The Competitive Dialogue Procedure: Advantages, Disadvantages, and its Implementation into English and Dutch Law

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Abstract
Competitive Dialogue (CD) is a new contract award procedure of the European Community (EC). It is set out in Article 29 of the ‘Public Sector Directive’ 2004/18/EC. Over the last decades, projects were becoming more and more complex, and the existing EC procedures were no longer suitable to procure those projects. The call for a new procedure resulted in CD. This paper describes how the Directive has been implemented into the laws of two member states: the UK and the Netherlands. In order to implement the Directive, both lawmakers have set up a new and distinct piece of legislation. In each case, large parts of the Directive’s content have been repeated ‘word for word’; only minor parts have been reworded and/or restructured. In the next part of the paper, the CD procedure is examined in different respects. First, an overview is given on the different EC contract award procedures (open, restricted, negotiated, CD) and awarding methods (lowest price and Most Economically Advantageous Tender, MEAT). Second, the applicability of CD is described: Among other limitations, CD can only be applied to public contracts for works, supplies, and services, and this scope of application is further restricted by the exclusion of certain contract types. One such exclusion concerns services concessions. This means that PPP contracts which are set up as services concessions cannot be awarded by CD. The last two parts of the paper pertain to the main features of the CD procedure – from ‘contract notice’ to ‘contract award’ – and the advantages and disadvantages of the procedure. One advantage is that the dialogue allows the complexity of the project to be disentangled and clarified. Other advantages are the stimulation of innovation and creativity. These advantages are set against the procedure’s disadvantages, which include high transaction costs and a perceived hindrance of innovation (due to an ambiguity between transparency and fair competition). It is concluded that all advantages and disadvantages are related to one of three elements: communication, competition, and/or structure of the procedure. Further research is needed to find out how these elements are related.
Keywords: Public procurement, Directive 2004/18/EC, Competitive Dialogue, English procurement law, Dutch procurement law.

1. Introduction

Competitive Dialogue (CD) is a contract award procedure for public works, supply and services contracts which are complex and of substantive value. It is set out in Art. 29 of the ‘Public Sector Directive’ 2004/18/EC (henceforth referred to as 'the Directive'). The new CD procedure was one of the major changes effectuated by the Directive. Until January 2006 there were three separate EC directives for the award of public works, supplies, and services contracts, being 93/37/EEC, 93/36/EEC and 92/50/EEC respectively. After a long period of consultation which saw the European Commission’s Green Paper of 1996 (COM(96) 583 final) and a follow-up report of 1998 (COM (98) 143 final), the Directive was adopted in March 2004, consolidating the three old directives into one. Subsequently, the Directive was implemented into the national laws of the member states. Regarding this implementation see Section 2 below. Apart from the consolidation of the three old directives into one, the most important change effectuated by the 2004 Directive pertains to the insertion of new procedures: the CD procedure is the only new ‘contract award procedure.’ Further new ‘procedures’ are the ‘framework agreement procedure’, and two procedures which take account of the new possibilities of information technology, being the ‘dynamics purchasing system’ and ‘electronic auctions’. For a summary of the content of the Directive see Arrowsmith (2005: para 3.31 et seq) and Trepte (2007: xxvii et seq).

This paper is divided into four parts. First, the implementation of the CD procedure in the EU member states will be analyzed (Section 2). The laws of the Netherlands and the UK have been chosen as examples. Second, the major features of the CD procedure are explained, i.e. its context, scope of application and the rules of the dialogue itself (Section 3). Third, the advantages and disadvantages of the procedure are examined (Section 4). Fourth, conclusions are drawn, for example on how to overcome the disadvantages (Section 5).

2. Implementation of the Directive: the examples of English and Dutch law

EC directives need to be implemented in the national laws of the member states; they are not applicable themselves, except in exceptional cases (namely if a member state fails to implement the directive on time). If the contracting authorities have to, or choose to, apply the procedure, they need to apply it in the form of the national legislation which implemented the Directive. This is a crucial difference from EC regulations which are directly applicable, that is without
implementation (Article 249 of the EC Treaty). Even though the text of the Directive 2004/18/EC is not directly applicable, it is of great relevance because the courts of the member states will turn to this source if questions of interpretation arise.

Normally, directives set out minimum standards which the member states have to implement into their law, whereby they are free regarding the choice of the form and method of the implementation. However, this obligation to implement the Directive’s content does not exist regarding the CD procedure because CD is an ‘optional procedure’ (Trepte 2007: para 7.188): the member states may provide for a CD procedure in their national legislation but are free to refrain from doing this. The wording of Article 29(1) of the Directive reveals this optional character (‘Member States may provide (…)’).

As examples of the implementation, the situation in two member states is analyzed: the UK and the Netherlands. In the UK the implementation took place separately for Scotland (The Public Contracts (Scotland) Regulations 2006, SI 2006 No. 1) and England, Wales and Northern Ireland (The Public Contracts Regulations 2006, SI 2006/5). This article will only consider the latter Regulations (referred to as the ‘English Regulations’ or ‘English law’) which came into force on 31 January 2006, but not the Scottish legislation. In the Netherlands, the Directive was implemented with effect from 1 December 2005 by the Besluit Aanbestedingsregels voor Overheidsopdrachten (BAO) (which can be translated as ‘Regulation for Procurement Rules for Public Contracts’).

The implementation of EC directives can be analyzed at different levels. First, looking at the content of the implementation legislation, the CD provisions in the Directive and the English and Dutch legislation are identical to a great extent. Both countries have set out the CD procedure in a very open, unrestricted way: for example, there are no restrictions on the use of the CD in terms of thresholds. Another comparative aspect relates to the question of whether the national legislator has implemented the Directive’s content by reference. If this method is used, the national legislation does not repeat the content of the EC directive in detail but simply states that the contracting authorities have to adhere to the EC directive (see Arrowsmith 2006: 90). This approach was not taken in the UK or in the Netherlands. Instead, both countries have opted for an approach which is known as ‘detailed implementation’. This approach covers both the situation in which the EC directive’s content is repeated word for word and the situation in which the national lawmaker drafts a distinct piece of legislation with reworded and restructured provisions. In the
UK, there is a mix of the two situations. Some passages are ‘word for word’ repetitions of the Directive, other passages are restructured and rephrased. For example, in the Directive, the ‘CD Article’ (Article 29) is shorter than the relevant provision in the English Regulations because many details are provided for in separate articles of the EU Directive (e.g. the definition of complex contracts) while these provisions are integrated in the relevant article of the English Regulations. In the Netherlands, the situation is similar: The text of the Directive was translated into Dutch and effectuated in the BAO word for word. Article 29 was more or less copy-pasted, except for some small textual differences.

3. The CD procedure
In this section, the CD procedure is going to be considered on the basis of the Directive only.

3.1 Context of the CD procedure
The CD is a contract award procedure which was added to the open, restricted, and negotiated procedures. A knowledge of these basic types is indispensable for the understanding the new CD procedure. The open procedure is characterized by the publication of a call for tender. In reply to this call all interested suppliers can make a bid, based on the technical specifications provided by the contracting authority. The restricted procedure differs from the open procedure in that only suppliers that are invited by the contracting authority may bid. In the first step, all interested suppliers can ask for participation in reply to a call for tender. In the second step, a limited number of selected suppliers is asked to make a bid. In the negotiated procedure the contracting authority is free in selecting appropriate candidates. The authority relies on consulting and negotiating with the potential suppliers to adapt tenders received in order to meet the specified needs.

Within the three contract award procedures mentioned above (open, restricted, negotiated), two types of awarding methods can be employed: lowest price (compared to the other bids) and MEAT: the Most Economically Advantageous Tender (measured with criteria, their prioritization and the minimum thresholds to be achieved, published in advance). Before the new Directive came into force, the open procedure was used the most. The restricted procedure was only used in cases of technical complexity when the contracting authority wanted to be assured of the contractor’s suitability. The negotiated procedure was only applicable in special cases, such as urgency or secrecy, or when the other procedures had not produced an acceptable tender. Of the awarding methods employed, the lowest price method was most often used in cases of low
complexity projects with a well defined design and a certain degree of trust in the constructor.
MEAT was common in design-build contracts, and in cases of organizational or technical complexity. Thus, complexity had proved to be a significant determinant in the choice of both the procurement procedure and the awarding method.

Since projects became more and more complex, the use of the negotiated procedure increased. The fact that this procedure distorted competition, led to a call for a new procedure: CD. Regarding the important relationship between the notion of complexity and the CD procedure see Section 3.2 below. Regarding the fact that MEAT is always to be applied in the CD procedure, see Section 3.3 below.

3.2 Applicability of the CD procedure
Not every public contract can be awarded using the CD procedure. Its applicability is limited in four respects: the subject matter of the contract, complexity, inappropriateness of other procedures, and the contract’s value. These will be explained in turn.

The subject matter of the contract. The Directive, and thus the CD procedure, is only applicable for public contracts for works, supplies and services. Public contracts awarded within the utilities sector (water, energy, transport and postal service sectors) cannot be awarded using CD. Those contracts are governed by the new Utilities Directive 2004/17/EC which does not contain a CD procedure. Articles 12 to 18 of the Directive provide further limitations related to the contract’s subject matter because they stipulate several ‘excluded contracts’. One of these contract types can be important for PPP projects: if the PPP contract is a services concession (NB: not every PPP project is set up as a services concession) the Directive is not applicable (Article 17). In other words, CD cannot be employed if the economic operator receives, as consideration for its services, in part or in full, the right to exploit the services. However, CD can be used if the PPP contract is either no concession at all, or a works concession. If it is a concession contract which contains elements of works and services (mixed concession), e.g. the construction and operation of a railway system or hospital, the contract has to be classified according to the test of the ‘principal object of the contract’ (Trepte 2007: paras 4.44, 4.64, 4.106). Thus, if the principal object of the concession contract is services, CD cannot be used.

Complexity. The CD procedure is confined to ‘particularly complex contracts’ (Article 29(1) of the Directive). According to Article 1(11)(c) contracts are ‘particularly complex’ if the contract
authority is not objectively able to define the technical specifications or not able or satisfy their needs or objectives, or not able to specify the legal or financial structure of the project. Section 2 of the Commission’s (2005) Explanatory Note states that these provisions should be read in the light of the first part of Recital 31 of the Directive: There it is pointed out that those cases in which it is objectively impossible to define the means to satisfy the contracting authority’s needs can especially occur in transport infrastructure projects, large computer networks or projects involving complex and structured financing.

**Inappropriateness of other procedures.** A contract which is characterized as being particularly complex cannot always be procured by CD. The contracting authority has to be of the opinion that the use of the open or restricted procedure will not allow the award of the contract (Article 29(1)). Only if those procedures are not likely to allow the award of the contract may the authorities make use of CD. The Commission’s (2005: 2) Explanatory Note points out it should be checked, case by case, whether the use of the CD procedure is justified or not.

**The value of the contract.** Finally, the Directive (and therefore the CD procedure) does only apply to contracts which satisfy the relevant thresholds (Article 7 of the Directive). These differ according to the subject matter of the contract. Last year, the thresholds were adjusted by EC Regulation 1422/2007 (published on 5 December 2007). The new threshold for public works contracts, for example, is €5,150,000. This equals £3,497,313 and this amount is set out in the English Public Contracts Regulations 2006, as amended in 2007 (see Henty 2008: 112). It should be noted that projects below the threshold may also be procured by the Dialogue. This depends on the national legislation which implements the Directive.

It should be noted that the four factors described above have to be taken into account by the contracting authorities because they have to justify their choice of the CD procedure in a report after the procurement has ended (Article 43 of the Directive). Among others, the contracting authority will have to explain why the other contract award procedures did not suit the situation at hand.

### 3.3 The CD procedure – step by step

First, the contracting authority has to publish a contract notice in the Official Journal of the European Union in which it sets out its needs and requirements, either defined in that notice
and/or defined in a descriptive document (Articles 29(2), 25(2) of the Directive). Any economic operator may make a request to participate.

The second step is the selection of the candidates, i.e. the economic operators with whom the dialogue will take place. For the rules that guide the selection procedure – which have to be distinguished from the rules for the award procedure – the third paragraph of the core provision of the CD procedure, Article 29, refers to Articles 44 to 52: Article 44 sets out general provisions, for example that the dialogue should start with at least three economic operators (Article 44(3)). The following Articles 45 to 52 contain criteria for the qualitative selection. Candidates can be excluded if not suitable because of their personal situation (e.g. conviction for corruption), Article 45(1)(b); their not being enrolled to the appropriate professional or trade register, Article 46; or their environmental management capability, Article 50, to name just a few provisions. Finally, Article 51 allows the contracting authorities to request additional documents and Article 52 provides that the member states can set up lists of approved economic operators.

Third, once the candidates have been selected, the contracting authority opens a dialogue with each of them to identify the means best suited to satisfy the authority’s needs, Article 29(3). The starting point is that the dialogue should be carried out individually with each of the participants on the basis of the ideas and solutions of the economic operator concerned. The contracting authority is free to discuss all aspects of the contract with the candidates, Article 29(3). The dialogue may therefore relate not only to ‘technical’ aspects, but also to economic aspects (prices, costs, revenues, etc.) or legal aspects (distribution and limitation of risks, guarantees, possible creation of special purpose vehicles, etc.) (Commission 2005: 7). However, the possibility of an open dialogue is severely limited because contracting authorities must not disclose confidential information to the competitors without the agreement of the particular economical provider, Article 29(3). This principle of non-disclosure has been criticized as being a hindrance to an effective dialogue (see Section 4.2 below). Provided that it is declared in the contract notice, the contracting authority can conduct the dialogue in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage. For this, the award criteria which were published in the contract notice or the descriptive document need to be applied, Article 29(4). The dialogue continues until the contracting authority can identify the solution or solutions, Article 29(5).
Fourth, after closing the dialogue, the remaining participants will be asked to submit their final tenders based on the solution(s) presented and specified during the dialogue, Article 29(6). In looking for final tenders, contracting authorities may ask candidates to clarify, specify, fine-tune and provide additional information, as long as this does not involve changes to the basic features of the tender, which are likely to distort competition or have a discriminatory effect, Article 29(6).

Fifth, all tenders received have to be assessed based on the award criteria as laid down in the contract notice or the descriptive document. The contract will be awarded on the sole basis of the award criterion for the Most Economically Advantageous Tender (MEAT), Articles 29(1), (7), 53.

Sixth, the candidate selected on this basis may be asked to clarify aspects of the tender or confirm commitments contained in the tender, provided this does not affect or modify substantial aspects of the tender or of the call for tender, and does not distort competition or cause discrimination, Article 29(7). Finally, the Directive allows the contracting authorities to specify prices or payments to the participants in the dialogue, Article 29(8). Thus, economic operators can be reimbursed for their costs incurred during the dialogue (regarding Article 29(8) see also Section 4.2, third main argument).

4. Advantages and disadvantages of CD

An assessment of the advantages and disadvantages of the CD procedure is not simple because there are good arguments on both sides. We will assemble and examine these arguments, starting with the strengths of the procedure and then its weaknesses.

4.1 Advantages

The CD procedure enables contracting authorities to procure projects whose technical specifications and price levels cannot be defined upfront because these matters can be defined during the dialogue. This can also be achieved with the negotiated procedure but only CD involves an element of competition. This is an important advantage of CD. In the literature, several other arguments have been put forward in support of the CD procedure. Several of them concern the claim that CD stimulates innovation: Losch (2007) stresses that more innovative, creative solutions are likely because the solution is not prescribed under the CD procedure and because economic operators from several disciplines could be interested in taking part in the
dialogue. Nagelkerke et al (2007) point out that by procurement on the basis of MEAT criteria (see Section 3.1 above), and by the increased understanding of the client’s needs due to the dialogue, economic operators are stimulated to come up with more innovative solutions: innovation can be driven by, among others, the wish to be efficient over the whole contract period and the possibility to outbid other candidates. According to Fransen et al (2005), efficient and innovative solutions are made more attractive to economic operators because they profit by their solutions themselves.

Besides the two matters mentioned above (‘dealing with complexity while keeping competition alive’ and ‘innovation/creativity’), six other advantages can be identified: First, CD enables the public contracting authority to adjust specifications in the stage between contract notice and contract award and to clarify where necessary. Thanks to this, contractors are better capable of meeting the authority’s needs, leading to better price-quality ratings (Schrijvers, 2007: 2). Second, CD stimulates communication (asking questions, clarifying aspects, etc.) which decreases insecurity amongst candidates about the requirements and needs of the contracting authority, and shortens the time needed to make the final bid. Third, the possibility of fine-tuning (Article 29(6)) makes obscurities and differences in interpretations during the construction stage avoidable (Schrijvers 2007: 2). Fourth, the chances for successful construction are high because the economic operators base the offered solutions on their own specialism. They will not have to carry out works which are not in their field of expertise. Fifth, CD offers possibilities to fit contract clauses, solutions, risk allocations and financial structures to the specific situations at hand: as a consequence, risks can be allocated to the party who can bear them best (Fransen et al 2005). Sixth, CD gives insight to the contracting authority into what economic operators have on offer at an early stage. This decreases insecurity for the contracting authority. Cross tender comparison is possible (although cherry picking is not allowed), enabling the contracting authority to gain better insights into the question of how realistic the estimated costs were, and into the relative quality of each bid (Raganelli and Fidone 2007, Van den Berg and Stelling 2007).

4.2 Disadvantages
The main arguments brought forward against the CD procedure pertain to (1) high transaction costs, (2) hindrance of innovation, (3) hindrance of competition, and (4) miscellaneous.
Transaction costs. The transaction costs of the CD process are enormous. This is because the process is time-consuming and labour-intensive for both contracting authorities and economic operators (Van den Berg and Stelling 2007). Contracting authorities have to conduct several separate dialogues, to judge the dialogue products of the economic operators, and they have to document the dialogue process because of the required transparency. Next to that, the contenders work out their dialogue products in a detailed manner, which costs a lot as well (Wedekind 2005). The problem becomes compounded by the fact that the contracting authority and the economic operators have differing working flows. This means that by-products of the work, like estimations of the costs, planning of the work, details of the design, etc. are needed in both organizations at different moments and sequences. Again, this results in high transaction costs (PSIBouw and Balance & Result, 2008). The burden of high costs is not usually taken away from the economic operator, at least not completely, by the possibility to become compensated (Article 29(8) of the Directive) because a compensation is not obliged and the amount of the compensation is determined by the contracting authorities themselves. Further, the high costs are not always balanced by high profits: The low deal flow of CD projects means that the possibilities for economic operators to receive a high return on investments are low (PSIBouw and Balance & Result, 2008). An aspect that can severely affect the costs of a project is the probability of lawsuits following the selection or award decision of the contracting authority. In general, the possibility to challenge an award decision is beneficial because there needs to be a legal safeguard against unfair decisions, see Stergiou and Heemskerk (2005). However, looking into this aspect for the CD procedure, it can be said that the risk for lawsuits is large, due to the fact that the costs for a lawsuit are relatively low compared to the investments made during the dialogue procedure. The gain on the other hand, when a lawsuit is won, is large (See Raganelli and Fidone 2007). Lawsuits are not just costly in terms of money, but also in terms of time (Wedekind 2005). Finally, associated with the high costs of the CD procedure, there is the problem of keeping the ‘CD knowledge’ in the organization: both contracting authorities and economic operators need extra knowledge to be able to conduct a dialogue which involves high costs for both parties. The infrequency of projects procured under CD makes it very difficult to keep this knowledge within the organization (Schrijvers 2007). The risk then, is that advice organizations are attracted to guide the process, leading to the outsourcing of future CD projects as well (PSIBouw and Balance & Result 2008).

Hindrance of innovation. In this context it can be observed that the principles of transparency and equal treatment on the one hand, and the principle of non-disclosure of confidential information
of the CD candidates (Article 29(3) of the Directive) do not sit well with each other. The principle of equality of treatment (which is closely related to the requirement of a fair competition), combined with the principle of transparency drive the contracting authority to provide all contenders with the same information. However, the clause concerning the guarding of intellectual property rights means that the contracting authority cannot provide all information to all contenders. Trepte (2007: para 7.84) criticizes the principle of non-disclosure and attributes its inclusion into the Directive to ‘intense industry lobbying.’ He considers the non-disclosure principle as a limitation of the CD procedure because the contracting authority is prevented from disclosing the solution of one candidate to the other candidates. This, according to Trepte (2007: para 7.84), “means that the agent will be obliged, in effect, to accept one of the solutions offered (with minor tweaking) rather than being able to compare and evaluate the different proposals with a view to coming up with a combined solution (for which all participants could tender) which meets his original wish list.” This is not a feature which supports innovation. Regarding this problematic relationship between the above mentioned principles see also Roe and Verschuur 2005, Orobio de Castro, according to Chao-Duijvis 2005, Van Nouhuys and Van de Bend 2006, Nagelkerke et al 2007. Moreover, innovation may be limited by the fear of economic operators that the non-disclosure principle is breached by the contracting authorities: although intellectual property rights are formally safeguarded, the secrecy of private information cannot be guaranteed. Process failure may cause information to be disseminated to others. This can cause economic operators to limit sharing of their knowledge and to hinder coming up with innovative solutions (Panagopoulos 2007).

**Hindrance of competition.** The fact that economic operators have to make large investments just to take part in the dialogue procedure means that only the large contractors can do so. Smaller contractors cannot easily take part in the procedure, or are excluded early on in the process due to the demands of the project portfolio and/or financial state. This harms competition rather than stimulating it. Trepte (2007: para 7.85) even suggests that the bidder whose solution is chosen is in a monopoly situation because of the ‘ban on disclosing information’. An interesting way out of this dilemma has been proposed by Treumer (2004: 182): the option to pay the CD candidates (Article 29(8) of the Directive) might be used to compensate them for sharing their solutions with others. A final point in terms of the ‘hindrance of competition’ argument was put forward by Schrijvers (2007) who stresses that the often small rewards offered by contracting authorities in projects which fall under the scope of the CD procedure hardly stimulate participation by economic operators.
Miscellaneous aspects against the CD procedure. By challenging the market to come up with ideas, one risks receiving tenders which differ in such a way that they become non-comparable, because each tender represents its own value (Oosten 2006, Losch 2004). The way tenders are valued has to be determined before the dialogue starts: selection and award criteria have to be stated in the contract notice or descriptive document (Article 29(7) of the Directive). The nature of CD makes this difficult, however. Although the contracting authority conducts an overview of requirements and needs, the dialogue is meant to determine how those are best met. In that context it can be questioned whether it is practically possible to formulate award criteria upfront. During the dialogue, the contracting authority will gain better insight into possible solutions and thus be better capable of determining the elements (award criteria) and their weight for choosing the most economically advantageous tender (Stergiou and Heemskerk 2005, Wedekind 2005). Besides this there is an ambiguity in the goals of cooperation and competition (Hoezen and Dorée 2008): The focus now tends to be on the competitive elements in the CD procedure. However, the striving for better cooperation between the contracting authority and candidates should not be forgotten either. Especially within PPP projects, the need for trust between the parties involved is large, because the partnership builds on cooperation and interdependence, leading to mutual goals and interests. Absence of trust will lead to suboptimal solutions (Klijn and Koppenjan 2000).

5. Conclusion
The implementations of the CD procedure into the English and Dutch jurisdictions are shown to be very similar. However, there are differences regarding the structure of the implementation. A surprising difference pertains to the fact that there is nearly no purely national procurement legislation in English law while such legislation exists in the Netherlands.

Regarding the advantages and disadvantages of the CD procedure, further research is needed to find out how the elements are related. This especially pertains to the question whether CD imulates or hinders innovation.

were reviewed on the ‘narrow’ basis of authors from both the UK and the Netherlands. There seems to be no distinct differences between the authors from these two jurisdictions. However, it is difficult to generalize from this finding because only two jurisdictions have been considered. Another interesting point can be made regarding the advantages and disadvantages: it is striking to see that they all seem to be related to the three elements of communication, competition, and/or structure of the procedure. This is illustrated in Table 1.
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<tr>
<th>(Dis)Advantage</th>
<th>Related element</th>
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<tr>
<td>Complexity of the project can be disentwined</td>
<td>Communication</td>
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<td>Innovation and creativity stimulated</td>
<td>Competition</td>
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<td>Possibility to adjust specifications</td>
<td>Structure of the procedure</td>
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<tr>
<td>Insecurity decreased by dialogue and use of specialism by contractors</td>
<td>Communication</td>
</tr>
<tr>
<td>Better construction stage, thanks to fine-tuning and use of specialism by contractors</td>
<td>Communication and competition</td>
</tr>
<tr>
<td>Solutions fit for purpose</td>
<td>Structure of the procedure &amp; Communication</td>
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<tr>
<td>Authority more confident</td>
<td>Competition</td>
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<tr>
<td>High transaction costs</td>
<td>Structure of the procedure</td>
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<td>Hindrance of innovation</td>
<td>Communication vs. Competition</td>
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<td>Hindrance of competition</td>
<td>Structure of the procedure &amp; Communication</td>
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<tr>
<td>Difficulties in assessing the tenders</td>
<td>Structure of the procedure</td>
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<tr>
<td>Low cooperation levels</td>
<td>Competition vs. Communication</td>
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*Table 1: Elements related to the (dis)advantages mentioned*

The review of the advantages and disadvantages indicates that these are the important elements. It is, however, the critical question of how these elements are interrelated. From a practical point of view it is interesting to find out the relationships between the elements involved, for this insight might help to outweigh the disadvantages, and to enhance the advantages of the CD procedure.

From an academic point of view, it is interesting to search for the relationship between the CD procedure and relational contracting. Does the dialogue support the ideas which are commonly associated under the label of ‘partnering’, ‘collaboration’, and relational contracting, simply because it forces the parties to communicate? This research question, also containing the three elements mentioned above, will be addressed in future research. It will also be investigated whether there are differences as to how the CD procedure is carried out in practice in the two jurisdictions of England and the Netherlands.

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