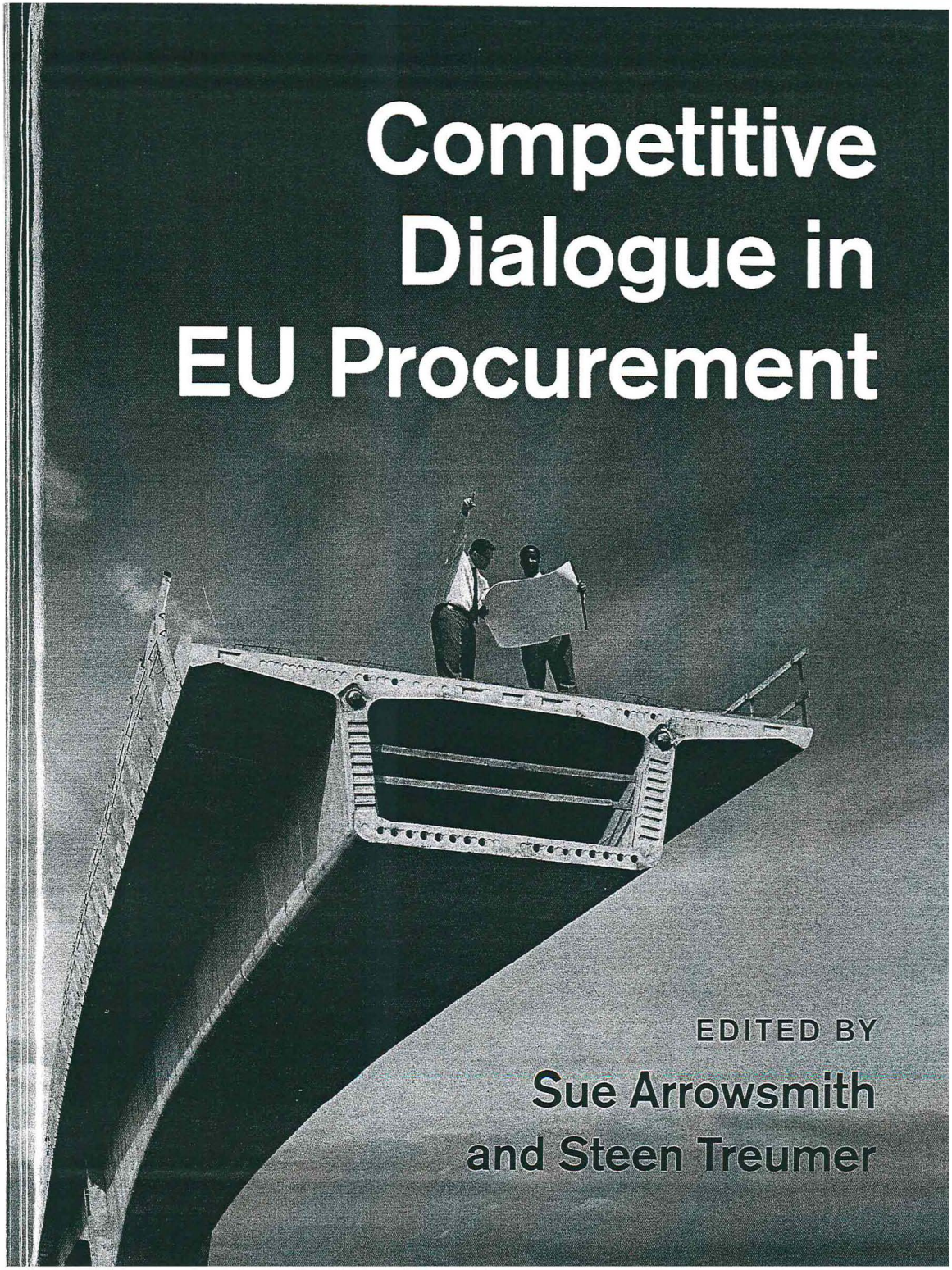
Competitive Dialogue in EU Procurement



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CONTENTS

FIGURES

11

Competitive dialogue in Italy

GABRIELLA M. RACCA AND DARIO CASALINI*

1. Introduction: regulation of public procurement in Italy

Italy has a long-standing tradition of legislation on public procurement. The first Italian legislation on award procedures for work contracts dates back to the very birth of the Italian state in 1865 and was among the first statutes issued after the creation of Italy as a national state.[1] Later, the legislation on public accountancy of 1923 regulated supplies and works procurement by imposing on public authorities a general duty of competitive tendering.[2] Such domestic legislation on public contracts pursued the goal of value for money in public expenditure and was therefore drafted from the point of view of contracting authorities that must comply with the principles of efficiency and effectiveness (Article 97 of the Italian Constitution). This approach was then merged with the European Union perspective of protection of fair competition among market operators aspiring to enter into contractual relationships with public authorities. The objective choice of the best contractor meets both the need for value for money expressed by contracting authorities and the economic operators' right to fair competition, thus contributing to the continuous improvement of the European market and quality of life.[3]

This historical legal background explains why, since the first generation of EU Directives on public procurement, Italian law has implemented the EU Directives far beyond their scope. The EU Directives on

* Sections 2, 3 and 5.1 to 5.7 were written by Gabriella M. Racca; all the other sections were written by Dario Casalini.

[1] Law No. 2248 of 20 March 1865, Annex F, Law on Public Works.

[2] RD No. 2440 of 18 November 1923; A. Massera and M. Simoncini, 'Basics of Public Contracts in Italy', *Ius Publicum Network Review – Report* (2011), available at www.ius-publicum.com.

[3] The rules of public contracts were originally imposed in order to ensure the ethics of the public administration: G. M. Racca, *La responsabilità precontrattuale della pubblica amministrazione tra autonomia e correttezza* (Naples: Jovene, 2000).

public procurements have always been implemented through statute law and further amended in compliance with the next generation of EU law. European provisions are usually transposed literally with the same wording, mainly as regards principles and definitions, the rationale being to avoid setting corresponding domestic concepts that might turn out to be misleading. In addition to these literal transpositions, the Italian legislator drafts very detailed rules to limit contracting authorities' discretion in undertaking procurement.

EU Directives 2004/17 and 2004/18 have been implemented in Italy by means of Legislative Decree No. 163 of 13 April 2006 (Public Contracts Code, hereinafter PCC) and its executive regulation DPR No. 207 of 5 October 2010, which together form a body of legislation of more than 600 sections. The executive regulation entered into force only very recently, on 8 June 2011. The PCC and its executive regulation deal with the award as well as the execution of the contract. In principle, contract performance is governed by the ordinary rules (private law) applicable to contractual relationships, as defined in the Italian Civil Code. Nonetheless, many rules departing from private law (as set out in the Italian Civil Code) govern contract performance – for example, concerning subcontracting, variants, payment mechanisms, and intermediate and final inspections – as these are compulsory legal provisions that cannot be derogated from by either party. Any failure by economic operators during the performance phase may also involve a breach of rules on competition since the contract performed may not correspond with the one awarded under the rules on competition in awarding contracts.[4]

The Italian Republic 'recognises and promotes local autonomies' (Article 5 of the Italian Constitution) and, in addition to the state, 'is composed of the Municipalities, the Provinces, the Metropolitan Cities [and] the Regions' which are 'autonomous entities having their own statutes, powers and functions' (Article 114 of the Constitution). The state has exclusive legislative competence on competition rules and, consequently, on public contracts.[5] At various times, the regions have filed claims before the Constitutional Court to assert their competence

[4] R. Cavallo Perin, G. M. Racca and G. L. Albano, 'The Safeguard of Competition in the Execution Phase of Public Procurement', *Quaderni Consip*, VI (2010), www.consip.it; G. M. Racca, 'Collaborative Procurement and Contract Performance in the Italian Healthcare Sector: Illustration of a Common Problem in European Procurement' (2010) 19 *Public Procurement Law Review* 119.

[5] Art. 117, § 2, lett. e, l, m and s, of the Italian Constitution.

on matters concerning public contracts, namely, contracts below EU thresholds (Const. Court No. 401/2007), specification of requirements on in-house provision (Const. Court No. 439/08), definition of awarding procedures and regulation of contract performance (Const. Court No. 411/08), extension of public contracts (Const. Court No. 320/08), design and planning (Const. Court No. 221/2010) and exclusion of abnormally low tenders (Const. Court No. 160/2009). However, the Constitutional Court has denied regional competence on such matters on the basis that they all relate to competition issues and has left to the regions only a limited discretion in the choice of the composition and functions of the jury and on the effects of work contracts over city planning (Const. Court No. 401/07). This discretion must be exercised in compliance with EU and national principles. In addition, local authorities (municipalities, provinces, and metropolitan cities) are accustomed to issuing regulations concerning award procedures for public contracts below the thresholds of the EU Directives.

Taking account of local authorities and other public bodies covered by EU rules on public procurement, in Italy there are several thousand contracting authorities, each procuring without any supervision other than judicial review and the application of the regulatory provisions laid down by an independent national authority, as described further below.

As regards the former, judicial review of public contract award procedures falls within the jurisdiction of administrative courts (Regional Administrative Tribunals (TAR) and the Consiglio di Stato as court of appeal). Jurisdiction over public contracts litigation has been historically divided between the administrative courts, for disputes concerning the award procedure, and the ordinary courts (tribunals, court of appeal, Cassazione), for disputes regarding contract performance once the contract commences. After the implementation of Directive 2007/66 amending the EU rules on remedies for contracts governed by the procurement Directives, the administrative courts can declare the award void and the contract ineffective,[6] whereas the ordinary courts maintain the competence over disputes arising during the performance phase,[7] except for the application of special public law rules in this phase (such

[6] Art. 133, Administrative Trial Code; Cass., ord. 5 March 2010, No. 5291; Cass., S. U., ord. 10 February 2010, No. 2906; Cons. Stato, V, 15 June 2010, No. 3759.

[7] Cons. Stato, VI, 26 May 2010, No. 3347; Cons. Stato, V, 1 April 2010, No. 1885; Cass., S. U., 11 January 2011, No. 391.

as special public law rules on sub-contracting).[8] Whenever ineffectiveness is deemed to be inappropriate, the administrative courts may impose on contracting authorities the alternative penalties of fines and contract shortening.

Litigation in Italy has dramatically increased in the last decade, with several thousand legal actions on public procurement being brought each year before the administrative courts.[9] The courts have been playing a significant role in developing public procurement law and strengthening and standardising its enforcement. However, the need to reduce the growth in litigation, caused mainly by a lack of relevant professional skills within contracting authorities and consequently a lack of trust in their procuring activities, led the Italian government to add a new disposition to the PCC to penalise 'rash lawsuits' in 2011. Whenever 'the judicial decision is based on obvious reasons or well-established case law' Italian judges can now condemn the losing party (either the contracting authority or the contractor, but normally the latter as a reckless plaintiff) to pay a fine, the amount of which is between two and three times the court fees.[10]

In addition to judicial review, Italian law envisages the institution of the Italian Authority for the Control over Public Contracts (Autorità di vigilanza sui contratti pubblici). This has the task of monitoring both the award and the execution of public contracts. The Authority's activities are funded by the state, the awarding authorities and, partly, by bidders.[11] Every bidder has to pay a fee to participate in an award procedure: the payment of the fee is a mandatory requirement of the procedure, which will be set aside for non-compliance.[12] The Authority submits proposals to the government for legislative amendments to the

[8] Cons. Stato, IV, 24 March 2010, No. 1713.

[9] There were an average of 3,000–4,000 legal actions every year, amounting to 4 per cent of the overall number of award procedures: M. Lipari, 'Le cause e la casistica del contenzioso amministrativo', speech at the conference 'Gare pubbliche ed efficiente gestione delle risorse' held at LUISS, Rome, on 8 February 2011.

[10] Art. 246-bis, PCC, added by Art. 4, Law Decree No. 70 of 13 May 2011, which became Law of 12 July 2011, No. 106.

[11] G. M. Racca, 'Public Contracts', *Ius Publicum Network Review – Report* (2011).

[12] Arts. 6 and 8, PCC; Art. 1, § 67, Law No. 266 of 2005, provides that the Italian Authority for the Control over Public Contracts, in order to cover the costs of their activity, defines annually the amount of the fees to be paid by the public and private entities subject to its supervision, as well as the method of collection (for the amount of the fee, see the Resolution of the Italian Authority for the Control over Public Contracts of 15 February 2010).

PCC and gives opinions on the correct interpretation and implementation of the PCC. It also prepares an annual report for the Parliament on the award and execution of public contracts. The Authority enjoys powers of inspection and of imposing pecuniary sanctions against economic operators who are found liable for making false declarations of their own qualification requirements. The Authority may also impose fines on contracting authorities and economic operators that refuse to disclose information or provide false information. Besides these pecuniary sanctions, the Authority has the power to suspend from public contracts for a period of one to twelve months any economic operator found liable for making false declarations.[13]

2. The background: complex procurement prior to competitive dialogue

The competitive dialogue procedure in Directive 2004/18 overlaps with other award procedures specifically envisaged by the Italian national legislation for those cases in which the contracting authority is not able to define the most suitable work or service to meet its needs or has to resort to financial arrangements involving private capital. These other specific award procedures are relevant for complex contracts, raising the question of their relationship with and their distinction from competitive dialogue.

The need for a contracting authority to award a single contract with different subject-matter (design, execution, management, exploitation of works) through a special procedure was met in Italy by the so-called *appalto concorso*.[14] The use of such a procedure was a long and not always satisfactory experience which allowed the public administration (and particularly a jury of politicians and non-experts in the field) to

[13] Art. 6, § 11, and Art. 48, PCC.

[14] The expression *appalto concorso* appears for the first time in a Ministerial circular (No. 586 of 21 May 1917) and was then regulated by Art. 3, d.lgt. 6 February 1919, No. 107, and then by Royal Decree of 8 February 1923, No. 422. According to the legislation implementing Directive 93/37, this procedure was allowed only in special circumstances briefly defined by the Law (Art. 17, §§ 1 and 5, and Art. 20, § 3, Law of 11 February 1994, No. 109: i.e. particularly complex works which imply the choice between different technical solutions and whose amount is above €25 million). The entry into force of the new government regulation implementing PCC repealed the *appalto concorso* from 8 June 2011 (Art. 253, § 1-quinquies, PCC).

award contracts with a wide discretion, hence choosing a successful tenderer without a genuine competition.

In the past, the Italian *appalto concorso* allowed contracting authorities to express basic needs to be fulfilled and implemented by economic operators. The subject-matter of the *appalto concorso* included both what now in Italy is the object of an 'ideas contest' (*concorso di idee*) and the object of a design contest (preliminary, final and executive plans), along with the execution of the works. At times, it included facilities management services or the exploitation of the work in the same procurement award procedure.

In order to comply with Directive 93/37 on public works (one of the predecessors to the current Public Sector Directive 2004/18), the Italian procedure of *appalto concorso* was turned into an open or restricted procedure with prior publication of the contract notice in the sense of the EU procurement Directives. However, often it was also used to award works concessions[15] which, as Chapter 1 explained, are subject only to very limited obligations under the Directives. In other words, contracts awarded by this procedure could be structured either as a 'public works contract', whose subject-matter could be both the design and execution of works, or a 'public works concession', whose subject-matter was both the design and the execution of works and whose consideration consisted either solely in the right to exploit the construction or in this right together with payment.[16] A precondition for using this procedure was the complexity of the subject-matter and uncertainty over the technical solutions and specifications to be adopted.

However, linking three different subject elements (design services, execution of works, and facilities management services) in one award procedure made it difficult to guarantee a genuine overall competition for each element of the subject-matter. Effectively, the contract for the execution element was being awarded on the basis of limited planning and only a generic definition of the needs of the procuring entity (with the details being developed under the contract itself), and it appears that this does not comply with the requirements of the EU Directives. A further problem with the procedure was that – as just noted above – the juries were traditionally composed of politicians and not of persons having technical and professional skills related to the subject-matter of

[15] In accordance with Law No. 109 of 1994, Art. 20, §§ 1–3, now repealed.

[16] Law No. 109 of 1994, Art. 20, § 4, and now Art. 53, § 2, lett. b, PCC, and Arts. 105–116, DPR No. 207/2010, where it is provided that the contracting authority must define at least the final plan of the works.

the contract.[17] These factors undermined a correct and objective evaluation of the economic operators' proposals, and contributed to the decision to repeal it.

Overall, this procedure did not guarantee transparency and raised several issues relating to legality and fairness, due to the misuse of the wide discretion the procedure entails, as is apparent from the extensive case law.[18] After an initial period when a total separation between services procurement for planning (the ideas contest, and the design contest) and works procurement (execution) was compulsory, a new procedure similar to the *appalto concorso* was introduced by the PCC in 2006. This was labelled the *appalto integrato*.

The *appalto integrato* seems to comply better with the EU Directives as it involves an award on the basis of preliminary and final plans, and not only on the basis of limited planning and a generic definition of the needs of the procuring entity, as we have seen with the *appalto concorso*. The subject-matter of the *appalto integrato* is the drafting of the executive plan, along with the execution of public works, and it has been defined on the basis of the EU Directive's rule that assumes the possibility of awarding the design and execution of work either separately or jointly.[19] The needs previously met by the *appalto concorso* are now being pursued either through an *appalto integrato*, or through a public works concession procedure in the sense of the Directive if the right to exploit the work instead of receiving all or part of the payment is included in the contract documents.[20]

Besides using the *appalto integrato*, whenever a contracting authority is not able to define the design of a work to be performed, it can choose among specific procedures laid down by the PCC for that purpose, regardless of the threshold of the contract,[21] namely (i) the ideas contest and (ii) the design contest.

[17] Const. Court No. 453/1990 required the majority of the members of the jury to be experts in the subject-matter of the competitive tendering.

[18] Among the more than 1,000 decisions on the *appalto-concorso* procedures, see Cons. Stato, V, 10 September 2009, No. 5433; Cons. Stato, V, 21 January 2009, No. 282; Cons. Stato, V, 7 January 2009, No. 17; and Cons. Stato, IV, 26 May 2006, No. 3190. Currently, according to the PCC, public works can be performed only by means of public works procurements (including *appalto integrato*) or public works concessions: see Art. 53 PCC, implementing recital 9 of Directive 2004/18, while public works concession is defined under Art. 1(3) of Directive 2004/18.

[19] Art. 1(1)(b) of Directive 2004/18.

[20] Public works concession as defined by Art. 143 PCC.

[21] A similar procedure is found in French law, under which the so-called *marchés de definition* should apply whenever 'the public entity is unable to specify the aims and performances which the contract must meet, the techniques to be used, and the human and material resources required. The purpose of such contracts is to explore the possibilities and conditions for establishing a contract subsequently, if necessary through production of a model or demonstrator. They must also enable the price level of the provisions to be estimated and calculated, as well as the different phases of the performance schedule' (Art. 73 of the French Public Procurement Code, issued by Decree of 1 August 2006, No. 2006-975). See Case C-299/08, *Commission* v. *France* [2009] ECR I-11587.

The ideas contest (*concorso di idee*) is a services procurement, and its subject-matter is broad and imprecise since it was created in the PCC in order to provide contracting authorities with outlines of ideas which are less specific and detailed than those in a preliminary plan.[22] Furthermore, unlike the design contest, the subject-matter of the ideas contest is not limited to planning for works but may take place also for planning services and supply contracts. The best idea is purchased by the contracting authority from the economic operator in return for a prize or reward (not considered as compensation). The idea will then become the subject-matter for a design contest or a tendering procedure for design and execution. Alternatively, but only for public works contracts, the PCC allows the contracting authority to provide expressly in the contract notice the possibility of entrusting the winner of the ideas contest, if appropriate, with the task of completing the further steps of the design (preliminary, final and executive plans) by means of a negotiated procedure without publication of a contract notice.[23] This is done following the provision under Article 31(3) of Directive 2004/18[24] as implemented by the PCC, Article 57, § 4, which allows use of this negotiated procedure for negotiating the design contract when this has been provided for in the rules of an initial design contest held under the Directive's rules. It is important to note that, in accordance with what is allowed under the Directive, this procedure covers only the design element – it does not allow the award of a contract under the negotiated procedure without a notice for the *execution* of the project.

The design contest (*concorso di progettazione*) is used by contracting authorities to purchase the preliminary plan, which is the first level of design of works, amongst the three levels (preliminary, final and executive) of design defined by Italian law. This level comprises production of

[22] Art. 108 PCC.

[23] Art. 108, § 6, PCC.

[24] Art. 31(3) of Directive 2004/18 states that, 'when the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates, in the latter case, all successful candidates must be invited to participate in the negotiations'.

a preliminary plan that covers the definition of the qualitative and functional characteristics of the works, the general framework of the needs and requirements to be met, and a report supporting the proposed solution, along with an outline of the dimensional, volumetric, functional and technological characteristics of the work to be performed.[25] The contracting authority enters into a service contract by means of the design contest. The object of the contract is the preliminary project. This must be further specified and detailed in the final plan and then in the executive plan. Whenever the contracting authority is not able to provide within its own organisation the two further stages of planning, a new procurement procedure must be issued for this purpose. Its subject-matter will be the design (development of the preliminary plan into final and executive plans) and construction (works execution).[26]

It is worth noting that the PCC expressly forbids economic operators who took part in the works planning phase or procedure to bid in the award procedure for the execution of these works. According to the case law of the Italian administrative courts, this rule is a specific instance of the general principle of equal treatment. This precludes the planner and its subsidiaries from being contractor, sub-contractor or concessionaire of the same works.[27]

The availability of these alternative traditional procedures was cited as the reason for a decision by the Italian legislator to suspend the use of competitive dialogue for contracts covered by Directive 2004/18 until June 2011, as described below. It is worth noting that the repeal of *appalto concorso* was linked to the entry into force of the new government regulation and the possibility to use competitive dialogue.[28] However, as we will see in section 4 below, competitive dialogue may improve transparency and guarantee advantages over these approaches that may lead to its use in practice in the future.

3. Introduction to competitive dialogue

As we have seen in Chapter 1, competitive dialogue is an optional award procedure under Directive 2004/18. Italy decided to implement

[25] Art. 93 PCC.
[26] Art. 109 PCC allows for a two-stage contest whose subject-matters are respectively the preliminary and the final projects.
[27] See Cons. Stato, IV, 3 May 2011, No. 2650.
[28] See Art. 253, §§ 1-quater, 1-quinquies and 3, PCC.

competitive dialogue in its Public Contracts Code.[29] However, the application of this procedure for contracts covered by Directive 2004/18 was postponed until the entry into force of the government regulation enforcing the code of 8 June 2011,[30] meaning that the possibility for using the procedure in Italy had only just come into force at the time of completing this chapter. This decision to postpone the implementation of the procedure arose out of the fact that competitive dialogue is an entirely new procedure whose implementation in Italy raised concerns over the risks of its abuse by contracting authorities – given the wide discretion it entails by the standards of Italy – and because of the consequent high risk of litigation. Thus, after implementing it, Italy suspended its application. This was done contrary to the opinion of the supreme administrative court (Consiglio di Stato), according to which the competitive dialogue is a self-executing provision of Directive 2004/18 whose enforcement in Italy does not need further regulation to be issued.[31] The provisions concerning competitive dialogue set out in the government regulation (DPR No. 207/2010) specify the suitability requirements, the essential content of the contract notice and the minimum requirements of the bid (feasibility study and plans), and provide that contracting authorities acquire the property of the preliminary plan by paying any prizes or awards to the winner.[32]

Besides the introduction of competitive dialogue for contracts covered by the Directive, since 2006, when the PCC implemented the new public procurement Directives, a kind of competitive dialogue procedure – an informal award procedure that was labelled as 'competitive dialogue' in national law – has been applied in Italy as an instrument to award public contracts that do not fall within the scope of the Directive or its full rules, such as concessions and other forms of privately financed arrangements and public–private partnerships (see below).[33] As Chapter 1 explained, these arrangements fall within the scope of EU principles only rather than the EU Directives on public contracts and, in default of detailed rules concerning the relevant awarding procedures, public authorities enjoy a wide discretion in shaping the procedure, including

[29] Art. 58 PCC. For the most recent overview on the topic, see S. Vinti, 'L'evidenza pubblica', in C. Franchini (ed.), *I contratti con la pubblica amministrazione*, vol. I (Turin: Utet, 2007), pp. 329–36; R. Invernizzi, 'Il dialogo competitivo e il dialogo tecnico', in M. A. Sandulli, R. De Nictolis and R. Garofoli (eds.), *Trattato sui contratti pubblici*, vol. III (Milan: Giuffrè, 2008), pp. 1905–40.
[30] Art. 253, § 1-quater, PCC.
[31] Cons. Stato, ad. gen., 6 June 2007, No. 1750, § 5.6.
[32] Arts. 113–114 DPR No. 207/2010.
[33] See section 4 below.

the possibility of using a procedure akin to competitive dialogue. Because of the suspension of competitive dialogue for contracts covered by the Directive, and its use only for those contracts outside the Directive, there has been only limited use of the procedure so far. In this respect, Tenders Electronic Daily (TED) reported thirty-four competitive dialogue procedures in Italy between 2006 and 2010: one in 2006; two in 2007; four in 2008; nine in 2009; and eighteen in 2010. Of these, nine were public works contracts, eighteen services contract and seven supply contracts.

By means of competitive dialogue, the procuring entity asks economic operators to co-operate in defining solutions that normally represent the starting point of a procedure and are expressed in the contract notice. In some way it seems that the public administration must justify its inability to make the typical discretionary choice between several lawful and valid solutions. It is unable to define the technical, legal or financial means best suited to satisfying its needs, to identify the alternative solutions and to be sure to choose the best one to serve the public interest. Italian law requires a specific statement of justification to be given concerning the complexity of the contract in order to justify the adoption of competitive dialogue.[34] The strong emphasis on 'complexity' suggests that such a statement of justification will comply with Italian law only if the prior conclusion of a previous and separate procurement of services – such as a completion of a study or an ideas contest[35] – would be unproductive,[36] since it is objectively impossible for the procuring entity even to define its needs and the specifications of a project. The Italian provisions specify this inability with some examples of complexity linked to historic-artistic, architectural and environmental aspects.[37]

[34] Art. 58, § 3, PCC.

[35] Whose subject-matter defines the needs and objectives to be finalised in a project and its execution: Art. 108 PCC.

[36] Art. 58, § 2, PCC provides that a contract can be considered 'particularly complex' when the contracting authority 'does not have, due to objective factors not depending on it, studies on the identification and quantification of their own needs or the detection of instrumental means to the satisfaction of those needs, functional, technical, managerial and financial-economic analysis and the same state of fact and of law of any intervention in its historical and possible components of art, architecture, landscape, and the components of sustainability environmental, socio-economic, administrative and technical matters'. Thus it seems to recall the European Commission's *Explanatory Note – Competitive Dialogue – Classic Directive* (2005), available at http://simap.eu.int.

[37] Art. 58, § 2, PCC: see section 4 below.

The competitive dialogue has been implemented in Italian law in compliance with the general approach to implementation of Directive 2004/18 in Italy. Thus it has been implemented largely by literal translation of the EU provisions, with a few details added, mainly to reduce its potential coverage (as explained in section 4 below). Further provisions in the PCC (Article 58) and the related regulation (Articles 113–114) also add some further provisions to the EU rules. They define the concept of legal or financial complexity of the subject-matter of the contract, set out the mandatory content of the descriptive document and the invitation to tender, provide for a feasibility study to be attached to every offer in the first phase of dialogue, and state that the final offer must contain the preliminary plan, while the successful bidder will draft the final and executive plans and execute the work.

Italy does not have a tradition of 'soft law' instruments. As far as the competitive dialogue procedure is concerned, there are no government guidelines. However, the Authority for the Control over Public Contracts in its annual report to the Parliament of 2007 provided a comparative overview on its implementation of competitive dialogue across EU Member States and some information about its rationale and correct use, frequently referring to the guidance from the Office of Government Commerce (OGC) in the UK.[38]

Because of the suspension of the application of competitive dialogue in Italy until June 2011 there is no relevant case law so far. Nevertheless, many judicial decisions concerning traditional issues in carrying out restricted and negotiated procedures seem relevant to highlight and analyse the main practical difficulties that competitive dialogue will probably bring about in Italy.

4. Scope of the competitive dialogue procedure in law and practice

Competitive dialogue is regarded by law and by scholars in Italy as an exceptional procedure for particularly complex contracts. According to the PCC, the public administration must clearly justify its inability to define the technical means needed to identify the most suitable solutions to meet its initial requirements, and to determine which of several

[38] Italian Authority for the Supervision of Public Contracts for Works, Services and Supplies, Annual Report 2007 (9 July 2008), § 8.1; on the OGC guidance, see generally Ch. 3 above.

possible solutions would best satisfy the public interest: thus 'the provision whereby the contracting authority decides to use the competitive dialogue must expressly point out the specific reasons' suitable for justifying its application,[39] sometimes even requiring the approval of the Superior Council of public works or of the Supreme Council of cultural heritage (see below).

In order to prevent abuse of the competitive dialogue procedure, the Italian national implementation also further specifies the type of reasons that must underlie the inability to identify the best solution, and also provides that they must not be attributable to the contracting authority itself and must be expressly stated in advance.

In this respect, along with stating expressly in the legislation the two situations defined by EU law for the existence of a particularly complex contract (contracting authorities are 'not objectively able to define the technical means capable of satisfying their needs or objectives' or are 'not objectively able to specify the legal and/or financial make-up of a project'), Italian law specifies that 'the contract may be regarded as particularly complex when the contracting authority, due to objective factors not attributable to it, has no data available':

(i) 'on the identification and quantification of its needs'; or
(ii) 'on the identification of the instrumental means capable of satisfying its needs', thus including a lack of knowledge: (a) of the 'functional, technical, managerial and economic-financial characteristics' of these means, (b) of 'the analysis of the actual condition and legal status of each intervention, regarding how its historical, artistic, architectural, or landscape aspects' are affected; and (c) of the 'sustainability, socio-economic, administrative and technical elements' of the project.[40]

The absence of case law on competitive dialogue in Italy means that there is no settled interpretation on whether the assessment of the impossibility of identifying the instrumental means capable of satisfying the contracting authority's needs requires conditions (a), (b) and (c) alternatively or cumulatively, and whether a lack of data concerning only one of the several aspects listed in the above-mentioned provision would be enough to prove this impossibility. We can expect a strict interpretation, but such uncertainty could deter contracting authorities from using competitive dialogue.

[39] Art. 58, § 3, PCC. [40] Art. 58, § 2, PCC.

Moreover, Italian law sets out further specific limitations on the use of competitive dialogue. One is a requirement for a prior advisory opinion of the Superior Council of public works or of the Superior Council for cultural heritage for contracts pertaining to the relevant field. Both must be given by the relevant council within thirty days after the request by the contracting authority, although after this deadline the contracting authority has the right to proceed anyway.

A further limitation, which is the most important, is that the most complex works procurements such as strategic infrastructure works and production plants[41] are excluded from the application of competitive dialogue. As we saw in sections 3 and 4 of Chapter 1, competitive dialogue was envisaged for use by the EU specifically for projects of this kind, so it is surprising that in Italy its scope has been narrowed, and is not available in cases falling within its core rationale of dealing with complex technical subject-matter.

Competitive dialogue is a formal award procedure regulated by Article 58 of the PCC and Articles 113–114 of DPR No. 207/2010 that sometimes – as we have seen and will see in the next sections – applies in situations that are outside the Directive's rules. It is applicable to:

(i) Public works, supply, service contracts and works concessions as defined by Directive 2004/18 (Article 54 of the PCC).
(ii) Public works, supply, service contracts and works concessions in the utilities sector. In this respect, Article 220 of the PCC expressly lists competitive dialogue among the tendering procedures available in the utilities sectors that are regulated by Directive 2004/17.[42]
(iii) Public contracts the value of which is below the threshold: in this respect Article 121 of the PCC extends the rule of the above-mentioned Article 54 to public contracts below the threshold of the EU Directives. Competitive dialogue has been used in Italy in practice for such below-threshold contracts. However, it must be pointed out that technical, legal or financial complexity for contracts below the thresholds seems hard to prove, since Italian rules concerning below-threshold contracts are much simpler (no publication in the OJEU is required) and quicker (shorter time limits).[43]

[41] Arts. 161–205 PCC.
[42] G. Urbano and M. Giustiniani, 'Il dialogo competitivo', in M. Clarich (ed.), *Commentario al codice dei contratti pubblici* (Turin: Giappichelli, 2010), p. 406.
[43] Arts. 124–125 PCC.

In the case of other public contracts falling outside the scope of the Directives, contracting authorities are not bound to follow the formal award procedures defined by Article 58 of the PCC and Articles 113–114 of DPR No. 207/2010. However, authorities can structure the award procedures on the basis of such formal models if they choose to do so, thus ensuring compliance with EU principles under the TFEU that apply to these contracts. This is because service concessions, non-priority services (under Annex IIB of the Directive and Article 20 of the PCC) and other public contracts falling outside the scope of the Directives (for example, some private financing arrangements expressly defined by Italian law[44] because of their complex financial make-up that, mainly as regards public works, is put forward in order to pursue the maximum investment of private capital)[45] are only subject to these Treaty principles (Article 27 of the PCC) and not to detailed rules. The lack of detailed rules concerning these arrangements allows public authorities significant discretion in shaping the most appropriate award procedure, thus allowing the use of a kind of competitive dialogue procedure beyond any express legal provision.

The Italian law defines the special circumstances which allow for use of the special rules of competitive dialogue but does not tie its use to any particular form of public contract: thus it provides a legal tool suitable for any kind of public contract, including any PPP arrangement, such as concessions.[46] It has been expressly clarified by the Italian legislator,

[44] Arts. 152 *et seq.* PCC.

[45] According to European Commission, *Green Paper on Public–Private Partnerships and Community Law on Public Contracts and Concessions*, COM (2004) 327 final, section 20; and European Commission, *Mobilising Private and Public Investment for Recovery and Long Term Structural Change: Developing Public Private Partnerships*, COM (2009) 615 final, section 1, the common characteristic of any form of PPP – regardless of the establishment of a new subject (institutional PPP, involving co-operation between the public and the private sector within a distinct entity) or not (contractual PPP, in which the partnership between the public and the private sector is based solely on contractual links) – is to 'relieve the immediate pressure on public finances by providing an additional source of capital'.

[46] See C. Contessa and N. De Salvo, 'La procedura di dialogo competitivo fra partenariato pubblico/privato e tutela della concorrenza', *Urb. e appalti* (2006), p. 508; G. Pasquini, 'Il project financing e la discrezionalità', *Giornale dir. amm.* (2006), p. 1115; F. Gaspari, 'Il dialogo competitivo come nuovo strumento negoziale e la sua (asserita) compatibilità con la finanza di progetto', *Giust. amm.* (2007), p. 3; B. Raganelli, 'Il dialogo competitivo dalla direttiva 2004/18/CE al codice dei contratti: verso una maggiore flessibilità dei rapporti tra pubblico e privato', *Riv. it. Dir. Pub. Com.* (2009), p. 162.

amending the PCC, that the competitive dialogue procedure can be used for the award of a concession.[47]

We can argue that the core characteristic or even the *raison d'être* of competitive dialogue is precisely the impossibility to foretell the outcomes. Once competitive dialogue starts even on the basis of a preliminary plan, its outcomes cannot be predicted; hence the dialogue might in some cases lead the contracting authority to enter a public procurement, to issue a concession or to establish an institutional PPP without this being known in advance. Within these procedures, whenever the complexity of the subject-matter from a technical, legal or financial point of view justifies use of competitive dialogue, a competitive dialogue can be run, if necessary based on the preliminary, financial and economic plans to be specified or amended.[48]

On this view, the explicit legal exclusion of the competitive dialogue procedure for infrastructure works and production or industrial plants in Italy seems likely to turn out to be counterproductive. Strictly speaking, in this case the only available award procedure in Italy is a restricted procedure (based on a preliminary plan drafted by the contracting authority itself) to identify a general contractor, departing from the ordinary award procedures for public works procurement. This provides for a general contractor to be entrusted with the global task of performing, by whatever means, the public works; and this contractor will decide whether and how to provide the work planning, financial make-up and execution itself or through sub-contractors, and will also issue expropriation procedures if necessary. The general contractor also enjoys the power to define whether or not the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.[49]

The selection of a general contractor puts together many different services (planning, financing and execution of works) and therefore considerably reduces competition among economic operators potentially interested in carrying out only single part(s) of the whole

[47] Art. 58, § 15, PCC as amended by Legislative Decree No. 152/2008.

[48] The Italian Authority for Public Contracts in its annual report to the Parliament of 2008 states that the rules concerning the competitive dialogue are applicable, notwithstanding the suspension of its application until the entry into force of the government's secondary regulations (Art. 253, § 1-quater, PCC), in those cases in which the preliminary project needs to be either specified or modified; Urbano and Giustiniani, n. 42 above, pp. 403–6.

[49] Art. 176 PCC; P. Chirulli, 'L'affidamento a contraente generale', in C. Franchini (ed.), *I contratti con la pubblica amministrazione*, vol. II (Turin: Utet, 2007), pp. 953–81.

subject-matter. The general contractor procedure, like the competitive dialogue procedure, was specifically laid down to deal with complex contracts for which the involvement of private capital may be extremely useful. However, while the choice of the general contractor excludes competition in other potentially distinct market segments of work planning, financing and executing – since the general contractor is not generally compelled to apply EU Directives on public procurement – competitive dialogue may involve a fair and more transparent competition on every aspect of the arrangement, which could result in a more direct and efficient control of the contracting authority over the contractors' activities.

In practice, competitive dialogue has been used in Italy so far mainly for contracts outside the scope of the Directives – for example, in the public utilities sector to establish mixed capital companies entrusted with the task of providing public services to citizens. As we saw above, there were thirty-four procedures between 2006 and 2010, accounted for by the possibility for using competitive dialogue outside the scope of the Directives themselves (given that its use has been postponed for contracts covered by the Directives). The fact that the Italian legislator has not so far favoured competitive dialogue has been supported by the availability of alternative procedures, mainly for public works contracts, such as the design contest and the ideas contest discussed in section 2 above, the use of which is not limited to the specific circumstances that allow competitive dialogue. These alternatives were relied on to justify postponing the entry into force of the new procedure. However, their use might potentially be reduced by the new opportunities offered by competitive dialogue now that competitive dialogue has been brought into force more generally.

Two main differences distinguish these traditional tools from competitive dialogue. First, both the design contest and the ideas contest are affected by the traditional rigidity of ordinary procedures. They are still part of a strict tendering model in sharp contrast with the negotiation models. There is no room for manoeuvre for a flexible negotiation (dialogue) over the different possible solutions. The contracting authority is bound to select the best solution proposed as assessed through applying the award criteria only, unless the specific cases and circumstances which allow for a negotiated procedure are met.[50]

[50] Art. 56, §§ 2–3, PCC allows for negotiation after the time limit for bid submission has expired.

Secondly, competitive dialogue seems to offer relevant time and transaction costs savings in that its two-phase structure allows for a single award procedure for design and execution of public work. The subject-matter of the competitive dialogue is the 'needs and requirements' expressed by the contracting authority to be specified and implemented by the market operators during the dialogue. The competitive dialogue procedure may then end with the award of a public contract which entrusts the contractor with the tasks of both planning *and* executing works or planning *and* providing services. By way of contrast, both the design and ideas contests, as service contracts, need a further procedure in order to award a works contract. As the French experience underlines, any fragmentation of the award procedure into two separate procedures, the first for design and the second for execution, does not comply with EU Directives whenever participation in the latter is limited to the successful participants in the previous procedure without a new publication of the contract notice.[51] As the CJEU stated in Case C-299/08, *Commission* v. *France*: 'that difference by itself makes it impossible for [that] procedure . . . to be interpreted as a form of implementation of the competitive dialogue procedure.'[52] In other words, the direct awarding of linked, subsequent procurements is not compliant with EU rules. This key decision of the CJEU on the French procedure of *marchés de definition* outlines the crucial elements that could give rise to distortion of competition in Italy also.

5. Operation of the competitive dialogue procedure

5.1. Introduction

The PCC and its enforcing regulation provide detailed rules on how a contracting authority must conduct the procedure. In Italy, the set of rules for competitive dialogue is specified in the three main different

[51] In *Commission* v. *France*, n. 21 above, the CJEU stated that 'the purpose of the procedure for the award of *marchés de définition* is to award two types of contracts, namely *marchés de définition* [design contest] and *marchés d'exécution* [for works execution], the latter being awarded after being opened to competition limited to the holders of the former alone. Accordingly, economic operators who might be interested in participating in *marchés d'exécution*, but who are not holders of one of the *marchés de définition*, are discriminated against in comparison with those holders, contrary to the principle of equality, which is laid down as a principle for the award of contracts in Article 2 of Directive 2004/18.'

[52] *Commission* v. *France*, n. 21 above, para. 38 of the judgment.

phases as envisaged in Directive 2004/18, namely, the selection phase, the dialogue phase and the final tender phase.[53]

5.2. *The planning stage and drafting of the descriptive document*

In Italy, a key problem can be found in the lack of experience in carrying out the important planning and preparation activities that are often considered to be needed to make competitive dialogue successful (as discussed, for example, in Chapter 3 on the UK and Chapter 8 on Spain).[54] Another critical element to be considered is the correct and complete definition of the content of the descriptive document. The latter could have a scope that is even more broad and imprecise than the subject-matter of the Italian ideas contest (*concorso di idee*), discussed earlier, which might not give rise to satisfactory end results. Moreover, as the experience of the UK indicates, competitive dialogue requires skilled and experienced officials at all stages of the procedure and a significant input in terms of staffing, advice and support.[55]

As elaborated in section 5.5 below, the number of participants in the dialogue can be reduced to below the number of those satisfying the minimum qualification requirements by means of applying the qualitative selection criteria, but this must be planned in advance since the contract documents must in this case provide for a maximum number of participants to be invited to the dialogue.[56]

The original implementation of competitive dialogue in Italy contained a provision that allowed contracting authorities to specify in more detail at the final tender stage the award criteria as stated in the contract notice, in order to adapt them to the specificities of the solution or solutions chosen during the dialogue and admitted to the final stage. However, this has been repealed, following an infringement procedure against Italy.[57] The possibility of later specification of the award criteria was considered in Italy as not being compliant with the CJEU case law

[53] R. Dipace, 'Il dialogo competitivo', in C. Franchini (ed.), *I contratti di appalto pubblico* (Turin: Utet, 2010), pp. 622–8.

[54] See respectively Ch. 3, section 5.2, and Ch. 8, section 5.2.

[55] OGC/Treasury, *Competitive Dialogue in 2008: Joint Guidance on Using the Procedure*, § 1.14: see Ch. 3 above.

[56] Art. 55, § 6, PCC; as for the contract notice, see Art. 64, § 1, and Art. 58, § 5, PCC: see section 5.5 below.

[57] Art. 58, § 13, PCC, repealed by Law No. 152 of 11 September 2008, following the decision of EU Commission C (2008) 0108 of 31 January 2008 pursuant to infringement procedure No. 2007/2309 against Italy.

requiring the award criteria to be defined in such a way as to allow any participants to be aware of any relevant elements while drafting the offer, without later specifying 'elements which, if they had been known at the time the tenders were prepared, could have affected that preparation'.[58] Thus according to Italian law, the descriptive documents expressing the needs of the contracting authority or the contract notice must define both the suitability requirements of tenderers and the awarding criteria for both evaluating the solutions proposed during the dialogue phase *and* the final tenders stage,[59] without adding to these or developing them in any more detail prior to the final tender phase. Therefore, the PCC compels contracting authorities to use the qualitative selection criteria and the award criteria defined in the contract notice. The position under the Directive itself as regards the possibility of developing the award criteria during the procedure was considered in section 5.6.5 of Chapter 1.

The contract notice could, however, define in advance *different* criteria to be applied in each stage of the procedure (for example, criteria regarding technical merit in the first stage of the dialogue and criteria concerning aesthetic, functional characteristics and price in the second stage). Again, the position under the Directive itself in this respect was considered in section 5.6.5 of Chapter 1.

5.3. *Confidentiality of information and solutions*

As stated in the Directive, under Italian law contracting authorities 'may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement'.[60] Italian law does not provide any further guidance on how to protect confidential information disclosed by participants during the dialogue, leaving it to contracting authorities' discretion.

As for the Italian experience, the issues relating to confidentiality of information have been assessed by academics and practitioners only in a theoretical way, because of the lack of practical enforcement or case law.[61]

[58] See, in particular, Case C-532/06, *Emm. G. Lianakis and others* v. *Dimos Alexandroupolis and others* [2008] ECR I-251, para. 43.

[59] Art. 58, § 5, PCC; and Art. 113, § 1, DPR No. 207/2010.

[60] Art. 58, § 8, PCC, implementing the exact wording of Art. 29(3) of Directive 2004/18.

[61] S. Vinti, 'Il dialogo competitivo: troppo rigido nella fase creativa, poco regolato in quella comparativa' (2009), available at www.LexItalia.it; Raganelli, n. 46 above, pp. 164 *et seq.*

5.4. *Advertising requirements*

In Italy, the contract notice for competitive dialogue must be published in the OJEU, as required by the Directive, and is also subject to further national requirements on publication, which also apply to other award procedures. In this respect, the notice must be published in the national official journal (special series for public contracts notice) and on the websites of both the Authority for the Control over Public Contracts and the relevant Ministry. A summary of the contract notice must also be published in at least two high-circulation national newspapers and in two of the most circulated local newspapers.[62] Italian law lists the fixed content of the contract notice or the descriptive document: the needs or objectives of the contracting authority as well as the requirements for admission to the competitive dialogue, the tender evaluation criteria and the deadline for submission of the applications for participation in the procedure.[63]

5.5. *The selection phase*

The rules governing the selection phase under Directive 2004/18 were discussed in section 5.5 of Chapter 1. As regards the number of participants to be invited to the dialogue, Italian law adopts a stricter approach than required by Directive 2004/18. As we have seen in Chapter 1, this generally requires a minimum of three economic operators to be invited. In Italy, it is provided that the maximum number of participants may be limited if required for 'justified reasons of good administration'[64] (that is, to prevent overcrowding in the negotiations, which can hinder their flexibility and prolong the procedure excessively) – but, even so, the number invited cannot be less than six, insofar as there is a sufficient number to satisfy the selection requirements.[65]

As regards the requirements for selection of those to be invited, the rules on the permitted selection criteria and the disclosure of those criteria are the same as those in the Directive, the provisions of which are simply repeated in the Italian legislation.[66]

[62] Art. 66, § 7, PCC.
[63] As expressly stated in Art. 58, § 5, PCC.
[64] Art. 62, § 1, PCC allows for a maximum number of economic operators to be invited only for contracts whose subject-matter is particularly complex (competitive dialogue and works contracts of a value above €40 million) as well as for the negotiated procedure with prior publication of a contract notice.
[65] Art. 62, § 2, PCC.
[66] Art. 62, § 1, PCC implementing Art. 44(3) and (4) of Directive 2004/18; see also section 5.2 above.

As required under the Directive itself, minimum levels of suitability requirements (economic and financial standing and technical or professional capacity) specified in the contract notice must be related to and proportionate to the subject-matter of the contract.[67] The relevant provisions aim to avoid the risk of unreasonably high requirements that may reduce participation and competition. The reasonableness of such qualitative selection requirements could prove to be difficult to assess, however, as the contract value and its precise subject-matter are indefinite and hence hard to define in advance.

It is also provided in the Italian legislation – in a provision that is additional to the rules in the Directive – that, if a maximum number of economic operators to be invited has been defined (according to Article 44(3) of Directive 2004/18), this number must be proportionate to the structure of the relevant supply market (that is, considering the number of economic operators who satisfy the suitability requirements), in order to ensure genuine competition.[68]

Selection of participants using qualitative selection criteria is relatively new in Italy. Economic and financial standing and technical or professional capacity have been used in the past as selection criteria suitable for reducing the number of economic operators to be invited in a tendering stage only in the context of public works, before the relevant provisions were repealed in 1995, although reintroduced in 1999.[69] The qualitative selection criteria to be applied in order to reduce the number of participants to be invited in the dialogue phase are expressly listed in Article 263 and Annex L to DPR No. 207/2010 (applicable to the restricted procedure as well as competitive dialogue, in compliance with Article 44(3) of Directive 2004/18). The relevant provisions state that the score to be assigned depends only on certain specified elements and only if they exceed the minimum selection requirements set out in the contract notice. These elements are the overall turnover of the previous financial year (at least between two and four times the contract

[67] Art. 2, § 1, Art. 73, § 3, and Art. 74, § 5, PCC.
[68] See Art. 62 and the general principle stated in Art. 57, § 6, PCC, though referring to the negotiated procedure.
[69] As for works contracts, such a provision – first included in Art. 27 of Law No. 406/1991 and then in Art. 23 of Law No. 109/1994 – was repealed by Law No. 216/1995. See Vinti, n. 29 above, pp. 332–6.

value), the list of similar works or services previously carried out, and the list of the technicians employed.[70]

5.6. *The dialogue phase*

When compared with the traditional tendering model, the flexibility of competitive dialogue is basically due to the power of the contracting authority to discuss the proposals submitted by economic operators and to ask for further amendments. This exception to the basic rule of regular tendering that prohibits amendment of offers after the time limit for their submission raises some issues as far as the principles of non-discrimination and equal treatment are concerned.

Under Italian law, the contract notice must indicate whether there is a limit to the solutions that will be discussed during the dialogue stage.[71] If this is the case, the notice must define the objective and non-discriminatory award criteria to be applied in order to select the projects admitted to the dialogue phase.[72] The Italian legislation, following the Directive,[73] requires that the contract notice or the descriptive document shall specify the award criteria chosen to determine the most economically advantageous tender along with their relative weighting or, at least, whenever the weighting is not possible for justifiable reasons, their descending order of importance. It seems inherent in competitive dialogue that these award criteria may need to be of wide application across a range of very different bids, so that they are suitable to identify the final best proposal or proposals. To that aim, the award criteria arguably need to leave a wide discretion to the awarding authority. Nonetheless, as we have seen at section 5.2 above, such award criteria can no longer be amended, modified or further specified during the dialogue as was previously envisaged in the Italian legislation, which, as we saw, has been

[70] Art. 265 of and Annex L to DPR No. 207/2010 contain the same rules as Art. 67 of and Annex F to the repealed DPR No. 554/1999, according to which half of the maximum number of participants must be selected by applying the qualitative selection criteria and the remaining half chosen by means of a public lot.

[71] Art. 58, § 9, PCC.

[72] Art. 58, § 9, PCC uses the same wording as Art. 29(4) of Directive 2004/18, which states that 'contracting authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document'.

[73] Art. 83 PCC implementing Art. 53 of Directive 2004/18; in this respect, Cons. Stato, adv. sect. on legislative draft, 17 September 2007, No. 3262, warns of the problems of guaranteeing genuine competition.

amended in this respect in order to comply with the European Commission's assessment during an infringement procedure against Italy.[74]

The Italian legislation allows the same freedom that is allowed by the Directive regarding the structure of the dialogue and the manner of conducting it. This means, *inter alia*, that contracting authorities may choose between two available alternatives: to run the dialogue individually with each candidate or to discuss the proposals jointly with all of them at the same time. Under the first option, the problem of how to ensure that information given is the same, or how to assure that genuine competition and non-discriminatory treatment – since the discussion will be held on the basis of different solutions – arises.[75]

The choice in this respect may depend on the subject-matter of the contract and on the expected content of the tenders. A joint dialogue would allow the public administration to assess in-depth, and compare, the quality and economic aspects of the proposals, considering the operators' experience and the added value that the dialogue would entail. The lack of mutual knowledge of other competitors' tenders[76] is a weakness of traditional tendering models in cases of complex contracts, since it increases transaction costs due to information asymmetries. Competitive dialogue was set up as a response to these failures, since it is capable of drawing public procurement into a situation of perfect information considered by microeconomics as being the ideal model of perfect competition.[77] However, the requirement of a perfect information scenario must be balanced against the need to comply with the rules on protection of confidential information and technical or trade secrets, and the risk of unauthorised 'cherry-picking' (i.e. the use of the ideas

[74] See section 5.2 above.

[75] Vinti, n. 61 above.

[76] As for the ordinary tendering procedure (open or restricted procedure), the basic rule is not to disclose any of the content of tenders until the contract is awarded, to avoid hindering fair competition. Art. 13, § 2, PCC provides a time limit to information disclosure that goes far beyond Art. 6 of Directive 2004/18 concerning only the content of information and according to which 'the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders'.

[77] Assuming that all agents (contracting authority as well as bidders) are rational and have perfect information, they will choose the best solutions, and public contracting will reward those who propose the best solutions with higher rewards. Perfect information allows a contracting authority to make the best decision as long as it means in practice that the buyer knows all things, about all products, at all times.

and solutions of one of the participants by another one without that other's consent).

It can be noted that, in Italy, the breach of the equal treatment principle during a public contract procedure due to unfair leaking of information or selective communication has sometimes led to criminal convictions.[78]

As we have seen in section 5.6.3 of Chapter 1, under the provisions of the Directive the dialogue phase can be structured in successive stages in order to reduce the number of solutions to be discussed by applying the award criteria where this is provided for in advance. The same flexibility on this issue is found in the Italian legislation on competitive dialogue.[79] Therefore, during the dialogue in Italy there could be more than one application of the award criteria as defined in the contract notice: first, in order to reduce the number of solutions to be discussed during the dialogue stage, secondly, for the choice of the best solution among the final tenders (see section 5.7 below).

As we have seen in Chapter 1,[80] there are various possible approaches under the Directive as regards the development of the basis for the final tender, and these are all possible also under the flexible approach of the Italian legislation. Thus one possibility is that at the end of the dialogue phase the contracting authority will identify the best solution amongst those proposed, which represents a solution deemed suitable and effective to serve the public interest; and on the basis of this solution it will open the competition asking for the final and complete tender, thus receiving from all tenderers offers based on another tenderer's project. This approach has been labelled by one commentator in Italy as the promoter model.[81] The dialogue could eventually also entail the choice for the basis of the final tender stage of a mixed solution that includes the best elements of quality and the most innovative solutions of the various different tenders. This has been referred to in Italy as the patchwork solution.[82] There is also a third model, which has been referred to in Italy as the Chinese walls model:[83] under this approach

[78] See for collusive tendering: Cass., sect. VI, 19 January 2000, *Virgili*; and Cass., sect. VI, 28 April 1999, *Bruno*. For bribery in public contracting, see Cass., sect. VI, 12 June 1997, *Albini*; and Cass., sect. VI, 25 March 1994.

[79] Art. 58, § 8, PCC implementing Art. 29(4) of Directive 2004/18.

[80] See Ch. 1, section 5.6.3.

[81] M. Ricchi, 'Negoauction, discrezionalità e dialogo competitivo' (2007), available at www.giustizia-amministrativa.it.

[82] Ricchi, n. 81 above.

[83] Ricchi, n. 81 above.

the dialogue is carried out separately to best protect confidential information and technical or trade secrets and different solutions are discussed waiving any effective comparison among them (for example, a tunnel or bridge in order to solve a transportation bottleneck; or totally different locations of solutions in a land development plan).[84] This third model appears to be the one most commonly used in practice in Italy.

It can be noted that the Italian law expressly provides for any 'specifications, clarifications, improvements or additions' by any participants during the dialogue (Article 58, § 14, PCC). This is because the negotiation that this phase entails requires an exchange of information among the parties involved to the maximum possible extent (as also applies in the negotiated procedure: Article 56, §§ 2–3, and Article 57, § 6, PCC), provided that the negotiation complies with the framework of the procedure for conducting the dialogue set out by the contracting authority in the contract documents.

Italian law provides that any solution submitted during the dialogue phase by the participants shall include its relevant feasibility study and provisional costs report.[85] These documents are obviously subject to changes and amendments during the dialogue phase. The aim of such provisions is to ensure the parties enter the final tender stage with a sufficiently precise and accurate solution to be put to tender.

5.7. *Final tender stage*

As we have seen in section 5.6.4 of Chapter 1, it is stated in the Directive, and is also repeated in the Italian legislation,[86] that the contracting authority closes the dialogue when it can identify the solution or solutions which are best suited to satisfying its needs, if necessary after comparing the solutions proposed by applying the award criteria defined in advance. It then calls for final tenders, which must contain all the elements required and necessary for the performance of the project.[87] The Italian legislation also repeats the provision stated in the Directive (as discussed in section 5.7.4 of Chapter 1) that the final tenders may be clarified, specified and fine-tuned by participants if the contracting authority so requests, provided that this does not involve changes to

[84] OGC, *UK Procurement Policy Note – Preliminary Guidance on the Application of the Public Procurement Rules to Development Agreements* (19 October 2009).

[85] Art. 113, § 2, DPR No. 207/2010.

[86] Art. 58, § 10, PCC.

[87] See Ch. 1, section 5.7.1; Art. 58, § 12, PCC.

the basic features of the tender or the call for tenders, insofar as such variations are likely to distort competition or have a discriminatory effect.[88]

The Italian legislation also contains a specific provision, not found in the Directive, stating that the final offer shall include the preliminary plan and the draft of the contract documents for contract performance.[89] The dialogue's purpose is the drafting of a preliminary plan and the winner must draft the final and executive plans in addition to defining all elements required and necessary for the performance of the work or service. Italian legislation clearly provides that the final offer will contain a preliminary plan. The winner can be asked to develop his project (into final and executive plans) and execute it, if so provided in the contract notice.[90] This will be done after the contract is concluded.

This approach differs from UK experience (as reported in Chapter 3), since, in Italy, such a possibility does not apply to the negotiated procedure,[91] thus leaving room for completing the project later only in case of competitive dialogue. However, it seems compliant with EU law[92] since the further activity (detailing the bid into final and executive plans) defined by the contract signed by the winner does not seem to risk modifying substantial aspects of the tender (that still include 'the preliminary plan and the draft of the contract documents for contract performance')[93] or distorting competition or resulting in discrimination.

5.8. *Procedure following the selection of the preferred bidder*

Once the best offer has been selected, the PCC provides for a provisional award that is subject to a positive assessment of the suitability requirements (such as the final verification of a bidder's self-certifications of his own suitability requirements) and to completion of documentation, and may be subject to approval by a controlling authority. Once these steps are completed, the provisional award to the preferred bidder is then

[88] Art. 58, § 14, PCC.
[89] Art. 113, § 4, DPR No. 207/2010.
[90] Art. 113, § 5, DPR No. 207/2010.
[91] Where bids can be modified and improved only if the procedure takes place in successive stages (Art. 56, § 4, PCC implementing Art. 30(4) of Directive 2004/18): Cons. Stato, VI, 15 June 2011, No. 3642.
[92] Art. 29(6) of Directive 2004/18 requires the final tender to 'contain all the elements required and necessary for the performance of the project'.
[93] Art. 113, § 4, DPR No. 207/2010.

confirmed as the final award, prior to concluding the contract. This is a general approach applicable to every award procedure, not only to competitive dialogue.[94]

On the other hand, the rule allowing the preferred bidder 'to clarify aspects of the tender or confirm commitments contained in the tender', as stated in Article 29(7) of Directive 2004/18, applies only to competitive dialogue and seems to raise many doubts concerning the future application of competitive dialogue in Italy. The clarification follows a specific request of the contracting authority and seems necessary whenever the preferred bid substantially differs from the initial offer because of its evolution during the dialogue. As we have seen, Italian law allows for any 'specifications, clarifications, improvements or additions' by any participants during the dialogue (Article 58, § 14, PCC), but following Article 29(7) it allows only for clarification of 'aspects of the tender' or confirmation of 'commitments contained in the tender' by the preferred bidder (Article 58, § 16, PCC), stating that in both cases they must 'not have the effect of modifying substantial aspects of the tender or of the call for tender and must not risk distorting competition or causing discrimination' (Article 58, §§ 14 and 16, PCC).

The meaning of Article 29(7) of the Directive was discussed in section 5.8 of Chapter 1. The simple repetition in Italy of the EU Directive's wording on this issue, together with the prohibition of such clarifications in every other procedure but competitive dialogue, do not indicate any well-established principles for defining the boundaries of what may be done at the preferred bidder stage. Comparing the slightly different expressions used in the Italian law with reference respectively to participants in the dialogue and preferred bidder, the latter seems stricter. The preferred bidder can clarify only 'aspects of the tender' or confirm 'commitments contained in the tender',[95] while any other 'specifications, clarifications, improvements or additions' – allowed in the dialogue phase – are prohibited.

The amendments to the preferred bid also raise the issue of challenge where there is a breach of Article 29(7), since it seems difficult

[94] Arts. 11–12 PCC.
[95] The European Commission in its Explanatory Note on competitive dialogue, n. 36 above, § 3.3, clearly emphasises that 'this does not entail any negotiations solely with this economic operator – amendments aimed at authorising such negotiations were proposed and rejected by the Community legislative process'.

for the interested parties to access the relevant information. Consequently, some uncertainty over the time limit for legal proceedings may also be raised.

It is submitted that further drafting of the final and executive plans[96] by the winning bidder after conclusion of the agreement as was discussed above does not amount to a clarification or confirmation of the tender in the sense envisaged by Article 29(7) but is a mere fulfilment of the obligation undertaken by subscribing to the contract.

5.9. *The standstill period and the possibility for legal challenge*

As explained in section 5.9 of Chapter 1, EU law has recently acknowledged and now provided for in legislation (in Directive 2007/66) a requirement for a standstill period between notification of the award decision and conclusion of the contract.

A general standstill provision was in fact provided for in the former Italian regulatory system, but the consequences of its derogations were not defined. Furthermore, the standstill period could be waived whenever the public administration invoked reasons of urgency.[97] Italian law implementing the EU standstill requirement laid down expressly in Directive 2007/66 does not provide for any special provision on the standstill period for the competitive dialogue procedure. The standstill period in Italy is thirty-five days, commencing with the receipt of the last notification of the final award, thus exceeding the minimum of 'at least ten days' provided by Article 2a(2) of Directive 2007/66.[98] Such a long standstill period is due to the explicit willingness of the Italian legislator to define a longer term than applies for filing legal claims before the

[96] Provided for in Art. 113, § 5, DPR No. 207/2010.

[97] Art. 10, § 7, PCC, before the implementation of Directive 2007/66 by means of Legislative Decree of 20 March 2010, No. 53; for further references, see G. M. Racca, 'Derogations from the Standstill Period, Ineffectiveness and Remedies in the New Tendering Procedures: Efficiency Gains vs. Risks of Increasing Litigation', in S. Treumer and F. Lichère (eds.), *Enforcement of the EU Public Procurement Rules* (Copenhagen: DJØF, 2011), pp. 95–102.

[98] Art. 11, §§ 10 *et seq.*, PCC. Art. 11, § 9, PCC states that the standstill period runs from the moment when the final (for example, after the assessment of bidders' documents on suitability requirements or the approval of controlling authority) contract award decision is sent to the tenderers and candidates concerned.

administrative courts against the contracting authority's decision (thirty days for public contracts).[99] This approach aims to favour the correction or revision of the award procedure: in case of legal claims, the contracting authority can thus decide to revise the procedure or part of it before the contract is signed.

The standstill period of thirty-five days is common to every procedure and must be considered together with settled Italian case law that allows lawsuits only against decisions (such as contract documents, rejection of a bidder, or a final contract award) that are effectively prejudicial to the tenderers or candidates concerned.[100] Participants in competitive dialogue can take proceedings in respect of any decision immediately prejudicial to their interests and the court can suspend the procedure or annul part of it whenever the prejudicial decision is unlawful.

These rules can delay challenges to the conduct of the dialogue phase. These rules contribute to the complexity of the competitive dialogue procedure in Italy, and, together with the risk of legal challenge already highlighted that is entailed by the multiple applications of qualitative selection and award criteria, may deter contracting authorities from using this cumbersome, costly and time-consuming procedure.[101]

5.10. *Payments for costs of participation*

The PCC allows contracting authorities to award 'prizes or incentives to the participants in the dialogue',[102] even if the dialogue terminates without award due to the fact that none of the solutions proposed is capable of satisfying the needs expressed in the contract documents.

Where a competitive dialogue is terminated without an award, however, the participants cannot receive any compensation other than the prizes provided for in the contract documents.[103]

Italian law does not specify or regulate in detail the organisation of these economic incentives for participation, which are left to the

[99] Art. 120 of the Administrative Trial Code, whereas the ordinary courts maintain competence over disputes arising during the performance phase: see section 1 above.

[100] Settled Italian case law rules out any standing requirement for challenging violations during a public contract award procedure carried out in stages (i.e. concessions, PPP): see Cons. Stato, sect. V, 1 October 2010, No. 7277, with comment of M. Mattalia, 'Project Financing, un istituto in continua evoluzione' (2011) 5 *Giurisprudenza Italiana* 1198–1208.

[101] See Racca, n. 97 above, pp. 99–102.

[102] Art. 58, § 17, PCC.

[103] Art. 58, § 11, PCC.

contracting authority's choice. The only mandatory legal provision set out in the regulation enforcing the PCC is that, whenever payments of prizes or awards are provided for, those payments must bring about the transfer of the property of the preliminary plan submitted during the dialogue.[104]

Three main alternatives are thus possible:

(i) The dialogue terminates without award and the contracting authority neither awards any prize nor compensates for the costs of participation.
(ii) The competitive dialogue concludes with an award and only the winner receives the envisaged prize (together, if applicable, with the right of execution of the project).
(iii) The competitive dialogue concludes with an award and both the winner (who may also, if applicable, have the right of the execution of the project) and participants are awarded different prizes.

Although competitive dialogue was suspended until recently – and therefore there is no experience of payments in that context – an established practice on payments to participants has been developed with regard to design contests[105] and ideas contests.[106]

Through the payment of such prizes to the winner and other deserving bidders, the contracting authority acquires the property of the relevant designs or ideas. Prizes and payments for costs of participation are used both to boost disclosure of confidential information and innovative know-how and to purchase them. The introduction of these economic incentives induces potential tenderers to participate.

6. Concluding remarks

As we saw in section 3 of Chapter 1, the origin of competitive dialogue lies in the experience of other EU Member States. One aim of competitive dialogue was to avoid a distorted use of the restricted procedure; and the European Commission was also seeking to encourage use of competitive dialogue rather than the negotiated procedure for major projects.[107] Thus the procedure was established to provide a flexible procedure for complex contracts in which the rigidity of previous

[104] Art. 114 DPR No. 207/2010. [105] Art. 99, §§ 4–5, PCC.
[106] Art. 108, §§ 1 and 4, PCC.
[107] European Commission, Explanatory Note, n. 36 above.

procedures generated inefficient outcomes, and a more structured alternative to the negotiated procedure in order to control negotiations. A key issue was the need to reconcile the interests of EU policy in the development of the best European undertakings with the active interest of Member States in keeping a certain autonomy in public contracting, including for cases of particularly complex contracts.

The competitive dialogue procedure seems an adequate procedure at a national level. However, one possible problem is that the procedure might not easily attract participation and competition at a European level between economic operators of different Member States, even with projects of considerable value. It seems obvious to say that negotiation and dialogue are easier between parties that share the same language and legal system.[108] It is unlikely that undertakings of other Member States will face the cost of a procedure that could turn out to involve significant costs and not to result in obtaining a contract. The complex Italian implementation of competitive dialogue will probably discourage both foreign and national participation, thus undermining the possibility of satisfying the Italian requirement for a minimum of six participants in the dialogue phase.

In Italy, specifically, we have seen that there was no previous experience of an award procedure of this kind. Further, since the application of competitive dialogue, although found in the Italian legislation, was suspended until very recently, it is not possible to say how this procedure will be used in practice for contracts covered by Directive 2004/18. However, we have identified in the analysis above some potential problems with the procedure. One is that the attempt to formalise and structure negotiation in detail runs the risk of not being supported by adequate public management. Another problem is that it entails the risk of numerous claims for damages filed by tenderers that in Italy go through two suitability assessments and two rounds of application of the award criteria. First, there is the evaluation of each bidder's capacity requirements; secondly, there is the reduction of the number of participants by means of applying the qualitative selection criteria to decide who will be invited to participate in the dialogue; thirdly, whenever the dialogue is carried out in successive stages, the award criteria are applied to reduce the number of solutions to be discussed; and, finally, the same award criteria are applied again to choose the best final tender. In Italy,

[108] Italian Authority for the Supervision of Public Contract for Works, Services and Supplies, Advice of 2 April 2008, No. 4.

such a highly complex system entails a real risk of frequent litigation insofar as each step of the procedure may be the object of claims and damages claims by economic operators. Each excluded participant could file a claim, and the court could either suspend the procedure, or annul it and require the contracting authority to pay damages. An Italian contracting authority considering commencing a competitive dialogue procedure needs to balance carefully the possible litigation costs in the event of a claim with the opportunities entailed by the greater flexibility involved in such a procedure. For these reasons, it may be that the procedure will not be used extensively in Italy.

On the other hand, competitive dialogue seems to offer positive possibilities from an Italian perspective, overcoming the lack of transparency entailed by the previous similar procedure of the *appalto concorso*. It introduces and promotes competition at a stage of the award procedure traditionally run in Italy directly by the contracting authorities within their own organisations, namely, the drafting of the contract documents. In the Italian experience, the informational weakness of public officials often entails a failure of public contracting and consequently high transaction costs without an efficient outcome. More specifically, the lack of adequate professional competence sometimes induces the smallest contracting authorities to improperly leave the drafting of the technical specifications of a particularly complex contract to the same economic operators who then participate in the award procedure as tenderers. Despite the issues raised by the implementation of competitive dialogue and the risks of non-objective and discriminatory awards that are presented in Italy, competitive dialogue may provide a structured, formalised and transparent procedure to define the technical specifications for complex public contracts, which will be useful to prevent the distortions that may otherwise occur at this stage and undermine the policy objectives of public contracting.

12

Competitive dialogue in the Netherlands

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1. Introduction: regulation of public procurement in the Netherlands

The Netherlands is a constitutional monarchy that has been governed by codified law since the end of Napoleonic rule in 1814. Statutory law itself pre-empts the Napoleonic laws, which were introduced in the Netherlands during Napoleonic rule from 1795 to 1814. Cursory research shows that public procurement has a long-standing tradition in the Netherlands,[1] whereby relevant statutory civil law[2] on both procurement and the execution of the contract has been supplemented with a general procurement policy. Even in 1815, public procurement by means of an open procedure was declared obligatory by royal decree.[3]

Together with Germany, Luxemburg, Belgium, France and Italy, the Netherlands were one of the Founder Member States of the European Union, and EU Treaty law and secondary legislation under the relevant treaties, including the procurement Directives, have been applicable to Dutch legislation from the outset. The first Dutch law aiming to implement EU procurement provisions[4] simply declared the provisions on public procurement applicable without explicitly transferring the separate provisions into Dutch legislation.

More recently, Public Sector Directive 2004/18 was implemented in the Netherlands on 1 December 2005 when the 'Decree Tender

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1 One example is the tender for the barge-canal in Leiden on 27 February 1657.

2 Dutch Civil Codebook.

3 www.europeseaanbestedingen.eu/europeseaanbestedingen/europese_aanbesteding/historie_eu_aanbesteding.

4 Framework law on EEC-provisions public procurement, 31 March 1993.