Spain. The author would like to highlight the lack of detail in the law, confidentiality, the compatibility of the common trunk model

with cherry picking and confidentiality, how to deal with consortia, exclusions during the dialogue and the scope for discussions after the tenders have been submitted. A final note on the grounds for use is also worth mentioning.

The lack of detail in the Spanish Law on Public Sector Contracts regarding competitive dialogue was expressed by the interviewees as a major issue in the country. The law is indeed very detailed in other areas, as traditionally in the country, but not on the competitive dialogue. Respondents have also said that this lack of detail could be overcome through secondary legislation developing the Law on Public Sector Contracts or guidance from public procurement advisory bodies. Indeed, in 2009 some secondary legislation came into force with the aim of developing the Law on Public Sector Contracts. Sadly, it did not touch competitive dialogue (apart from the jury for the procedure). Public procurement advisory bodies have also been silent regarding the use of the procedure. Truth be told, is up for contracting authorities to ask them for guidance and none has done so so far.

As we have seen, the Spanish law does not provide any new solutions on how to deal with confidentiality and cherry picking. Furthermore, depending on the exact model of dialogue stage being applied by contracting authorities, as we have mentioned above on Portugal it is not clear if confidentiality is particularly useful when common technical specifications are to be developed either during the dialogue or at its end. The exception might be if variant tenders are to be accepted and the candidate with the confidential information may want to use that information to have a more competitive variant tender. The compatibility of the extreme case of cherry picking involved in the common trunk model with both the Directive 2004/18 and the Law on Public Sector Contracts is debatable.

The legality of creating consortia during the dialogue is another legal issue faced in practice by contracting authorities in Spain. The author has seen both scenar-

ios in practice. In one case the consortia was allowed (the possibility had been included in the tender documents) whereas in another the contracting authority refused the request fearing being accused of giving preferential treatment to those candidates and a hypothetical negative effect on competition.

The Law on Public Sector Contracts also does not make it clear if exclusions at the tender stage are applicable to the candidates themselves or only the solutions they are offering. The practice has not dissipated the doubt since no contracting authority has ever used this possibility even when faced with excessive numbers of candidates during the dialogue stage. It is clear there is some fear in contracting authorities about using this possibility.

Spanish law also does not provide any clues regarding what can be discussed after the submission of the tenders either before or after the selection of the preferred bidder. Local practice, however, has pointed out that only small discussions are to be held at this point. In fact, it may be one of the best practices of the country as we will discuss on the fifth question.

Although contracting authorities that have used the procedure have not had a problem with competitive dialogue, it may be the case all other contracting authorities that have not used it may have a different opinion. Secondly, the actual grounds for use of the public-private cooperation contract are uncertain. Regarding the first point, one should add that contracting authorities that use the procedure feel secure about the reasons justifying its use and had no problems in assessing the situation they faced against the legal rule. However, comparing this situation with the overall negative response from interviewees in Portugal about the clarity and certainty of the grounds for use (even discounting for the differences in the actual draft) and also some remarks made by two lawyers without actual experience in the procedure, it may be the case that many other contracting

authorities may feel unsure about the grounds for use and refuse to use it. In other words, we should not extrapolate this finding into the general class of contracting authorities in Spain but only to the contracting authorities that have used it. This is a serious doubt that warrants further investigation by researchers.

Finally, it is quite apparent that the legal grounds for use of the public-private cooperation contracts are unsure at best. Although not an issue of the procedure *per se*, the uncertainty has an impact on the procedure because competitive dialogue is the default procedure for these contracts and not for alternatives such as the public works concessions. Practice has shown also that for these contracts, contracting authorities are still using the open procedure and not competitive dialogue.

5. Fourth question: other issues found in practice

Further to the issues related with legislation, it became apparent from the interviews in the target countries with contracting authorities that have used competitive dialogue that a number of issues existed in practice. These issues are not specifically addressed either in the national law or in Directive 2004/18 but are still relevant for assessing the practice of the procedure.

Due to the difference in the number of interviews with lawyers and contracting authorities that have used the procedure in Portugal and Spain, more practical issues were identified in the latter. One can say these practical issues are, in general, issues related with project management, if one thinks about the procedure as a project that needs to be managed. The issues arose from the questions surrounding how the dialogue stage had been organized in practice and the general section of the interview guides.

(r) Spain

In Spain it was possible to detect the following practical issues: how to organise the dialogue stage; perceived duration; stress on human resources; how to maximise the outcome of the dialogue stage; how to avoid the negotiation or discussion creep and the number of candidates.

Regarding the organisation of the dialogue stage, as the Law on Public Sector Contracts does not provide a lot of detail, it is up to contracting authorities to decide how they should organise the dialogue stage. It implies contracting authorities deciding on the use of outline solutions and successive stages, for instance. It also implies decisions on how to organise meetings and transfer of information, what content to include in the minutes or if these are to be drafted at all.

The perceived duration of a procedure is also a practical issue. It may well be true the duration of the procedure from launching the contract notice until the award may be perceived as a longer period than if an open procedure had been used. After all, the open procedure is well standardised and contracting authorities have a lot of experience in running it. If one, however, includes in the duration of both procedures the time it takes to prepare the launch of competitive dialogue and drafting the technical specifications of the open procedure, it may be the case the difference is at least partially abated.

Some contracting authorities perceive competitive dialogue as a strain on their human resources. The added work of preparing rounds of discussions and having actual meetings with the candidates is being pointed out as a negative point regarding competitive dialogue. This was particularly seen in smaller contracting authorities that did not try to adapt their approach to the needs of this procedure

but tried to run competitive dialogue as they would run an open procedure. Larger contracting authorities or where changes were made to its own practice have not reported the same issue.

How to maximise the outcome of the dialogue stage was an issue identified by the author when contracting authorities complained about candidates quitting at the tender stage or when they presented much improved offers at that point, in comparison with what they had offered during the dialogue. As an hypothesis warranting further study, the author considers this may be the result of companies not taking the dialogue stage seriously enough. In consequence, companies are not allocating senior management to the dialogue stage and making a high level final decision only when the point of truth comes. Clearly, the moment of truth is the submission of the tenders (to which they are then bound) and it may explain why so many companies quit at that point or the decision to commit leads to a marked improvement in the conditions offered. However, it may also be the case that companies are simply using negotiating tactics, playing the cards close to their chest and keeping their options open with the minimum cost possible for them. This should be expected in any negotiation setting and as such contracting authorities should be advised of this possibility. To conclude the present topic, one may argue[645] that financial incentives may play an important part in improving the usefulness of the dialogue stage, as either to entice more companies to take part or making the ones participating more interested in the outcome. Perhaps, as has been used in Portugal for contracts tendered by an open procedure with a negotiated phases, these payments could depend on the company actually submitting a tender and the tender coming within x% of the winning tender.

645. As Racca and Casalini, (Paper) (2010) Implementation and application of competitive dialogue: experience in Italy have made.

Some of the contracting authorities mentioned that there were too many discussions and they were very long and time consuming without providing the outcome (better technical specifications) the contracting authority was hoping for. In other words, they had faced firsthand the dreaded "discussion or negotiation creep", where talks drag over time, months go by and nothing is actually achieved.

Contracting authorities have reported that discussing with more than three to five candidates is particularly difficult. One could think then that contracting authorities would employ successive stages to eliminate the solutions and or candidates and bring the discussion down to what they would consider a manageable level. However, that is not happening in practice. No contracting authority interviewed by the author has ever used successive stages for this purpose. What was seen in practice is that contracting authorities are upping the requirements in the level of detail or the actual technical requirements and candidates opting to quit the procedure. One may question if their decision should be construed as dropping from the procedure or, in alternative, it should only affect their solution and they should be kept in the procedure if at the tender stage the technical specifications are to be drafted as in two of the models described in Chapter 10. In addition, contracting authorities have mentioned that some candidates would have actually preferred to be excluded during the dialogue stage than to have a bid fare badly and seeing the winner use the marking of tenders as a marketing tool.

There has also been reported a significant number of candidates not submitting bids after participating in the dialogue until the end. In the cases the contract to be awarded was a public-private cooperation contract it became clear companies were not able to raise the necessary finance to proceed. In other contracts the reason may be the excessive number of candidates present or the fear of them being branded as losers if they perceive they are not competitive. Developing incen-

tives to keep candidates engaged in the dialogue and have them present competitive offers is an area that warrants further research.

The author's suggestions is for improvements at project management level, either through the anticipation of the possibility of these issues occurring at the planning stage or the hiring of external experts to provide assistance to avoid these pitfalls. The author does not believe these issues should be addressed simply by adding more regulation into the competitive dialogue procedure.

Finally, the author would like to point the fact that confidentiality during the dialogue stage has not been identified as an issue by the respondents. Two caveats should, however, be mentioned. Firstly, the author has not interviewed the companies that participated in the procedures and they might offer a different view, since they are the ones with something to lose if its violated. Secondly, the interplay between confidentiality, the ban on cherry picking and the practice of developing a common trunk solution during the dialogue stage remains a puzzle to be sorted out.

(2) Portugal

In Portugal, the limited number of contracting authorities that have used competitive dialogue does not allow the author to draw many conclusions regarding the practical issues of the procedure. Three are, however, worth discussing at this point: organisation of the dialogue stage, procedure duration (particularly in local authorities) and preliminary solutions.

In Portugal, contracting authorities face the same issues as their Spanish counterparts about how to organise the dialogue stage. The Portuguese law, apart from imposing the need to evaluate outline solutions and a mandatory model for the

dialogue stage does not provide detailed answers on mundane issues such as the ones above mentioned for Spain.

The second issue is faced by local authorities. In Portugal, all reports (preliminary and definitive) on procurement procedures are voted for in a meeting of the local council and are not approved by the jury for the procedure. It means that the following votes have to be taken: tender documents, assessment ofthe economic, technical or professional ability of candidates, admission of outline solutions, winning solution, common technical specifications and the winner of the contract. Apart from the first, all others have to be voted twice, once for the preliminary version and another for the final report. In addition, the executive branch of local councils in Portugal do not include only members of the winning party. Seats are allocated on a proportional basis. Local councils are composed of members of between 2 and 5 political parties. The reality is that this increases the entropy of the procedure, its duration and the political risk of the whole procedure being derailed in one of those various votes. Perhaps Portuguese local contracting authorities might consider bringing on board the jury members of the opposition as it has been successfully done in Spain.

As we have seen in Chapter 6, before the start of the dialogue stage companies will have to submit preliminary solutions that will be assessed by the contracting authorities. This may raise two specific issues. The first is the level of detail the preliminary solution needs to have and how the contracting authority can make sure that it is comparing solutions with a similar level of detail. The second, in the words of one respondent, is "how can the contracting authority know what is adequate or not even before the start of the dialogue?"

6. Fifth question: best practices identified

A number of practices identified during the empirical research conducted in Spain can be described as being best practices at this point. *In Portugal, once* more, the limited number of interviews with contracting authorities that have actually used the procedure does not allow for significant conclusions.

In this section, the best practices identified will be divided by the moment they are relevant to: before the start, during the dialogue stage and after tenders are submitted.

As purely project management best practices the author highlights the need of preparing the procedure correctly in advance and anticipating potential problems, hire external assistance if needed, limiting the duration of the dialogue stage, organising the meetings per sector, and having internal audit controls in place.

As mixed best practices the author thinks creating a multidisciplinary team (based in the jury for the procedure), conducting a prior request for information, providing just enough detail at the start, limiting the number of candidates, restricting the discussions after tenders have been submitted.

(1) Before the launch of the procedure

Contracting authorities should take the opportunity of including actual experts in the jury for the procedure as mandated by the Law on Public Sector Contracts and create multi-disciplinary teams to manage the procedure as a project team. It was clearly seen that when the opportunity was taken to change the practice of allocating simply one person to run the procedure and actually accept the change needed that the contracting authority was happy with the end result. This was done by allocating a full team of internal experts (project manager(s), legal advi-

sors, technicians for various areas), or if the contracting authority did not have enough in-house man power by hiring external legal, financial, project management or technical advice. As one of the respondents put it, "paying a small fee to have external expert advice paid off handsomely in the running of the procedure and the end result".

Some contracting authorities have posted requests for information notices on the Tenders Electronic Daily website to gauge the interest the project may have in the market. Furthermore, this has given companies more time to prepare themselves and even to create consortia.

As has already been mentioned in literature, it is paramount to prepare the procedure correctly in advance and anticipate as many potential issues (and solutions) as possible before launching the tender.[646] This is particularly important in a procedure with so many uncertainties and where so much scope for discretion in the actual running is given to the contracting authorities, especially in comparison with the open or restricted procedures. Further to this point, it is beneficial to put as much information as possible in the tender documents, particularly housekeeping rules. The contracting authority should explain clearly how the dialogue stage is actually going to be organised (particularly the meetings, the order where they will be held, if sectorial meetings will be held, the maximum number of participants and who should participate) and all associated information to assuage any fears potential candidates might have in participating in a competitive dialogue. It should even limit itself, for instance, by declaring that all the information will be treated as confidential if it is ready to actually do so and feels candidates will take that as a sign of seriousness.

646. Burnett, 'Conducting competitive dialogue for PPP projects - Towards an optimal approach' (2009) 4 *EPPPL* p.193 and Rijksoverheid, *The competitive dialogue* (Rijksoverheid, 2009) p.15-25.

Defining the maximum number of candidates should be decided before launching the dialogue. Many of the contracting authorities interviewed in Spain have not done so and regret their decision. The general view of respondents is that, at this point, the appropriate number of candidates to invite to the dialogue stage is between three and five. According to the respondents, over five transaction costs involved are vastly increased and timescales to actually run the dialogue stage will also have a tendency to slip.

It is worthy to mention the differences found on the topic of payments for developing solutions found across respondents. Respondents in Portugal that had not used the competitive dialogue said that it was a good idea and could foster competition. Indeed, payments have been made in the country for participants in open procedures with a negotiation phase. However, in the two countries it was not possible to find one competitive dialogue where these payments have taken place. Contracting authorities are not paying any sort of compensation to candidates. In consequence, the question remains: which is the best practice? To pay or not to pay candidates for the development of solutions?

(2) During the dialogue

During the dialogue stage the contracting authority should make sure it has put in place sound internal controls that will allow it to run the dialogue efficiently. For instance, meetings should be divided into specific areas if the project is big enough to warrant smaller teams allocated to each area (this was successfully seen in action in the medical sector). Information about the content or detailed agenda of the meeting should be given in advance to the candidates. Interviewees have argued that minutes of meetings provide a useful paper trail for both the purpose of internal audit and external controls.

Also internally, the contracting authority should set either at the start of the procedure or at the latest at the start of the dialogue stage set a deadline for the dialogue stage and partial milestones to make sure it avoids never ending discussions and the slippage of timescales. This was implemented by a contracting authority in the country after the review of their first procedure. It was considered - and validated in subsequent procedures - that pre-determining a deadline and partial milestones would improve the dialogue stage.

Non-text based communications should be avoided during the dialogue stage. One of the interviewees made it clear to the candidates that no information transmitted through telephone would be taken into account. Another one set up a secure website with public and private areas to handle all the communications between the parties.

(3) After the submission of tenders

Contrary to the responses from Portuguese interviewees criticising the Portuguese law makers for limiting the scope of post-submission discussions, in Spain the body of evidence gathered points to the limited utility of such discussions and potential risks for the contracting authority in entertaining discussions particularly after the preferred bidder has been chosen. It has been argued that considerable scope for discussions after tenders have been submitted would be beneficial for competitive dialogue,[647] as it would reduce the transaction costs overall, for instance.

However, it is apparent from the data collected that the lack of use of these discussions is not leading to failure in the procedure. On the contrary, candidates are

647. Kennedy-Loest, 'What can be done at the preferred bidder stage in competitive dialogue' (2006) 6 *PPLR*, p.316 and Arrowsmith, *The law of public and utilities procurement* (2nd, Sweet&Maxwell, 2005), p.631.

submitting very complete and detailed tenders. Furthermore, particularly after the choice of the preferred bidder, tenderers are not able to use the lack of competition to its benefit to extract concessions or changes to the contract, since at this point the company is in a better bargaining position. Furthermore, the company has all the incentive in keeping discussing to improve its position so avoiding these discussions at this point may also provide respite for "discussion creep".

It has not been observed in practice that companies are not able to provide a sufficiently detailed bid at the end of the dialogue stage and subsequent discussions are needed to refine it. It was observed however, that a significant number of candidates reaching the end of the dialogue opt not to present bids. This may be a sign of the added transaction costs of submitting a very detailed bid, or as it was argued before in the previous question, the case that candidates are not taking the dialogue seriously enough. Paradoxically, it may be the situation also of having too much "competition", that is, too many companies taking part during the dialogue stage and feeling there is no point in submitting bids. It is also too soon to see if during the performance of the contract problems arise due to the lack of discussions after the dialogue stage.

7. Dialogue stage models seen in practice

From the practice observed in the target countries, as we have discussed above in Chapters 7 and 10, it was possible to find in Spain that contracting authorities were adopting three different ways of conducting the dialogue stage and that this classification covered virtually all of the procedures assessed. That is not say that it is easy in many cases to actually find the differences between the crowd-sourced or common trunk model and the other models and the boundaries appear to be hazy. A thorough case-by-case analysis (not only of tender documents, but also of

the minutes of meetings and eventually more participants in the discussions) would be necessary to confirm this thesis and it was not possible to do so during this research as it had not been planned for in advance.

The practice of developing a common trunk model had already been mentioned in the literature as a common way of conducting competitive dialogue procedures.[648] Furthermore, the author has seen his thesis of a three-pronged classification of the dialogue stage corroborated by a paper on the experience in Italy that was presented in September 2010 at the Global Revolution V conference in Copenhagen.[649]

This piece of information is worth bringing to the body of knowledge. The models provide a helpful guideline at this point, on a topic where interviewees have argued legal rules or at least qualified information is lacking. This classification provides some structure to the issue of how to organise the dialogue stage, moving the analysis to an abstract level higher than the pure empirical analysis. The objective is, thus, to stimulate discussion about this topic and contribute for the advance of legal science. The author does not argue these are the only ways to conduct the dialogue stage but that these were the only ones he witnessed in practice.

Further to providing some structure to the analysis of the dialogue stage, this classifications raises two new questions. The first question is what is the actual importance and logic of having confidentiality and a ban of cherry picking in a crowd-sourced or common trunk model? The second, connected with the first, but more of an assertion than really a question, is: how can the contracting authority comply with the principle of transparency and not identify clearly at the

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648. Burnett, 'Conducting competitive dialogue for PPP projects - Towards an optimal approach' (2009) 4 *EPPPL* p. 193.
649. Racca and Casalini, (Paper) (2010) Implementation and application of competitive dialogue: experience in Italy

start of the procedure what model it will follow? Further research is needed to confirm if these three models represent the reality in Spain and other member States. In any event, even if the classification does not cover the whole reality and contracting authorities may organise the procedure in other ways, disclosing what model of dialogue will be applied is an important piece of information that should be made available at the start of the procedure to companies.

In Portugal, due to the limitations imposed by the national law, only the common specifications model was seen in action. However, from the few interviews carried contracting authorities appeared to have problems in maintaining the discussions on different solutions during the dialogue stage without leading the candidates into a common solution as in the crowd-sourced or common trunk model. It may happen that as practice develops in the country we will end up with seeing the crowd-sourced model being applied in practice under the guise of a common specifications model. This might also explain why in one of the few situations where the procedure was used why the contracting authority had problems in identifying a winning solution when all were so similar.

In any event, the models herewith described are based in the practice witnessed by the author and will probably evolve with time.

8. Conclusion

To conclude this research it is worth pointing out the similarities and differences between the two countries and EU legal framework on the competitive dialogue. Although both Portugal and Spain have transposed the competitive dialogue into their national legislations the way they did so was different and with a direct impact in the use of the procedure. Whereas in Spain the law makers decided to copy the essential of Directive 2004/18 (recitals included) into the Public Sector

Contracts Law, the Portuguese law makers considered necessary to adapt the procedure to fit within the national framework. This has led to the identification of a significant number of potential issues (legal and otherwise) with the procedure in Portugal. For the author, the principal cause for the lack of use of competitive dialogue in Portugal is the more restricted approach taken to the grounds for use connected to the overall restrictive interpretation that was observed in the empirical research. In the author's view, the purposeful sampling employed ensures these findings are extendable to the general population of those categories (public procurement lawyers, contracting authorities).

Practice in each country is clearly different. In Portugal the use of the procedure is incipient at best. In Spain, although the usage numbers are far from those seen in France or the UK for instances, from the data it appears an interesting practice is developing in the country. Contracting authorities are applying the procedure and appear overall to be satisfied with it and the challenges to project management brought by it. Contrary to respondents in Portugal, they do not seem to have any issues with the grounds for use. The author considers these findings are also extensible to the general population of contracting authorities that have used the procedure, but not the overall population of Spanish contracting authorities. It is clear that the practice developed in each country, particularly in the areas where the procedure is being used, does not fit exactly the objectives set forth by the Commission. On the one hand, it is not being used for major infrastructure projects (except IT and R&D, where the use coincides with the expectations of the Commission). It is telling that it has been used zero times for transport networks, although both countries are building new high speed rail lines, for instance. Furthermore, although the Commission has argued that competitive dialogue should not be used for all public-private partnerships contracts but only in the cases where the contract was "particularly complex". In Spain, however, com-

petitive dialogue is the default procedure for all public-private cooperation contracts.

From the practice in Spain it was possible to identify three distinct *models of* organizing the dialogue stage. The author does not argue these are the best or even the sole models to do so, but those were the ones he saw and replicate what was found in Italy by other researchers. What the author considers is that contracting authorities should identify what kind of model they intend to use in the dialogue stage or otherwise transparency may be compromised.

Although according to Directive 2004/18 it is possible to exclude candidates (or at least solutions, depending on the interpretation) during the dialogue stage, the truth is that in Spain this was not seen in practice. Contracting authorities are not formally excluding candidates or solutions, nor conducting successive stages. However, the way they are organizing it by demanding more from the candidates is making them quit the procedure on their own accord. They are thus, achieving exclusions of candidates without facing judicial review risks.

Although the differences in both countries are clear and numerous, there appears to be some coincidence in the way the Portuguese law makers regulated the competitive dialogue after the submission of tenders and the way Spanish contracting authorities are dealing with the same stage. Whereas in the Portuguese law the tender stage is simply cross referenced to the open and restricted procedures, the Spanish law allows for discussions to take place under the exact same conditions as Directive 2004/18. Spanish contracting authorities, however, appear not to entertain discussions with tenderers or the winner of the contract. In fact, it appears they are applying the Portuguese law and not the Spanish. On this topic, the practice found in Spain is different from what could be expected from the Directive 2004/18 and the Law on Public Sector Contracts. However, it may be said

that this contributes to avoiding "negotiation or bid creep" and also for too many adjustments to be made when competition is no longer present.

It should be noted though that many issues the author found during the course of his research do not have a legal basis. Issues such as the perceived cost of the procedure, how to organize the meetings, how to keep the candidates interested in the procedure, how to ensure they keep the promises during the dialogue stage or how extract from them the best tender possible are more practical than legal. For the author it seems they seem to be project management issues that, however, are relevant to mention as they impact the practice of the procedure. Pointing them out may be of use to contracting authorities in any member State.

Regarding best practices, the findings on Spain about the information to give at the start of the procedure, the anticipation of problems, creation of multidisciplinary team, restricting verbal discussions outside of meetings and (eventually) the lack of discussions after tenders are submitted may again be of use to entities in other member States.

Finally, due to the exploratory nature of this project, the author considers that more (new) questions than answers have been found. They provide a starting point for subsequent research by other researchers, perhaps using different methods such as quantitative analysis, in either country and also in other member States. What is clear for the author is that a lot remains to be investigated about competitive dialogue.

Annex I - informed consent form

Informed consent form for interview

I _____, the interviewee, hereby consent to be interviewed by Pedro Telles, (the interviewer) a Ph.D candidate at the University of Nottingham School of Law, supervised by Professors Sue Arrowsmith and David Fraser and doing research on the implementation of the competitive dialogue procedure in Portugal and Spain.

Consent is also hereby granted for the use of the interview responses as input data solely for the purposes of the research identified in the previous paragraph.

Anonymity will be preserved by means of removal of identifiers and other technical means to break the link between the data and the interviewee.

The interviewer will ensure that confidentiality of the interview content is kept, with the exception of obligations imposed by law, such as the Freedom of Information Act, Data Protection Act, as well as copyright and libel laws. Data will be kept on a heavily encrypted sparse image file stored remotely with transfer of files done through *Secure Socket Layer* connections.

The parties have agreed that the interview shall be registered by means of (tape recorder/ notes).

Any and all records kept will be destroyed after two years.

The parties have also agreed in the following set of limitations:

- not to address the interviewee by name;

- not to identify the interviewee workplace;

- background information provided with guarantee of anonymity;

- (Others may be added on an *ad-hoc* basis, if requested)

(Place and date)

Annex II - Informed consent form (Spanish)

Autorización de entrevista

Yo, _____, el entrevistado, concedo autorización de entrevista a Pedro Telles, un estudiante de doctorado en Derecho de la Universidad de Nottingham supervisionado por los Profesores Sue Arrowsmith y David Fraser, que estudia a la implementación del procedimiento de diálogo competitivo en España y Portugal.

La autorización se concede solamente para que los datos recogidos en la entrevista sean utilizados en la investigación identificada en el párrafo anterior.

La identidad del entrevistado se quedará protegida bajo sigilo por medio de remoción de los elementos o conexiones que identifiquen al entrevistado en los datos.

El entrevistador garantizará la confidencialidad de los datos recogidos, con excepción de las obligaciones que le sean impuestas por ley, como las del Freedom of Information Act o Data Protection Act, así como las derivadas de copyright. Los datos serán mantenidos en un fichero bajo encriptación y archivados remotamente con la transferencia hecha en un una conexión secura.

El entrevistado acepta que se (grabe/saquen apuntes) de la entrevista.

Todos los datos serán destruidos al final de siete años.

Se reserva el entrevistado el derecho de retirarse su autorización de participación a cualquier momento hasta la entrega de la tésis por el estudiante.

Se acordó aún que:

- al entrevistado no se identificará por su nombre;

- no se identificará a la entidad donde trabaja el entrevistado;

- información extra será fornecida bajo garantía de confidencialidad

(Local y fecha)

Annex III - interview guide: Portuguese law makers

1. Situation of particularly complex contracts before the Public Contracts

2. Competitive dialogue in the Public Contracts Code

2.1 Reasons for transposition

2.2 Relationship with other procedures

2.3 Grounds for use

2.3.1 Article 30 of the Public Contracts Code

2.3.2 Article 33 of the Public Contracts Code

2.4 Assessment of the economic, technical or professional ability of candidates

2.4.1 Which model is available

2.5. Single solution

2.5.1 Why?

2.5.2 Why evaluate at the start of the dialogue?

2.6 Exclusions during the dialogue

2.6.1 Reasons for them not being admitted

2.7 Confidentiality

2.7.1 Importance

2.7.2 Lack of innovation

2.8 Electronic auctions and negotiation phase

2.8.1 Reasons for the express exclusion

2.9 Common specifications model

2.9.1 Reasons for it being mandatory

2.9.2 Comparison with own solution model

2.9.3 Relationship with confidentiality, cherry picking and intellectual property

2.10 Transition to the tender stage

2.10.1 Candidates to be notified

2.10.2 Candidates to be invited to submit tenders

2.11 Tender stage

2.11.1 Lack of a stage for fine-tuning

2.11.2 Lack for a specific stage for amendments and discussions

Annex IV - interview guide: Portugal

1. Adoption decision

2. Grounds for use

3. Start of the procedure

4. Assessment of the economic, technical or professional ability of candidates

5. Dialogue stage

6. End of dialogue

7. Tender stage

8. General

1. Adoption decision

1.1 Choice of procedure (competitive dialogue or not)

2. Grounds for use

2.1 Particularly complex contract concept

2.2 Interpretation of the grounds for use

2.3 Impossibility of article 30/1 of the Public Contracts Code

2.4 Technical ability and functional needs of article 30/2

3. Start of the procedure

3.1 Work done in advance

3.2 Information put in the notice

3.3 Number of candidates

3.4 Payment for the development of solutions

3.5 Contract cost estimation

4. Assessment of the economic, technical or professional ability of candidates

4.1 Complex or simple, which is more appropriate

4.2 Issues with either of the models

4.3 Alternatives to the current models

5. Dialogue stage

5.1 Organisation of the dialogue stage

5.1.1 How was the stage organised (meetings, communications with candidates)

5.1.2 Detail in the law

5.2 Number of solutions

5.2.1 Limitation to a single solution

5.2.2 Evaluation of preliminary solutions

5.2.3 Level of detail

5.2.4 Variants

5.3 Exclusions

5.3.1 Exclusions at the start of the dialogue

5.3.2 Lack of exclusions during the dialogue itself

5.4 Confidentiality

5.4.1 Interpretation of article 214/3 of the Public Contracts Code

5.4.2 Issues with confidentiality

5.4.3 Articulation with common specifications

5.4.4 Rules on secrecy (article 66 of the Public Contracts Code) as an alternative

6. End of dialogue

6.1 What content ended up in the common technical specifications

6.2 Candidates dropping out?

7. Tender stage

7.1 Tenders

7.1.1 Tender completeness

7.1.2 Abnormally low tenders

7.2 Fine-tuning stage

7.2.1 Should exist?

7.2.2 What should be discussed

7.3. Discussion with preferred bidder

7.3.1 What can be discussed

8. General

8.1 Reasons for lack of use

8.2 Market feedback

8.3 Duration

8.4 Monetary cost

8.5 Human resources cost

8.6 Rules of the procedure (clear or unclear, points to improve)

8.7 General impression

8.8 Judicial review

8.9 Anything to add

Annex V - interview guide: Spain

1. Adoption decision

2. Grounds for use

3. Start of the procedure

4. Assessment of the economic, technical or professional ability of candidates

5. Dialogue stage

6. End of dialogue

7. Tender stage

8. General

1. Adoption decision

1.1 Choice of procedure (competitive dialogue or not)

2. Grounds for use

2.1 Particularly complex contract concept

2.2 Interpretation of the grounds for use

2.3 Public-private cooperation contracts

3. Start of the procedure

3.1 Work done in advance

3.2 Information put in the notice

3.3 Number of candidates

3.4 Payment for the development of solutions

3.5 Contract cost estimation

3.6 Composition of the jury for the procedure

4. Assessment of the economic, technical or professional ability of candidates

4.1 Choice of candidates to invite

4.2 Number of candidates invited

4.3 Judicial review

5. Dialogue stage

5.1 Organisation of the dialogue stage

5.1.1 How was the stage organised (meetings, communications with candidates)

5.1.2 Detail in the law

5.1.3 Successive stages

5.2 Solutions

5.2.1 Number of solutions admitted

5.2.2 Level of detail

5.2.3 Variants

5.2.4 Outline solution at the start

5.3 Exclusions

5.3.1 Were forecast

5.3.2 Use (criteria)

5.3.3 Judicial review

5.4 Confidentiality

5.4.1 Interpretation of article 166/2 of the Law on Public Sector Contracts

5.4.2 Issues with confidentiality

5.4.3 Information classified as confidential

5.4.4 Articulation with common specifications

6. End of dialogue

6.1 Candidates dropping out?

7. Tender stage

7.1 Tenders

7.1.1 Tender completeness

7.1.2 Abnormally low tenders

7.2 Fine-tuning stage

7.2.1 Interpretation of article 167/1 of the Law on Public Sector Contracts

7.2.2 What can be discussed

7.2.3 Actual use

7.3. Discussion with preferred bidder

7.3.1 Interpretation of article 167/2 of the Law on Public Sector Contracts

7.3.2 What can be discussed

7.3.3 Actual use

8. General

8.1 Lack of detail in the law or public procurement advisory body ruling/guidance

8.2 Market feedback

8.3 Duration

8.4 Monetary cost

8.5 Human resources cost

8.6 Rules of the procedure (clear or unclear, points to improve)

8.7 General impression

8.8 Judicial review

8.9 Anything to add

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