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Public Procurement Award Procedures in Directive 2014/24/EU

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1. Introduction

The purpose of this Chapter is to explore changes to contract award procedures instituted by Directive 2014/24/EU. The Chapter will re-examine the traditional open and restricted procedures, the more recent competitive dialogue procedure and the new competitive procedure with negotiation as well as innovation partnerships. Concerning existing procedures (open, restricted and competitive dialogue), discussion will focus on the changes that have or should have been introduced. The new competitive procedure with negotiation and innovation partnership necessitates more detailed critical examination. It will be demonstrated that although some of the changes answer the call for simplification,² many challenges remain and new challenges have been introduced, particularly concerning the new procedures.

This Chapter is divided into the following Sections. Section 2 examines the nature of the procedures according to a proposed taxonomy of standard and special procedures. Section 3 examines the standard procedures comprising the open and restricted procedures. Section 4 examines special procedures comprising the competitive dialogue, competitive procedure with negotiation and innovation partnership. Section 6 offers some provisional conclusions.

2. Nature of Procedures under Directive 2014/24/EU

The number of public procurement procedures that can be used has expanded over the years, in particular, as a result of the 2004 and 2014 revisions. In addition to the traditional open, restricted and negotiated procedures, the 2004 reform formally introduced competitive dialogue.³ The 2014 reform has instituted a new competitive procedure with negotiation⁴ and the innovation partnership.⁵ The multiplication of procedures necessitates defining their nature as their different characteristics have an impact on which subsidiary rules are applicable or how legislative limitations should be overcome. As such, it can be argued that the procedures contained in Directive 2014/24/EU may be characterised as standard, special or exceptional

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² An objective also mentioned in Recitals 84, 86 and 114 to Directive 2014/24/EU and assumed by the European Commission. See Commission, Public Procurement Reform - Fact Sheet 1 (2014).

³ Article 29 Directive 2004/18/EC.

⁴ Article 29 Directive 2014/24/EU.

⁵ Article 31 Directive 2014/24/EU.

depending on the freedom that contracting authorities exercise in their choice as to the relevant procedure.

Procedures may be characterised as standard when the contracting authority can use them in any circumstances and for any type of contract covered by the Directive. By contrast, procedures have a special nature when they can be chosen only according to specific grounds for use. Finally, procedures are deemed exceptional when they function as a final alternative enabling a contract award when all else fails. This proposed taxonomy of procedures implies that only the open and restricted procedures are to be classified as standard. Competitive dialogue,⁶ the competitive procedure with negotiation and the innovation partnership require specific grounds for use and, as such, are deemed special procedures.⁷ Finally, the negotiated procedure without prior notice remains a procedure of final resort if none of the other procedures are suitable. The latter cannot be identified as a regulated procedure as such, rather constituting an authorisation to contracting authorities to devise a method of awarding a contract according to circumstances prescribed by the Directive. As such, this procedure is not examined for the purposes of this Chapter.

Interestingly, whilst Member States previously exercised freedom to decide whether or not to introduce new procedures like the competitive dialogue,⁸ this is no longer possible under Directive 2014/24/EU which requires that all the special procedures mentioned above must be transposed.⁹ Importantly, however, Member States remain free to adapt such procedures through national legislation.¹⁰

⁶ For a detailed discussion concerning the nature of competitive dialogue under Directive 2004/18/EC, see S Arrowsmith and S Treumer, 'Competitive Dialogue in EU Law: A Critical Review' in S Arrowsmith and S Treumer (eds) *Competitive Dialogue in EU Procurement* (CUP 2012), 36-58. For the view that the competitive dialogue is a standard procedure, see M Farley, 'Directive 2004/18/EC and the competitive dialogue: A case study on the application of the competitive dialogue procedure to the NHS LIFT' (007) 2 EPPL, 62; and S Arrowsmith, *The Law of Public and Utilities Procurement* (2nd edition, Sweet & Maxwell, London 2005) 632-635. For a view that the competitive dialogue is a special procedure, see Commission, *Explanatory note on competitive dialogue*, 2005, 2. Considering the procedure under Directive 2004/18 as exceptional in nature, see S Treumer, 'The field of application of the competitive dialogue' (2006) 6 PPLR, 313; S E Hjelmborg et al., *Public Procurement Law: the EU Directive on Public Contracts* (Djof, Copenhagen, 2006), 283; and P. Delelis, *Le Dialogue Compétitif* (2007) 3 *Revue du Trésor*, 280.

⁷ With regard to the innovation partnership, Article 31(1) provides an indication of its nature in its reference to the need for an innovative product, service or works that "cannot be met by purchasing products, services or works already available on the market" and also Article 2(1)(22) which defines innovation for the purposes of the Directive. As such, the procedure cannot be used if whatever is proposed does not meet such definitions. For a discussion of the definition of "innovation" under the Directive, see Section 3 of Butler's Chapter in this book.

⁸ Article 29(1) Directive 2004/18/EC.

⁹ Article 24 (1) Directive 2014/24/EU.

¹⁰ Portugal had made such adaptations with regard to the competitive dialogue procedure. See P Telles, 'Competitive Dialogue in Portugal' in S Arrowsmith and S Treumer (eds) *Competitive dialogue in EU Procurement* (n 6) 370.

3. Standard Procedures

Directive 2014/24/EU has instituted certain changes to both the open and restricted procedures in accord with the simplification objective and stated aims to make them more flexible and increase market access.¹¹ These changes can be organised into two main categories: reducing timescales and reducing bureaucracy. Timescales have generally been shortened by approximately 30.¹² Bureaucracy is to be reduced through the introduction of the European Single Procurement Document,¹³ self-certification for prospective tenderers¹⁴ and a single stage variant in the case of the open procedure.¹⁵ With the exception of the single stage variant, all other changes are arguably of an evolutionary rather than revolutionary character and should be considered as a much needed "refresh" to modernise the procedures.

3.1. Common Aspects for the Open and Restricted Procedures

3.1.1. Reduced bureaucracy and paperwork

Article 59 of Directive 2014/24/EU mandates that contracting authorities must accept the European Single Procurement Document,¹⁶ which substantially equates to a self-declaration produced by a candidate as constituting *prima facie* evidence they are not subject to any of the exclusion grounds contained in Article 57 and that they comply with the selection criteria set by Articles 58 and 65. In the UK, for example, the use of self-declarations to verify non-application of the exclusion grounds is relatively common. To this extent, Directive 2014/24/EU simply provides a clearer legal basis for such an approach. However, it is likely that changes will arise from the use of self-declarations with regard to selection criteria (suitability, financial and technical ability). Until now, contracting authorities have generally requested detailed evidence to be provided for analysis. Again, drawing on the UK's experience, this approach has motivated the notoriously onerous "pre-qualification questionnaire" requirements which must be complied with for every procurement procedure. By restricting the request of selection information to a self-declaration, Directive 2014/24/EU, in effect, reduces a barrier to entry that had been highlighted as a key deterrent to supplier participation in public procurement.¹⁷

¹¹ Commission, Procurement Reform Fact Sheet 2 – Simplification for tenderers (2014).

¹² G Fletcher, 'Minimum time limits under the new Public Procurement Directive' (2014) 3 PPLR, 94-102, 94.

¹³ Article 59 Directive 2014/24/EU.

¹⁴ *Ibid.*

¹⁵ Article 27 Directive 2014/24/EU.

¹⁶ This should be read in conjunction with Article 61 which creates an online repository of certificates (e-Certis) that should be accessible to contracting authorities and is also expected to reduce the burden imposed on suppliers.

¹⁷ Both by trade bodies and independent research, at least in the UK. See for example, Confederation of British Industry, Getting a better purchase – CBI public sector procurement report (2014), 15; Federation

By removing this barrier to public procurement participation, it is expected that the total number of companies taking part in public procurement will increase, in turn, increasing the overall transaction costs for each contracting authority using the open procedure in expectation of more tenders. In addition, overall transaction costs for the market are also expected to increase due to increased participation rates. In correspondence, if it is assumed that the number of public contracts available in the market does not increase in relative proportion, it is expected that there will be a larger number of unsuccessful bidders which could also increase recourse to remedies.

Although the authors agree that this is a welcome evolution and that artificial barriers to public procurement participation should be reduced, it would have been appropriate to consider the implications of this measure and propose solutions for them. For example, early intervention at the tender documents stage is necessary. Shorter and clearer documentation enables potential suppliers to take an informed decision as to whether or not to proceed without making the investment of time and effort to formulate a tender.¹⁸ In addition, a push for alternative dispute resolution mechanisms that do not involve litigation could have been considered such as a procurement ombudsman or similar independent authority. With greater autonomy afforded to suppliers, there ought to be effective mechanisms in place to enable clearer determinations to be made and issues to be resolved which are appropriate and proportionate to the nature of the decision-making and stage of tendering.

In addition to the above, Directive 2014/24/EU now requires contracting authorities to provide tender documents online and free of charge.¹⁹ Anecdotal evidence seen by the authors in Portugal and Spain in the past indicates that charging for tender documents was a common practice used by contracting authorities to restrict access to suppliers interested in the contract opportunity.

3.1.2. Minimum yearly turnover requirements (turnover cap)

A second major change to the standard procedures concerns the introduction of Article 58(3) which imposes a cap on turnover requirements limited to twice the value of the contract. Excessive turnover requirements have been widely used by contracting authorities as an easy filter to exclude participants in procedures. This had a pernicious effect on SMEs²⁰ (in particular, start-ups) more directly as their turnover numbers will always be smaller than larger companies, putting them at a disadvantage. It could be argued that turnover requirements are discriminatory in, and of themselves, not least because they are a blunt instrument to achieve exclusion and one which is generally completely unconnected to the contract itself. By capping turnover requirements, Directive 2014/24/EU may provide an implicit recognition of their *prima facie* incompatibility with EU law.

of Small Businesses, Local government procurement report (2013) 7-8, 93 and Welsh Government, Barriers to procurement research, (2008) 9-15.

¹⁸ Such was piloted in Wales for contracts below the EU thresholds in the Winning in Tendering project undertaken by Bangor University during 2012 and 2013 (unpublished). In total, over 15 contracts from three different contracting authorities were awarded under this pilot.

¹⁹ Article 53 Directive 2014/24/EU, although this principle is subject to restrictions (see Article 22(1)).

²⁰ Recognised in Recital 83 of Directive 2014/24/EU.

However, it should be observed that Article 58(3) does allow for contracting authorities to set higher turnover requirements but imposes the burden of proof on the contracting authority to justify why such turnover is required for that particular contract. It remains to be seen whether contracting authorities will comply with the spirit of the Directive in facilitating market access or continue to demand higher turnover requirements to restrict access to smaller providers.

Although the turnover cap is a welcomed addition, and exceptions notwithstanding, the fact is that excessive turnover requirements were being used for a reason, in effect, limiting the number of participants, in particular in the open procedure. The underlying reasons for such requirements have not been fully addressed by the reduction in transaction costs through the single-stage variant, discussed below. The reality is that contracting authorities wish to avoid analysing too many tenders as well as the increased risk of litigation due to the higher number of aggrieved participants. As such, it would not be surprising if contracting authorities remained committed to finding new ways of limiting market access during the selection stage. For example, in order to achieve essentially the same aim, contracting authorities could demand ever higher insurance values,²¹ participation or performance bonds,²² or impose harsher technical requirements. All these options (and more) remain available to contracting authorities interested committed to limiting the number of participants in procedures. In addition, this is likely to be further exacerbated as the nature of funding arrangements become increasingly more complex as well as methods of measuring economic standing, for example, other financial requirements not directly connected with turnover values such as financial ratios or overall leverage values.

3.2. Open Procedure

3.2.1. Reduced timescales

Directive 2014/24/EU reduces the duration of certain stages of the open procedure, allowing for the procedure to be carried out more expeditiously than had previously been possible. For example, whereas under Directive 2004/18/EC the minimum time limits for receipt of bids stood at 52 days,²³ under Directive 2014/24/EU it is now only either 35 days²⁴ (for paper tenders) or 30 days (in electronic format).²⁵ It should be noted, however, that the average duration of tenders in the EU, irrespective of procedure, is much longer than the advertised minimum targets, averaging 123 working days in 2013.²⁶

²¹ Common in the UK and an area in which a more integrated approach by the Directive would have been welcome.

²² Common in Spain and Portugal, for example.

²³ Article 38(2) Directive 2014/24/EU.

²⁴ Article 27(1) Directive 2014/24/EU.

²⁵ Article 27(4) Directive 2014/24/EU.

²⁶ Spend Network, Tender time frames: <<http://tt.spendnetwork.com/index.html>> accessed May 15 2014. For reference, the UK Government aims to conduct open procedures in less than 120 working days. See, Government Procurement, Government sourcing: A new approach using, LEAN (2012) 3-6.

In the event that a prior information notice is used in accordance with Article 48, it is now possible to reduce the advertising period to 15 days,²⁷ whereas under Directive 2004/18/EC the norm was either 36 or 22 days for exceptional cases.²⁸ By using a prior information notice, the contracting authority may effectively halve the actual duration of the open procedure, although the time spent on the preparatory phases of the procurement will be higher due to the use of the prior information notice.²⁹ In addition to these reductions, under Article 27(3), it is now possible to accelerate the open procedure in cases of urgency, an option that was formerly only available for the restricted procedure under Directive 2004/18/EC.³⁰ However, Directive 2014/24/EU does not clarify what constitutes grounds for urgency. According to Recital 46 of Directive 2014/24, the state of urgency need not be one of extreme urgency brought about by events unforeseeable for, and not attributable to, the contracting authority.³¹ This contrasts with the circumstance of “extreme urgency” permitting the use of the negotiated procedure without prior publication.³² As the concept of urgency is an exception to the regular deadlines, it is open to argue that the contracting authority may, itself, give rise to the situation of urgency, for example, by delaying commencement of the procedure on purpose, although case law on the negotiated procedure without prior publication may suggest that such reasons are unlikely to be tolerated.³³ Further, Recital 46 merely states that urgency needs to be “duly substantiated” but does not prescribe any specific threshold that must be met. Recital 46 also requires that the general time-limits must be “impracticable”. This differs from an objective impossibility and provides a further indication that any such determination could incorporate a considerable degree of discretion and subjective decision-making by contracting authorities.

Reducing timescales for the open procedure is a reasonable measure when seeking to reduce transaction and opportunity costs imposed on both procurers and the market. However, there is a balancing act to be undertaken given that too significant a reduction could potentially affect competition.³⁴ When timescales are too short, it is very difficult for suppliers to find the opportunity and prepare a bid on time. As such, very short timescales may be used by contracting authorities with an anti-competitive motivation, precisely for the purposes of reducing the scope of potential bidders or to skew a tender in favour of a preferred supplier.³⁵

²⁷ Article 27(2) Directive 2014/24/EU.

²⁸ Article 38(4) Directive 2004/18/EC.

²⁹ Which needs to be advertised at least 35 days before the contract notice and up to a maximum of 12 months in advance.

³⁰ Article 38(3). See generally, S Arrowsmith, *The Law of Public and Utilities Procurement* (n 6) 457-460.

³¹ G Fletcher, ‘Minimum time limits under the new Public Procurement Directive’ (n 12) 96.

³² For a discussion of the concept of urgency and its application under this ground in previous Directives, see S Arrowsmith, *The Law of Public and Utilities Procurement* (n 6) 617-620).

³³ *Ibid.*

³⁴ A similar argument is made by G Fletcher, ‘Minimum time limits under the new Public Procurement Directive’ (n 12) 94.

³⁵ It is particularly interesting to note that under Articles 40 and 41, companies consulted before the launch of a tender and involved in the drafting of the tender specifications can take part in the procurement as long as it does not distort competition, nor violate non-discrimination or transparency.

Further, this negative effect is felt particularly by SMEs which generally suffer disproportionately from transaction costs due to the lack of resources and dedicated expert procurement staff.

Notwithstanding, the reduction in timescales is to be welcomed, although for simple contracts or contracts near the lower end of threshold values, it might have been preferable to have reduced the timescales further, particularly, in tenders where suppliers are not required or expected to submit a detailed qualification document.

3.2.2. “Single stage”

One of the criticisms levelled at the open procedure over the years has been the excessive bureaucracy the procedure entails and is one which has contributed, in significant part, to the procedure's perceived excessive duration. In part, this is due to the two successive stages that need to be completed before the award: selection and tender. Until now, all participants in an open procedure submitted the selection information at the start of the procedure. All selection information submissions were then assessed in accordance with the prescribed selection criteria identified at the start, followed by the analysis of tenders. The two-stage approach increases the transaction costs which, although beneficial for complex contracts, make it unwieldy for contracts with limited complexity or lower values. In this area, the biggest innovation introduced by Directive 2014/24/EU is to be found in Article 56(2). This article allows contracting authorities to award the contract without checking candidates against the selection criteria set in the tender documents. Under this model, after selecting the preferred bidder, the contracting authority will then assess the winning tenderer's documentation only. In effect, this amounts to cutting out a full stage of the procedure as it does not constitute a “selection stage” in itself, nor is it subject to the minimum time limits imposed by article 27(1) as these apply to the receipt of tenders only. In addition, after identifying the preferred bidder, nothing in the Directive precludes the contracting authority from using the standstill period to require the necessary information from tenderers, thus shortening the procedure further.

In this “single stage” version, the open procedure is significantly shorter and with lower transaction costs for everyone involved as only the prospective winner submits the selection information. The most interesting point about this option is that it reorients the focus back on the quality of the tender instead of tenderer qualities without necessarily downgrading the importance of the latter. One of the risks attending the traditional open procedure is the potential to assess tenders under the influence of the bidder's results in the selection stage when the same panel is used.

Some potential issues with this new version of the open procedure should be noted, however. First, it imposes on the contracting authority the risk and work of collating the selection information itself under certain circumstances, for example, under Article 59(5), namely when accessing databases containing the necessary information. In consequence, part

In the event that a single supplier or a limited number of suppliers are consulted, is hard to imagine that such access will not distort competition.

of the transaction cost savings afforded by the new model could be consumed by forcing the contracting authority to find that information. In other words, there is a transfer of the transaction cost from the supplier to the contracting authority.

Second, this new model of checking the qualifying information raises the risk that the preferred bidder will not comply with the necessary requirements as set in the tender documents. As this fact will only be confirmed later in the procedure where the emphasis is to award the contract as soon as possible, it is possible that contracting authorities will simply turn a blind eye to lack of compliance, at least for minor, non-material non-compliance (howsoever determined) which does not increase the likelihood of the contract being successful. A legalistic view of such possibility would imply that any non-compliance should lead to exclusion. However, for minor compliance faults, this is unlikely to happen due to the costs sunk in the procedure and the fact the preferred bidder has the best bid (as only the best bidder has its documents checked). It could be argued that this would constitute a violation of equal treatment. However, in this circumstance, only one tenderer is scrutinised and the effective exclusion of other tenderers from the competition (having not submitted the best bid) means that such tenderers are not in a comparable position. As long as all candidates could potentially be treated equally in the same situation, then equal treatment would be ensured. A question would remain, however, in relation to suppliers that never submitted a tender on the basis of their determination that they would not be able to comply with the selection criteria. The answer might be that as they never submitted a tender (and thus have not borne the cost of developing one) they are not in the same situation and as such do not warrant equal treatment in this sense.

Contracting authorities can, and should, take measures to reduce the risk of companies submitting tenders without complying with the selection criteria. For example, they should list the criteria clearly and the consequences for lack of compliance i.e. exclusion from, or cancellation of, the procedure. Keeping both options open is important to minimise the risk of collusion where all tenderers (with the exception of the worst tender) are then unable to comply with some of the selection criteria.³⁶ Additionally, particularly for larger or more complex contracts, contracting authorities could consider requiring performance or participation bonds to balance risk,³⁷ although even this approach carries risks.

3.3. Restricted Procedure

3.3.1. Reduced timescales

The restricted procedure received only minor changes to its operation under Directive 2014/24/EU, mostly connected to reducing timescales but with exception of a specific change

³⁶ This approach has been successfully piloted in Wales for contracts below EU thresholds by the Winning in Tendering project between 2012 and 2013 (unpublished).

³⁷ These are common in some Member States (e.g. Portugal and Spain) but are not widespread practice elsewhere (e.g. UK).

related to sub-central contracting authorities. Requests to participate may now be time limited to 30 days³⁸ instead of the previous 37 days,³⁹ while tenders have also been reduced from 40 days⁴⁰ to 30 days.⁴¹ In instances in which electronic means have been used, tendering timescales can be further reduced to 25 days⁴² a reduction from 35 days.⁴³ In the instance in which a prior information notice⁴⁴ is used, the period for receiving tenders can be reduced to only 10 days⁴⁵ in comparison with the current limit of 36 days.⁴⁶ With further regard to the use of the prior information notice, the same concerns and limitations raised above for the open procedure are of equal, and perhaps even greater, application. As the restricted procedure is a procedure used for more complex contracts, offering suppliers only 10 days to submit tenders seems to impose a significant limitation upon tender preparation. Further, it could offer the possibility for contracting authorities to facilitate the discreet disclosure of discriminatory information to a preferred supplier during the prior information notice period and still appear to comply with the Directive by giving only 10 days for the tender submission.

The exception mentioned above is the possibility granted in Article 28(4) for sub-central contracting authorities to agree with the selected candidates the duration of the tender stage. It is unclear if the agreement must be obtained from all candidates, although the use of the expression "mutual agreement" appears to imply that an agreement from all must be required. It should also be observed that Directive 2014/24/EU does not impose a need for explicit agreement to be obtained, opening the possibility for contracting authorities to require only implicit consent. For example, it could state as a condition of participation in the restricted procedure that by submitting a request to participate, the supplier is consenting to a certain duration of the tender stage. Another example could be where the contracting authority informs suppliers that the tender stage duration is a certain period unless they express their disagreement within 24 or 48 hours. Further, it might even be raised that perhaps the time limits may not be identical for all tenderers and that each tenderer may be given its own deadline as technically both the contracting authority and each tenderer are in "mutual agreement". In any case, the above could potentially increase legal uncertainty and the possibility of discrimination (factual and/or legal) between tenderers in practice.

Whilst the reductions in timescales appear reasonable and sensible, the shortened timescales pertaining to the prior information notice may seem excessive. Restricted procedures tend to be used for larger and more complex contracts and where suppliers will ordinarily need more time to prepare bids. Further, shorter timescales will foster close relationships between suppliers and procurers as suppliers will want to know as soon as possible the prescribed dates for bids, thereby potentially facilitating corruption or discrimination in favour of suppliers with preferential access. In addition, such tight timescales

³⁸ Directive 2014/24/EU Article 28(1).

³⁹ Directive 2004/18/EC Article 38(3).

⁴⁰ Directive 2004/18/EC Article 38(3).

⁴¹ Directive 2014/24/EU Article 28(2).

⁴² Directive 2014/24/EU Article 28(5).

⁴³ Directive 2004/18/EC Article 38(6).

⁴⁴ The notice can now be used as a call for competition if the conditions set by Article 48 are met.

⁴⁵ Directive 2014/24/EU Article 28(3).

⁴⁶ Directive 2004/18/EC Article 38(4).

may have the impact of either foreclosing the market as suppliers may be forced to invest in developing the bid without knowing if they have made it to the tender stage. In alternative, this may disadvantage suppliers which are not in a position to take that risk and may not be able to prepare a tender in the short “official” tender stage. There is also the risk that suppliers will simply not even bother taking part in the procedure at all due to those short timescales. Finally, SMEs are generally disproportionately affected by transaction and opportunity costs in comparison with larger organisations. By shortening the window for submitting full tenders, this may lead SMEs to avoid taking part in the procedure and thus function as a new mechanism to control the number of participants in the procedure, in particular, if the European Single Document and self-declaration by tenderers makes it more difficult.

4. Special Procedures

According to Article 26 of Directive 2014/24/EU, contracting authorities are able to use competitive dialogue,⁴⁷ the new competitive procedure with negotiation⁴⁸ and innovation partnerships⁴⁹ to award contracts as long as certain grounds for use are met. All three must be transposed into national legislation.⁵⁰

The competitive procedure with negotiation and competitive dialogue share the same grounds for use, whereas the innovation partnership appears to be applicable in situations where close cooperation between the parties is envisaged over a long term relation and need requires the development of products or services which are not otherwise available on the market.⁵¹ A cursory glance at the three procedures, regulated in successive articles of the Directive, creates an instant impression that all three procedures are very similar. Each has its own specificities but there is more by way of commonality than distinction between them. As such, the underlying rationale for providing two or three very similar procedures with similar grounds for use might be questioned.⁵² It can be argued in favour of the new setup that by

⁴⁷ Directive 2014/24/EU Article 26(4).

⁴⁸ Ibid.

⁴⁹ Directive 2014/24/EU Article 26(3).

⁵⁰ Directive 2014/24/EU Article 26(3) and (4).

⁵¹ Directive 2014/24/EU Recital 49. See also P Cerqueira Gomes, ‘The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive’ (2014) 23 PPLR 209, 210, citing also at fn 12 M. Steinicke, *The Public Procurement Rules and Innovation*, in *EU Procurement Directives — Modernisation, Growth and Innovation — Discussions on the 2011 proposals for Procurement Directives* (Jurist- og Økonomiforbundets Forlag, 2012), 260

⁵² Competitive dialogue has previously been used for the procurement of innovation, particularly in the health sector. See P Telles, ‘Competitive Dialogue and Innovation: The Case of the Spanish Health Sector’, in G Piga and S Treumer (eds) *The applied law and economics of public procurement* (Routledge 2013) 28-49 and G Simonsen, M Rolfstam, ‘Public Procurement of healthcare innovation in the ScanBalt area’ 2013 <http://vbn.aau.dk/files/173630136/Simonsen_Rolfstam_2013.pdf> last accessed May 5 2014.

having multiple different procedures for use in the same situations, contracting authorities have more choice at the time of selecting a procedure. However, there are opposing arguments. It may be that having two or three similar procedures for the same situations will actually confuse procurers and lead to non-adoption as it leaves officials open to criticism should a procedure fail or the results are not as good as anticipated. Further, it may be that the current national or local practice will prevail. For example, competitive dialogue is popular in countries such as the UK and France and so it is possible that contracting authorities within these Member States may prefer to keep on using the tools to which they have become accustomed. In other countries like Portugal, where competitive dialogue has been unsuccessful and where a version of the competitive procedure with negotiation has existed since the 1990s for the award of service concessions, it is expected that use of the competitive dialogue option will remain practically non-existent.

4.1. Competitive dialogue

Competitive dialogue is primarily regulated in Article 30, with the exception of the grounds for use (Article 26) and confidentiality (Article 21). The general purpose of competitive dialogue appears to remain unchanged, namely that for certain contracts where the solution is not clear in advance, it is possible for contracting authorities to discuss with candidates any and all topics related to a contract. As with the open and restricted procedure, the changes to competitive dialogue are relatively minor and essentially relate to the grounds for use which, as will be discussed, below appear to have been widened as well as the possibility of conducting the dialogue with a single supplier.⁵³ It could be said that Directive 2014/24/EU is a missed opportunity with regard to the changes or improvements which were needed to make the procedure more useful and easier to use.

4.1.1. Grounds for use

Directive 2004/18/EC introduced competitive dialogue as a means to award complex contracts. Since its inception, the objective scope and nature of the procedure has been subject to extensive academic discussion.⁵⁴ This was mostly due to the fact that Article 1(11)(c) of Directive 2004/18/EC demanded the contract to be "particularly complex" without providing a clear definition of what constitutes such a contract. However, whilst there has been substantially no or limited jurisprudence on this particular procedure, this could also constitute a possible indication that, where it has been used in practice, the procedure has not proven to be problematic. The perceived risks surrounding the grounds for use may have impaired uptake

⁵³ In case no others have been deemed suitable according to the selection criteria, Article 65(2) Directive 2014/24.

⁵⁴ For the view that the procedure has an exceptional nature and that its grounds for use should be interpreted restrictively, S E Hjelmberg et al., 'Public procurement law: the EU directive on public contracts' (n 6) 283 and Delelis, 'Le Dialogue Compétitif' (n 6) 280. For the view that the grounds for use of the procedure are more flexible, see S Arrowsmith and S Treumer, 'Competitive Dialogue in EU Law: A Critical Review' (n 6) 36 – 49.

of the procedure in some Member States such as Portugal⁵⁵ but this reputation has not led to significant litigation in Member States where it has been extensively used, for example, in the UK and France.⁵⁶

Under Directive 2014/24/EU, competitive dialogue is no longer limited to situations of particular complexity but can be used for the award of contracts on the same grounds as the competitive procedure with negotiation specified in Article 26(4). The new grounds for use are reasonable, while appearing clearer and more straightforward than had previously been the case. Although these grounds for use do not resolve perceived or actual problems inherent in the procedure itself, they do remove part of the uncertainty that might have affected the procedure's adoption in some Member States. As such, they may help increase its use. However, it must be taken into account that the grounds for use are shared in their entirety with the competitive procedure with negotiation. As these procedures are alternatives to one another, it is possible that, in fact, the adoption rate of competitive dialogue will diminish rather than increase due to competition from the new competitive procedure with negotiation.

Directive 2014/24/EU is generous with regard to the prescribed grounds for use of the competitive dialogue (and the competitive procedure with negotiation) and covers two completely different scenarios: one where the grounds for use are primary or direct; the other where the grounds are secondary or indirect.⁵⁷ With regard to the first scenario, the procedure can be used as a matter of first recourse whereas in the second it can be used in the instance in which a previously open or restricted procedure has failed for specific reasons.

Regarding the primary or direct grounds for use, Article 26(4)(a) states that the procedure can be used for the award of works, supplies or services when: (i) the needs of the contracting authority demand adaptation of readily available solutions; (ii) they include design or innovative solutions; (iii) due to the nature, legal and financial complexity of the contract; or (iv) technical specifications cannot be defined in sufficient detail.⁵⁸ These grounds are alternative rather than cumulative. Therefore, a contracting authority may be able to justify the use of the procedure based upon any one or more bases. In comparison to the grounds for use of competitive dialogue in Articles 29, 1(11)(c) and Recital 31 of the Directive 2004/18/EC,⁵⁹ it is clear that (iii) and (iv) are adaptations of pre-existing grounds whereas (i) and (ii) are completely new, perhaps constituting a recognition of the flexibility needed in more contracts than expressly anticipated in Directive 2004/18/EC. In addition, Directive 2014/24/EU contains no reference either to particular complexity (Article 29) or objective impossibility (Article 1(11)(c)). This new state of affairs can only be considered as a positive development, particularly in the

⁵⁵ See P Telles, 'Competitive Dialogue in Portugal' (n 10) 380 and P Telles, 'Competitive Dialogue in Portugal' (2010) 1 PPLR, 1-32.

⁵⁶ See S De Mars and R Craven, 'An Analysis of Competitive Dialogue in the EU' in S Arrowsmith and S Treumer (eds) *Competitive Dialogue in EU Procurement* (n 6) 152.

⁵⁷ On the division of the grounds for use into categories (adaptation; design; complexity; technical specifications), see J Davey, 'Procedures involving negotiation in the new Public Procurement Directive: key reforms to the grounds for use and the procedural rules' (2014) 3 PPLR 103-111, 109.

⁵⁸ These grounds are detailed in the definitions included in Annex VII.

⁵⁹ Although Directive 2014/24/EU includes in its own Recitals some examples of projects that could be tendered via the competitive procedure with negotiation or the competitive dialogue, e.g. Recitals 42 and 43.

interests of simplification and legal certainty.⁶⁰ Although it can be said that Article 26(4)(a)(iii) appears to be similar to the previous requirement of Article 1(11)(c) of Directive 2004/18/EC, it does not in fact require a degree of particular complexity as had previously been the case.

For use of competitive dialogue and the competitive procedure with negotiation under primary grounds, contracting authorities will still have to justify the choice of procedure. Notwithstanding the fact there is no objective impossibility requirement, it has been argued this test needs to be objective.⁶¹ The authors would contend that, as had previously been the case, this is very difficult to do in practice. A strategic use of pre-market engagement would solve most of the issues that can be tackled with the competitive dialogue, albeit with less transparency or safeguards. Under Directive 2014/14/EU, the test should essentially be subjective in nature: the contracting authority must justify why, in that specific situation, it needs to use either of these procedures. This should not depend on any external unit of measurement or comparison, i.e. what the reasonable contracting authority would do in that situation. By "subjective", it is meant the actual situation being faced at that moment by that specific contracting authority. In any event, the authors are of the view that the availability of broader grounds will enable easier reliance on any of the requirements set forth in Article 26(4)(a).

Concerning the secondary grounds for use, these can be found in Article 26(4)(b) and arise in situations where only irregular or unacceptable tenders are submitted in the course of an open or restricted procedure. In this instance, it appears that the contracting authority has two options: it can either issue a further invitation to those tenderers for a competitive procedure with negotiation without putting out a notice or re-advertise the contract as a competitive procedure with negotiation. Perhaps surprisingly, only the first option is specifically referred to in Article 26(4)(b). This gives cause for question for two reasons. Firstly, it is not clear why the competitive procedure with negotiation is allowed to proceed without a notice when Article 26(1) and (5) specifically state that a notice must be used. Secondly, it is not clear why it is permitted to use the competitive procedure with negotiation without notice (the more substantial exception to the principle of transparency) as opposed to a procedure with notice (a lesser incursion on transparency). In fact, if all the tenders are unacceptable and/or irregular, it is not clear why those tenderers should be given a privileged "second chance" with competition closed to potential bidders that did not have an unacceptable or irregular bid in the first instance. When examining the conditions under which tenders should be considered unacceptable⁶² or are otherwise irregular,⁶³ in accordance with the second paragraph of Article 26(4)(b), it is clear that the situations leading to the classification of being unacceptable or irregular should not warrant the preferential treatment of closing off the competition to other bidders. Finally, in the specific case of a candidate being excluded due to lack of qualifications,

⁶⁰ For the view that the new grounds for use do achieve the stated aim of simplification and flexibility, see generally J Davey, 'Procedures involving negotiation in the new Public Procurement Directive: key reforms to the grounds for use and the procedural rules' (n 57).

⁶¹ For the view that an objective test is still required, see J Davey, 'Procedures involving negotiation in the new Public Procurement Directive (n 57) 105-106.

⁶² For example, not having required qualifications or excessive price.

⁶³ For example, for corruption or collusion, lack of compliance, late submission or abnormally low prices.

it appears unlikely that such candidate will be able to secure such requirements in short order.

Whereas the primary or direct ground for use appears to be a step in the right direction when compared to Directive 2004/18/EC, the secondary or indirect grounds for use could have perhaps been given more careful attention. The possibility of allowing a new competition (whether competitive dialogue or competitive procedure with negotiation) with a contract notice could have gone some way to potentially resolving this issue.

4.1.2. Non-discrimination and Confidentiality

As was the case under Directive 2004/18/EC, competitive dialogue continues to raise issues surrounding non-discrimination and confidentiality.⁶⁴ Article 30(3) states that equal treatment must be observed and that information should not be provided to candidates in a discriminatory manner. Further, the same paragraph adds that any confidential information cannot be disclosed without prior authorisation from the respective candidate. Under Directive 2004/18/EC, it was debatable as to whether or not contracting authorities might ask for a blanket authorisation to disclose before launching a procedure, for example, as a condition for participation.⁶⁵ According to Article 30(3) of Directive 2014/24/EU, it is simply illegal to impose such an authorisation as a condition for participation.

This change of approach to the confidentiality clause through a draconian and overly formalistic prohibition on communication (unless agreed), benefits candidates to the detriment of the procedure's utility. It is argued that its adoption demonstrates a clear lack of understanding as to how the procedure works and how it has been used over the last ten years, namely, to design and establish a common set of specifications on which candidates can base their tenders. This has been the practice in Spain, Italy and, to a certain extent, the UK.⁶⁶ Either in situations where the contracting authority has no solution for its problem or where it has an idea but is unsure on the best solution, the reality is that candidates are in effect competing to shape the contracting authority's opinion and influence the draft of the technical specifications. In effect, contracting authorities have been using competitive dialogue to "crowd source" the tender specifications.⁶⁷ This *modus operandi* was quite common over the last decade and represented the most useful (and easy) way to organise competitive dialogue. In addition, from the perspective of competition, such a model avoids two important pitfalls in public

⁶⁴ S Charveron, 'Competitive dialogue threatens PFI' (2007) 18 *Construction Law*, 29, A Brown, 'The impact of the new procurement directive in large public infrastructure projects: competitive dialogue or better the devil you know' (2004) 4 *PPLR*, 173; S Treumer, 'Competitive Dialogue' (2004) 13 *PPLR*, 178; and S Arrowsmith and S Treumer, 'Competitive Dialogue in EU Law: A Critical Review' (n 6) 64-66.

⁶⁵ For a view in favour, see S Arrowsmith and S Treumer, 'Competitive Dialogue in EU Law: A Critical Review' (n 6) 66. For a view that this would create a new selection criterion not foreseen in articles 45 through 52 of the Directive 2004/18, see M K Larsen, 'Competitive Dialogue' in Nielsen and Treumer (eds), *The new EU public procurement directives* (Djøf 2005) 76-77 and S De Mars and F Olivier, 'Competitive dialogue in France' in S Arrowsmith and S Treumer (eds) *Competitive Dialogue in EU Procurement* (n 6) 292-295.

⁶⁶ S Arrowsmith and S Treumer, 'Competitive Dialogue in EU Law: A Critical Review' (n 6) 72-78.

⁶⁷ P Telles, 'Competitive Dialogue in Spain, in S Arrowsmith and S Treumer (eds) *Competitive Dialogue in EU Procurement* (n 6) 413-416.

procurement. The first concerns the "dialogue" that some suppliers want to have with contracting authorities before launch of a procedure particularly the open and restricted procedures where technical specifications and award criteria are clearly set in advance. It is perhaps ironic to think that suppliers may complain against confidential information being shared during a competitive dialogue but may be interested in passing the same information to the contracting authority during preliminary market consultations before the launch of an open or restricted procedure as to influence tender specifications.⁶⁸ The second is that by insisting on a model where each candidate will present a tender based on their own design and assuming that no "cross-pollination" occurs, then, in effect, all candidates except the one with the contracting authority's preferred solution are wasting their time and money in the dialogue. Although Article 30(6) states that final tenders have to be based on the solutions presented by participants in the dialogue, in reality, there will be no or limited competition as the contracting authority will sooner or later identify a preferred solution (officially or not) and reach its determination well in advance of the end of the dialogue.

4.1.3. Negotiations with Preferred Bidder

Article 29(7) of Directive 2004/18/EC allowed the contracting authority to clarify certain aspects of the preferred bidder offer as long as the discussions did not modify essential aspects of the tender or procedure. The drafting of this provision generated debate as to what would fall within the legitimate scope of discussion for the purposes of clarification. Article 30(7) of Directive 2014/24/EU introduces two small albeit important changes: (i) what were previously deemed as "clarifications" are now defined as "negotiations"; and (ii) financial commitments of tenderers are now expressly identified.

The first change indicates an evolution of what kinds of discussions the contracting authority and preferred bidder may entertain. It would appear that moving from "clarifications" to "negotiations" entails an enlarged scope for changes to the bid submitted. Article 30(7) of Directive 2014/24/EU states that the contracting authority may start negotiations with the preferred bidder with the aim of confirming financial commitments or any other terms as long as such negotiations do not modify essential aspects of a tender, tender requirements or distort competition. It can be argued that this change reflects the perspective of some authors that the preferred bid needs to be negotiated to obtain the best possible result from the procedure and to reduce bid costs.⁶⁹ This is arguably a naive view of competition and one that leaves the door open for suppliers to claw back any promises made either in the dialogue or in the bid submitted in a moment where there is zero competitive pressure from other tenderers. Although it is possible for the contracting authority to negotiate hard at this stage, the reality is that it is generally starting from a weaker negotiation position. In terms of costs, it has as many sunk costs as the winner but crucially a much higher reputation cost to shoulder in case the procedure is aborted. The "nuclear" option of returning to the second bidder is sometimes not

⁶⁸ Which is now explicitly allowed for in Article 40 of Directive 2014/24/EU.

⁶⁹ S Arrowsmith, *The Law of Public and Utilities Procurement* (n 6) 660-663; R Craven, 'Competitive Dialogue in the UK' in S Arrowsmith and S Treumer (eds) *Competitive Dialogue in EU Procurement* (n 6) 244-264.

even possible at all, as these discussions may drag for months and the second best bidder may have simply demobilised. Further, even if it is possible to do so, by definition, the second best bid is always worse than the winning bid, again putting the contracting authority in a difficult negotiation position. It could be argued that it even leaves the contracting authority in a worse bargaining position, as the second bidder knows it is the last chance before cancellation, thus having an even stronger starting position than the original winner. Although some contracting authorities under the right conditions and right advice will be able to navigate this scenario, many more will not have the resources (person hours, knowledge) available to do so.

Further, opening the door for further discussion with the preferred bidder actually gives the dialogue participants the incentive to go as low as possible at tender stage to ensure access to this negotiation phase. That constitutes yet another incentive for tenderers to view the dialogue stage as scarcely relevant and not commit resources until final tenders are to be submitted.⁷⁰ Article 30(7) (as 29(7) Directive 2004/18/EC did before it) states that only the contracting authority may request the start of negotiations. However, this is of limited use when it is considered that the preferred bidder may confirm financial commitments at this stage. In effect by allowing negotiation on financial issues, Directive 2014/24/EU is putting contracting authorities in a very difficult negotiating position. As was seen in Portugal with the open procedure with a negotiation phase, inviting third parties such as banks (which are not tenderers and, as such, not bound by the terms of the tender) to confirm their financial commitments to large complex projects invites them to move the goal posts when there is no, or limited, competitive pressure. Additionally, it can be argued that once negotiations are declared open, it will be very difficult for the contracting authority to block out requests and suggestions from the tenderer. Moreover, once negotiations have started, the supplier has the incentive of protracting those negotiations for as long as possible until it gets what it wants because the contracting authority will be the party under pressure to finalise the contract. This type of approach may be said to explicate the perceived excessive cost⁷¹ and duration⁷² of competitive dialogue procedures reported in the UK which averaged 430 working days⁷³ and which is absent from countries like Spain where the average has been shorter than a calendar year.⁷⁴

Finally, when faced with difficulties arising from discussions with the preferred bidder, contracting authorities (and the actual personnel involved) face the possibility of reputation risk arising from failure and sunken costs and so will likely more easily concede to demands rather than abort the procedure. In other words, the lack of competitive pressure at this stage leaves the preferred bidder with the upper hand.

4.1.4. Unresolved Issues

⁷⁰ This has been observed in Spain. See for example, P Telles, 'Competitive Dialogue in Spain' (n 67) 418

⁷¹ R Craven, 'Competitive Dialogue in the UK' (n 69) 262.

⁷² *Ibid*, 263.

⁷³ Cabinet Office, *Accelerating Government Procurement* (February 2011) 3. It is not entirely clear if the 430 days identified referred to working days, although the stated objective of turning around competitive dialogues in 130 days indicates that this is the case.

⁷⁴ P Telles, 'Competitive Dialogue in Spain' (n 67) 270.

4.1.4.1. Payment of solution development

Under Article 29(8) of Directive 2004/18/EC, it was possible for the contracting authority to specify prices or make payments to the participants in the dialogue stage as compensation for development work. Contracting authorities were under no obligation to do so. Unsurprisingly, there are no confirmed reports of their widespread use other than in France,⁷⁵ evidence they were seldom used in Denmark,⁷⁶ and evidence that they were not used at all in Poland,⁷⁷ Portugal,⁷⁸ Spain⁷⁹ or the UK.⁸⁰ Directive 2014/24/EU could have introduced a significant change in the regulation of competitive dialogue by imposing the requirement that solutions be paid for, a reality that has been uncommon in practice. For instance, with regard to the innovation partnership discussed below, Article 31 provides that contracting authorities should bear the development costs.⁸¹ Paying for the development of solutions (even if not the full cost) signals to the market that the contracting authority is serious about the process by "putting money on the table", mitigating (to some extent) fears that it is looking only for free consultancy under the guise of a competitive dialogue. These arguments have been made in practice in Portugal in the past in relation to the competitive procedure with negotiation where the contracting authority decided to pay for the bid development costs for losing bidders up to a certain value.⁸² As a consequence, there had been a reported reduction in litigation due to the fact that payments could not be made before the contract was awarded i.e. after the standstill period had passed. In essence, suppliers are forced to make the choice between cutting their losses and taking the payment or risk delaying any payment as a result of having to go through the judicial process.

4.1.4.2. No reduction in transaction or opportunity costs

Competitive dialogue is perceived to be a lengthy procedure imposing high transaction and opportunity costs to all involved. Some of these are necessary and inherent in complex contracts in which projects often involve high-risk exposure and complex management. However, Directive 2014/24/EU has done very little to reduce the transaction costs for the parties involved, although it should be emphasised that part of the responsibility for reducing

⁷⁵ S De Mars and F Olivier, 'Competitive Dialogue in France' (n 65) 303-304.

⁷⁶ S Treumer, 'Competitive Dialogue in Denmark' in S Arrowsmith and S Treumer (eds) *Competitive Dialogue in EU Procurement* (n 6) 366.

⁷⁷ A Gorczyńska, 'Competitive Dialogue in Poland' in S Arrowsmith and S Treumer (eds) *Competitive Dialogue in EU Procurement* (n 6) 442.

⁷⁸ P Telles, 'Competitive Dialogue in Portugal' (n 10) 397.

⁷⁹ P Telles, 'Competitive Dialogue in Spain' (n 67) 419.

⁸⁰ R Craven, 'Competitive Dialogue in the UK' (n 69) 256.

⁸¹ Article 31(2) which requires payment in appropriate instalments according to the successive phases of the research and innovation process.

⁸² This information had been collected and collated during Ph.D research for one of the author's Ph.D theses (Telles) and which has taken the form of unpublished semi-structured interviews. See P. Telles, *Competitive Dialogue in Portugal and Spain*. Ph.D Theses, submitted to the University of Nottingham (2011).

such costs lies with Member States and their transposition.⁸³ For example, the time limit to receive requests for participation remains at 30 days. As indicated above, it is still possible to discuss important contract elements with the preferred bidder without any competition leverage still present.⁸⁴ Further, dialogues can still run for as long as the contracting authority wishes. It would have been preferable to impose upon the contracting authority the need to identify a deadline for the dialogue stage,⁸⁵ in conjunction with a clear exclusion of negotiations with the preferred bidder, something which Directive 2014/24/EU does enable for the competitive procedure with negotiation.⁸⁶

4.1.4.3. Non-binding dialogue stage

Another issue that could have been resolved in Directive 2014/24/EU would have been to make any discussions, particularly interim solutions presented, binding as well as providing a mechanism to force candidates that have not been eliminated during the dialogue to present a bid after the dialogue is concluded. Under the current system, any “offer” made by suppliers during the dialogue stage is not binding and can be changed during the dialogue or at tender stage. It is therefore perhaps no surprise that suppliers do not provide all the information (especially price) during the dialogue and retain such information for the tender stage. In consequence, the dialogue stage may not be as useful as could otherwise be the case, as suppliers can simply offer any information without being bound by that information. However, considering a commitment during the dialogue as a firm commitment also carries risks not least in reducing the procedure’s flexibility. A compromise might be to provide that if successive stages are present and used, the information used to make the decision would be binding for the remaining tenderers in the dialogue stage. After all, the information provided at that moment has been considered definitive enough to make a decision whether or not to exclude the tenderer. However, such approach would not solve the problem in situations where no successive stages are used.

4.2. Competitive Procedure with Negotiation

Directive 2014/24/EU includes a “new” public procurement procedure called the competitive procedure with negotiation. In reality, this is not an entirely new procedure but simply a new name for the negotiated procedure with prior notice or at least of one of the ways

⁸³ For instance, the UK has analysed how competitive dialogue has been used and published guidance aiming to improve practice. See HM Treasury, Review of Competitive Dialogue (November 2010) and Cabinet Office, Accelerating Government Procurement, (February 2011). In addition, the new Crown Commercial Service includes standard operating procedures for competitive dialogue. Available at: <<https://ccs.cabinetoffice.gov.uk/about-government-procurement-service/lean-capability/lean-sourcing/lean-sourcing-standard-solution>> last accessed 14 May 2014.

⁸⁴ Although, as discussed in Section 4.2 below, this does not happen under the competitive procedure with negotiation.

⁸⁵ Such a deadline could be subject to interim review and possible extension in exceptional cases where this is necessary (subject to appropriate justification)

⁸⁶ Discussed in Section 4.2 below.

in which such could be undertaken. This procedure is also very similar to an award procedure already in existence in Portugal called the open procedure with negotiation phase.⁸⁷

A primary observation regarding this procedure is that it has the ostensible appearance of the kind of negotiation procedure which contracting authorities have been looking for since the 1990s and is, perhaps, what competitive dialogue should have been in 2004.⁸⁸ This assumption then begets the question introduced at the start of this Part of the Chapter, namely why is it that competitive dialogue is made available alongside this procedure? It is open to question precisely what point there is in offering two very similar procedures for the same or substantially the same situations, as discussed earlier with regard to the grounds for use. In the interests of simplification and "economies of scale", it would have been preferable to have only one instead of both.⁸⁹

4.2.1. General characteristics

The grounds for use of the procedure have been discussed in Section 4.1.1. above. In terms of characteristics, the competitive procedure with negotiation follows a three-stage design comprising selection, initial tenders and negotiation of subsequent tenders. Suppliers apply to take part in the procedure. Suppliers are then selected before being invited to present the initial and subsequent bids. During the negotiation phase, contracting authorities may reduce the number of participants before awarding the contract.⁹⁰ As indicated above, this is not an entirely new structure as it is identical to the open procedure with negotiation which exists in Portugal and similar to the practice of negotiated procedures in general.⁹¹

4.2.2. Selection stage

The procedure commences with a notice that must include the needs and characteristics required, award criteria and minimum requirements.⁹² As with competitive dialogue, the contracting authority will have to provide procurement documents at the start of the procedure including the imposition of minimum requirements,⁹³ These documents should provide "sufficient detail to tenderers to make an informed decision," which appears to indicate that a higher level of detail is required. This suggests that such a level of information is closer to the requirements set for the open and restricted procedure than competitive dialogue.

As with the restricted procedure, competitive dialogue and the innovation partnership to be discussed below, contracting authorities are entitled to restrict the number of suppliers to select, in this case to at least three.⁹⁴ This appears to be a reasonable compromise. A procedure

⁸⁷ P Telles, 'Competitive Dialogue in Portugal' (n 10) 1-32.

⁸⁸ S Arrowsmith and S Treumer, 'Competitive Dialogue in EU law: A Critical Review' (n 6) 8-25.

⁸⁹ In support of this argument, see J Davey, 'Procedures involving negotiation in the new Public Procurement Directive' (n 57) 109.

⁹⁰ Article 29(6) Directive 2014/24/EU.

⁹¹ S Arrowsmith and S Treumer, 'Competitive Dialogue in EU law: A Critical Review' (n 6) 16-25.

⁹² Article 29(1) Directive 2014/24/EU.

⁹³ Ibid.

⁹⁴ Article 65 (2) Directive 2014/24/EU.

in which multiple iterations from each bid were expected would not be well served by a completely open field of competition equivalent to that anticipated under the open procedure. By allowing the limitation of suppliers for selection purposes, Directive 2014/24/EU ensures that the transaction costs are limited for the contracting authority. Further, the market will not have to bear unnecessary transaction costs. Similarly, from the supplier's perspective, the internal market is not well served by multiple companies investing time and money on a project that only a limited few will have a realistic chance of winning. However, such reduction could limit opportunities for SMEs as the selection requirements tend to favour larger suppliers.

4.2.3. Initial bids stage

According to Article 29(2), selected bidders are to be invited to present an initial bid and have 30 days in which to do so. There is no indication in the Directive as to how detailed these initial bids should be e.g. whether in complete form or simple bid outline. In the interests of economy and simplicity, it would appear that contracting authorities are entitled to set in advance the level of detail they expect in the bid at this stage. In most cases, an outline bid will be sufficient to commence negotiations, for example, in situations where an innovative solution is required, although the risks attending the procurement of an innovative solution may necessitate a detailed initial bid to instil sufficient confidence to get the proposal off the ground. In other cases, it may be preferable to require a detailed bid, for example, where the contracting authority intends to use the no-negotiation option included in Article 29(4), which allows the contracting authority to award the contract immediately after receiving the first set of bids without conducting any negotiations.

Concerning the benefits and drawbacks of requiring complete or outline initial bids, attention should focus on the higher transaction costs imposed by requiring more detailed initial bids against the benefits which this approach may bring to the parties, although typically the contracting authority tends to extract the greater benefit from this approach. First, it focuses the discussion on the points that are central to the contract and avoids wasting time on subsidiary or secondary concerns thereby potentially making for a shorter procedure and expedited award. Second, it anchors the discussion by forcing suppliers to commit themselves at the start, thus conferring an advantage on the contracting authority concerned to establish its mandate as early as possible. In proposing an outline bid, a supplier may steer the negotiations on the topics that are yet to be discussed and settled, whereas if negotiations start from a complete bid it is more difficult, though not impossible, to move prior commitments. Even though such changes are indeed possible,⁹⁵ a competent negotiator acting on behalf of the contracting authority will be able to extract concessions from the supplier in return.

4.2.4. Negotiation stage

The negotiation phase of the competitive procedure with negotiation is to be carried

⁹⁵ With the exception of minimum requirements and award criteria which are not negotiable. See Article 29(3).

out under similar rules or limitations as concerns the competitive dialogue. Everything relevant may or should be negotiated;⁹⁶ equal treatment of tenderers is to be ensured;⁹⁷ no confidential information may be passed from one tenderer to another;⁹⁸ and exclusions during this stage are possible.⁹⁹ In this respect, the sense is that Directive 2014/24/EU has largely copied and pasted the dialogue stage into this procedure, replacing the word "discussions" with "negotiations", thus leading to the issue raised at the start of this Section, namely that if both procedures share the same grounds for use and are quite similar, the basis for maintaining two discrete procedures is unclear.

There are, however, certain specificities to the negotiation phase that distinguish it from the discussion phase of competitive dialogue. For example, the contracting authority should give sufficient time to tenderers to re-submit tenders during the negotiation phase when the technical specifications change.¹⁰⁰ The possibility of providing enough time for tender preparation could be deduced from the 30 day minimum deadline for initial tenders but the Directive has expressly provided for this possibility in Article 29(5) (and not for the competitive dialogue). There is also a limit on discussing or negotiating the minimum requirements. As the minimum requirements need to be set at the start of the procedure, prohibiting a discussion of such requirements ensures that negotiations will not be entirely free, thus avoiding a situation in which final bids solve a different problem to that originally advertised. As the minimum requirements are mandatory and imposed upon tenders, this limitation can be seen as reflecting the *Nordecon* case.¹⁰¹ In consequence, a tender that does not meet the minimum requirements cannot be accepted for negotiation by changing those same minimum requirements. The question remains unresolved, however, if the non-compliant tender may be made compliant via negotiations, perhaps by applying the principle of proportionality or if it must be excluded as a non-compliant bid.

However, the general trend is that contracting authorities are left with the same flexibility as they have had in relation to the competitive dialogue over the last 10 years. The contracting authority will define how this stage should be run subject to certain overarching obligations such as equal treatment and confidentiality. This is not necessarily to be criticised as it provides the flexibility contracting authorities have been requesting. Nevertheless, the flexibility afforded by the lack of prescriptive rules provides a corresponding measure of legal uncertainty. Some contracting authorities (or more specifically, the individuals tasked with leading the procedure) are generally uncomfortable exercising the judgment call on the design of, and reasons for, a particular negotiation format. The perception, and often reality, is that where there is uncertainty, there is risk. As such, it would not be surprising to see contracting authorities that successfully used competitive dialogue in the past embracing this new competitive procedure with negotiation. After all, the differences between both are minor and the newer procedure does allow for "negotiations". For contracting authorities that have never

⁹⁶ Article 29(3) Directive 2014/24/EU.

⁹⁷ Article 29(5) Directive 2014/24/EU.

⁹⁸ Article 29(5) Directive 2014/24/EU.

⁹⁹ Articles 29(6) and 66 Directive 2014/24/EU.

¹⁰⁰ Article 29(5) Directive 2014/24/EU.

¹⁰¹ Case C-561/12 *Nordecon v Rahandusministeerium* [2013] WLRD (D) 470.

embraced competitive dialogue for reasons such as perceived risk and uncertainty (even discounting that the grounds for use are now clearer), it seems unlikely that they will adopt this procedure quickly, at least until practice emerges on how to run the negotiation phase. In this regard, the authors expressly advocate the broad publication and dissemination of guidance and information sharing among contracting authorities.

Another issue meriting consideration, in particular, with regard to equal treatment and confidentiality, concerns the limitations imposed upon contracting authorities during the negotiation stage. In a procedure in which suppliers develop and refine tenders already submitted (as opposed to the competitive dialogue, for example, in which new solutions are developed), it makes perfect sense to impose confidentiality and equal treatment in no uncertain terms. Any information passed from one tenderer to another confers a comparative advantage or disadvantage in what is effectively a zero-sum game. As such, Directive 2014/24/EU prohibits the contracting authority from imposing a blanket authorisation on sharing information. The logic of this assessment changes if, in reality, the competitive procedure with negotiation ends up being used in scenarios for which competitive dialogue has proven so popular over the last decade, namely to design technical specifications that will be used at the final tender stage. Flexibility is already built into the procedure as the Directive only imposes limits on the discussions of minimum requirements and award criteria. Everything else appears to fall within the legitimate bounds of discussion and negotiation, thus in theory, allowing the procedure to be run as the competitive dialogue has been until now. In such case, participants will no longer be engaged in a zero-sum game thereby favouring a more flexible view of confidentiality requirements. In this instance, bidders are competing to influence the technical specifications and, as such, have an incentive in sharing the information necessary for inclusion in the final technical specifications. After all, technical specifications are generally public by nature.

4.2.5. Final tender stage

Directive 2014/24/EU makes no reference to the fine-tuning of tenders and discussions with the preferred bidder at the final tender stage. Absent explicit authorisation, the conclusion could be that neither are permitted at all or, more likely, that the position is equivalent to that under the open and restricted procedure. By contrast, it is interesting to observe that competitive dialogue still includes specific rules allowing for the fine-tuning of tenders and discussions with the preferred bidder.¹⁰² In this regard, it is unclear why the Directive would choose two different ways to conclude two similar procedures with common grounds for use and similar structure. One argument might be that since tenders are negotiated and solutions only discussed, it is expected that all the relevant issues have been settled by the time the final tenders are received. However, the same arguments made with regard to competitive dialogue in favour of flexibility can also be offered in relation to competitive negotiation, i.e. reducing transaction costs or securing financial commitments only at this stage. It is arguable that such flexibility should not be permitted in the competitive procedure with negotiation phase. The absence of effective competition at this stage means that there is little deterrent to prevent the

¹⁰² See Section 4.1.3. above.

preferred bidder's interest in "clawing back" concessions made in the final tender. It would perhaps be preferable for all-important discussions to occur while there is competitive pressure and lower costs which have already been sunk. For the sake of consistency, it would have also been preferable to have the same solution in both the competitive dialogue and competitive negotiations. In the authors' view, the approach taken under the competitive procedure with negotiation is the preferable one.

4.2.5.1. Risks arising from the competitive procedure with negotiation

The competitive procedure with negotiation as stipulated in Directive 2014/24/EU exposes certain potential risks in its practical application. This procedure demands competent negotiation skills from contracting authorities and may impact the principle of competition. As contracting authorities have not traditionally been permitted to negotiate (at least in contracts significantly above thresholds) there will be a steep learning curve for the officials involved that may not lead to the best outcomes being achieved.¹⁰³ In addition, good project management skills will become essential in order to avoid procedures becoming unnecessarily protracted, an experience already encountered in relation to competitive dialogue.¹⁰⁴

The second risk is connected with the duration of procedures and tender commitments. As indicated above, with regard to the competitive procedure with negotiation, it is possible that the contracting authority will require only outline tenders and not full tenders from the point of commencement. If that is the case, it is not clear how to determine whether the changes introduced during the negotiations are not actually violations of commitments made in the outline tenders or made in any interim tender during the negotiation stage. In both cases, there is a risk that the "horse trading" involved in any negotiation may imply changes to tenders received. Directive 2014/24/EU provides an indication in this regard in permitting the negotiations to cover anything except the award criteria or the minimum requirements. By contrast, everything else can be negotiated and changed, including the terms of the outline tenders. This is not simply a matter of legalistic or academic abstraction, as the longer the negotiation stage lasts, the more likely it is that the original assumptions made by tenderers become out-dated. In consequence, if the tenders submitted are indeed negotiable and suppliers are not bound by them until the final tender is submitted, it must be questioned to what extent suppliers will take the starting and interim bids seriously. This problem has previously been associated with competitive dialogue,¹⁰⁵ where discussions are not taken seriously precisely because they do not constitute firm commitments.

As indicated above, there is also a risk that the minimum requirements may change as the procedure progresses. It may be that the situation has simply changed and the original minimum requirements no longer make sense or that temptation (and sunken costs) may incline the contracting authority to abandon or downplay those requirements. It may not be legitimate to do so but the likelihood of tenderers complaining against such change as time

¹⁰³ L Chever and J Moore, 'Negotiated procedures overrated? Evidence from France questions the Commission's approach in the latest procurement reforms' (2012) 4 EPPPL, 228-241.

¹⁰⁴ P Telles, 'Competitive Dialogue in Spain' (n 67) 416-418.

¹⁰⁵ *ibid*, 411-416.

goes on reduces accordingly also likely, in part, to sunken costs.¹⁰⁶ However, in the instance in which all remaining tenderers are in agreement with the change then such threat is removed, irrespective of the fact that an eliminated tenderer or candidate might have been prejudiced by such change and will not know about it.

A final risk for this procedure is the possibility that it will be used to "crowd-source" technical specifications that will be used for the final tenders, as happened in relation to the competitive dialogue over the last decade.¹⁰⁷

It is extremely difficult to gauge at present whether practice in relation to this procedure will organically evolve in the directions hypothesised in this Section. Much may be learned from the evolution of competitive dialogue as one of the models adopted in various EU Member States over the last decade.

4.3. Innovation Partnership

During consultations on Directive 2014/24/EU, stakeholders recommended greater use of procedures suited for innovative procurement such as competitive dialogue, design contests and, in particular, the negotiated procedure.¹⁰⁸ Whilst there exists a certain ambivalence on the part of contracting authorities as to how to tailor procurement processes accordingly,¹⁰⁹ the Impact Assessment indicated that 48% of contracting authorities seek innovative products, solutions or services in their tender documents on at least some occasions; 7% indicate an aim to do so as much as possible and 10% indicate that they do so regularly.¹¹⁰ As will be discussed in this Section, in addition to incorporating slight modifications to the grounds for use of existing procedures, Directive 2014/24/EU has gone one step further in instituting a tailor-made innovation partnership procedure under Article 31.

Described as the Directive's "most important novelty",¹¹¹ the innovation partnership mandates, under a single procedure, the purchase of both research and development ("R&D") solutions and resulting supplies, services or works which cannot be met by solutions already available on the market.¹¹² In this regard, the procedure deviates from the historical tendency of the public sector Directives to require discrete treatment of R&D and resultant purchases through the award of separate procedures, although the extent to which the innovation

¹⁰⁶ Time limits for remedies may also play a part, for example, if the change occurred well before the award and stand still period.

¹⁰⁷ See Section 4.1.2. above.

¹⁰⁸ Commission Staff Working Paper, 'Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Public Procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors', SEC(2011) 1585 final, 65.

¹⁰⁹ For a discussion in this regard, see Section 2 of Butler's Chapter in this book.

¹¹⁰ Impact Assessment, (n 108) 61.

¹¹¹ A R Apostol, 'Pre-commercial procurement in support of innovation: regulatory effectiveness?' (2012) 6 PPLR 213, 221.

¹¹² Recital 49 and Article 31(1) Directive 2014/24/EU.

partnership may be said to achieve purposes not otherwise possible through use of existent procedures is at least questionable enough to raise the necessity of a discrete procedure.¹¹³ Specifically, the innovation partnership has been identified as comprising three key phases. Under the first phase, an award procedure is conducted in accordance with the Directive to choose the partner or partners that will subsequently participate in the innovation phase of the contract awarded.¹¹⁴ The second phase occurs after the award of the contract under which an innovative solution is developed as a matter of contract execution.¹¹⁵ The final phase concerns the placing of orders for the purchase of results constituting the outcome of the innovation phase, again, as part of contract execution.¹¹⁶ This Section examines the key features of the innovation partnership procedure.

4.3.1. Choice of Procedure

Directive 2014/24/EU does not specify any explicit grounds for use of the innovation partnership procedure *per se*.¹¹⁷ However, as indicated in Section 2 above, on the taxonomy proposed in this Chapter, the innovation partnership may be said to be a special procedure for use where R&D development is necessary i.e. in those instances in which there is no available solution on the market.¹¹⁸ In this regard, contracting authorities must apply national procedures adjusted to be in conformity with the Directive.¹¹⁹ The previous Section has touched upon national experiences of adjusting (or not) to forms of negotiated procedure such as competitive dialogue. In light of this experience, the absence of specified grounds for use may provide a further incentive (or excuse) for Member States to simply copy and paste the procedure into national law.¹²⁰ It is suggested that in order for the procedure to gain traction, Member States must make suitable adaptations (howsoever determined) that allow contracting authorities on the ground to acculturate. The procedure will only gain credence if it is seen as an option capable of local implementation; otherwise the procedure may simply generate a perception of a symbolic but otherwise practically redundant inclusion. The extent to which options are available to use the procedure and whether the procedure will be taken up is another matter.

4.3.2. Participation in an Innovation Partnership

¹¹³ See generally Butler's Chapter in this collection.

¹¹⁴ P Cerqueira Gomes, 'The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive' (51) 210.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ On the conditional use of the competitive procedure with negotiation and competitive dialogue, see Section 4.1.1. above.

¹¹⁸ Article 31(1) Directive 2014/24/EU.

¹¹⁹ Article 26(1) Directive 2014/24/EU.

¹²⁰ This is particularly likely in Member States such as the UK which signals a commitment to a "copy-out" method of transposition.

The innovation partnership may be said to provide greater visibility of the contracting authority's search for innovative products. The Impact Assessment observed that simply allowing for variants or alternative solutions does not signal to potential suppliers that the contracting authority is looking for an innovative solution¹²¹ whereas the innovation partnership allows contracting authorities to clearly indicate their interest in such proposals while retaining broad competition.¹²² The innovation partnership relies exclusively on the contracting authority's own initiative to identify need and request participation by issuing a contract notice.¹²³ In response, any economic operator may submit a request to participate by providing the requested information for qualitative selection.¹²⁴ The minimum time limit for receipt of requests to participate must be 30 days from the date on which the contract notice is sent.¹²⁵ Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure.¹²⁶ Only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the procedure.¹²⁷

The status of the innovation partnership as a special procedure is confirmed by the fact that in the procurement documents, the contracting authority must identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market.¹²⁸ It must indicate which elements of this description define the minimum requirements to be met by all tenders.¹²⁹ The information provided must be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.¹³⁰

Ultimately, the contracting authority may decide to set up the innovation partnership with one partner or with several partners conducting separate R&D activities.¹³¹ It should be observed that Recital 49 states that contracting authorities should not use innovation partnerships in such a way as to prevent, restrict or distort competition. In this regard, Recital 49 further states that in certain cases, setting up innovation partnerships with several partners could contribute to avoiding such effects. However, it is submitted that anti-competitive behaviour may continue to result even with the inclusion of several partners. It has been observed that the innovation partnership procedure could have an anti-competitive effect by

¹²¹ It appears that variants are rarely requested in practice in any event. For a discussion in this regard, see Section 7 of Butler's Chapter in this book.

¹²² Impact Assessment (n 108) 191.

¹²³ Article 31(1) Directive 2014/24/EU.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid. In accordance with Article 65(2) which provides that there is a minimum of three candidates in the innovation partnership.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

locking in to a single supplier absent a stipulation as to limits of time or volume of purchases.¹³² A number of suppliers could similarly be locked in. Further, as will be discussed below with regards to target setting and termination, participation of multiple partners presents its own difficulties and potential distortive effects. Directive 2014/24/EU does not contain any specific provisions relating to the review of innovation partnerships once the partnerships are set up, or with a view to the admittance of new members. It is therefore at least arguable that innovation partnerships may display certain behaviours increasingly characteristic of framework agreements and which should necessitate similar or equivalent safeguards. This could include the imposition of an equivalent time limited duration (of 4 years) or other suitable time limit which may be subject to review.¹³³

4.3.3. Qualitative Selection

In selecting candidates, contracting authorities must, in particular, apply criteria concerning the candidates' capacity in the field of R&D and of developing and implementing innovative solutions.¹³⁴ The reference to "in particular" confirms that Article 58 containing the general provisions on selection criteria continue to apply with regard to this procedure. Article 58 indicates that selection criteria may relate to "suitability to pursue the professional activity" and "technical and professional ability".¹³⁵ Beyond this general provision, it is clear that the assessment of selection criteria under the innovation partnership procedure envisages a more specific assessment of capacity. It has been observed that the Directive clearly felt the need to explain that capacity in the field of R&D and innovative solutions could be taken into account when selecting economic operators without being discriminatory.¹³⁶ However, it has also been argued that this provides for more legal certainty than would be given by the general criteria set out in Article 58 thus constituting a step forward in its recognition that purchasing innovation demands different selection criteria due to the necessity of specialised knowledge in the field.¹³⁷

¹³² S Bedin, HT.618 – Consultation on the draft R&D&I-Framework, Section 2.3. Public procurement of research services, addressed to the European Commission, Directorate-General for Competition, 16 February 2014. Available at: http://ec.europa.eu/competition/consultations/2013_state_aid_rdi/sara_bedin_en.pdf > accessed 5 May 2014. See also S Corvers, R Apostol, C Mair and O Pantilimon, Comments on the procurement section in the ongoing DG COMP open consultation on the Draft Union Framework for State aid for Research, Development and Innovation, Corvers Procurement Services BV, 3. Available at: http://ec.europa.eu/competition/consultations/2013_state_aid_rdi/corvers_en.pdf > accessed 5 May 2013.

¹³³ Article 33(1) Directive 2014/24/EU.

¹³⁴ Article 31(6) Directive 2014/24/EU.

¹³⁵ Article 58(1)(a) and (c) Directive 2014/24/EU, respectively.

¹³⁶ P Cerqueira Gomes, 'The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive' (n 51) 210, fn14

¹³⁷ *ibid.*

It is questionable whether this additional provision is necessarily productive of more legal certainty. Firstly, clarity is not aided by the absence of any definition of R&D.¹³⁸ Secondly, potential issues arise in relation to relatively new suppliers to the market (e.g. start-ups) proposing a solution but which may lack the experience to demonstrate capability. It has been observed that the initial proposal for the Directive made reference not only to the tenderer's capacity but also to their experience whereas Directive 2014/24/EU has omitted reference to experience, allowing contracting authorities to select start up companies that generally have the capacity but not the experience of a large company.¹³⁹ Notwithstanding, it is not clear to what extent experience can still be an operative factor. Thirdly, in any event, it is conceivable that economic operators (whether start-ups or well-established operators) that may be able to evidence R&D capacity may not necessarily be able to evidence capacity related to the development and implementation of innovative solutions and *vice versa*. Directive 2014/24/EU does not clearly demarcate the boundaries between R&D and something which is developed, implemented or commercialized.¹⁴⁰ The potential for legal uncertainty in this area is also perhaps acknowledged by the fact that, in contrast to Directive 2014/24/EU, specific guidance has been issued in relation to the assessment of technical and/or professional ability under the Defence and Security Procurement Directive, in which such capacity is a particular focus.¹⁴¹

It has also been observed that another potentially problematic issue concerns the fact that the preferred supplier is selected before the market has started R&D and without firm evidence of who will be able to develop the best solution.¹⁴² Instead, selection is based on antecedent qualification criteria such as financial capacity (e.g. minimum turnover) and technical capacity (e.g. prior customer references).¹⁴³ On this basis, it has been suggested that there is a risk of lock-in, thereby precluding competition at a point in which there is no substantial proof that the preferred supplier will be able to develop a more suitable solution than other providers.¹⁴⁴ Consequently, there is a risk that offers are not compared on the basis of which offer can deliver the most suitable solution (in the absence of evidence of any results that will come from the R&D) but rather based on other selection criteria and negotiation.¹⁴⁵

Therefore, contracting authorities are afforded considerable discretion with regard to qualitative selection under the innovation partnership procedure.

¹³⁸ For a discussion in this regard, see Section 4 of Butler's Chapter in this book.

¹³⁹ P Cerqueira Gomes, 'The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive' (n 136)

¹⁴⁰ See generally Section 3 of Butler's Chapter in this book.

¹⁴¹ See Article 42 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L 216/76. For guidance on this provision, see Directorate General Internal Market and Services, Guidance Note, Security of Supply, Directive 2009/81/EC on the award of contracts in the fields of defence and security, 8-9.

¹⁴² S Bedin, HT.618 – Consultation on the draft R&D&I-Framework (n 132).

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

4.3.4. Structure of the Innovation Partnership Procedure

After initial selection, the innovation partnership must be structured in successive phases.¹⁴⁶ The structuring of the innovation partnership is arguably as crucial as the dialogue stage in a competitive dialogue in ensuring the optimal end result. These phases are not defined except that they must follow the “sequence of steps in the research and innovation process”.¹⁴⁷ It has been observed that the absence of any stipulation as to detail of these phases provides a measure of flexibility.¹⁴⁸ However, it is important to recognize that there are, nevertheless, inherent limitations that will impact on the structuring of the partnership. One significant limitation is that performance levels and maximum costs must be agreed *before* the commencement of the innovation process, a determination that has been identified as providing “less flexible boundaries”.¹⁴⁹ This aspect is considered in more detail below. Suffice to state for present purposes, the obvious difficulty of prospectively determining performance and maximum costs aside, these considerations are likely to be important operative factors in the minds of officials when designing the phases, setting targets and potentially even determining the number of viable or suitable partners.

With regard to the research and innovation process, this may include the manufacturing of the products, the provision of the services or the completion of the works.¹⁵⁰ However, the sequence of steps in the research and innovation process is not clear. The Directive does not define research, or, more specifically, R&D nor prototyping and manufacturing processes. Further, it has not been made clear in Article 31 or elsewhere in the Directive whether these steps correspond to Pre-Commercial Procurement (“PCP”) phases.¹⁵¹ It appears anomalous to provide guidance on the PCP model but no guidance on the corresponding use of such pre-commercial procurement phases under the innovation partnership procedure. Comparable guidance on the R&D phase under the innovation partnership procedure could prove useful to contracting authorities.

4.3.4.1. Proportionality of duration and value to the degree of innovation

An integral aspect of maintaining the structure of a partnership is to ensure, as far as possible and practicable, proportionality of time and cost. This aspect is expressly identified in

¹⁴⁶ Article 31(2) Directive 2014/24/EU.

¹⁴⁷ *ibid.*

¹⁴⁸ P Cerqueira Gomes, ‘The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive’ (n 51) 212

¹⁴⁹ *Ibid.*, 213

¹⁵⁰ The 2013 draft provided that the partnerships shall be structured in successive stages following the sequence of steps in the research and innovation process *possibly up to* the manufacturing of the supply or the provision of the services (italics added). See Article 29(2) of Proposal for a Directive of the European Parliament and of the Council on public procurement (Classical Directive) (First reading), Brussels, 12 July 2013, 11745/13.

¹⁵¹ For a discussion in this regard, see Sections 3 and 4 of Butler’s Chapter in this book and citations therein

Article 31 in two subsections. Firstly, Article 31(2) provides that the innovation partnership must aim at the development of an innovative product, service or works (as well as the results), provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants.¹⁵² Secondly, Article 31(7) provides that the duration and value of the different phases must reflect the degree of innovation of the proposed solution and the estimated value of supplies, services or works must not be disproportionate in relation to the investment required for their development. These references appear to indicate a primary focus on proportionality of cost (by phase and overall) above duration.

In this regard, Article 31 is more circumscribed than previous provision made in the 2011 Draft proposal, for example.¹⁵³ The latter provided that the partnership's duration and value should "remain within appropriate limits, taking into account the need to recover the costs, including those incurred in developing an innovative solution, and to achieve an adequate profit".¹⁵⁴ It had been observed that such additional provision seemed overly prescriptive.¹⁵⁵ For example, it would be difficult to determine what is meant by the fact that duration and value should "remain within appropriate limits", the types of costs that would form the basis of assessment and what constitutes an "adequate profit".¹⁵⁶ More fundamentally, these factors appear to relate exclusively to financial considerations such as cost recovery and profit when the provision requires that value (which is not technically specified in monetary terms) should reflect the degree of innovation. To this extent, Article 31 is therefore less prescriptive but the earlier prescriptions in the Draft provide an insight into the difficulties of objectively determining proportionality. Notwithstanding, it is suggested that these issues could never be fully resolved within the Directive itself, not least because such assessments concern intangible notions reminiscent of the kinds of assessments necessary to determine a "particularly complex" contract under the competitive dialogue. For this reason, the final text incorporates references which are even more generic. In any event, these factors are unlikely to be able to form a basis for challenge post-award. However, a public procurement challenge aside, it has been observed that the nature of such forms of partnership mean that it can be extremely difficult to value the resources put into a partnership by the contracting authority and contractor such as to ensure a balance which prevents illegal state aid.¹⁵⁷ As indicated above, the Directive appears to suggest that such an assessment can be undertaken

¹⁵² See also Recital 49 Directive 2014/24/EU.

¹⁵³ Proposal for a Directive of the European Parliament and of the Council on public procurement, COM(2011) 896 final, Brussels, 20 December 2011.

¹⁵⁴ Article 29(4) Draft Proposal (n 153)

¹⁵⁵ See for example, A Semple, 'Mixed offerings for sustainability in new EU Directives'. Available at: <<http://www.procurementanalysis.eu/resources/Mixed+offerings+for+sustainability+in+new+EU+Directives.pdf>> accessed 15 May 2014.

¹⁵⁶ *ibid.*

¹⁵⁷ For a useful discussion from the perspective of assessing compatibility of partnerships with State aid rules, see T Inden and K N Olesen, 'Legal Aspects of Public Private Innovation' (2012) 7(4) EPPPL 258-267.

with relative ease as the contracting authority is required to achieve proportionality in terms of structure, duration and value.¹⁵⁸

It has also been observed that the Innovation partnership is “poorly drafted” on the duration and cost aspect, allowing significant discretion in deciding the value and duration of any contract.¹⁵⁹ It is possible but difficult to envisage how the EU legislator could realistically regulate the cost variable. However, with regard to duration, there is a conceivable risk of market foreclosure as contracting authorities could potentially set up “innovation partnerships” to get around time limits imposed on framework agreements, for example. It is recalled that Recital 49 emphasises the fact that innovation partnerships should not be used to prevent, restrict or distort competition but there are no specific requirements identified in Article 31 itself concerning reporting, monitoring, review or time-limits on innovation partnerships.

Perhaps one of the most significant questions concerns uncertainty as to why Directive 2014/24/EU seeks to require (or presumes) a necessary correspondence between the estimated value of the contract and the investment required for development. It is axiomatic that the end result should reflect the cost but this fails to take account of the reality that costs incurred in development will not necessarily bear in direct proportion to the overall contract value. Further, issues such as intellectual property inevitably factor into account on either side of the contracting equation and, as a result of which, it may be very difficult to argue that there is or will be proportionality in the short, medium and long term.

A final aspect that remains unclear is whether investment required for development is confined to investments made by the contracting authority within the framework of the innovation partnership or whether it includes investments previously made by the private partner, or both.¹⁶⁰ It has been suggested that if this could conceivably incorporate investments outside the terms of the innovation partnership, contracting authorities may have significant discretion to award large value contracts of lengthy duration for the purchase of R&D results.¹⁶¹

4.3.4.2. Target Setting and Termination

Article 31 makes specific reference to post-award considerations, in particular, to target setting and termination of the partnership. Such provision confirms the somewhat anomalous character of the innovation partnership within the overall legislative scheme of the Directive in its coverage not only of the procurement function but also aspects of contract management.

¹⁵⁸ Article 31(7). Experience suggests that even the use of specific calculation models used to quantify this balance (e.g. drawing up a “state aid account”) do not solve the problem of how to value (i.e. qualify and quantify) the inputs and outcomes of a partnership. See T Inden and K N Olesen, ‘Legal Aspects of Public Private Innovation’ (n 157) 264.

¹⁵⁹ A R Apostol, ‘Pre-commercial procurement in support of innovation: regulatory effectiveness?’ (n 111) 222.

¹⁶⁰ S Corvers, R Apostol, C Mair and O Pantilimon, Comments on the procurement section in the ongoing DG COMP open consultation on the Draft Union Framework for State aid for Research, Development and Innovation (n 132).

¹⁶¹ *ibid.*

With regard to target setting, Directive 2014/24/EU provides that once an economic operator is admitted to the partnership, the partnership must set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.¹⁶² Based on those targets, the contracting authority may decide after each phase to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts.¹⁶³ Termination is possible provided the contracting authority has indicated those possibilities and the conditions for their use in the procurement documents.¹⁶⁴

It has been observed that intermediate targets will play a decisive role in evaluating partner capacity/performance and that given the “evaluative nature” of these targets they should be as objective and proportionate as possible in order to comply with general principles of EU procurement law.¹⁶⁵ However, the provisions on targets generate significant legal and practical uncertainty, in the same way that the relative bargaining positions of suppliers and contracting authorities may be destabilized under the competitive dialogue and competitive procedure with negotiation. A fundamental issue concerns the boundaries of target setting and design.¹⁶⁶ For instance, it is unclear how such targets will be formulated e.g. in terms of performance, cost, other or a combination. Further, whilst it appears that there must be relative agreement on those targets, it is not clear to what extent the contracting authority will ultimately dictate their terms. A host of issues may also arise where multiple partners are involved. Firstly, the possibility cannot be excluded that multiple partners contracting on similar terms may collectively exercise control over targets, weakening the position of the contracting authority. Secondly, it is not clear whether certain targets will be applicable to all partners. Thirdly, there could be potential for variability in the form, content and application of targets between partners. Fourthly, it is also unclear to what extent contracting authorities will utilise those targets as a basis for comparison of performance by partners. Fifthly, it cannot be excluded that partners may evolve at different speeds and which may result in certain partners being given more time to develop solutions so as to reach any collectively agreed performance levels. Such a possibility may be foreseen, for example, where partnerships comprise both start-ups and established companies. It is unclear whether a legalistic view of equal treatment would prevent such variation. Sixthly, similar to the provisions for competitive procedure with negotiation and competitive dialogue, Article 31 contains no interstitial provision, for example, to review targets, allow for independent scrutiny or verification of those targets, or record requirements of performance. Further, there is an additional risk that any targets may be subject to *ad hoc* revision. Finally, if there are several partners but certain individual contracts are terminated, aggrieved partners may look to examine requirements imposed on other partners to determine whether the basis for termination is justifiable. It may also be particularly

¹⁶² Article 31(2) Directive 2014/24/EU.

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ P Cerqueira Gomes, ‘The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive’ (n 51) 213.

¹⁶⁶ *ibid* 211.

difficult for terminated partners to verify the application of such targets in the absence of requirements of the kind identified above.

It has been observed that whilst the result of the innovation partnership must have a direct connection to the subject matter of the contract giving effect to the initial aim, there is a potential risk that the outcome exceeds the concrete public need described in the procurement documents.¹⁶⁷ In response, it has been suggested that it would be appropriate, and arguably required, under the EU law principle of transparency for the contracting authority to publish not only the results of the final product, service or goods, but also the intermediate targets.¹⁶⁸ In light of the above, it is possible to envisage issues regarding the manner, form, detail and timing of publication. Notwithstanding, this kind of proposal evidences the need for some measure of transparency in light of their potential effects.

A number of other issues may also arise in relation to termination. For instance, provision is only made for termination on the contracting authority's election but Article 31 is otherwise silent on the partner's rights, if any, including in the instance of mutual termination. This aspect is likely to be governed exclusively by national law. Further, whilst Directive 2014/24/EU repeatedly emphasises the importance of protecting confidential information during the process of participation in negotiations, Article 31 is silent on the issue of exploitation of confidential information (e.g. know how or even intellectual property) obtained during the course of a now terminated contract in continuing on-going contracts with other partners. The only reference is to a requirement that the contracting authority must not reveal to the other partners solutions proposed "or other confidential information communicated by a partner in the framework of the partnership" without that partner's agreement.¹⁶⁹ Given that the terminated participant is no longer a partner, it is not clear to what extent, if at all, any confidentiality obligation continues.

Finally, the provisions on payment of remuneration in appropriate instalments are also vague. It has been observed that this provision is "regrettably inflexible" because remuneration in instalments may not be suitable for all types of partnership, particularly, where the supplier receives funding for its R&D work from other sources.¹⁷⁰ However, if the amount or timing of instalments is an issue, for example, the reality will be that most suppliers entering an innovation partnership must appreciate that adaptations will need to be made in order to meet schedules and practices of the contracting authority. More fundamentally, it is submitted that by at least forcing a requirement to provide payments, the Directive ensures that contracting authorities do not look for free R&D, a position relatively common under the competitive dialogue in which it was often provided that development costs "may" be paid but rarely, if ever, were paid.

¹⁶⁷ P Cerqueira Gomes, 'The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive' (n 51) 214.

¹⁶⁸ Ibid.

¹⁶⁹ Article 31(6) of Directive 2014/24/EU which further provides that: [...] such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

¹⁷⁰ A Semple, 'Procuring innovation – will the new Directives help?' <http://www.procurementanalysis.eu/resources/Procuring+innovation_new+directives.pdf> accessed 15 May 2014.

The issue of R&D instalment payments also raises broader questions concerning the risk of State aid under Article 107 TFEU. The longstanding assumption (increasingly challenged) is that the award of a public contract in accordance with the EU procurement Directives will not *prima facie* raise the issue of compatibility with EU State aid rules, provided any conferred economic advantage does not go beyond normal market conditions.¹⁷¹ However, it has been argued that the drive towards added flexibility under Directive 2014/24/EU may increase the risk of State aid in public procurement, a risk which is exacerbated in procedures which permit extensive negotiations, the use of public funds to develop proprietary technology and the use of non-economic award criteria.¹⁷² In this regard, the innovation partnership has been identified in emphatic terms as “the perfect cover to circumvent rules controlling R&D State aid”.¹⁷³ Specifically, it has been argued that where public procurement activities refer to future services, works or goods reliant on contracting authority funding or sponsoring through R&D, there risks potential for not only short term anti-competitive effects concerning interim payments for R&D development but also deferred anti-competitive effects in relation to future goods or services once developed.¹⁷⁴ These effects may be of acute significance from a State aid and competition law perspective if the the goods, works or services are not for exclusive use by the public buyer.¹⁷⁵ In this instance, at the outset, a contractor may gain a first mover advantage which prevents the development of competition in private markets.¹⁷⁶ To this extent, it is submitted that the Directive could have played a more substantial role in providing early detections and monitoring of anti-competitive effects e.g. reporting requirements on R&D funding, interim review of innovation partnerships and their duration.¹⁷⁷

In light of the above, it should be emphasised that target-related performance (including performance-based termination) and payment by instalment requires careful planning and management. It follows that contracting authorities will need to ensure that they have the relevant expertise in place to deal with multiple legal and practical permutations at the execution stage. This should not be any different to the staff requirements or expectations of contracting authorities embarking on a competitive dialogue or competitive procedure with negotiation. However, it is clear that the innovation partnership introduces new variables that cannot simply be treated as matters of post-award contract execution falling outside the Directive’s scope; rather, these are aspects which must comply with the specific provisions of the Directive and EU law more generally, in particular, principles of equal treatment and transparency.

¹⁷¹ For a discussion of this position generally, See A Sanchez-Graells, ‘Public procurement and state aid: reopening the debate?’ (2012) 6 PPLR, 205-12 and citations therein.

¹⁷² *Ibid*, 209.

¹⁷³ *ibid* 211.

¹⁷⁴ A Sanchez-Graells, ‘Public procurement and state aid: reopening the debate?’ (n 171) 211-12 and citations at fn26 and 27.

¹⁷⁵ *Ibid* 212.

¹⁷⁶ *ibid*.

¹⁷⁷ Such requirements could also assist assessments of compliance with the State aid rules (as well as any basis for exemption from their application).

4.3.4.3. Intellectual Property Rights and Risk Management

An inevitably recurring theme in the context of negotiated forms of procurement concerns the balance of interests between contracting authorities and economic operators in the trade-off. A key aspect in this regard relates to the management of risk.¹⁷⁸ This issue is particularly important with respect to intellectual property rights (“IPRs”) and other technical “know-how”. The Impact Assessment stated that the Innovation partnership “should provide for the necessary IPR transfer and protection arrangements depending on individual circumstances”.¹⁷⁹ However, Article 31 simply requires the contracting authority to “define the arrangements applicable to intellectual property rights” i.e. without reference to determining acquisition, transfer or subsequent protection. A number of observations can be made in this regard. Firstly, this provision means that ultimately the terms of acquisition (as well as transfer and protection) are left to the discretion of the contracting authority.¹⁸⁰

Secondly, given that Article 31 does not define the scope of the innovation partnership by reference to the sharing of benefits between the contracting authority and economic operators,¹⁸¹ Article 31 does not necessarily preclude the possibility that a partnership may be implemented irrespective of the sharing of IPRs between the contracting authority and the private partner.¹⁸² It has been argued that often the contracting authority will not need acquire the intellectual property right itself but solely the right to exploit the asset under an IP licence.¹⁸³ Further, it has been suggested that by allowing IPR retention by the private partner, the State will provide a competitive incentive for the private sector reinforcing the apparent spirit of Recital 49. It is beyond the scope of the Chapter to hypothesise the possible IPR and licensing options that may be available. Suffice to state that the (commercial) reality is that most forms of partnership will necessitate arrangements that will require at least one form of IPR acquisition, transfer, licensing or protection.

Thirdly, Article 31 is silent on the issue of IPR management at discrete phases. For instance, Article 31 does not regulate how the relevant IPR should be acquired when the partnership comes to an end. It has been suggested that acquisition could possibly occur after the award of the contract or even after the achievement of an intermediate target.¹⁸⁴ The 2011 Draft Proposal provided that a contracting authority may decide after each stage to terminate

¹⁷⁸ On the issue of risk in the procurement of innovation generally, see Report of Expert Group to the European Commission, ‘Risk management in the procurement of innovation: Concepts and empirical evidence in the European Union’ (2009). Available at: <http://ec.europa.eu/invest-in-research/pdf/download_en/risk_management.pdf> 15 May 2014.

¹⁷⁹ Impact Assessment (n 108) 63.

¹⁸⁰ Article 31(6) Directive 2014/24/EU. See also P Cerqueira Gomes, ‘The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive’ (51) 215

¹⁸¹ This should be contrasted with Article 14 Directive 2014/24/EU discussed in Sections 3 and 4 of Butler’s Chapter in this book.

¹⁸² A R Apostol, ‘Pre-commercial procurement in support of innovation: regulatory effectiveness?’ (n 111) 222.

¹⁸³ P Cerqueira Gomes, ‘The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive’ (52) 215-216.

¹⁸⁴ Ibid 215.

the partnership and launch a new procurement procedure for the remaining phases, “provided that it has acquired the relevant intellectual property rights”.¹⁸⁵ This provision has been omitted from the final text raising the question as to whether or not it is possible to terminate the partnership and launch a new procedure irrespective of the issue of IPR acquisition. In any event, the operating assumption appears to be that the contracting authority obtains the IPR under an innovation partnership. On any interpretation, the above indicates the importance of IPR not only in structuring the initial partnership with a partner but also in informing any decision to terminate a partnership and subsequently award contracts to other partners. Further, as indicated above in the context of the discussion of target setting and performance, Directive 2014/24/EU is unclear on the use to which information may be put by the contracting authority which was acquired during the course of a partnership and which is now terminated. Similar uncertainty exists in relation to the use of IPRs and other technical know-how in this regard.

A final issue concerns the potential risk of State aid. It has been argued that because the Directive does not specifically require that the contracting authority must acquire all intellectual property rights generated by the partner to achieve a prescribed intermediate target, a partner could benefit from having obtained public funds which it could then use in the development of other innovative solutions thereby unfairly impacting competition.¹⁸⁶ Further, as indicated above, the final text does not include any condition that the contracting authority must acquire the relevant intellectual property rights before terminating a partnership.

Notwithstanding the issues identified above, it is submitted that whilst Article 31 contains only a limited reference to IPR, at the very least such provision commits contracting authorities to a determination on IPR whilst also providing the flexibility needed to decide on if, and how, it wants IPR to be shared. An important issue will concern the nature and scope of IPR arrangements as well as any permissible amendments to those arrangements throughout the duration of a partnership. It is clear that IPR will need to become a focal point for planning procurement exercises.

4.3.5. Negotiation under the Innovation Partnership Procedure

As indicated in the introduction to Section 4 above, the Directive’s successive provisions on the competitive procedure with negotiation, competitive dialogue and innovation partnership suggest that all have certain commonalities. Although designated as a discrete “procedure” alongside the other procedures, the innovation partnership does not formally prescribe a procedure comparable to competitive negotiation with publication or competitive dialogue. Whether the innovation partnership should correspond with the competitive procedure with negotiations is unclear in light of the omission of a reference to this procedure in the final text. The 2011 Draft Proposal expressly referred to the award of the contract in

¹⁸⁵ Article 29(2) Draft Proposal (n 153)

¹⁸⁶ P Cerqueira Gomes, ‘The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive’ (n 184)

accordance with Article 27 (on the competitive procedure with negotiation).¹⁸⁷ Yet, the Impact Assessment identified the encouragement of iterative rounds of negotiation with suppliers under the Innovation partnership and relates such negotiations to the experience with comparable procedures, specifically identifying competitive dialogue.¹⁸⁸ Article 31 does not cross-reference the competitive negotiation with publication procedure. This could reflect an underlying uncertainty as to how any negotiation or dialogue is to proceed under the innovation partnership. However, in light of the earlier indications in the Draft Proposal and observations below, it may be inferred that the innovation partnership procedure utilizes a form broadly equivalent to the competitive procedure with negotiation.¹⁸⁹

In this regard, Article 31 contains a number of provisions in relation to the conduct of negotiations. Firstly, Article 31 qualifies that the minimum requirements and the award criteria must not be subject to negotiations.¹⁹⁰ Secondly, unless otherwise provided for in Article 31, contracting authorities must negotiate with the tenderers the initial and all subsequent tenders submitted by them to improve their content, except for the final tender.¹⁹¹ In contrast to Article 29(1) concerning the competitive procedure with negotiation, Article 31 does not provide for the possibility for contracting authorities to award contracts on the basis of the initial tenders without negotiation. Thirdly, during the negotiations, contracting authorities must ensure the equal treatment of all tenderers.¹⁹² This requires that contracting authorities must not provide information in a discriminatory manner which may give some tenderers an advantage over others.¹⁹³ Further, contracting authorities must inform all tenderers whose tenders have not been eliminated through the process of negotiation in writing of any changes to the technical specifications or other procurement documents other than those setting out the minimum requirements.¹⁹⁴ Following those changes, contracting authorities must provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.¹⁹⁵ These provisions are broadly equivalent to those under Article 29 on the competitive procedure with negotiation. Fourthly, negotiations may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the specified award criteria in the contract notice, in the invitation to confirm interest or in the procurement documents.¹⁹⁶ The contracting authority must indicate whether it will use that option by specifying such in the contract notice, the invitation to confirm interest or in the procurement documents.¹⁹⁷ Finally, contracting authorities must not reveal to the other participants confidential information

¹⁸⁷ Article 29(3) Draft Proposal (n 153).

¹⁸⁷ Article 29(4) Directive 2014/24/EU.

¹⁸⁸ Impact Assessment (n 108) 61-2.

¹⁸⁹ In support of this view, see P Cerqueira Gomes, 'The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive' (n 51) 210.

¹⁹⁰ Article 31(3) of Directive 2014/24/EU.

¹⁹¹ Article 31(3) of Directive 2014/24/EU.

¹⁹² Article 31(4) Directive 2014/24/EU.

¹⁹³ *Ibid.*

¹⁹⁴ *ibid.*

¹⁹⁵ *ibid.*

¹⁹⁶ Article 31(5) Directive 2014/24/EU.

¹⁹⁷ *ibid.*

communicated by a candidate or tenderer participating in the negotiations without its agreement.¹⁹⁸

To this extent, many of the same of observations identified in Section 4.2 above in relation to the competitive procedure with negotiation are applicable *mutatis mutandis* to negotiation under the innovation partnership procedure.

4.3.6. Award Criteria

Article 31 provides that contracts awarded under the innovation partnership must be awarded on the sole basis of the award criterion of the best price-quality ratio, thus excluding simply the lowest price, in accordance with Article 67.¹⁹⁹ Article 67 provides that the best price-quality ratio must be assessed on the basis of criteria which may comprise *inter alia* quality including “innovative characteristics”.²⁰⁰ Again, whilst providing a measure of flexibility, there is no discernable indication as to how such criteria could be objectively formulated and applied. When considered in light of the discretion afforded to contracting authorities to assess innovation capacity for the purposes of qualitative selection, there exists potential for considerable subjectivity in decision-making across the procurement phases.

4.3.7. Correspondence of the Innovation Partnership to Innovation Objectives

The innovation partnership procedure clearly aims for greater procedural flexibility and which is reflected by the generality of its terms. However this Section has focused on some of the legal and practical issues which may be encountered in setting up and managing such a partnership and which could ultimately result in innovation objectives not being achieved. An identification of the practical issues of implementation augments the case for careful and strategic adjustment of national laws (or, at the very least, national policies) to flesh out the procedural content of Article 31.

Beyond the practical aspects, it could be argued in more general terms that the innovation partnership procedure does not stimulate contracting authorities to act as demanding first customers of innovative solutions. It has been observed that Directive 2014/24/EU is poorly drafted with regard to the subsequent purchase of products and services resulting from R&D.²⁰¹ The procedure does not appear to be limited to the direct purchase of first products or services (i.e. goods and services which have not yet been commercialized and for which the contracting authority is the first customer)²⁰² but also appears to permit

¹⁹⁸ Article 31(4) Directive 2014/24/EU. The Directive’s provisions on confidentiality are contained in Article 21.

¹⁹⁹ Recital 49 and Article 31(1) Directive 2014/24/EU.

²⁰⁰ Article 67(2)(a) Directive 2014/24/EU

²⁰¹ A R Apostol, ‘Pre-commercial procurement in support of innovation: regulatory effectiveness?’ (n 111) 222.

²⁰² *ibid* 219.

contracting authorities to buy developed products or services after such have been commercialized.²⁰³ Consequently, it has been argued that contracting authorities will not be incentivized to act as first customers to pull innovative products or services onto the market in accordance with the objective identified in Recital 49 but may, in fact, create obstacles to competition,²⁰⁴ even to the extent of favouring national based technology suppliers and national industry.²⁰⁵ This Section has also identified the broader State aid implications regarding the potential deferred anti-competitive effects which may be incurred if the results of the innovation partnership procedure are not for exclusive use by the public buyer. Overall, therefore, there are concerns not only about the limitations of the innovation partnership procedure in either locking suppliers in or conferring first mover advantages but also at the end game in relation to who will be permitted to use the results and in what markets, public or private or both. On this view, it has been suggested that contracting authorities are unlikely to apply the procedure in light of the resulting legal uncertainty.²⁰⁶

However, Article 31 does not preclude the terms of any individual innovation partnership from being limited to the purchase of first products and services. Much also depends on the extent of any freedom or restrictions specified under IPR arrangements. In reality, it remains to be seen to what extent innovation partnerships will be used given that they require contracting authorities to commit, at least formally, to buying commercial end-products before knowing whether suppliers can deliver. It is possible that contracting authorities may simply favour well-established suppliers that may be perceived to provide a greater assurance (if not guarantee) of success to the detriment of SMEs and other new market entrants.²⁰⁷ It is beyond the scope of this Chapter to examine claims that innovation partnerships will crowd out mainstream types of R&D investments in Europe.²⁰⁸ Nevertheless, it does raise the broader issue identified in the Chapter on innovation featured in this book,

²⁰³ *ibid* 222.

²⁰⁴ *Ibid*.

²⁰⁵ S Corvers, R Apostol, C Mair and O Pantilimon, Comments on the procurement section in the ongoing DG COMP open consultation on the Draft Union Framework for State aid for Research, Development and Innovation (n 132)

²⁰⁶ *ibid*.

²⁰⁷ S Bedin, HT.618 – Consultation on the draft R&D&I-Framework (n 125)

²⁰⁸ It is claimed that because innovation partnerships use the purchasing of R&D (representing approximately €2.5 billion each year) such partnerships prevent mainstream R&D grants and private R&D investments (representing approximately €200 billion each year). The argument runs that long-term innovation partnerships only permit the companies financing their R&D through that specific procurement contract to sell final end-products to the contracting authority for large scale deployments. By contrast, companies simultaneously pursuing the R&D phase of the innovation partnerships developing solutions through other types of R&D resource (e.g. company financing and R&D grants etc) will be excluded from selling to the contracting authority conducting the innovation partnership. For consideration of this point, see S Corvers, R Apostol, C Mair and O Pantilimon, Comments on the procurement section in the ongoing DG COMP open consultation on the Draft Union Framework for State aid for Research, Development and Innovation (n 132)

namely the extent to which EU public procurement law can be said to cohere within the overarching EU policy framework on R&D and innovation.²⁰⁹

Notwithstanding, it is suggested that there is a need for cautious optimism. As a model, the innovation partnership procedure may not be viable for use by smaller local authorities without the staff and expertise to set up and manage such partnerships. However, there are clear examples across the EU in which large contracting authorities have been prepared to engage in substantial forms of joint and cross-border procurement.²¹⁰ A strategic use of innovation partnerships is, therefore, entirely feasible provided that there is sufficient appetite for, and confidence in, their use. Critical to their use is a need for national legislators and contracting authorities to work within the existing parameters of what is legally certain even if there are aspects of inherent uncertainty. This could be aided by the publication of additional guidance on the innovation partnership procedure,²¹¹ although the authors echo caution expressed in the Impact Assessment, namely that guidance is no real substitute for certainty within the rules themselves. Further, it is quite conceivable that contracting authorities may err on the side of caution and continue to utilise forms of competitive dialogue or competitive negotiation to achieve substantially the same ends on the basis of at least some understanding of the legal parameters of those procedures. Ultimately, contracting authorities will need to be convinced that “value-added” will be realised through the use of this distinct partnership procedure.

5. Conclusions

As indicated in the introduction, Directive 2014/24/EU aims to introduce flexibility and simplification into public procurement in the EU. With regard to procurement procedures, there have been limited changes to the open and restricted procedures, mostly due to an honest desire to reduce the transaction costs and timescales involved. The biggest change introduced to these procedures was the possibility of running the open procedure as a single stage variant which should allow for much shorter procedures. Taking into consideration the long history and tradition of these procedures, these changes appear to constitute reasonable modifications in accord with their intended function and do not purport to radically alter their purpose. However, an important qualification concerns the short timescales under which the restricted procedure can now be used in circumstances of urgency.

Competitive dialogue could have been revised in Directive 2014/24/EU to provide a procedure more in tune with the realities of its use in practice. Other than getting rid of the hardly problematic “particularly complex” test, the Directive has not made radical changes. In

²⁰⁹ See Section 2 of Butler’s Chapter in this book.

²¹⁰ It has been suggested that the innovation partnership procedure seems likely to be of most use to EU Member States with developed public administrations and high innovation profiles such as Denmark, Finland, Germany and Sweden. See P Cerqueira Gomes, ‘The Innovative Innovation Partnerships Under the 2014 Public Procurement Directive’ (n 51) 214.

²¹¹ This view is supported by Gomes (n 51) 216.

fact, in the authors' view, the few changes introduced actually render the procedure less interesting and relevant than before while leaving many operational uncertainties present.

Of greater interest are the two new procedures included in the Directive: the competitive procedure with negotiation and innovation partnership. The competitive procedure with negotiation shares the exact same grounds as the competitive dialogue and most of its internal structure. In fact, other than referring to "negotiations", a cursory reading of Article 29 could leave the distinct impression that one was reading an article prescribing the competitive dialogue procedure! A central contention of the Chapter has been to question the rationale for instituting two similar procedures? This issue is exacerbated when considering the fact that both can also be used to procure innovation, a province of the innovation partnership which does not appear to be exclusive. Again, similar to competitive dialogue, the competitive procedure with negotiation continues to throw up a number of operational uncertainties.

Finally, it is apposite that the innovation partnership should be described as a "novelty". A "novelty" can connote both the positive quality of something being new and original as well as the negative sense of something that is intended to amuse as a result of its unusual design but which soon wears off. The procedure marks a shift from an historical preoccupation of the Directives to separate R&D and resultant purchases which, in turn, necessitate two distinct award procedures. This has been a cause of consternation for many contracting authorities and suppliers keen to ensure that, where practicable, those involved in development can ultimately follow through to deliver the resulting solution without the additional cost and risk involved in straddling two procedural realms. The innovation partnership provides a means of follow through from R&D to subsequent purchases in a single procedure. However, only time will tell whether it represents "value added" for contracting authorities and suppliers over and above the existent competitive dialogue and additional competitive procedure with negotiation. Whilst the objective to stimulate and facilitate innovation is a noble one, this Chapter has highlighted considerable legal and practical uncertainty with regard to the institutional set up of innovation partnerships, not least with regard to target setting and related performance, management in terms of proportionality of cost and duration, IPRs and termination. These discrete issues are also magnified by broader questions regarding the potential for innovation partnerships to act either as closed shops which prevent, restrict or distort competition or give rise to issues of State aid.

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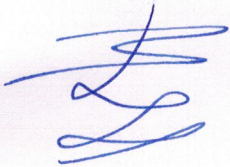
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Subject: Co-authorship of Public Procurement Award Procedures in Directive 2014/24/EU, in Lichere, Caranta and Treumer (eds) Modernising Public Procurement: The New Directive (European Procurement Law Series), Djof 2014

Dear Sirs,

The undersigned hereby confirms that the book chapter Public Procurement Award Procedures in Directive 2014/24/EU was jointly co-authored by both authors. Dr. Pedro Telles drafted the part pertaining to the open procedure, restricted procedure, competitive procedure with negotiation and competitive dialogue while Dr. Luke Butler drafted the section on innovation partnerships. Overall, each co-author contributed with around 50% of the material and was instrumental in revising the half drafted by the other.

Please feel free to contact me on my email with any queries you may have regarding the publication



29/10/15

Luke R A Butler

"Co-authorship of book chapter"

1 message

Luke Butler <Luke.Butler@bristol.ac.uk>
To: Pedro Telles <prtelles@gmail.com>

Fri, Oct 30, 2015 at 10:11 AM

Dear Pedro,

Pursuant to your request for confirmation of our co-authorship of a recent publication, I attach a copy of letter signed confirming our respective contributions.

Best

Luke.

--

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