# PPPs and Procurement

## Impact of the new EU Directives


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## Terms of Use of this Publication

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# Glossary of Acronyms and Key Terms

| | |
|---|---|
| EU | European Union |
| Commission | European Commission |
| CJEU or Court | Court of Justice of the European Union |
| Procedure | Legal framework for public procurement |
| OJEU | Official Journal of the European Union, used to publicise all relevant EU procurements over a certain threshold |
| Directive | Legal act of the EU |
| old Public Procurement Directive | Directive 2004/18/EC[1] |
| new Public Procurement Directive | Directive 2014/24/EU (sometimes called the Classic Directive)[2] |
| Concession Directive | Directive 2014/23/EU[3] |
| PPP | Public-private partnership |
| Procuring Authority | The public body responsible for procuring the PPP |
| SMEs | Small and medium-sized enterprises, sometimes used to help deliver PPPs as part of the supply chain; typically they will employ fewer than 250 people and have an annual turnover of less than EUR 50 million |
| SPV | Special purpose vehicle used in project finance transactions to contractually bind together the various private sector firms into the party that contracts with the public sector |

1 See: **eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:en:PDF.**

2 See: **eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG.**

3 See: **eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL_2014_094_R_0001_01.**

# Introduction

Public procurement refers to the process by which public authorities, such as government departments or local authorities, purchase works, goods or services from suppliers that they have selected for this purpose.

The EU regulates this activity through the use of Directives, which implement and expand upon the principles and freedoms established by the EU treaties. These Directives aim to make the procedures for awarding public procurement contracts transparent and open to all suppliers across the EU, which can thus offer their services and products to public authorities throughout the EU single market.

In March 2014 two new Directives of relevance to PPPs were adopted by the EU in the area of procurement: specifically, public procurement and concessions.[4] The new Public Procurement Directive (2014/24/EU) is effectively a reform of a previously agreed Directive (2004/18/EC) while the Concessions Directive (2014/23/EU) is new, reflecting the EU's wish to regulate concessions more closely.

The purpose of this publication is to summarise the key issues arising from the two new Directives in those areas where they are expected to have a specific impact on PPPs in the EU.

The publication therefore has the following structure:

- **Chapter 1** provides a summary of the key issues under the reformed Public Procurement Directive that are most relevant to PPPs;
- **Chapter 2** provides a summary of the key issues raised by the new Concession Directive that are most relevant to PPPs; and
- **Chapter 3** concludes and suggests some of the challenges that Member States may face going forward.

It is worth stressing that this publication does not constitute legal advice and in no way substitutes for Procuring Authorities seeking their own legal advice in connection with the procurement PPP projects or programmes. This publication considers key issues arising from the Directives in terms of broad principles, but it is important to bear in mind that national laws may give rise to different interpretations.

[4] A third new Directive (Directive 2014/25/EU) applies to procurement by certain entities in the utility sectors of water, energy, transport and postal services. This Directive may also cover PPPs in these sectors but is not considered further in this report.

# 1. Public Procurement and PPPs

## 1.1. Introduction to Public Procurement

The new Public Procurement Directive (Directive 2014/24/EU) replaced the old Public Procurement Directive (Directive 2004/18/EC) in March 2014. Member States had until 18 April 2016 to transpose the new Public Procurement Directive into domestic law. It regulates a wide range of procurement issues applicable to all public procurements over specific thresholds. As well as the issues discussed below, the new Directive sets out rules on general procurement procedures and issues that are also relevant to PPP procurement, such as:

- sector exclusions;
- the use of electronic procurement and framework agreements;
- publication, deadline and transparency standards; and
- the governance of public procurement as a whole.

### Box 1: Public procurement procedures under 2004/18/EC[5]

The *open procedure* provided the broadest scope for competition as any entity can tender for the contract. Any entity interested in the contract was invited to tender through an OJEU notice in order to ensure maximum competition.

The *restricted procedure* was used for quite straightforward public sector procurements where many suppliers may be able to meet the requirements of the tender. The advantage of this procedure over the open procedure was that it enabled the public sector buyer to limit the number of suppliers that were invited to tender.

The *negotiated procedure* was used for procuring more complex requirements but could only be used in exceptional circumstances. Public sector buyers must be in a position to justify their decision to use this procedure. The number of suppliers invited to tender could be limited but, in contrast to the restricted procedure, the public sector buyer was permitted to negotiate the tenders offered by bidders.

The *competitive dialogue procedure* was usually used for "*particularly complex*" supplies, services and works contracts where the best solution is not pre-known. This procedure was often available for procuring PPP contracts. The number of suppliers invited to tender could be limited and the procedure gave the public sector buyer the opportunity to engage in dialogue with bidders on proposed solutions before inviting final tenders.

[5] Adapted from: **www.gov.scot/Topics/Government/Procurement/Selling/SupplierJourney/bidding/bidding-routes-2and3/contract-award-procedures**

## 1.2. Reforms to the Procurement Procedures

Key changes

The new Public Procurement Directive makes some significant changes to the procedures that can be used for public procurements. Box 1 summarises the features of the public procurement procedures under the previous Public Procurement Directive in order to set the context for the changes introduced under the new Public Procurement Directive.

Under the new Public Procurement Directive, the *open* and *restricted* procedures remain relatively unchanged and so are not considered further in this report, particularly given their general application to all types of procurement and their unsuitability for complex PPPs. In addition, a new procedure, the *innovation partnership*, has been introduced but its usefulness to the PPP community is unclear at this stage (Box 2 sets out the key features of this new procedure).

Of greater interest for PPPs is the introduction of the *competitive procedure with negotiation,* which replaces the *negotiated procedure* and removes some of the previous restrictions on its use. At face value this procedure looks attractive for PPPs as it is relatively flexible and gives Procuring Authorities greater scope to design their own procurement processes. It contains elements of negotiation without the more prescriptive aspects of the *competitive dialogue procedure*, but there are some potential drawbacks, which are looked at in the following section.

### Box 2: The Innovation Partnership[6]

Under this new procedure, Procuring Authorities can identify a need to be met by a product, service or works not currently available on the market, stating minimum qualitative requirements. One or more successful bidders can then try to develop the product, service or work that best meets the original specification (with cost negotiations continuing through the project's various phases) prior to the Procuring Authority deciding whether or how to continue with the project. The ability to engage with bidders in this way has previously been discouraged until contract award criteria and technical specifications are published. Therefore, whilst maintaining core requirements, such as the need to publish clear evaluation criteria for bidders at the outset, the new procedure offers Procuring Authorities greater flexibility where the means to deliver the product, service or works are not initially certain.

The procedure is most likely to be utilised in research and technology projects where the uncertainty about the final product means that Procuring Authorities may wish to explore what ideas and solutions the market puts forward, before deciding whether to purchase one of the resulting solutions.

[6] See Article 31 of Directive 2014/24/EU.

Promoting the benefits of negotiation

What is welcome in the new Public Procurement Directive, particularly given some of the criticisms levelled at the perceived complexity of the *competitive dialogue procedure*, is an explicit reference at the outset to the benefits of negotiation for more complex procurements.

*"There is a great need for contracting authorities to have additional flexibility to choose a procurement procedure which provides for negotiations. A greater use of those [*competitive procedure with negotiation *and* competitive dialogue*] procedures is also likely to increase cross-border trade…"* [7]

*"Negotiations should aim at improving the tenders so as to allow contracting authorities to buy works, supplies and services perfectly adapted to their specific needs."* [8]

This recognition of the benefit of increased flexibility goes beyond what was enshrined in the old Public Procurement Directive (where the *negotiated procedure* was only to be used in exceptional circumstances) which said that the *competitive dialogue procedure* should only be used:

*"in the case of particularly complex contracts…[where]…contracting authorities consider that the use of the* open *or* restricted *procedure will not allow the award of the contract, the latter may make use of the competitive dialogue."* [9]

Choosing the right procedure

Both the *competitive procedure with negotiation* and *competitive dialogue procedure* have therefore been made more widely available for Procuring Authorities to use in procuring their contracts. The new Public Procurement Directive now lays down four grounds on which either of these procedures may be used:

- the absence of readily available solutions that do not require adaptation;
- the need for design or innovative solutions;
- the complex legal and financial make-up of solutions; and
- technical specifications cannot be established with sufficient precision.[10]

The new Public Procurement Directive states that "*Member States shall provide that contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue [procedure]…"* on any of the above grounds.[11]

7 See Recital 42 of Directive 2014/24/EU.

8 See Recital 45 of Directive 2014/24/EU.

9 See Article 29 (1) of Directive 2014/24/EU.

10 See Article 26 (4)(a) of Directive 2014/24/EU.

11 See Article 26 (4) of Directive 2014/24/EU.

Therefore, compared to the old Public Procurement Directive, **the new Public Procurement Directive gives Procuring Authorities considerably more scope to use a negotiated solution for their procurements**, rather than the more traditional *open* and *restricted* procedures.

## 1.3. Making Changes during the Procurement Process

Experience has shown that for complex projects, Procuring Authorities welcome the ability to discuss, negotiate upon and modify proposed solutions during the procurement process. In the new *competitive procedure with negotiation*, tenders can be submitted, negotiated and then re-submitted as a final tender. Procuring Authorities are permitted to conclude the procurement process after the initial tender stage if they find a bidder that closely meets their requirements (and they have given themselves this possibility in the initial tender documentation). The new Public Procurement Directive is clear, however, that this procedure does not anticipate changes being made once final tenders have been submitted.

On the other hand, under the *competitive dialogue procedure,* there is arguably more flexibility for Procuring Authorities at this late stage of the process. After final tenders have been submitted, tenders can still be:

*"clarified, specified and optimised at the request of the contracting authority"…*
provided this does not… *"involve changes to the essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect."*[12]

The *competitive dialogue procedure* then goes further in allowing further clarification and improvement once the winning bidder has been appointed (Table 1 compares the old and new Public Procurement Directives on this point).

However, the concern remains that the text in the new Public Procurement Directive might still not give sufficient comfort to Procuring Authorities with regard to finalising financing post-tender. For example, publicly issued, bond-financed PPPs, where final prices may change in line with the bond market on the day of financial close may, in theory, be vulnerable to a legal challenge from losing bidders. However, the new text explicitly states that negotiations to confirm "*financial commitments or other terms*" (see Table 1) are acceptable, as long as these do not have a discriminatory effect. There is not a *carte blanche* to make financial changes, but changes are likely to be acceptable if a rival bidder would have faced the same conditions on the same day, and preferably the changes are made according to criteria or indices pre-determined in the original OJEU notice or procurement documents. It remains to be seen whether this wording gives sufficient comfort to Procuring Authorities and does not deter them from exploring innovative financing solutions for PPPs.

[12] See Article 30 (6) of Directive 2014/24/EU.

**Table 1 - Post-preferred bidder changes**

| 2004/18/EC text on *Competitive Dialogue* | 2014/24/EU text on *Competitive Dialogue* |
|---|---|
| *"At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or the call for tender and does not risk distorting competition."* [13] | *"At the request of the contracting authority, negotiations with the tenderer identified as having submitted the* ***tender presenting the best price-quality ratio****….may be carried out to confirm financial commitments* ***or other terms contained in the tender by finalising the terms of the contract*** *provided this does not have the effect of* ***materially modifying essential aspects of the tender or of the public procurement****, including the needs and requirements as set out in the contract notice or in the descriptive document* ***and does not risk distorting competition or causing discrimination****."* [14] |

The **new *competitive procedure with negotiation*** provides some important flexibility pre-final tenders for Procuring Authorities. However, this flexibility comes at the expense of some rigidity post-final tenders. **The procedure may therefore be useful in situations where Procuring Authorities are relatively confident about the project's requirements, and the ability of the market to respond appropriately to these, but would still feel the benefit of some negotiation prior to final submissions.**

The ***competitive dialogue procedure*** **should remain useful for relatively complex projects where the Procuring Authority is less sure what is available in the market to meet its needs and is seeking to maximise the experience available in the market.** This procedure has the added flexibility of allowing the Authority to confirm and optimise final details and other terms after tender selection.

A more detailed, step-by-step comparison of these two procedures is given in the Annex.

## 1.4. Contractual Modifications

It may be unrealistic to expect Procuring Authorities to anticipate all the modifications that may need to be made to a PPP contract over a period potentially in excess of 25 years, but it is important for Procuring Authorities to be aware of their procurement law obligations in this context.

[13] See Article 29 (7) of Directive2004/18/EC.

[14] See Article 30 (7) of Directive 2014/24/EU.

A body of CJEU (Court of Justice of the European Union) case law, developed since the introduction of the old Public Procurement Directive, has sought to regulate the ability of Procuring Authorities to make modifications to public contracts during their lifetime without retendering them.[15] The objective of this has been to ensure a level playing-field and that bidders are treated fairly during the original procurement process (i.e. that all bidders and potential bidders know the full anticipated scope of the project that may be bid for through the original tender documentation). One concern is that, if the contract (as modified over time) had been advertised in the original procurement, this might have resulted in different bidders participating or different bids being admissible or accepted. For example, some parties that did not bid at all, thinking that the initial project proposal was (say) too small or that it was beyond their skill set, may have chosen to bid for it if they had known its later, modified scope. Another concern is that it would be unfair (and contrary to the principle of equal treatment) if a bidder could win a contract by offering a set of attractive terms but then be permitted to amend those terms (e.g. increase its prices) substantially during the term of the contract.

The new Public Procurement Directive now helpfully consolidates provisions from the old Public Procurement Directive and CJEU case law, and sets out the various circumstances in which the modification of contracts is permitted without the requirement for a new procurement procedure.[16] Table 2 sets out some additional guidance on how to manage the risks associated with making changes during the life of a PPP contract.

One such circumstance is where the modification is not "*substantial*".[17] In line with the rationale set out above, a modification will be considered "*substantial*" if, either (a) had it been known during the initial procurement, the modification would have encouraged other candidates to bid or caused a different bid to be chosen or (b) it changes the economic balance of the contract in favour of the contractor, or (c) it extends the scope "*considerably*", or (d) it sees a new contractor replace the contractor initially awarded the contract.[18]

It remains the case that there is a specific exemption permitting modifications to contracts if these have become necessary due to circumstances which were unforeseeable by a diligent Procuring Authority. Such modifications must not change the overall nature of the contract and, as under the old Public Procurement Directive, the value of such modifications must not exceed 50% of the value of the original contract. The new Public Procurement Directive clarifies that, where several successive modifications are made to a contract, the 50% limit will apply to the value of each modification (but, implicitly, not to the aggregate value of successive modifications). However, successive modifications to the same contract must not be aimed at circumventing the new Public Procurement Directive.[19] On these grounds, a

[15] Principally Case C-454/06 Pressetext, CJEU judgment of 19 June 2008. The previous Public Procurement Directive contained only limited provisions touching on this area: Articles 31 (4) and 61 of Directive 2004/18/EC.

[16] See Article 72 of Directive 2014/24/EU.

[17] See Article 72 (4) of Directive 2014/24/EU.

[18] See Article 72 (4c) of Directive 2014/24/EU.

[19] See Article 72 (1b) of Directive 2014/24/EU. This limitation applies to each modification but should not be aimed at circumventing the Directive.

notice confirming that the contract has been modified must be published in the OJEU.

Modifications are also now permitted to provide for additional works or services that have become necessary and where the contractor cannot be changed either for economic or technical reasons or without causing significant inconvenience or substantial cost duplication for the Procuring Authority. The 50% limit (described above) also applies to this situation, as does the requirement to publish a notice to this effect in the OJEU.

Of particular relevance to PPPs (and project finance in general) is that there are now further protections for Procuring Authorities faced with having to restructure a consortium or replace a private partner. Such changes are explicitly permitted under both the new Public Procurement Directive (and the Concession Directive) in the event of an insolvency or corporate restructuring.[20] This removes concern that lenders' rights to step in to projects that are not performing and take action (e.g. to replace/restructure the SPV in the contract) might be at odds with the Procuring Authority's procurement duties.

In another new provision, which adds considerable additional flexibility, modifications of any kind and irrespective of their monetary value are permitted where they have been:

*"provided for in the initial procurement documents in clear, precise and unequivocal review clauses…"* [21]

Many PPP contracts contain provisions for dealing with situations where changes are required and can be initiated over the contract term. It remains to be seen, however, whether these provisions do, or even can (given the limited extent to which it is possible to foresee changes that may be required over a long-term contract) anticipate changes with the clarity and precision that the Commission and CJEU will require in practice.

Lastly, a modification will be permitted where the value of the change falls below the *de minimis* threshold (10% of the original contract value for service and supply contracts and 15% of the original contract value for works contracts). To benefit from this exemption, the modification must not change the overall nature of the contract and it is important to bear in mind that (in contrast to the 50% limit applying to unforeseeable or necessary modifications referred to above) the *de minimis* threshold will apply to the **cumulative** value of successive modifications to the same contract.

[20] See Article 72 (1d) and (4d) of Directive 2014/24/EU.

[21] See Article 72 (1a) of Directive 2014/24/EU.

## Table 2 - How to manage risks arising from modifications during contract term

| Potential changes | Options for managing change and mitigating risk |
|---|---|
| **Additional works or services become necessary during contract term**<br>**Extension to duration of contract**<br>**Amendments to contract's commercial terms (e.g. pricing)**<br>**An alternative prime contractor steps in (e.g. due to takeover or insolvency)**<br>**Change of a sub-contractor (e.g. due to insolvency or poor performance)** | The options for managing change will depend on the Procuring Authority's choices made prior to publication of the OJEU notice. A Procuring Authority that invests time and resource from the outset in ensuring flexibility will have more options and face lower risks.<br>▪ Refer to potential change in initial procurement documents (e.g. contract notice and/or invitation to tender) and ask bidders to take this into account when submitting bids.<br>▪ Provide for the potential change in a review clause in the contract. The new Public Procurement Directive states that such a review clause must:<br>- be "*clear, precise and unequivocal*";<br>- state the scope and nature of possible modifications or options; and<br>- state the conditions under which it may be used.<br>There is no further clarification on how precise or detailed a review clause must be to be effective: this will depend on the facts of each case and on future guidance in case law.<br>▪ Specify an upper limit (e.g. maximum value or duration) on the potential change (this was deemed helpful in the UK *Edenred* case).[22]<br>▪ Try to bring change within the scope of a specific derogation, e.g.:<br>- additional services have become necessary and cannot be provided by a different supplier for economic or technical reasons and the value is not over 50% of the value of original contract; or<br>- change has become necessary due to unforeseeable circumstances and any increase in price is not over 50%; or<br>- a new contractor steps in following a corporate restructuring.<br>▪ If possible, keep the value of the change to (a) below the Directive's relevant financial threshold and (b) below 10% (services/supplies) or 15% (works) of total value of initial contract.<br>▪ Remember that the value/impact of successive changes may need to be cumulated.<br>▪ Consider publishing a voluntary *ex-ante* transparency (or VEAT) notice in OJEU, describing the change and the circumstances giving rise to it. This would mitigate the risk that the amended contract could be declared ineffective if successfully challenged. |

[22] In Edenred v HMT [2015] UKSC 45, the Supreme Court ruled that the UK Government could entrust the administration of its new tax-free childcare scheme to the supplier Atos under an existing contract, on the basis that this contract included review clauses which were sufficiently flexible to encompass the new services. Consequently, the extension of the supplier's remit did not involve any 'substantial modification' for the purposes of the procurement rules. The Supreme Court considered that one factor supporting this conclusion was that the review clause in question had an upper financial limit of GBP 2 billion.

## 1.5. Wider Policy Objectives

During the drafting process, the Commission was placed under considerable pressure to use the new Public Procurement Directive (not the Concession Directive) as a tool to deliver other policy objectives. This would have meant ensuring that procurements across the EU met, for example, defined environmental standards or key policy objectives (such as the use of SMEs or apprentices). Although there are sections in the new Public Procurement Directive that allow the use of green and social criteria in awarding public contracts, these are optional rather than obligatory and come with a number of conditions to prevent their misuse.[23] The use of these clauses will also be scrutinised and reviewed as the provisions of the new Public Procurement Directive are implemented to ensure that they are not employed as a way of distorting competition in the EU by, for instance, artificially favouring local firms. **Procuring Authorities therefore have some flexibility in this area to ensure that procurements meet their own policy and procurement priorities.**

One key area of the new Public Procurement Directive that may have a more direct impact on PPPs is the set of new rules about splitting contracts into lots. These were inserted into new Public Procurement Directive with the intention of encouraging greater access for small and medium-sized enterprises to larger contracts. However, many complex projects work better as a whole rather than sub-divided. Therefore there was a risk that such rules might place an additional burden on Procuring Authorities and create additional risks for them to manage, such as a need to integrate separate contracts within the project as a whole. As it is, the Directive 2014/24/EU allows Procuring Authorities to refrain from splitting the contract into lots if they wish to do so. They merely have to state, in the OJEU documentation or in their report at the end of the procurement phase, *"an indication of the main reasons for their decision not to subdivide into lots"* [24] but they do not have to provide any further justification or analysis.

**The overall policy on splitting contracts into lots is not intended to be burdensome** and there is no process for questioning the Procuring Authority's reasons for not doing so.

[23] See Article 43 of Directive 2014/24/EU.

[24] See Article 46 (1) of Directive 2014/24/EU.

# 2. Concessions and PPPs

This Chapter provides a summary of the key issues for PPPs arising from the Concession Directive. This is a new Directive covering both works concessions (previously included as a separate section in the old Public Procurement Directive) and service concessions (see Box 3 for the key definitions). The latter were excluded from the scope of the old Public Procurement Directive and thus effectively unregulated. However, CJEU case law established that the award of service concessions nonetheless had to comply with the EU Treaty principles of non-discrimination, equal treatment and transparency. This treatment of concessions under the old Public Procurement Directive, and the ambiguity over how concessions were defined, caused significant differences in interpretation across the EU, creating uncertainty and a considerable volume of CJEU case law.

Both the new Public Procurement Directive and the Concession Directive therefore seek to articulate how public contracts should be procured and awarded in order to best comply with these EU Treaty principles. However, whereas the new Public Procurement Directive is quite prescriptive, laying out in some detail the required processes by which contracts should be procured and awarded in order to meet these principles, the Concession Directive is less prescriptive in its required processes. This potentially offers Procuring Authorities greater flexibility in deciding how their procurement procedures can be configured for concession contracts while remaining non-discriminatory, transparent and treating bidders equally. This has the potential to produce procurement procedures which better meet Procuring Authorities' and bidders' needs for these particular types of (often complex) contract (e.g. being more agile and less administratively burdensome than if required to observe all the required processes set out in the new Public Procurement Directive).

The Concession Directive could therefore be particularly important for PPPs as, although user-pay PPPs (e.g. demand-based) would almost always be seen as concessions, and are called as such in some countries, most government-pay PPPs (e.g. availability-based with the notable exception of shadow toll arrangements, see 2.3) have not traditionally been seen as projects which could be procured in this way.

As set out in this Chapter, the wording in the new Directives, particularly around the definition of *supply risk*, may open the possibility for procuring availability-based PPPs using the Concession Directive (although this will depend on how the transfer of risks associated with such PPPs are interpreted by practitioners and lawmakers in light of the Directives' provisions).

**Box 3: Defining concessions in the Concession Directive** [25]

***"Works concession** means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators, the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment."* Works concessions are often used to deliver major infrastructure projects such as the construction and operation of roads, bridges or tunnels. When the concessionaire receives some or all of its remuneration by way of tolls directly charged to users (or paid on their behalf by government in the form of shadow tolls), consideration is derived from "*exploitation*" of the work and not from the Procuring Authority that awards the concession. The concessionaire takes the financial and operational risk when it finances the construction of the work and operates it without a guarantee that it will necessarily be able to recoup its full investment and make a profit over the period of the concession.

*"**Service concession** means a contract for pecuniary interest concluded in writing by means of which one or more Procuring Authorities entrust the provision and the management of services other than the execution of works referred to above to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment."* Service concessions are used in projects which principally require operation and maintenance services rather than construction works: for example, a concession to operate an existing railway or port, charging third parties for the use of those facilities, or a concession to run a government canteen and charge users of the canteen directly.

**"*The award of a works or service concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both**. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible*."

## 2.1. Objective of the Concessions Directive

Given the importance of concessions for the public sector, the Concessions Directive was considered necessary in order to rectify some of the perceived abuses in the procurement of concessions, such as overlong concession periods and the award or renewal of concessions without competition. The drafting of the Concession Directive proved controversial and consequently took longer to agree than was originally

[25] See Article 5 of Directive 2014/23/EU.

envisaged. The text should perhaps therefore be seen as a further step along the way to more transparent procurement in the field of concessions rather than a final destination.

The Concession Directive articulates some basic rules to bring more transparency to the procurement of concessions (e.g. by requiring their prior advertisement and by limiting their length). However, it is not as prescriptive or broad in scope as the new Public Procurement Directive, in that there are no compulsory procedures as such (see section 1.2). Nor does the Concession Directive contain any of the wider policy tools described above concerning social or green procurement (see section 1.5). Table 3 at the end of this Chapter summarises some of the potential benefits of utilising the Concession Directive instead of the new Public Procurement Directive and therefore why the debate over which Directive to use for PPPs is relevant.

## 2.2. Relevance to PPPs

The Concession Directive introduces (or clarifies) a regime which is more flexible and less procedurally prescriptive than that in place for standard public procurements. It does not mandate procedures, such as *competitive dialogue*, but merely sets out broad principles, highlighting, for instance, the possibility of negotiation for complex projects.

> *"The contracting authority…may hold negotiations with candidates and tenderers. The subject-matter of the concession, the award criteria and the minimum requirements shall not be changed during the course of the negotiations."* [26]

This approach offers Procuring Authorities greater flexibility in the way that they conduct their PPP procurements if they are seen as falling within the scope of the Concession Directive rather than the new Public Procurement Directive. This could be beneficial for Procuring Authorities, particularly in mature PPP markets, that are comfortable shaping their own procedures through negotiation based on previous experience and established models and contract documentation. The issue for consideration in less mature PPP countries is that the lack of detailed procedural rules may increase the risk of Procuring Authorities inadvertently failing to adhere to general principles, such as equal treatment and transparency, in the procurement process.

Early analysis by the Commission when drafting the new Public Procurement and Concession Directives suggested that the majority of PPPs could be regarded as concessions, as defined by the Commission and the CJEU, rather than ordinary public contracts. This analysis was then used as the basis for trying to distinguish between the two Directives through the drafting process. Unfortunately, this analysis did not fully take into account the complete spectrum of PPP contracts, particularly availability-based PPPs, which make up a considerable proportion of the current PPP market. **It remains unclear whether an availability-based PPP project would come within the scope of the Concession Directive or whether it would need to be procured under the new Public Procurement Directive. This uncertainty may**

[26] See Article 37 (6) of 2014/23/EU.

**cause problems for some Member States with regard to the transposition (particularly for those that already have laws concerning concessions) and application of the Directive.**

If the Concession Directive is mistakenly applied to an arrangement which fails to meet the definition of a concession discussed below, but is in fact an ordinary public contract falling within the new Public Procurement Directive, a third party could raise a legal challenge on this ground. In a worst-case scenario, such a challenge could mean that the entire procurement process has to be re-run.[27] Mis-characterising an ordinary public contract as a concession may also mean that the Procuring Authority has to return any EU grant money if the project fails an *ex-post* assessment by the EU body awarding the grant, on the basis that the procurement had not complied with the correct EU procedures. **The chances of the risks of re-running the procurement or returning grant money materialising would be greatly reduced if the award procedure complied with the requirements of the new Public Procurement Directive, as this is the higher, more prescriptive standard.**

## 2.3. Defining a Concession

A key initial step when procuring a PPP is therefore to establish which Directive should be followed. First of all, there is no specific legal definition of a PPP at the EU level in either of the Directives to guide Procuring Authorities, although national lawmakers have in the past created their own definitions when drafting their own laws on procurement or concessions. The Concession Directive gives some explanation of what a concession is from an EU point of view: see the detailed definitions set out in Box 3 above. In short, under a concession:

*"a company is remunerated mostly through being permitted to run and exploit the work or service and is exposed to a potential loss on its investment."* [28]

Recital 20 of the Concession Directive (quoted in Box 4) is particularly relevant as it tries to articulate how these potential losses might occur.

[27] In practice, this risk is greatly reduced by the fact that, in many jurisdictions, any procurement challenge has to be brought within a short period of time (e.g. 30 days in the UK) of the claimant first having knowledge of the alleged breach. Consequently, any challenge based on an allegedly incorrect choice of procedure would have to be commenced early in the process and could not be left until after the procurement procedure has been completed.

[28] See: **ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-12-concession-definition_en.pdf.**

**Box 4: Recital 20 of the Concession Directive**

*"An operating risk should stem from factors which are outside the control of the parties. Risks such as those linked to bad management, contractual defaults by the economic operator or to instances of force majeure are not decisive for the purpose of classification as a concession, since those risks are inherent in every contract, whether it be a public procurement contract or a concession. An operating risk should be understood as the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk. Demand risk is to be understood as the risk on actual demand for the works or services which are the object of the contract. Supply risk is to be understood as the risk on the provision of the works or services which are the object of the contract, in particular the risk that the provision of the services will not match demand. For the purpose of assessment of the operating risk the net present value of all the investment, costs and revenues of the concessionaire should be taken into account in a consistent and uniform manner."*

It therefore becomes possible to try and establish whether a PPP falls within the definitions laid down in the Concession Directive.[29] From these definitions and previous CJEU case law, it is apparent that the EU is concerned with a number of related issues in defining a concession based on whether the *operational risk* has been transferred.[30] The key headline questions are as follows:

- are the *risks associated with demand or supply* of the asset or service under the contract being transferred to the private sector partner?
- is the private sector partner exposed to the *vagaries of the market*? and
- are the relevant risks being transferred *foreseeable but uncertain*?

If the answer to these questions is yes, then potentially the project could be procured as a concession. If the answers to the above questions are no, this would mean that the project should be treated as procurement of an ordinary public contract.

The clearest example of where a negative response to these questions arises is where a project benefits from guarantees from the Procuring Authority which mean that the private partner is certain to at least break even on its investment costs. This would imply that none of the above risks associated with the questions above has been transferred sufficiently.

A further example of a negative response is where the *risks transferred are inherent in all public contracts*. It should be assessed on a case-by-case basis whether the risks being transferred in a PPP contract can be considered to be of a different

[29] It is worth stressing that the definition of concessions used in the Concession Directive does not match that employed by EUROSTAT for statistical treatment (balance sheet classification) purposes, so it is not possible to use the statistical treatment analysis of a PPP for procurement purposes.

[30] Adapted from recitals 18-20 of Directive 2014/23/EU.

complexity or intensity to those (such as maintenance or ground risks) found in many conventional contracts.

Recital 20 of the Concession Directive gives further guidance on how to approach transfers of the following specific types of *operational risk*:

- *force majeure* - i.e. if a concessionaire might lose its investment as a result of what is termed an "act of god", this does not mean that sufficient risk has been transferred; in other words, the transfer of a risk materialising from something that is not foreseeable is not sufficient to give rise to a concession, as other public contracts also have to deal with such risks;

- *contractual default* - i.e. if a concessionaire bears the risk that it may default and consequently lose its investment, this is not sufficient to indicate that risk has been transferred as this can happen in any public contract; and

- *bad management* - i.e. just because a concessionaire might not realise its expected profits because of its own inefficient internal workings, this does not mean that operational risk has been transferred, as public contracts also have to deal with these risks. It is not clear whether the fact that contracted-for risks that materialise in the provision of a PPP contract would be considered to be *bad management* in the sense intended by Recital 20 of the Directive or whether at least some of the contracted-for risks would be considered *supply risks*.

The following sections attempt to understand these issues in greater detail in terms of their relevance to PPPs.

Can demand-based PPPs be procured as concessions?

User-pay PPPs - these PPPs (e.g. a toll road) can be regarded as a concession, since the private sector partner is remunerated by exploiting revenues from an asset that are uncertain as a result of the transfer of *demand risk*, and this example is indeed quoted in the Commission's literature.

Shadow-toll PPPs – although a "government-pay" contract, a pure shadow-toll arrangement could also be regarded as a concession, given that these contracts also transfer *demand risk,* as payment is based on usage; it is just the source of the payment that is different. This is because the private sector partner is also remunerated on the basis of its ability to exploit revenues from an asset that are unpredictable, but is rewarded according to usage by government on behalf of users.

It remains to be seen whether a contract that contained a mix of user-pay or shadow-toll arrangements with availability payments could be regarded as a concession. The answer would probably depend on the relative weight of the different forms of payment mechanism and therefore the extent to which the availability payment reduced the risk of the private partner not being able to recoup its investment.

Can availability-based PPPs be procured under the Concession Directive?

What is more difficult to determine is whether there is scope to procure availability-based PPPs under the Concession Directive. *Demand risk* for the usage of an asset is rarely transferred to the private sector under an availability-based PPP: the number of prisoners, students or patients using the facility is controlled by the public sector and the private sector is usually paid irrespective of use as long as it meets the various contractual standards. For this reason, the private sector counterpart is not subject to the *vagaries of the market* in the sense that there is only limited competition for usage (e.g. there is not usually a competitive market for students, patients or prisoners; this is defined by the public sector).[31]

Where the private partner is exposed to the vagaries of the market is in the pricing of materials, supplies and labour costs. Even here, aspects of this problem are often mitigated in PPP contracts through the use of periodic benchmarking or market testing during the life of the contract.

The most difficult issue is whether the *risk for the supply of the asset* (and, in the case of a PPP, the associated services) has been transferred to the private partner in availability-based PPPs and whether the risks being transferred are *foreseeable but uncertain***.** This issue is discussed in more detail in the following section.

It is also relevant to consider once again the issues raised in Recital 20 as to whether risks transferred within the contract are in fact *inherent in every contract***.** In these situations it is difficult to categorise a project as a concession. For example, if the multitude of contracted-for risks common to PPPs were to materialise and were merely seen in the same light as *bad management*, this would mean that sufficient operational risk has not been transferred in order to categorise the project as a concession under the Concession Directive. To complete the classification of PPPs using Recital 20, *force majeure* risks are rarely transferred to the private sector partner in any significant way anyway. Similarly, although *contractual default* risk is usually transferred in a PPP, this transfer is often mitigated by compensation in the form of termination payments to reflect the work that the contractor has already done. Therefore the key issue would appear to be how *bad management* is perceived, as it is often difficult to determine whether losses that the private contractor might incur are attributable to the transfer of a *supply risk* rather than *bad management*.

**If *supply risk* has been transferred, then this would suggest that the project can be procured as a concession. However, distinguishing between *supply risk* and *bad management* is difficult**, as discussed in greater detail in the next section.

Defining supply risk in availability-based PPPs

In interpreting the Concession Directive, there is particular difficulty with regard to how *supply risk* is defined (particularly in case law[32]) and how that equates to the

[31] Clearly some contracts may have ancillary elements that are subject to the market (e.g. a shop in a hospital or a food vendor in a stadium), but these will probably not be the "*object of the contract*" and are therefore unlikely to be decisive in determining whether the overall arrangement involves a sufficient transfer of risk.

[32] For example, see Case C-274/09, Stadler at **curia.europa.eu/juris/liste.jsf?language=en&num=C-274/09.**

more familiar term of *availability risk*. This section outlines what these risks might look like in a standard PPP project.

In a typical PPP project, the private partner takes many risks. In managing and taking on these risks, some of which could be termed *supply risks*, the private partner places its equity investment at risk. The private partner also needs to manage the risk of potential deductions from the availability payments, part of which are required to pay its lenders. Such deductions might arise if it fails to perform the services. Significant risk transfer occurs because, unlike a conventional public contract, the revenue stream does not match the cost liability being incurred. The private partner therefore incurs significant costs in building the asset in advance but is not reimbursed or compensated for these costs until that asset is working properly, together with the associated services. Furthermore, when the private partner is faced with any deductions through the payment mechanism (due to unavailability), it is expected to remedy the alleged defect from its own resources. This would reduce shareholder returns and potentially involve making a call for contributions from equity participants.

It is worthwhile considering the specific risks that are being transferred as part of a PPP contract and the guarantees in place to make sure this risk transfer is meaningful. One of the main reasons for choosing a PPP structure is that there is a contractual guarantee that the asset will be built on time and on budget. To back up this guarantee the private partner will be penalised financially, sometimes substantially, if it fails to supply the initial asset, and therefore provide the service, under the agreed terms. A further example is that at the start of the PPP, the private partner has to design and deliver an asset that has a value throughout the contract term, and beyond, from which is also required to deliver a service. This is a fundamental transfer of *supply risk* which requires the private partner to make product and design choices at the outset but is only rewarded for these choices through the stream of availability payments over the contract's life.

During the operational phase of a PPP, there are further risks that need to be managed to ensure that the asset and associated services remain in use and continue to perform to the agreed standard. These risks include many relief event risks (such as failure by a third party utility provider or industry-wide industrial action), risk of failure of sub-contractors, some utility risks, insurance cost risks, etc. An example of how risks such as these are transferred in PPPs is set out in in Box 5, which illustrates the UK's standard contract for PPPs. Managing these risks properly is fundamental to the smooth functioning of the PPP and if the private partner fails to do so, it can be penalised through deductions from the availability payment.

Persistent failure to perform the contract obligations can lead the private partner, in the worst case scenario, to forfeit the contract (through an event of default). Deductions are generally made by applying a pre-defined formula that progressively increases the level of financial penalties as the duration of the sub-standard performance persists. Mechanisms within the PPP contract typically require the Procuring Authority to formally warn the private partner that poor performance falling below the required contract standard has occurred. Such warnings are repeated if insufficiently corrected behaviour persists. The Procuring Authority may step in to

perform the services for a period of time while the issues leading to the service failures are addressed. This does not mean that the risk has not been transferred; rather the risk is being managed, as in this scenario the Procuring Authority will recoup its costs from the private partner who must bear this cost from its own resources.

The senior lenders to the private partner are also provided with the opportunity in the contract to take action and to apply coercive pressure for performance standards to be corrected. This opportunity to intervene is pre-emptive of any final decisive action by the Procuring Authority to terminate the contract. Such action by the lenders may include replacing the private partner. In each risk-management scenario the Procuring Authority is reimbursed for any costs incurred and this cost is ultimately borne by the private partner (including under events of default).

There is also an element of *supply risk* to ensure that the revenue/income stream matches the private partner's liabilities over the contract period. The public sector would be faced with a comparable problem in a conventional project when having to find the budget to cover large and/or unexpected maintenance costs during the life of the asset. In a PPP, this *supply risk* is transferred to the private partner and is often managed by the use of provisioning (e.g. sinking funds), pre-emptive maintenance planning, resource scheduling, product choices, the seeking and maintenance of warranties, supply chain management, etc. As mentioned previously, the private partner is also expected to manage many of the increases in costs associated with the supply of these services (e.g. labour, raw materials), though the impact of this for some services may be mitigated by periodic benchmarking and market testing. Similarly, the private partner retains significant *supply risk* until the end of the contract period with regard to returning the asset to the Procuring Authority in the required state.

Ultimately if the private partner fails to manage any of the above *supply risks*, it could lose its investment, which is one of the key aspects of a concession. However, to what extent this is simply down to *bad management*, as described in the Directive, rather than the effective transfer of *supply risk* is difficult to judge and will depend on a detailed analysis of the facts in each case. There is no guidance specifically on this point in the Concession Directive or existing case law. What the PPP contract typically does is to establish what risks are *foreseeable but uncertain* and identify who is responsible in the event of such risks materialising during the life of the contract. For the private partner, it also makes specific the consequences of failure to supply the contracted services to the standard defined.

**Box 5: Example of *availability risk* from the UK**

In December 2012, the UK Government launched a revised approach to the delivery of infrastructure and services through PPPs, called PF2, and published a substantial 400-page document *Standardisation of PF2 Contracts*.[33] The most relevant part to the discussion of *availability/supply risk* is Chapter 19 (and Section 19.5 in particular), which articulates the meaning of availability, and specifically Clause 19.5.3, which gives examples of how this issue is to be treated.

*"Unavailability will occur if the relevant key objective criteria determining availability are not satisfied. These will need to be tailored to each individual project but in the case of an office accommodation project, for example, may include:*

- *non-provision of a specified level of access;*
- *non-provision of specified physical and environmental conditions;*
- *a failure in supply of power, gas, electricity, water or other utilities and services;*
- *non-provision of a specified level of ambient temperature;*
- *non-provision of a specified level of lighting;*
- *non-provision of fully functioning communications or information services;*
- *non-compliance with a law which applies, affects or relates to the relevant area infrastructure;*
- *non-compliance with a law which applies, affects or relates to the relevant area;*
- *specified threats to the safety or health of persons using or having access, including failure to provide fire detection and alarm systems; or*
- *failure to comply with any other specified factors (i.e. those which are likely to jeopardise continuing operations)."*

Conclusion

An availability-based PPP involves a private partner running and exploiting a work or service that it has built in advance, and being remunerated by an availability payment which may be seen as a revenue stream to be exploited in the same way as a toll. In this situation it just so happens that the security for the recovery of revenue comes via a third party (i.e. the government on behalf of taxpayers), rather than directly from users (in the same way as with shadow-toll PPPs). **In an availability-based PPP, the private partner clearly faces the risk of a mis-match between its revenue**

[33] The standard contract used for the current PF2 initiative can be found at: **www.gov.uk/government/uploads/system/uploads/attachment_data/file/221556/infrastructure_standardisation_of_contracts_051212.pdf**

**stream and its costs and, consequently, the risk of suffering a potential loss on its investment.**

**Without clarity on whether the risks highlighted in this section fall within the definition of supply risk rather than bad management, it is uncertain whether it is appropriate to treat these types of PPPs as concessions, particularly as some discussions over how much risk will be transferred often occur during the dialogue phase (i.e. post-OJEU in a competitive dialogue).** Ultimately, each case will depend on its own specific facts and it is not possible to give a single, generic answer.

## 2.4. Rules for Concessions

If a PPP can properly be categorised as a concession, then the new regime in the Concession Directive provides a framework for regulation which previously only existed to a limited degree for works concessions and was almost non-existent in the case of service concessions (i.e. apart from abiding by Treaty principles).

In an effort to regulate concessions more effectively, many of the key provisions in the Concession Directive, such as those on the publication and timing of concession notices, are similar to those in the new Public Procurement Directive. Indeed, the provisions governing some of the subjects of most interest to PPPs, such as contractual modifications[34] (discussed in Chapter 1) are, helpfully, virtually a copy of the wording contained in the new Public Procurement Directive.[35]

Of note to PPPs, should they be defined as concessions, is the issue of concession length (i.e. how long the private partner is given to exploit the asset that it has delivered). This was possibly one of the more contentious aspects of the previous regime, where procurement awards were often made for periods of time significantly longer than the asset life. This meant that the rest of the market was effectively locked out of such projects, thereby constraining competition for the operation, renewal and refurbishment of such assets. Under the Concession Directive, the maximum duration of any concession lasting more than five years:

> *"shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made for operating the works or services together with a return on invested capital taking into the account the investments required to achieve the specific contractual objectives."* [36]

This provision is designed to prevent concessions from being awarded for an excessive length of time which is disproportionate to the amount of the up-front investment. However, there is some difficulty in interpreting how *"the time…to recoup the investment"* should be interpreted in practice for, for example, a complex project finance deal. Once again, this is an aspect that can only really be tested with experience from real projects.

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[34] Though there are some minor differences around the value of *de minimis* provisions and the use of indexation clauses between the two Directives.

[35] See Article 43 of Directive 2014/23/EU.

[36] See Article 18 of Directive 2014/23/EU.

## Table 3 - Potential advantages in the procurement process of procuring a PPP as a concession

| | |
|---|---|
| **Overall conduct of award procedures** | The Concession Directive does not prescribe the use of specific procedures following the publication of an OJEU notice and leading up to the publication of a concession award notice. Indeed Art. 30 of the Concession Directive confers express freedom on Procuring Authorities to design their own procedures for awarding concessions. Procuring Authorities must comply with the general principles (of equal treatment, transparency, non-discrimination and proportionality) as well as a limited number of specified procedural requirements (see below).<br>The new Public Procurement Directive on the other hand sets out five different procedures that can be used to procure projects in different circumstances. Each of these procedures has a set of different rules, with differing ranges of complexity for Procuring Authorities. There may potentially be some additional flexibility from using the Concession Directive in this area. |
| **Documentation** | The Concession Directive allows the Procuring Authority to wait until the invitation to tender stage to make the concession documents available.<br>This is a small practical advantage as the new Public Procurement Directive requires all procurement documents to be made available from the date of the OJEU notice, even where the invitation to tender / dialogue / negotiate will not be issued until a later date. |
| **Technical specifications** | The Concession Directive does not lay down any detailed rules on technical specifications. It merely sets out a general requirement to define and disclose "*technical and functional requirements*". However it does still prohibit any references to specific makes, sources, processes or patents, unless this is justified by the subject-matter and accompanied by the words "*or equivalent*".<br>Rules on this in the new Public Procurement Directive contain more detail, but these mostly accord with common sense and general principles which those using the Concession Directive would likely and implicitly have to abide by. For example, its requirements that technical specifications afford equal access to economic operators and are based on European standards where they exist, would under general principles also apply implicitly to a project procured using the Concession Directive. |
| **Division into lots** | Unlike the Public Procurement Directive, the Concession Directive does not require Procuring Authorities to justify a decision not to sub-divide a contract into lots.<br>This is arguably a very small practical advantage as even the provision for this in the Public Procurement Directive is not designed to be burdensome. |
| **Selection of candidates (information requirements)** | The Concession Directive is broadly equivalent to the Public Procurement Directive in this area albeit it does not contain specific restrictions on some of the information that can be required of bidders (e.g. in contrast to the Public Procurement Directive it does not specify a limit on the minimum turnover requirements that Procuring Authorities may set for candidates). |

| | |
|---|---|
| **Selection of candidates (number of bidders)** | The Concession Directive does not specify a minimum number of tenderers and arguably a Procuring Authority could invite as few as two tenderers (as general principles around maintaining genuine competition and transparency still need to be upheld).<br>This may be a significant advantage of the Concession Directive in reducing the time / cost of the procurement process for both the public and private sector. |
| **Selection of candidates (conduct of the procurement)** | The Concession Directive does not require a Procuring Authority to carry out a pre-selection stage and does envisage a scenario where a concession notice published in the OJEU incorporates an invitation to tender.<br>This offers Procuring Authorities the opportunity to design a procurement that sees tenders submitted more quickly than either the *restricted, competitive dialogue or competition with negotiation procedures* under Public Procurement Directive, and is coupled with flexibility in how to conduct the post-tender stage under the Concession Directive (see below). Tests on professional and technical ability and financial and economic standing and exclusion grounds could still be applied by incorporating them into the tender response.[37] |
| **Tenders** | The Concession Directive envisages an invitation to tender stage and a stage for evaluating tender responses but is silent on matters such as a formal call for final tenders (in contrast to the Public Procurement Directive which requires a formal close of dialogue under the *competitive dialogue procedure* and an invitation for final tenders under the *competitive procedure with negotiation*). This potentially allows for a more iterative tender process (though general principles around effective competition being maintained still apply). |
| **Post-tender negotiations** | The Concession Directive is silent as regards post-tender negotiations though general principles and key restrictions of not changing the subject matter, award criteria or minimum requirements still apply. This will limit the extent to which post-tender negotiations could result in a change to the preferred bidder's offer or the scope of the Authority's requirements. That said, the lack of express prohibition could potentially assist in relation to what might be termed grey areas that exist under the Public Procurement Directive (such as post-tender competition for debt financing). |
| **Award criteria** | The Concession Directive still requires tenders to be awarded on the basis of objective criteria which ensure effective competition and *"identify an overall economic advantage"* for the Procuring Authority. The Public Procurement Directive is more prescriptive as it requires Procuring Authorities to identify "*the most economically advantageous tender … on the basis of price or cost, using a cost-effectiveness approach, such as life-cycle costing … and may include the best price-quality ratio".*<br>An additional element of flexibility in the Concession Directive is that evaluation criteria do not need to be ascribed weightings but can be stated simply in descending order of importance (although in practice if a Procuring Authority creates a weighting system general principles will likely require it to be disclosed in the concession documents). |

[37] Of course there are disadvantages for the Procuring Authority potentially having to review a large number of potentially unsuitable tenders and of bidders expending time and costs on bids when they might otherwise have been eliminated more quickly through a pre-selection process.

# 3. Procurement Directives Going Forward

## 3.1. Public Procurement

The new Public Procurement Directive offers Procuring Authorities greater flexibility and clarity in many areas. In particular, for PPPs, the introduction of the *competitive procedure with negotiation* alongside some reforms of the *competitive dialogue procedure* will be welcome. The Directive actively promotes the benefits of negotiation in procuring complex contracts such as PPPs, in order to obtain a better outcome for the Procuring Authority. There is also greater clarity as to the circumstances when the two procedures that allow negotiation may be used. These measures in the Directive may therefore act as a helpful stimulus for some Member States that have not thus far valued the benefits of including greater negotiation in their procurement processes.

Although the Public Procurement Directive simplifies some procurement issues for Procuring Authorities, Chapter 1 set out a number of areas, such as post-tender changes and fine-tuning, where some ambiguity remains. In these cases, clarification from the Commission would be welcome, and indeed strongly preferred to the alternative of generating future CJEU case law. Some of the potentially helpful revisions in the new Public Procurement Directive still need to be tested so that they match PPP market practice with CJEU jurisprudence and the intentions of the Commission.

## 3.2. Concessions

The key question remaining under the new Concession Directive is in fact a fundamental one regarding what constitutes a concession for procurement purposes. Although there is some clarification in the recitals, there is a lingering question over whether the sorts of risks being transferred within a PPP, in particular an availability-based PPP, might mean that the project could be procured as a concession. As the Concession Directive is less prescriptive in many respects, there is clearly an advantage for Procuring Authorities in using it. This is because they can, if they so wish, tailor the procedure much more to their own needs (e.g. speed) and experience (e.g. level of negotiation). Clearly, such ambiguity is unhelpful if there were a possibility that, after a lengthy procurement process for a complex project, the original choice of Directive is called into question. This could happen if the risk balance in the project (for instance, in the contractual clauses or financial terms) changed while the project was being prepared, procured or negotiated.

Ultimately every PPP project (even those with some standardisation in place) is a complex web of different risks, some of which are fully transferred to the private sector, some partially and some not at all. In this context, trying to categorise the transaction correctly, without a specific project example, is difficult. Once again, it may help to match market practice with CJEU jurisprudence and the intentions of the Commission.

The lowest-risk approach for Procuring Authorities would be to procure PPPs using the new Public Procurement Directive. This may insure them against potential legal challenges resulting from using the wrong Directive, or from being forced to return EU grant money if the PPP contract is later determined not to be a concession contract according to the EU definition. However, this approach would inevitably forgo the extra flexibility offered by the Concession Directive. Without further clarification, PPP practitioners may feel that this uncertainty represents a missed opportunity to streamline and simplify the procurement process for PPPs.

## 3.3. Transposition and Implementation

Member States had until 18 April 2016 to transpose the Directives into their domestic laws. It is clear that some countries that already have detailed laws regarding concessions will try to implement the Concession Directive and therefore procure PPPs by making changes to what they already have. This may prove difficult in practice in some cases given the likely differences in definitions highlighted in this paper between the EU and the Member States. Other Member States which do not have existing separate laws for Concessions (such as the UK) have adopted the Directives with little changes. This may mean that discussions over the differences between the legal definitions and market practice are delayed until real projects materialise that raise questions about the meaning of the definitions within the Directives.

There is a risk that, despite the best efforts of the Commission to make public procurement clearer, differences in transposition and implementation may result in an uneven playing field across the EU regarding PPPs. This may cause confusion for multinational bidders in understanding how to bid for PPPs in different jurisdictions.

# Annex - Comparison between the *competitive dialogue procedure* and the *competitive procedure with negotiation*

| | Competitive dialogue ('CD') (art. 30 of new Procurement Directive) | | Competitive procedure with negotiation ('CPWN') (art. 29 of new Procurement Directive) | |
|---|---|---|---|---|
| **Availability** | | | | |
| Grounds for use | Either:<br>1. no readily available solutions meet the Procuring Authority's needs;<br>2. the contract includes design or innovation;<br>3. prior negotiations are necessary because of the nature, complexity, legal/financial make-up or related risks; or<br>4. precise technical specifications are not possible. | Art. 26(4) | The same. | Art. 26(4) |
| **Conclusion: available grounds for using the procedures are identical** | | | | |
| **Publicity and short-listing** | | | | |
| OJEU notice | Requirement to publish a contract notice in the OJEU and allow at least 30 days for responses. | Art. 30(1) | The same. | Art. 29(1) |
| Contract requirements and award criteria | Obligation to set out the contract requirements, award criteria and an indicative timeframe in the OJEU notice or a descriptive document. | Art. 30(2) | Essentially the same: obligation to specify the subject-matter, minimum requirements and award criteria in the procurement documents. | Art. 29(1) |
| Access to procurement documents | Requirement to offer full access to '*procurement documents*' (e.g. invitation to participate, technical specifications, proposed conditions of contract) from date of publication of OJEU notice (Art. 53). This is a new requirement introduced by the new Public Procurement Directive for all projects not just PPPs. It implies that key documents need to be available earlier in the process than previously. | Art. 53 (1) | The same. | Art. 53(1) |
| Rules on shortlisting | Rules apply to shortlisting a minimum of 3 applicants | Art. 30(1) and 65 | The same. | Art. 29(2) and 65 |
| **Conclusion: no material difference at this stage** | | | | |

| Dialogue / negotiations phase | | | | |
|---|---|---|---|---|
| Initial tenders | Art. 30 does not refer to initial tenders as part of the CD. However, in practice CD typically involves an invitation to submit outline solutions at an early stage. | N/A | Minimum time-limit for receipt of initial tenders is 30 days from date when the invitation to tender is sent. | Art. 29(1) |
| | In contrast to the position under a CPWN, it is probably not permitted for a CD award to be made on the basis of initial tenders: Art. 30 implies winner chosen post-dialogue, based on final tenders. | N/A | Authority may award contract on basis of initial tenders without negotiation if it indicates this possibility in contract notice or invitation. | Art. 29(4) |
| Basis for dialogue / negotiations | No express rule, but outline solutions and any subsequent submissions from bidders usually provide the basis for the dialogue | N/A | Initial tenders form the basis for subsequent negotiations. | Art. 29(3) |
| Objective of the dialogue / negotiations | The aim of the dialogue is to identify and define the means best suited to satisfying the Procuring Authority's needs. | Art. 30(3) | Negotiations take place in order to improve the content of all tenders except for the final tenders. Despite this difference in the stated purpose, in reality there seems to be no real difference between "*dialogue*" and "*negotiation*". | Art. 29(3) |
| Changes to specifications or procurement documents | Essentially the same general principles apply to changes and, although there is no express provision as such, the rule opposite may be implied from general principles. | GPs | General principles apply. However, minimum requirements and award criteria are expressly stated not to be negotiable. | Art. 29(3) & GPs |
| | The same: no express provision but the rule opposite may be implied from general principles. | GPs | Authority must inform tenderers of any changes to the technical specifications or other procurement documents and allow sufficient time for tenderers to (re-) submit amended tenders. | Art. 29(5) |
| Treatment of bidders | Requirement for equal treatment among participants and non-discriminatory provision of information. | Art. 30(3) | The same. | Art. 29(4) |
| Confidentiality | Authority shall not reveal a participant's solutions or confidential information to other participants without its consent (which has to be specific i.e. not a general waiver). | Art. 30(3) | The same. | Art. 29(5) |
| Successive stages | Dialogue may take place in successive stages to reduce number of solutions (provided option disclosed in advance). | Art. 30(4) | The same | Art. 29(6) |
| Closing dialogue / negotiations | Dialogue continues until Procuring Authority can identify the solution(s) capable of meeting its needs. | Art. 30(5) | No express provision but position is similar. In either procedure, the Procuring Authority has discretion to decide when to end dialogue/ negotiations and proceed to final tenders and award. | N/A |
| **Conclusion: the dialogue and negotiation processes are broadly equivalent. The only real difference is that a contract award can be made on the basis of initial tenders in CPWN but not in CD; however, this option in a CPWN would very rarely be feasible in relation to a complex PPP.** | | | | |

| Final tenders and award | | | | |
|---|---|---|---|---|
| Inviting final tenders | Procuring Authority informs participants that dialogue is concluded and invites remaining participants to submit final tenders based on solution(s) presented during the dialogue. | Art. 30(6) | Procuring Authority informs participants that negotiations are concluded and invites remaining participants to submit any new or revised tenders. Procuring Authority is not strictly obliged to invite final tenders post-negotiation, but in practice it will almost always do so. | |
| Content of final tenders | Final tenders must contain all elements required for performance of the project. | Art. 30(6) | The same: no express provision but the rule opposite may be implied from general principles. It means that final tenders must be comprehensive and cover all key aspects required for project delivery. | N/A |
| Post-tender discussions | Final tenders may be "*clarified, specified and optimised*", but "*essential aspects*" of tenders or the procurement cannot change if this would be likely to distort competition or have a discriminatory effect. | Art. 30(6) | Authority may not negotiate final tenders with tenderers.<br>The more detailed rule opposite may be implied from general principles and offer some flexibility in practice. Under either procedure, essential aspects, such as price, should not change post final tenders. | Art. 29(3) |
| Assessment of final tenders | Authority assesses tenders and awards contract on basis of its pre-disclosed award criteria. | Art. 30(7) | The same. | Art. 29(7) |
| Contract award | Contract shall be awarded on sole basis of best quality-price ratio per Art. 67(2). Authorities may not specify price or cost as sole award criterion. | Art. 30(1) and (7) | No equivalent restriction, so in principle price or cost could be used as sole basis. In practice, however, Procuring Authorities are very unlikely ever to specify price or cost as the sole basis for awarding a PPP. | N/A |
| Post-preferred bidder discussions | Negotiations with preferred bidder may be carried out to confirm financial commitments or other terms contained in tender, but "*essential aspects*" of tender cannot be modified. | Art. 30(7) | No express provision, but the rule opposite may be implied from general principles. Under either procedure, essential aspects, such as price, should not change post final tenders. | N/A |
| Payments to tenderers | Authority may specify prizes or payments to participants in the dialogue. | Art. 30(8) | No express provision, but nothing to preclude such prizes or payments. | N/A |
| **Conclusion: little difference in practice. The CD provisions allowing tenders to be "*clarified, specified and optimised*" and allowing tender terms to be confirmed are helpful, but such steps are also likely to be deemed permissible in a CPWN in accordance with general principles.** | | | | |

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