

*The Influence of EC law on the Procurement Regulation of Member States:
Competitive Dialogue*

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Introduction: Background

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

With the introduction of the EU public procurement directives in the 1970s (with the first directive in 1971) Member States were obliged to abandon their traditions to some extent. However, because the legislation set only minimum standards and allowed supplementary regulation by Member States¹, and because certain contracts were not regulated at all, there was a lot of scope for Member States to implement the directives in a way that matched—rather than ended—their traditions in the field of public procurement. In addition, the flexibility for Member States seemed to be enhanced in practice by the fact that the rules were uncertain. The amount of regulation present on the national level, and the source of that regulation, varied between Member States.

Twice in relatively recent history, in the 1990s and 2004, the European Union has supplied its Member States with detailed new legislative packages on the subject of public procurement law. As new legislation has been adopted, the obligations on Member States have become more detailed and, in many respects, have reduced the flexibility available.² Further, the scope for Member States' discretion has been reduced by i) strict judicial interpretation of the legislation at ECJ level ii) the development of general principles of equal treatment and transparency (first by the ECJ, later written into the legislation), that supplement the written rules and iii) the extension of EC procurement regulation into new areas that were excluded from the directives, in particular as a result of the ECJ's *Telaustria*³ decision, which ruled that all contracts—even those outside the directive—were subject to transparency obligations under the EC Treaty, and the decision in *Commission v. Spain*⁴, in which the ECJ noted that Article 296 of the EC Treaty did not lead to an automatic exemption from the Treaty or the Directives.

January 2006 was the implementation deadline for the most recent set of European directives on the subject of public procurement (2004/17/EC on the utilities sector and 2004/18/EC on the public sector).⁵

¹ Case 31/87, *Gebroeders Beentjes BV v Netherlands* [1988] ECR 4635.

² Sue Arrowsmith, "The Past and Future Evolution of EC Procurement Law: from Framework to Common Code?" (2006) 35 *Public Contracts Law Journal* 337

³ Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria and Herold Business Data AG* [2000] ECR I-10745

⁴ Case C-414/97 *Commission v Spain* [1999] ECR I-5585

⁵ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1 and Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

Many member states have already implemented these new directives; some others are still in the process of codifying the rules in them into national law.⁶

Introduction: Research Questions

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

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

Structure of the Current Article

The current article aims to provide, first of all, an overview of the research project that the author is undertaking; this will include a description of the method and methodology to be used, the case studies and their reasons for inclusion, and finally the sources to be used during the course of the research project. Secondly, in order to move beyond the preliminary stages of research and give an indication of the *types* of conclusions that this research will support, the second part of the article contains a summary of findings on one specific case study (competitive dialogue) in all four subject Member States.

Part 1: The Research Project

Method

The research aims to answer the above research question through a doctrinal legal approach, examining the hard and soft law regulatory responses to EU procurement legislation in three separate EU Member States. A doctrinal approach was selected primarily in light of the research question: namely, this thesis does not aim to evaluate the *effectiveness* of any particular piece of EU legislation, but rather aims to gain insight into the overall changes that have taken place in the formal rules of hard and soft law in national legal systems since the EU has started regulating public procurement, and how Member States have responded to different sources of regulation. A doctrinal approach allows for a concrete analysis of the laws of the countries that will be examined, both from a historical perspective—the starting point of this thesis—leading up to the current *status quo*.

Traditional doctrinal research may not necessarily incorporate soft law into the analysis, but this is crucial in the area of public procurement as the hard law that is issued is only one element of the legal material that the EU has produced in recent years. Case law has always played a major role in the interpretation of that hard law, but in recent years, the European Commission has also started issuing guidance on EU directives and on ECJ rulings that may have an impact on national procurement regimes.

⁶ See, for a summary of various EU Member States' current procurement regimes, Hans-Joachim Priess (ed.), *Getting the Deal Through: Public Procurement 2009*, available online at <http://www.gettingthedealthrough.com> (last accessed 7 August 2009)

In some areas, Commission 'guidance' has in fact led to the adoption of a given perspective by the ECJ, indicating the potential importance of documents containing official opinions of the Commission. Moreover, in the Member States that will be evaluated, legislation is frequently supplemented by official guidance from government departments, which is likely to have similar effects to Commission guidance. However, soft law is not simply considered from the perspective of having an influence on 'hard law' for the purposes of this study; it is considered as a source of law of potentially equal merit on its own for the purpose of assessing the influence that unrelated sources of EU regulation have in national jurisdictions.

Methodology

The research question will be answered by an examination of four Member States of the European Union as 'case studies' of the implementation phenomenon.

The four Member States that will be examined in answering this research question are France, Belgium, the Netherlands and the United Kingdom. These four countries were selected because they provide an interesting mixture of traditions as well as current progress. France has a history of legislating strictly beyond the scope of the Directives, thus necessitating of between EC law and pre-existing national law, and has implemented the 2004 Directives in a timely manner. Belgium has also had a history of strict legislation, but is having difficulties implementing the 2004 Directives, which leads to a set of questions regarding the appropriateness and legality of its 'current' public procurement regulation. The United Kingdom has a tradition of regulating procurement only through a 'soft law' approach to regulation, only implementing as law the exact rules in the directives and dealing with other aspects of procurement policy only through guidance and other soft law approaches. The Netherlands, like the UK, has traditionally only legislated what was necessary according to the directives, but proposals for a new Public Procurement Law had at their base an intention to make it easier to supplement the European directives with national legislation as opposed to guidelines. The Netherlands thus aims to be moving towards a system closer to that of Belgium, and will thus become an interesting comparator in light of the other two countries.

In these three countries, the study will examine implementation from two separate angles.

The first is implementation of the detailed procedures rules in the directives, focusing in particular on the 2004 directives which have not yet been studied from the perspective of the present study. The main focus of the thesis will be on the Public Sector Directive (2004/18/EC).

The study will select for study a number of key areas in which the new directives make important changes or clarifications in the law, probably to include:

- i) the new competitive dialogue procedure (which represents an entirely new procedure and will as such demonstrate how Member States respond to legislation in areas where no previous legislation exists);
- ii) framework agreements (the rules on which regulate possibilities that probably already existed under the old rules, with the aim of providing both legal certainty over their use and precise regulatory controls; this will demonstrate how Member States respond to changes in pre-existing (both national and European) legislation);
- iii) the general and imprecise principles of equal treatment and transparency (which have now been made explicit in the Directives, after earlier ECJ rulings that they were principles that applied to the

Directives; examining these will demonstrate how Member States respond to clarifications and changes to existing European norms that were primarily developed outside of legislation).

This will provide the opportunity to study Member States responses in the present environment to specific new requirements, both in terms of implementing their obligations (for example, the extent of implementation and differences in interpretation) and in terms of the influence of EC norms on areas outside EC regulation, such as below-threshold contracts. Wherever appropriate, an analysis of both hard law and soft law responses to these issues will be conducted.

The second area of regulation that will be examined will be the ECJ's rulings on contracts that fall outside the directive. Specifically, it will be examined how these countries have responded to the ruling in *Telaustria* indicating the existence of previously unacknowledged obligations in the EC Treaty to follow transparency rules in awarding below-threshold contracts, concessions and certain other contracts outside the directives. This recent rulings provide an opportunity, in particular, to compare responses to "regulatory" decisions of the ECJ with those of explicit legislation, and to consider the role of soft law—generally issued by the Commission or by government departments dealing with public procurement—which has been prominent in this area. It also provides an explicit opportunity to study the extent to which the Member States have drawn on rules contained in detailed EC secondary legislation, first, to regulate areas that were previously considered outside EC law and, secondly—since cases such as *Telaustria*—to implement their uncertain obligations in these areas.

A second case that will be examined in this category is *Commission v. Spain*, which is an important decision in the field of defence procurement that has led to uncertainty for contracting authorities. The ECJ in this case concluded that there is no automatic exemption for hard defence equipment in the EC Treaty and, rather, that there is an onus of some degree on Member States invoking said exemption to show that exemption of the contracts was necessary for their security interests. This 'test' of necessity has not been further elaborated on in law—due to a lack of case law—but there has, again, been guidance issued by the Commission on this issue.⁷

Principal Sources

The study is confined to considering implementation through the adoption of national regulatory rules, covering those in legislation, in jurisprudence and in soft law form such as governmental guidance to contracting authorities. The contracting authorities that are considered in this thesis will primarily be central government departments.

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

Part 2: Competitive Dialogue in the Subject Countries

⁷ The potential consequences of the Commission's recent proposal for a Directive dealing exclusively with defence procurement will be addressed in this study only insofar as it appears to have had an impact on Member States; any actual directive (and thus a new source of secondary legislation) is unlikely to enter into force prior to 2010, when this study aims to be completed.

Introduction

The first 'case study' that is examined in this thesis is the competitive dialogue procedure. Competitive dialogue is an interesting case study because it is one of the few *entirely* new additions to the 2004 directives; Member States thus in principal do not have a national tradition in dealing with this procedure, like they may well do with framework agreements. Further, they cannot rely on the ECJ's interpretation of this procedure (as is possible with respect to equal treatment and transparency, which are newly codified but have had a place in case law for a number of years) in implementing legislation or issuing guidance on the use of this procedure, as no cases regarded the procedure have been brought yet.⁸ All that exists on the procedure in terms of clarification from the EC is an Explanatory Note from the Commission which has no binding legal value.⁹

The possibility of a new, more flexible procedure was first mentioned in the Commission's 1996 Green Paper entitled "Exploring the Way Forward"¹⁰, where the Commission observed that industry was not willing to work on its own Private-Public Partnership (PPP)¹¹ infrastructure project (the Trans-European Network, or TEN) if there was no room for technical discussions prior to tendering. The responses the Green Paper received revealed that the standard procedures available under the procurement directives were perceived to be too inflexible to accommodate large and complex contracts in more general terms.¹² The United Kingdom, for instance, used the negotiated procedure with a notice—an 'exceptional' procedure, use of which has to be justified by the technical or financial complexity of a project—for all of its own PPP projects under the Private Finance Initiative (PFI). Examples of PFI projects include hospitals, major new IT system contracts, schools, and infrastructure; a classic example of a PFI project is the *London Underground* contract regarding the maintenance and servicing of the underground.

The Commission, after both comments on its Green Paper and experiences with PPPs through the TENs project, came to realize that the restricted procedure would not be appropriate for complex contracts.¹³ It first alluded to the introduction of more flexible procedures in its *Communication on Public Procurement* from 1998.¹⁴ The first draft of the new procedure was highly criticized, both by academics and involved parties,¹⁵ and it was redrafted twice¹⁶ prior to taking the shape it has in Directive 2004/18/EC.

⁸ This statement is correct the time of writing: August 7 2009; the possibility for future cases being brought to the ECJ regarding the competitive dialogue procedure is not being precluded here.

⁹ European Commission, *Explanatory Note on Competitive Dialogue*, January 2006 (accessed at http://ec.europa.eu/internal_market/publicprocurement/explan-notes_en.htm).

¹⁰ European Commission, *Green Paper on Public Procurement in the European Union: "Exploring the Way Forward"*, 27 November 1996, COM(96) 583, p. 34.

¹¹ As indicated by the name, a PPP is a contract in which the public sector collaborates with the private sector and transfers the risk of a project to the private sector, which has to obtain funding for the project privately.

¹² A. Rubach-Larsen, "Competitive Dialogue" in R. Nielsen and S. Treumer (eds), *The New EU Public Procurement Directives* (Copenhagen: Djøf 2005), p. 67-68.

¹³ European Commission, *Communication of the European Commission to the Council, to the European Parliament, to the Economic and Social Committee and to the Committee of the Regions on Public Private Partnerships in Trans-European Network Projects* COM(97)453, section 2.1

¹⁴ European Commission, *Communication on "Public Procurement in the European Union"*, 11 March 1998, COM(98)143 final, section 2.1.1.1

¹⁵ Rubach-Larsen (see above n. 12), p. 69; for criticism, see S. Arrowsmith, "The European Commission's Proposals for New Directives on Public and Utilities Procurement" (2000) 9 *Public Procurement Law Review* NA125, at 129 as well as R. Boyle,

What, then, is competitive dialogue? In simple terms, it is a procedure that falls between the restricted procedure and the negotiated procedure with a notice. Where it falls between these procedures, however, is more difficult to determine. All the details of the procedure, such as when it is available for use, what can be done during it, what can be done after it, and what are the effects of its existence on ‘surrounding procedures’ are unclear to differing extents.¹⁷

For the purposes of this article, four aspects of competitive dialogue implementation will be addressed. Firstly, as competitive dialogue is one of the Directive’s optional procedures, it needs to be determined if it will be used by Member States *at all*. If so, the next issue relates to how the procedure has been implemented into national law: has it been made available to all contracting authorities, to all values of contract, in all circumstances? Related to this are considerations regarding whether or not any of the legal uncertainties in the directive are clarified or altered in any way in the national legislation; this relates to concepts such as the definition of a complex contract, how much negotiation can take place following the submission of final tenders, etc. Thirdly, an assessment will be made of any soft law promoted by national government, particularly to ascertain how important the Commission’s explanatory note on competitive dialogue is deemed. Lastly, where appropriate, case law on competitive dialogue will be considered.

1. Status of Implementation

Member State	CD above EC Threshold?	CD below EC Threshold?
The United Kingdom¹⁸	Available for ‘particularly complex contracts’.	No specific legislation.
The Netherlands¹⁹	Available for ‘particularly complex contracts’.	For works: generally available; for services/goods: no specific legislation.
Belgium²⁰	Will be available for ‘particularly complex contracts’.	Unknown.
France²¹	Available for ‘particularly complex contracts’.	Available for ‘particularly complex contracts’. ²²

“Critique of Commission’s Proposals for a New Directive on the Co-ordination of Procedures for Public Contracts COM(00)275 final, as updated by the discussions in the Working Group” (2001) 10 *Public Procurement Law Review* NA65, at 66.

¹⁶ European Commission, *Communication* COM(02)236 final and COM(03)583 final.

¹⁷ For general commentary as well as critical perspectives on the competitive dialogue procedure, see Rubach-Larsen, see above n. 12; S. Arrowsmith, *The Law of Public and Utilities Procurement* (2nd ed) (Sweet & Maxwell: London 2005), Chapter 10; S. Treumer, “Competitive Dialogue” (2004) 4 *Public Procurement Law Review* 178; C. Bovis, “The New Public Procurement Regime of the European Union: a critical analysis of policy, law and jurisprudence” (2005) 30(5) *European Law Review* 607.

¹⁸ Implemented the Directive in the Procurement Contracts Regulations 2006, S.I. 2006/5.

¹⁹ Implemented the Directive in the Besluit aanbestedingsregels voor overheidsopdrachten (BAO) (Staatsblad 2005, 408, 16 juli 2005)

²⁰ Not yet in force, but will be implemented through Wet overheidsopdrachten en bepaalde opdrachten voor werken, levering en diensten van 15 juni 2006, (BS 15 februari 2007, 7355).

²¹ Implemented the Directive in CMP 2006 (Décret n° 2006-975 du 1er août 2006 portant code des marchés publics) and Ordonnance n°2005-649 du 6 juin 2005 relative aux marchés passés par certaines personnes publiques ou privées non soumises au code des marchés publics

The above chart is a simplified indication of to what extent the subject Member States have opted to make competitive dialogue available. With the exception of Belgium—where the Directives have as of yet not been properly implemented, but the new 2006 Procurement Law states quite clearly that competitive dialogue will be available for complex contracts—all Member States have opted to make competitive dialogue available subject to the condition that it can only be used for ‘particularly complex contracts’, as defined by the Directive in Article 1(11)(c):

- “where the contracting authority is not “objectively able” to define the technical means that will satisfy their needs with regard to the contract²³
- where the contracting authority is not “objectively” able to specify the legal and/or financial make-up of the given contract”

There are some mild variations of how the concept of a ‘particularly complex contract’ is implemented—some Member States, such as France, are quite explicit about competitive dialogue being available when the *best possible* solution cannot be clearly specified,²⁴ whereas the UK and the Netherlands just indicate that it is available where *no* solution is specified—but overall the wording of the Directive is adhered to rather strictly.

Below the EC thresholds, however, a large amount of variation is found. In the UK, there is no express legislation for below-threshold contracts, meaning that it can be assumed that competitive dialogue is freely available for those contracts, not even subject to the condition that the contract it is used for is particularly complex. Such non-restricted availability below threshold is also the approach explicitly taken by the Netherlands, which has extensive additional legislation in place for works contracts²⁵ that permits the use of the competitive dialogue procedure for all below-threshold works contracts regardless of their complexity. Regarding Belgium, there is no current knowledge as to how the availability of competitive dialogue will interact with national thresholds; but in France, we can observe almost the exact opposite approach as to that taken in the UK and in the Netherlands, as since December 2008, competitive dialogue is only *ever* available—including for contracts below the European thresholds—if the conditions of Article 36 of the CMP are met, which require the existence of a particularly complex contract. Where competitive dialogue in the UK and in the Netherlands can thus be used for a variety of below-threshold contracts, in France the contract in question would *still* have to be ‘particularly complex’ or the procedure will not be available.

In summary, then, it can be observed that above the thresholds, the procedure is made available exactly as the Directive prescribes, with not a single Member States placing additional conditionality on the procedure or limiting which contracting authorities can use it. Below the thresholds, however, it can be suggested that there is a distinct difference between procurement regimes that *tend* to legislate beyond the Directives (such as France) and those that *tend not to*; competitive dialogue is much more freely

²² Recent changes introduced by 2008 amending decrees, in light of the recession.

²³ This definition refers back to Article 23(3)(b), (c), and (d), which indicate what should be contained in technical specifications for contracts.

²⁴ This conforms to the general consensus among academics; for detailed discussions on whether or not competitive dialogue can be used to find ‘best possible’ solutions, see Arrowsmith, *The Law*, see above n. 17; Brown, see above n. 17; Rubach-Larsen, see above n. 12; For the opposing perspective, whereby it cannot be used so freely, see S. Treumer, “The Field of Application of Competitive Dialogue” (2006) 15 *Public Procurement Law Review* 307 and “Competitive Dialogue” (see above n. 17.)

²⁵ In principle binding only on four specific central government departments, but in practice, this same piece of legislation—the ARW 2005—is voluntarily adopted by other central government and local government departments when procuring works, at which point it becomes legally binding and enforceable in the Dutch courts.

available in the latter than in the former, where the restrictions that apply above-threshold also apply below-threshold.

2. National Implementation: Some Specifics

Because the scope of this article does not permit an actual detailed examination of the specific national rules, some general observations will be made here instead.

First of all, linguistic differences aside, not a single Member State examined in this thesis elaborates on the legal uncertainties that are left in the Directive. It was already noted above that the definition of a complex contract is, in most cases, left intact; lingering questions about what it means to ‘be objectively unable’ to set specifications are thus not answered by the legislation. France *does* supplement the Directive’s rules by explicitly stating that competitive dialogue becomes available when the *best* possible solution cannot be clearly specified by the contracting authorities, but this does not address more pertinent issues such as whether or not ‘objective inability’ is a relative concept—so, for instance, objectively, it is much more likely that a local authority engaging with its first large infrastructure project *cannot* set specifications than, say, the Ministry of Transport, where the procurement departments are likely to see huge infrastructure projects all the time. None of the national legislation addresses this issue.

Other legal uncertainties are played around with, but not helped. Near the end of the dialogue process, when tenderers submit their best and final offers, the Directive indicates that these bids can be “clarified, specified and fine-tuned”.²⁶ These same concepts are transplanted into all the national legislation; the UK does not expand on or alter them in any way, but the Netherlands and France have opted to respectively remove one term (specified, in the Netherlands) or add an additional one (complement, in France). None of these terms, however, are clearly defined anywhere and so the initial issues that were criticized in the Directive—how much ‘discussion’ is permitted at this stage?²⁷—are only made more unclear by these minor changes.

A similar point can be made with regards to ‘discussions’ that can be held with the winning bidder; the Directive on this point notes that clarification of aspects of the tender as well as a confirmation of commitments should be possible, but practice with large, complex contracts reveals that various elements of the tender—such as filling in details like the content of rooms in a hospital—are left until the very end. It is thus unclear if the Directive permits the ‘usual’ process of negotiation in large contracts and this would be an area in which national legislation could provide significant clarification—but none of the Member States address it specifically; the French legislation on PPP²⁸ actually doesn’t address discussion with the winning bidder *at all*, but merely notes that post-final-tender, clarifications etc. “as well as” confirmation of commitments can be demanded from any of the tenderers still in the process at this point. This may indicate that in France, no post-win ‘discussion’ is possible at all—if so, this is hardly a solution as the difficulty of determining the scope of a ‘clarification’ is merely moved to an earlier part of the procedure. Alternatively, it may simply be an attempt to group all of the unclear

²⁶ Article 29(6).

²⁷ Arrowsmith, *The Law*, n. 17 above, p. 1288; Brown (see above n. 17), p. see also S. Verschuur, “Competitive Dialogue and the Scope for Discussion after Tenders and Before Selecting the Preferred Bidder—What is Fine-Tuning Etc?” 15 *Public Procurement Law Review* 327, at p. 330-331, who agrees that a more flexible interpretation is appropriate for competitive dialogue.

²⁸ Ordonnance n°2004-559 du 17 juin 2004 sur les contrats de partenariat, Art. 7.

‘clarification’ terms together in one paragraph of the legislation, but this does little to help contracting authorities to determine the scope of their movement at this point.

One interesting subject is that of ‘payments to participants’. This is a subject that is dealt with explicitly in the legislation in France, where it is indicated that payment (for bid preparation costs) may be given to all participants, or to those that participate up to a certain stage in the dialogue, or even only to those who submit the ‘highest ranked’ bids.²⁹ The UK legislation, on the other hand, leaves the Directive’s provision intact, but does not indicate (like the French legislation does) when paying bid costs may be useful; instead, this is an issue left to guidance (see below), which reflects the general UK approach of not amending the EC Directives when implementing them. The Netherlands has implemented similarly, by also copying out the Directive on this issue, despite the fact that since 2001, central government policy has been to *not* pay for bid costs³⁰; the option thus appears to have been retained for lower levels of government, or simply left in place in light of the Netherlands’ only recently-ending tradition of not amending the Directives and instead implementing them by reference.

Although this is a very brief and simplified overview of the legislative implementation of competitive dialogue—and it has to be noted that there is no content here referring to Belgium, as Belgium has not provided detailed rules on the procedure yet—it highlights the most important points: not a single legislator, no matter how detailed or limited the national tradition for regulating public procurement through legislation is in their particular Member State, has opted to significantly expand upon the process of a competitive dialogue beyond what it is stated in the Directive. The reasons for this, however, are likely to be quite different. France, for instance, has used a procedure that is *very similar* to competitive dialogue since 1993; the so-called *procedure de l’appel d’offres sur performances* had similar restrictions on availability and similar limitations on post-submission discussions, meaning that national legislation already reflected the content of the 2004 Directive on competitive dialogue long before it even entered into force and apparently had caused no substantial difficulties for contracting authorities. For the Member States that do not have a history of legislating, however, there appears to be a much stronger trend of a fear to ‘misinterpret’ the Directives and consequently implement them *wrong*; the Dutch legislator, for instance, quite explicitly admitted to implementing by reference in the past out of a fear of not transposing correctly. The UK, finally, more generally opts to keep its national regulation of public procurement as informal as possible; any additions to the Directive’s provisions would only increase formalized regulation, and presumably are therefore avoided.

3. Guidance

The role of guidance can vary greatly; it can offer informal interpretations of the aforementioned legal uncertainties, but can also delve far beyond what the Directives actually require and deal with issue such as contract management and performance/execution, rather than merely contract award. As a general conclusion on the subject of competitive dialogue, guidance is an important part of ‘public procurement law’ in some of the Member State examined; central government websites provide vast libraries on either very general subjects—the run-through of a procurement procedure—or much more specific, small issues—such as competitive dialogue in the context of PPP.

²⁹ CMP 2006, Art. 67.

³⁰ These are described in Dutch as ‘rekenvergoedingen’, which translates loosely to compensation offered for ‘calculations’; it refers to the costs incurred in trying to prepare the financial elements of the bid specifically, which prior to the Parliamentary Enquiry were paid out every 1 in 10 procurements. See Frans Peters, “Onder Een Helm”, *Parool PS*, Wednesday 3 April 2002.

The most guidance was found in the UK and France, respectively; this may seem a counterintuitive conclusion—the country with the most legislation and the least legislation—but it bears repeating that in terms of competitive dialogue exclusively, *neither* country made a significant effort to legislate beyond what the Directive required. As such, similar ‘gaps’ in knowledge are being filled in by guidance. The UK has the most and the most elaborate guidance out of all Member States, with OGC (the central government department in charge of procurement policy) guidance as well as guidance from several other government-affiliated bodies covering the entire procurement process in detail, albeit without expanding upon clarification of difficult legal concepts beyond noting what absolutely *cannot* be done at certain stages of the process.³¹ Interesting in particular is how the OGC guidance refers back to the Commission’s explanatory note wherever possible, thus creating an interesting mixture and a potential hierarchy in terms of which soft law principles take precedence (the EC’s ‘guidance’ coming first, in this case). The OGC guidance also makes it clear that while the legislation in the UK permits the payment of bid costs, this is *not* to become standard practice; the fact that this is stated in guidance rather than in law indicates just how important guidance on public procurement *is* in the United Kingdom.

The French government has produced fewer guidance materials that contain detailed walkthroughs, but has produced a *Charter* of principles relating to competitive dialogue that outlines the key ‘good practice’ elements as well as legal requirements that need to be adhered to when using competitive dialogue in the context of PPP. The French government has also provided some more specific guidance on smaller issues, such as how to treat consortia during a dialogue procedure if membership changes and how to deal with the unlikely occurrence that negotiations with the winning bidder fail.³² The French Ministry of Economics website also refers back to the Commission’s Explanatory Note, but does not highlight it in any particular way.

Belgium does not have specific guidance on competitive dialogue as of yet; more surprising, however, is the fact that the Netherlands does not. Like all government websites dealing with procurement, they link back very explicitly to the Commission’s Explanatory Note, but have not as of yet produced specific guidance relating to competitive dialogue. This leads to the mistaken conclusion that the legislation in the Netherlands is clear and complete enough, and as noted above, this cannot be true if there are reasons to provide guidance in other Member States, since the implementation in legislation in all of these countries is very similar.

It is thus rather difficult to link the role of guidance back to the amount and type of legislation available within a Member State when it comes to competitive dialogue; obviously, in the UK and in France there is more emphasis on guidance through the process of a competitive dialogue, particularly in the context of PPP contracts, which appears to bear no relation to the fact that France *generally* legislates far more than the UK does in the field of public procurement. The Netherlands, on the other hand, has a tradition of not providing excessive government guidance—which is only recently starting to change, with a dedicated network set up by the Ministry of Economic Affairs to deal with procurement issues³³—and does not appear to make an exception for competitive dialogue, but instead refers contracting authorities to the Commission’s own guidance in case of queries.

4. Case Law

³¹ OGC & HM Treasury, “Competitive Dialogue in 2008”, available at http://www.ogc.gov.uk/documents/OGC_HMT_2008_Guidance_on_Competitive_Dialogue.pdf (last accessed 7 August 2009)

³² See <http://www.ppp.bercy.gouv.fr/>, under the section “Des Outils pour vous Aider” and then “Dialogue Competitif” (last accessed 7 August 2009).

³³ See <http://www.pianoo.nl> (last accessed 7 August 2009)

Given that competitive dialogue is a long process, there hasn't been much scope for legal proceedings in most Member States, where the procedure was only available from 2006 onwards. There is thus no case law in the Netherlands or the UK, which are both countries in which generally there tends to be either limited or (in the case of the UK) very limited case law on public procurement.

France, on the other hand, has seen several cases dealing specifically with competitive dialogue already; as an example, one of these³⁴ has dealt with the interesting issue of not obtaining enough (at least 3) *responses* to an invitation to participate in the dialogue process, and whether or not the procedure could continue at that stage. The Administrative Tribunal in question concluded that as the contracting authority had behaved in line with the French law (and the Directive) on competitive dialogue by inviting at least 3 parties, there was nothing preventing the procedure from going ahead with only 2 participants. The other case more specifically discussed the interplay of award criteria—which are meant to stay the same throughout the procedure, from what was announced in the contract advertisement—and the solution-building process that is the dialogue itself; the Conseil d'Etat here concluded that as long as the criteria themselves and the weightings remained as stated, nothing prevented a contracting authority from applying the stated award criteria a particular way geared towards the discussed solutions.³⁵ These two cases are merely examples, but obviously indicative of the fact that some of the issues left vague by the Directives will, in all likelihood, be clarified in the French administrative courts; this is to be expected simply because of the amount of case law that the French administrative courts see regarding public procurement in general.

5. Conclusions

In general, competitive dialogue—in all countries other than France—can be perceived as a 'new' procedure and its implementation in Member States reflects this: they have adopted the definitions set at the EU level to the letter and without adding any additional national legislative requirements for all EU-covered contracts. In those countries that traditionally did not legislate below-threshold, the procedure is left freely available and is regulated much less explicitly than it is above-threshold; in France, on the other hand, the same rules apply for all contracts regardless of their value, creating a harmonious if not perhaps suitable regime (as dialogue-based procedures *ought* to be more easily available for lower-value contracts; thus also why the Directives don't prescribe rules below certain monetary thresholds).

The role of guidance and case law thus looks to be potentially important in all Member States, but the ease with which this has been recognized varies greatly among the Member States examined here. The French and Dutch governments have embraced the idea of providing guidance, whereas the Dutch government has not, even though competitive dialogue is complex and there is no national experience with it. One commonality is the reliance on the Commission's explanatory note, which indicates that the Commission's own interpretation of the procedure weighs heavily—in the Netherlands, to the point where no additional guidance has been supplied, even. It can be assumed that with greater experience and more practice, the amount and quality of the guidance will be elaborated on in all of these countries.

³⁴ Tribunal administratif de Versailles, ordonnance, 22 janvier 2008 - Société Heli Union, req n° 0800043

³⁵ Conseil d'Etat, 7ème et 2ème sous-sections réunies, du 29 octobre 2004, 269814, publié au recueil Lebon

Regarding case law, it is much more likely that potential legal problems in the legislative provisions regarding competitive dialogue will be ironed out in France (and Belgium, when the Belgian legislation is finally updated) than in the UK and in the Netherlands; in the Netherlands, because competitive dialogue isn't being used much—by 2008 only 8 procedures had been started—and in the UK because there is just very little case law on public procurement in the first place. For these countries, then, additional legislation or improved guidance may prove to be rather crucial in trying to properly make competitive dialogue suitable for the (national) procurement process in practice.