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## **1. Introduction**

The paper presents quantitative, comparative research into the use of the competitive dialogue procedure across the EU. Data was gathered from contract notices published in the Official Journal of the European Union (OJEU) between 2006 and 2009 in Belgium, France, Germany, Ireland, the Netherlands, Portugal, Spain and the UK. The research seeks to answer the following set of questions in order to provide a general picture of the use of competitive dialogue in the EU:

- (1) what types of “contracting authority” have been using competitive dialogue?
- (2) in what market sectors is competitive dialogue being used?
- (3) what types of project is competitive dialogue being used to procure?
- (4) what proportion of projects procured by way of competitive dialogue involves private finance?

The paper will begin by describing the methodology and methods adopted by the study in order to effectively answer the above questions. In the next section of the paper the findings from the research will be presented. In this section, the four questions will be dealt with in turn, with the analysis of Member States being divided into irregular user Member States, regular user Member States, and heavy user Member States. The paper will conclude with some final observations on the project and its findings.

## **2. Methodology**

The research is quantitative in nature; that is, it seeks to measure the use of competitive dialogue in a manner that can be reduced to numerical data. Collected data can then be subjected to statistical analysis, so that trends and patterns in behavior can be identified.<sup>1</sup> The research is also comparative: data will be gathered for different EU Member States, and findings on use of the procedure will be contrasted between subject countries where appropriate.

Data was collected from a study of contract notices published in the series S supplement to the OJEU. Contracting authorities awarding contracts governed by Directive 2004/18<sup>2</sup> must have a contract notice published in the OJEU (Article 35 Public Sector Directive 2004/18). The notice ensures that contractors throughout the EU are aware of the contract competition and should provide them with sufficient information to decide if they would like to bid for the advertised contract.

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\* Both PhD candidates at the University of Nottingham. The authors would like to thank Pedro Telles and Dr. Pamela Hölbling for the data they collected for Spain, Portugal and Germany, as well as clarifications they offered on the collected data, where requested.

<sup>1</sup> For a general introduction to quantitative research see A. Bryman, *Social Research Methods*, (2<sup>nd</sup> ed., OUP, 2004), p.61; and S. Sarantakos, *Social Research*, (3<sup>rd</sup> ed., Palgrave Macmillan, 2005), p.343.

<sup>2</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (*Official Journal L 134*, 30/04/2004 P. 0114 – 0240).

Since 1998, the S series Supplement to the OJEU has been available online at the Tenders Electronic Daily (TED) website.<sup>3</sup> Here, registered users are permitted free access to search within the TED archives and view full contract notices. Using the TED search facilities, it was possible to view all notices advertising contracts to be awarded by competitive dialogue in individual Member States. The TED website therefore presented the ideal data collection tool; it allowed for a comprehensive analysis of competitive dialogue throughout the EU, providing findings that can be generalized. The research is, however, completely reliant on the accuracy of the TED searches.

## **2.1 Subject Countries**

Although TED provides information on all contract notices in each of the EU's 23 official languages, full contract notices are only provided in the language of origin. This necessarily limited the member states that could be accurately examined, due to the language proficiency of the researchers involved, to Belgium, France, Germany, Ireland, the Netherlands, Portugal, Spain, and the UK. It is submitted, nonetheless, that a reasonably comprehensive snapshot of competitive dialogue usage was possible.

## **2.2 Categories**

The particular quantitative data collection method adopted was the, so called, "content analysis" method.<sup>4</sup> Bryman explains that content analysis is "[a]n approach to the analysis of documents and texts that seeks to quantify content in terms of predetermined categories and in a systematic and replicable manner".<sup>5</sup> In accordance with this method, at the outset of the research, it was decided that data for the following categories would be required:

1. Type of public body;
2. Name of public body;
3. Type of document;
4. Category of contract;
5. Type of contract;
6. Subject matter of the contract;
7. Private Finance; and
8. Additional Comments.

Data collection proved quite demanding. Not only was the process laborious, but it also proved to be a challenge to objectively gather data. The entire reason a contracting authority may be using the competitive dialogue procedure is that they cannot say with precision what they want to procure, but can merely express it in terms of outputs to be met. In addition, a well drafted contract notice, particularly one involving a complex contract to be procured by way of competitive dialogue, is drafted to cater for a degree of change to contract scope. The above meant that the researchers were called upon to interpret what was in some cases vague text; this led to judgment calls on the parts of researchers and also the burgeoning of categories and subcategories titled "other" and "unclear", used when the content of the notice could not be recorded with confidence.

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<sup>3</sup> <http://ted.europa.eu>

<sup>4</sup> See Bryman (note 1), p.182.

<sup>5</sup> *Ibid*, p.183.

### **2.2.1 Category 1: Type of Public Body**

In relation to the first category, type of public body, the OJ notice asks that contracting authorities classify themselves into one of the following categories:

- a) Body governed by public law
- b) Ministry or any other national or federal authority
- c) Armed Forces
- d) Regional or local authority
- e) Utilities
- f) European institution/agency or international organisation
- g) Other
- h) Not Applicable
- i) National or federal agency/office
- j) Regional or local agency/office

Where this information was provided, it was recorded by the researchers. It should be noted that where an authority failed to specify a category, it is automatically classified by TED as “other”.

### **2.2.2 Category 2: Name of Public Body**

For the second category the actual name of the authority was recorded. When it became clear that data in category one was not providing a clear picture (see Section 4 below), the researchers grouped authorities into their own more meaningful classifications, using the name of the public body as a primary means of categorization. The following classifications of types of public bodies were thus adopted generally:

- a) Local government;
- b) Central government (including subdivisions);
- c) Health authorities
- d) Educational authorities;
- e) Housing & other local development/regeneration authorities;
- f) Emergency services;
- g) Waste; and
- h) Miscellaneous.

It should be noted that in Germany, “federal authorities” are also a category.

### **2.2.3 Category 3: Type of Notice**

A full TED search of all documents concerning competitive dialogue competitions was carried out. The amount of contract notices was recorded, as was the amount of additional information notices (which could be used to notify of cancellations of procurements) and corrigenda notices. These additional information and corrigenda notices were filtered *out* of the research, as they concern identical procedures and including data on them would duplicate findings.

The specific number of cancellations was calculated; however, it is not presented in the findings below. It was felt that this information would threaten the accuracy of the research, as it is highly likely that

further cancellations would take place after completion. The research only provides an overview of competitive dialogue contract notices *advertised*; it does not necessarily follow that these procedures were successfully completed.

#### 2.2.4 Category 4: Type of Contract

In the contract notice, contracts are classified as works, services, or supplies. This classification was recorded.

#### 2.2.5 Category 5: Contract Category

The following subcategories were identified in order to classify the type of contract being advertised:

- a) **Advertising & public relations.** This subcategory includes contracts relating to, inter alia, national advertising campaigns or general communications strategy consultancy.
- b) **Business services.** This subcategory includes contracts relating to, inter alia, management consultancy or infrastructure project management contracts.
- c) **Defence.** This subcategory includes all contracts issued by national Ministries of Defense that were specifically *military* in nature.<sup>6</sup>
- d) **Energy.** This subcategory includes all contracts related to the acquisition or distribution of energy (ie, gas, electricity, solar/wind energy)<sup>7</sup>, including the construction of energy infrastructure.
- e) **Financial Services.** This subcategory includes all contracts related to financial service provision, in areas such as, inter alia, banking, loans and credit.
- f) **Health services and supplies.** This subcategory includes all health-related purchasing aside from health infrastructure.
- g) **Information and Communication Technologies (ICT).** This subcategory combines all contracts that relate to IT purchases as well as telecommunications purchases.
- h) **Infrastructure and building construction.** This subcategory includes any contract involving building and construction, with the exception of “Energy” and “Waste” infrastructure.
- i) **Insurance.**
- j) **Other.** The “other” subcategory is made up of types of contract that did not occur frequently enough to justify a separate subcategory. Frequency was determined both on a per-country basis, and a per-project basis (ie, if a specific type of purchase was made semi-regularly in one country but not in others, they did not attain their own category).
- k) **Waste.** This subcategory includes all contracts related to waste collection and treatment, including the construction of any waste infrastructure.

#### 2.2.6 Category 6: Specific Subject of Contract

In this category the specifics of the contract were recorded. Data will only be presented in relation to contracts falling into the main Category Five subcategories that emerged: “Infrastructure and Building Construction” and “ICT”.

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<sup>6</sup> Ie, catering at an army base was excluded as the subject matter of the contract was not inherently military.

<sup>7</sup> Included in France are also “heating distribution” contracts as they require the establishment of an energy source and then subsequent heating installation in housing.

The “Infrastructure and Building Construction” subcategory was broken down as follows:

- a) **Education infrastructure.** This category includes schools, further education colleges, and university buildings.
- b) **Health infrastructure.** This category includes hospitals as well as hospital wings and clinics.
- c) **Housing and Accommodation.** This category includes housing, care/social housing and student halls of residence.
- d) **Mixed use area developments.** This category includes town regeneration projects that requested new residential infrastructure but also retail and other non-residential infrastructure.
- e) **Non-residential area developments.** This category includes town regeneration projects which did not contain a residential element.
- f) **Offices.**
- g) **Other.** As with the “other” section above this category contains any building construction projects that did not fit in the above categories but were not of a sufficient number to warrant their own separate category.

The “ICT” subcategory was broken down into the following:

- a) **Call centre.**
- b) **Hardware.**
- c) **Mixed** (combining software and hardware).
- d) **Networking** (telephony and internet).
- e) **Other.** See above.
- f) **Software.**
- g) **Web services.**

### 2.2.7 Category 7: Private Finance

For each contract notice it was recorded whether the authority intended the advertised project to be privately financed, left this option open, or did not intend private finance to be part of the arrangement. This proved to be quite a challenge, as authorities did not always state this explicitly. For this reason, it was also recorded whether it was unclear whether or not private finance was intended to be part of the arrangement (see Section 6 for details).

Where the contract notice stated explicitly that it would be following an established private finance arrangement or clearly described the arrangement (e.g. the UK *Private Finance Initiative* (PFI), the Dutch *Publiek Private Samenwerking* (PPS), and French *Contrat de Partenariat* (CP)) this was recorded.

### 2.2.8 Category 8: Other Comments

Finally, where contracts were considered to raise particular points of interest, e.g. if they seemed inappropriate for use of competitive dialogue, or represented a very interesting project, these findings were recorded to prepare eventual discussion of use.

It is worth mentioning that there were several contract notices identified where the level of complexity was questioned (e.g. there was more than one contract notice for catering services). However, the number of questionably complex contracts identified was not sufficient to support an argument of

overuse, and, indeed, it would not be appropriate to make such a judgment on the basis of the limited information presented in the contract notice.

### 3. General Observations: Number and Type of Contract Notices

*Table 3.1: Number and Type of Contract Notices for Subject Countries*

Member State		2006	2007	2008	2009	Total
Portugal	Supply				0	0
	Works				0	0
	Services				2	2
	<b>Total</b>				2 (5)	<b>2 (5)</b>
Belgium	Supply	0	1	2	0	3
	Works	0	1	1	1	3
	Services	5	5	7	1	18
	<b>Total</b>	5 (7)	7 (12)	10 (13)	2 (2)	<b>24 (34)</b>
Spain	Supply		2	2	11	15
	Works		0	7	3	10
	Services		0	0	5	5
	<b>Total</b>		2 (2)	9 (9)	19 (19)	<b>30 (30)</b>
Ireland	Supply	5	9	2	2	18
	Works	4	7	2	6	19
	Services	6	12	11	14	43
	<b>Total</b>	15 (15)	28 (33)	15 (17)	22 (31)	<b>80 (96)</b>
Netherlands	Supply	0	0	5	1	6
	Works	15	12	6	17	50
	Services	2	4	10	15	31
	<b>Total</b>	17 (20)	16 (20)	21 (29)	33 (47)	<b>87 (116)</b>
Germany	Supply	7	9	10	13	39
	Works	11	4	13	13	41
	Services	21	11	13	6	51
	<b>Total</b>	39 (47)	24 (31)	36 (49)	32 (46)	<b>131 (173)</b>
UK	Supply	53	57	49	46	205
	Works	65	73	74	54	266
	Services	162	237	252	268	919
	<b>Total</b>	280 (322)	367 (437)	375 (475)	368 (464)	<b>1390 (1698)</b>
France	Supply	89	96	100	109	394
	Works	46	75	62	94	277
	Services	171	182	220	202	775
	<b>Total</b>	306 (351)	353 (381)	382 (460)	405 (499)	<b>1446 (1691)</b>

Table 3.1 summarizes use of competitive dialogue in two of the most basic ways: how many OJ notices mentioning “competitive dialogue” as the procedure to be used were published in the OJ in the years 2006-2009? And, what type of contracts did these notices concern: works, services, or supply contracts?

### *Use by Numbers*

In Table 3.1 the bracketed numbers refer to the total number of documents (i.e. contract notices, additional information documents etc.) the search turned up for that particular year or total of years. The figure next to the bracketed number represents the number of contract notices. The findings presented below are on the basis of the information provided by contract notices only.

The above table reveals that there was wide variance in the frequency of use of the competitive dialogue procedure among the countries examined in this paper. Three different categories of ‘user countries’ can at this point be identified:

a) Irregular Users: Portugal, Belgium, Spain (Less than 50 notices total)

These countries are all typified by either recent introduction of the competitive dialogue procedure into national legislation, and hence a very slight frequency of use and a near-impossibility of generalizing how the procedure is used.

b) ‘Regular’ Users: Ireland, The Netherlands, Germany (Less than 200 notices total)

This category is titled ‘regular’ primarily because competitive dialogue has been used regularly enough for some general analysis of the types of purchases made using the procedure does become possible; however, as will be seen, there is a massive gap between ‘regular use and ‘heavy’ use in the field of competitive dialogue.

c) Heavy Users: The UK, France (More than 1000 notices total)

These two countries used the procedure extensively; with more than 1000 contract notices for competitive dialogue procedures each, they will form the basis of detailed discussion in the rest of this paper.

### *Type of Contract*

On the subject of type of contract, the table reveals that the majority of all contracts being advertised were services contracts; this is especially easy to see in the heavy-use nations such as France and the UK, but similar trends reveal themselves in most of the other countries studied.<sup>8</sup>

The use of the procedure for works versus supply contracts was more variable, and (as will be explored in Section 5) depended primarily on the amount of infrastructure that was being procured in the subject countries.

Even though this data was easy to extract from the contract notices, the statistics are not highly informative: calling a contract a “service” versus a “work” does not reveal anything about what types of purchases are actually sought out, after all. The problem is compounded by the fact that the relative monetary value of the contract determines how it is categorized; many of the contracts listed as ‘services’ were actually for things such as ICT software, or even large infrastructure projects that have a

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<sup>8</sup> Exceptions to this are Spain and the Netherlands, where more supply contracts and works contracts were advertised.

project management dimension to them. These findings thus prompted the further investigation that follows in Sections 4-6 below.

#### 4. Types of Public Authorities Using Competitive Dialogue

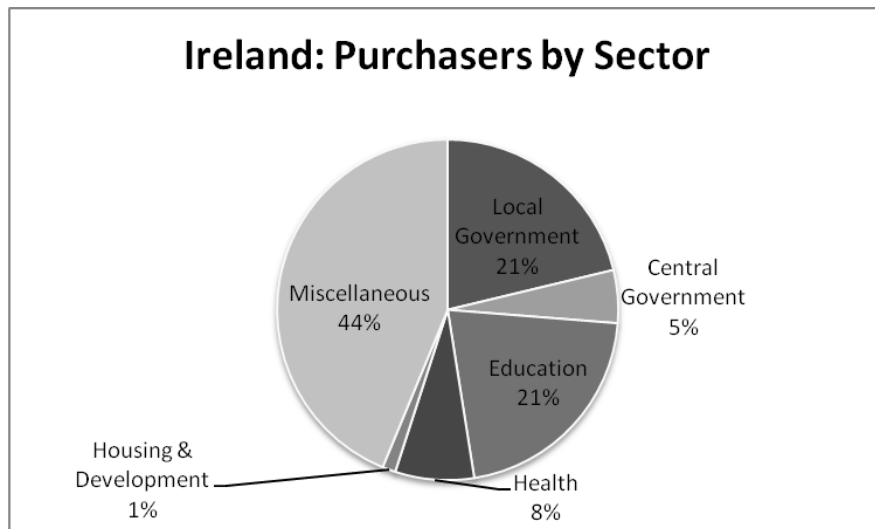
As discussed in Section 2.2.1-2.2.2 above, the OJ does collect data on the type of public authority that advertises a given contract. However, it is up to contracting authorities themselves to properly identify which of the OJ's categories they fall into, and the research found that this results in questionable data in nearly every country, with an abundance of bodies classified as 'other'; a more subjective approach was thus adopted so as to provide a clearer picture, and the researchers opted to organize the contracting authorities into categories defined by *sector* rather than the TED classification.

##### 4.1 Light Use Countries

It is impossible to generalize findings so few examples, but it can be noted that in Spain, the most regular users were local and city councils and regional public health service providers, whereas in Belgium, most contracts originated from European institutions. Both purchases made in Portugal originated from the same local authority.

##### 4.2 'Regular Use' Countries

###### 4.2.1 Ireland



**Figure 4.2.1: Purchasers using Competitive Dialogue in Ireland by Sector (2006-2009)**

Figure 4.2.1 unfortunately is not very illuminating due to the large number of contracting authorities that could not be categorized as local government, central government, education, health or waste—though it can be noted that as in all other countries, a significant proportion of contracts were advertised by local government authorities. The miscellaneous category included authorities such as the Commission for Taxi Regulation (5 notices), Coillte Teoranta (3 notices), Irish Greyhound Board (2 notices), Radio Telefis Eireann Network Limited (4 notices), Tourism Ireland (6 notices), and the National Roads Authority (3 notices).



#### 4.2.2 The Netherlands

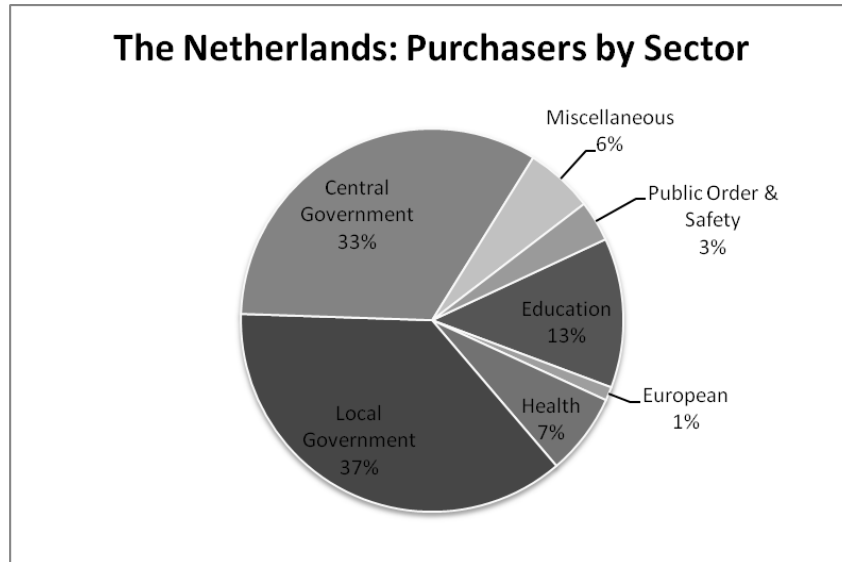


Figure 4.2.2: Purchasers using Competitive Dialogue in the Netherlands by Sector (2006-2009)

In the Netherlands, the Dutch national service for “road and water transport” construction (Rijkswaterstaat) was responsible for nearly all contracts in 2006 and at least two in all subsequent years, thus accounting for the large amount of purchases made by central government authorities. Other frequent users were local councils; significantly less frequently, educational bodies (such as universities), and health purchasers (such as hospitals) also used the procedure.

#### 4.2.3 Germany

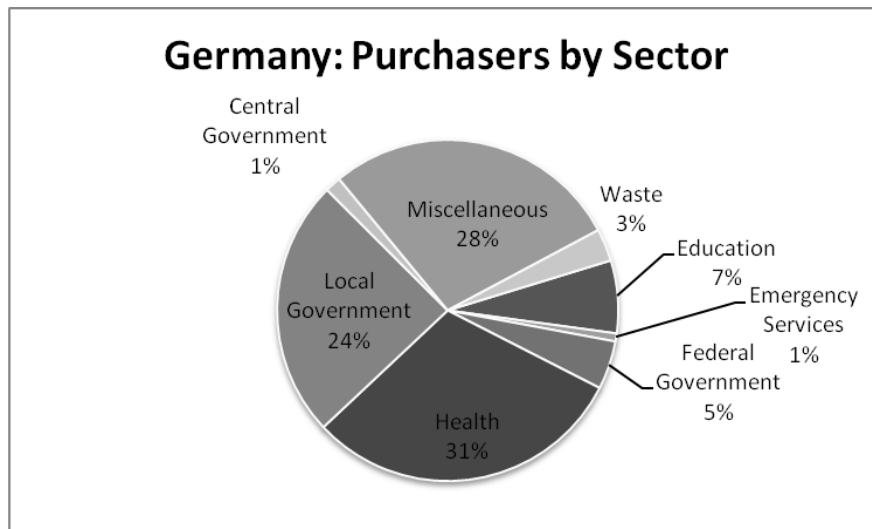


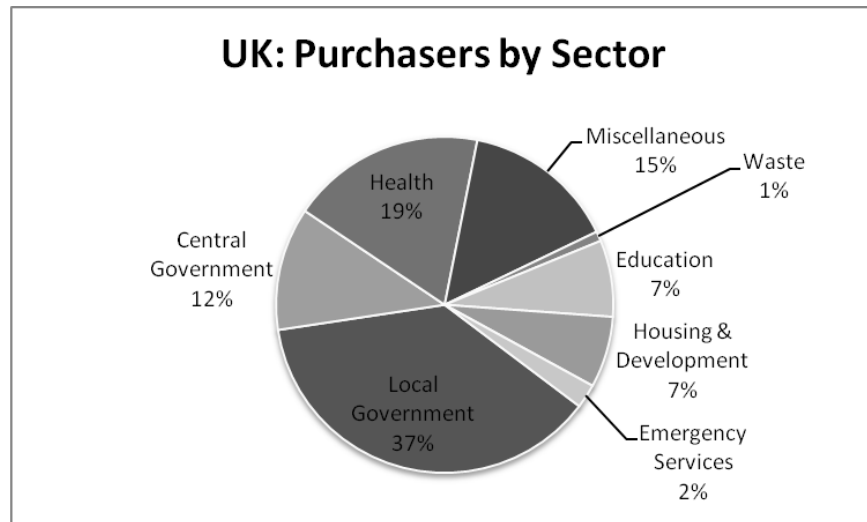
Figure 4.2.3: Purchasers using Competitive Dialogue in Germany by Sector (2006-2009)

What can be observed in Germany, and which will show in the UK and France as well, is that the health sector was a very heavy-duty competitive dialogue user, although in Germany, local (rather than federal) government also used the procedure very regularly. Other frequent users, filed under “miscellaneous”, were bodies governed by public law that deal with either community development (building of public

infrastructure) or research. Very interesting is that in Germany, only *two* instances of central government use of competitive dialogue were recorded, and only *six* uses took place at the federal level; while central government was rarely the most frequent user of competitive dialogue, this is a particularly low usage statistic in comparison to the other countries in this project.

### 4.3 Heavy Users

#### 4.3.1 The UK

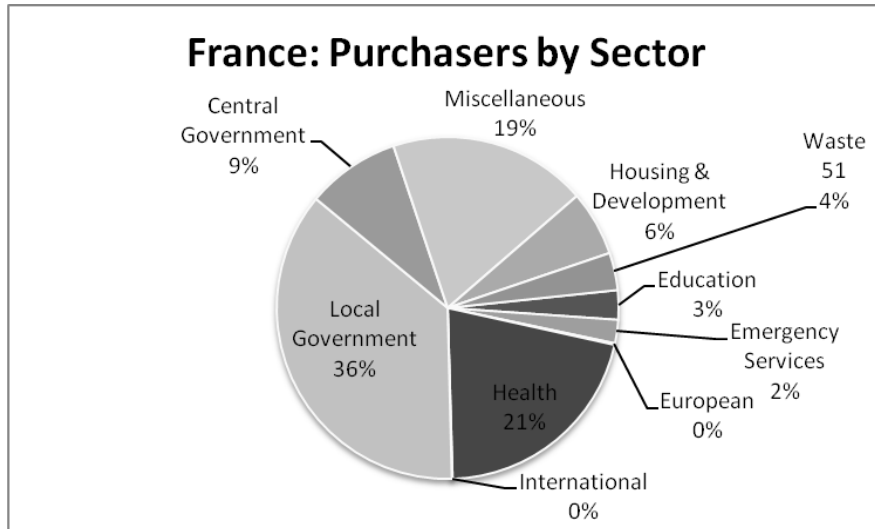


**Figure 4.3.1: Purchasers using Competitive Dialogue in the UK by Sector (2006-2009)**

Figure 4.3.1 shows that local government was by far the most common purchaser in the UK, but this is arguably slightly misleading in light of the contract classifications discussed in Section 5. It should be highlighted here that the local government sector is responsible for the bulk of educational infrastructure and waste purchases; for instance, local authorities are responsible for managing Building Schools for the Future investment programmes and the OJEU notice will be in their name.

It can be further noted that the education sector was made up mainly of UK universities, whereas the primary users of competitive dialogue in the health sector were local NHS trusts. In the miscellaneous category, bodies such as the BBC, the British Library, Transport for London and the Equality and Human Rights Commission were found. It should be mentioned that in the UK in particular, shared services purchasing, i.e. a local authority purchasing services on behalf of itself and other authorities, was a relatively common occurrence.

#### 4.3.2 France



**Figure 4.3.2: Purchasers using Competitive Dialogue in France by Sector (2006-2009)**

As can be seen in Figure 4.3.2, a variety of sectors were using competitive dialogue in France, though—as in most other countries—local and regional authorities and health sector purchasers, such as hospitals and health authorities, were the most frequent users. Striking is that unlike in the UK, the educational sector did not use competitive dialogue to a significant degree; this will be explained in examining the type of infrastructure built in France in Section 5.3.2 below.

The “miscellaneous” category does contain several varieties of repeat purchasers specific to France; for instance, local and national Chambers of Commerce use competitive dialogue quite frequently, as do a variety of national research centres or agencies. Bodies tasked with managing museums or heritage sites also used the procedure on a regular basis; beyond this—as was observed in the UK—a wide variety of other bodies granted with supervisory or management power through French law have relied on the procedure for their purchases.

## 5. Main Subject Areas of Contracts

As explained in Section 2.2.5 above, in order to provide a global overview of the types of purchases made, the researchers agreed on 10 main categories to fit the contract notices in; also used was a residual category titled “other”, for notices that did not fit any of the 10 main categories. Findings in each of the subject countries are discussed below.

### 5.1 Light Users

Again, no attempt will be made to generalize findings for the light user countries.

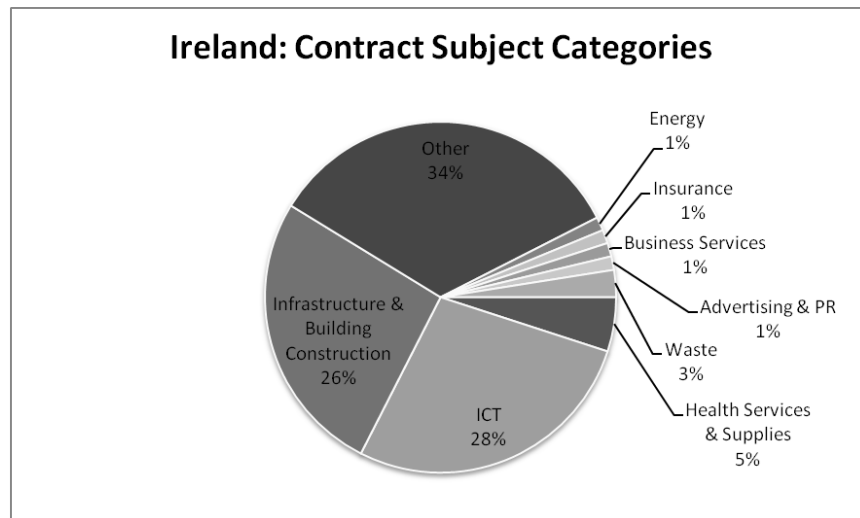
Portugal used competitive dialogue to buy one ICT software package, and for a contract regarding public-use bicycles as a method of inner-city transportation. Most of the contracts in Belgium, on the other hand, related to on-site assistance at nuclear power plants in Russia; other contracts were for financial services (credit and loan services), business services (consultancy), advertising & PR (information campaigns on the European Union) and infrastructure (EU delegation office buildings).

In Spain, there was a fairly balanced division of ICT, Infrastructure, and Health Services and Supplies contracts; however, beyond this, there were also notices for interesting one-off purchases such as the development of a fire-safety boot<sup>9</sup> for the fire services and an astrophysics telescope. The light-use countries thus indicate a wide variety of uses for competitive dialogue; this is an impression that will be reinforced by the countries in which it is used more regularly.

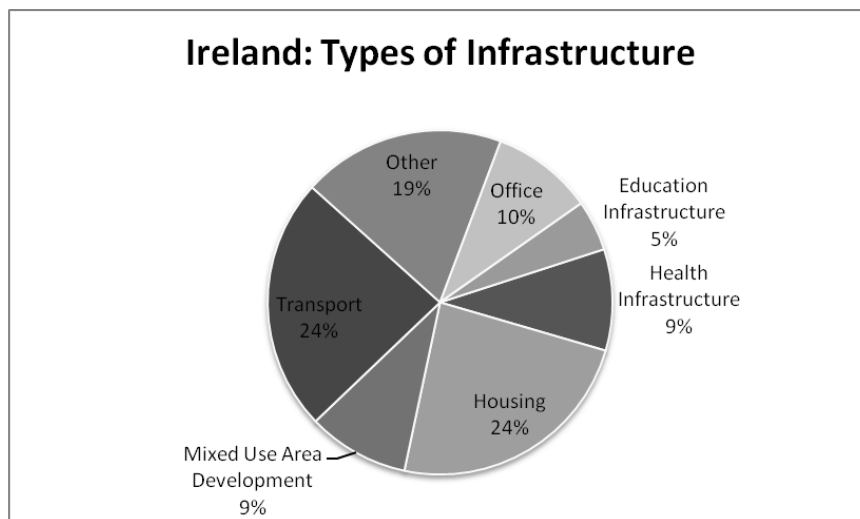
## 5.2 'Regular' Users

### 5.2.1 Ireland

Figures 5.2.1.1 illustrates the types of purchases being made with competitive dialogue in Ireland:



**Figure 5.2.1.1: The Main Subject Areas of Contract Notices in Ireland (2006-2009)**



**Figure 5.2.1.2: Infrastructure Contracts to be awarded using Competitive Dialogue in Ireland (2006-2009)**

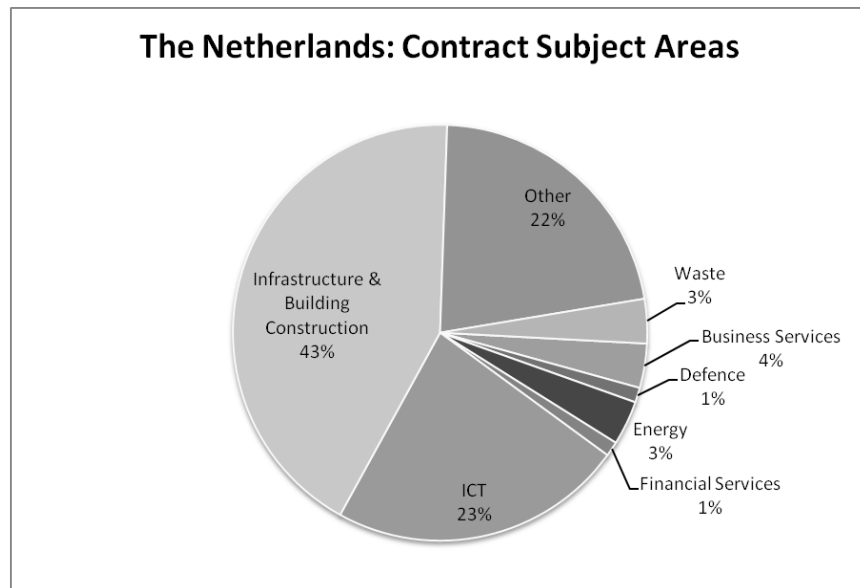
<sup>9</sup> According to Pedro Telles, this contract notice has been cancelled without award, though the OJ does not reflect this.

Interestingly, in Ireland the largest number of competitive dialogue advertisements fell within the “other” contract subject category. A variety of projects have been classified as “other”; some of the more interesting of these one off complex projects included the supply of library books, the production of rooted sitka spruce cuttings (two notices), the provision of admissions tests for the selection of students for undergraduate medical programmes, the design and build of a vehicle to travel from Ireland to Turin for the City of Science event 2010, the naming rights for a new stadium, and the supply of evidential breath alcohol testing equipment.

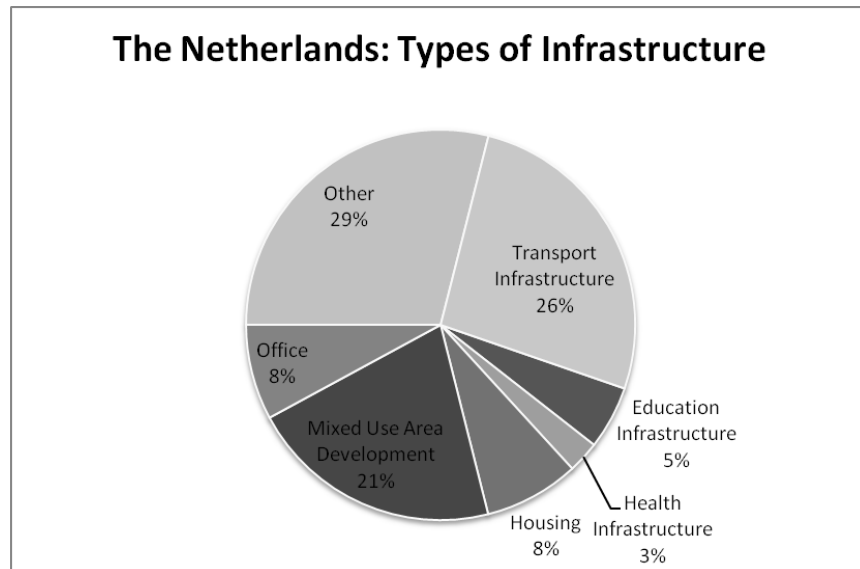
ICT purchases were regular, and as in all member states, primarily involved software purchases. The “infrastructure” category is also well represented in Ireland. The make-up of this category can be seen in Figure 5.2.1.2. As can be seen, the different subcategories within the infrastructure category are reasonably evenly distributed, which is unusual; other countries demonstrated a clear stand-out category.

### 5.2.2 The Netherlands

In the Netherlands, for instance, Infrastructure and ICT purchases were very common, as were “other” category contracts:



**Figure 5.2.2.1: The Main Subject Areas of Contract Notices in the Netherlands (2006-2009)**



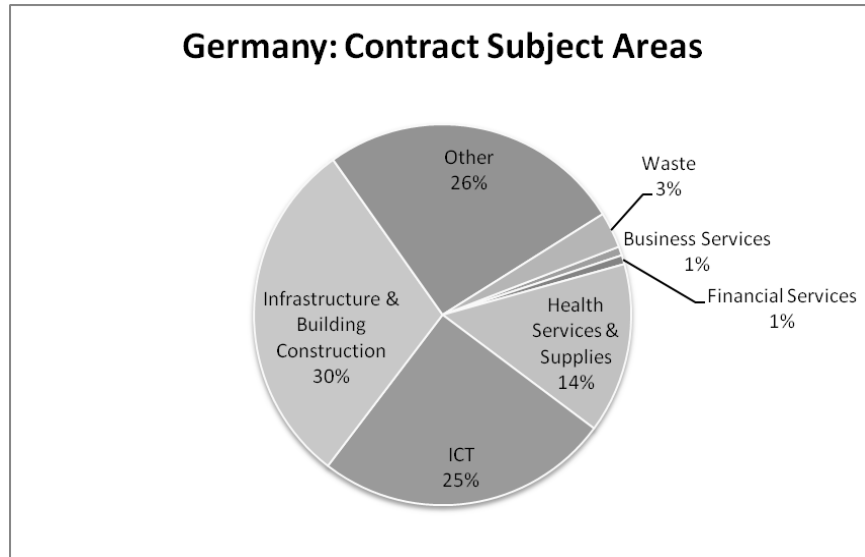
**Figure 5.2.2.2: Infrastructure Contracts to be awarded using Competitive Dialogue in the Netherlands (2006-2009)**

Figure 5.2.2.2 shows that, while the many infrastructure contracts related to either road works or urban development that included a mixture of housing and commercial properties, there are also a substantial number of interesting one-off purchasing; for instance, in 2007, a fission research reactor was purchased, and in 2009, the refurbishing of prison facilities at Schiphol airport was put up for award using competitive dialogue.

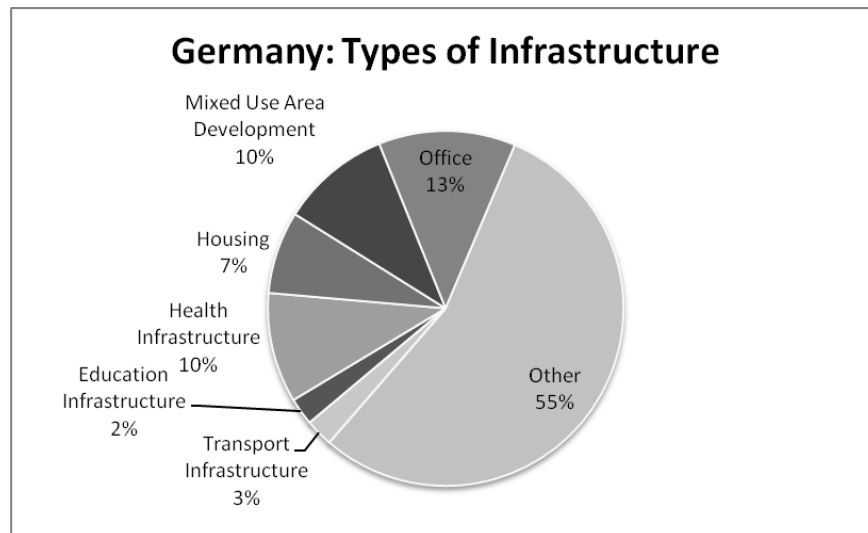
Regarding contracts in the ICT category, the bulk of the purchases once again were software-related, though the other categories were also represented. Also of interest in the Netherlands is the ‘other’ category. While space restricts us from discussing this category in detail, some interesting contract notices can be highlighted; one of these is the KOSMOS project, which relates to the design and maintenance of roadside artwork in all provinces of the Netherlands, and which accounts for 5 notices. Another example of a very rare purchase was a contract notice for a ‘research laser’ by a university; less unusual, but not fitting into any particular category, were contract notices related to tram and train exploitation (through a concession), the provision of assisted living to the elderly, and a research project into rush hour traffic on certain highways in the Netherlands.

### 5.2.3 Germany

Figure 5.2.3.1 reveals that there are four main categories of contract subject areas found in Germany. Unsurprisingly, Infrastructure, ICT and ‘Other’ also covered the variety of the contract notices in Germany, as they did in the Netherlands and Ireland—but with fourteen percent, a significant proportion of the notices related to Health Services and Supplies:



**Figure 5.2.3.1: The Main Subject Areas of Contract Notices in Germany (2006-2009)**



**Figure 5.2.3.2: Infrastructure Contracts to be awarded using Competitive Dialogue in Germany (2006-2009)**

As we can see in Figure 5.2.3.2, the majority of German infrastructure contracts fall into the ‘other’ category. This can be explained by the fact that **seven** contracts were advertised for the construction of swimming pools and spas, which was not a prevalent enough category in any other country to warrant its own mention. Also in the ‘other’ category were construction projects relating to infrastructure for a nation-wide garden show, and the provision of various public buildings such as a town hall or a new site for parliament.

The ICT category again primarily involved software-centric purchases. There were also a variety of interesting purchases in the ‘other’ category; as just a set of examples, competitive dialogue was used to award contracts as disparate as the supply of an organ, construction of an exhibition for a museum, service provision to asylum seekers by means of a smart-card system for food and clothing supplies, and the restoration of a historic medical fence. This once again illustrates the wide variety of uses that competitive dialogue has as a contract award procedure.

### 5.3 Heavy Users

#### 5.3.1 The UK

The UK is second only to France in terms of the number of competitive dialogue contract notices published over the period studied. As may have been expected, Figure 6.3.1.1 clearly shows that the majority of contracts advertised fell in the infrastructure, ICT and 'Other' categories:

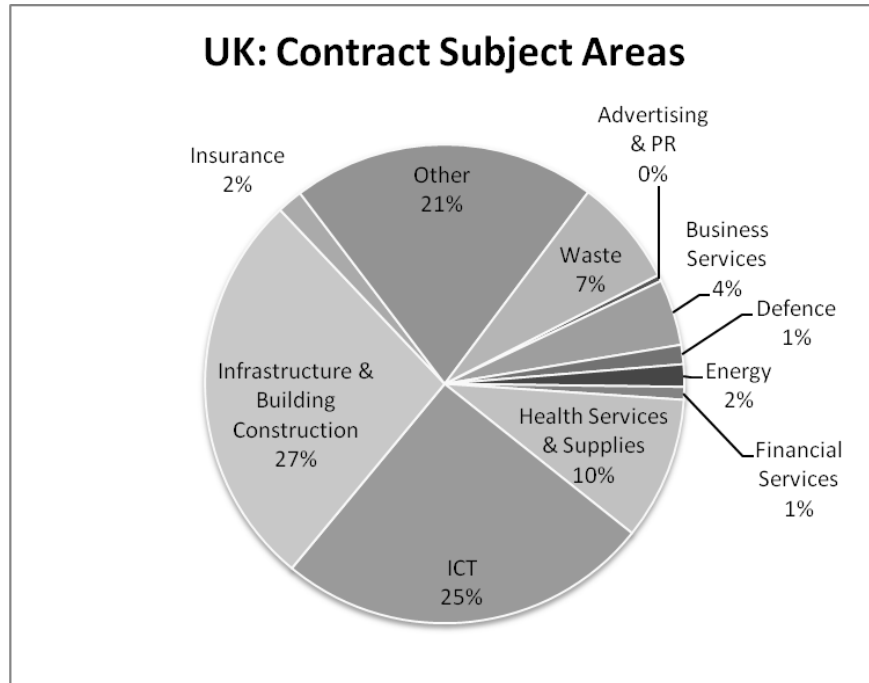


Figure 5.3.1.1: The Main Subject Areas of Contract Notices in the UK (2006-2009)

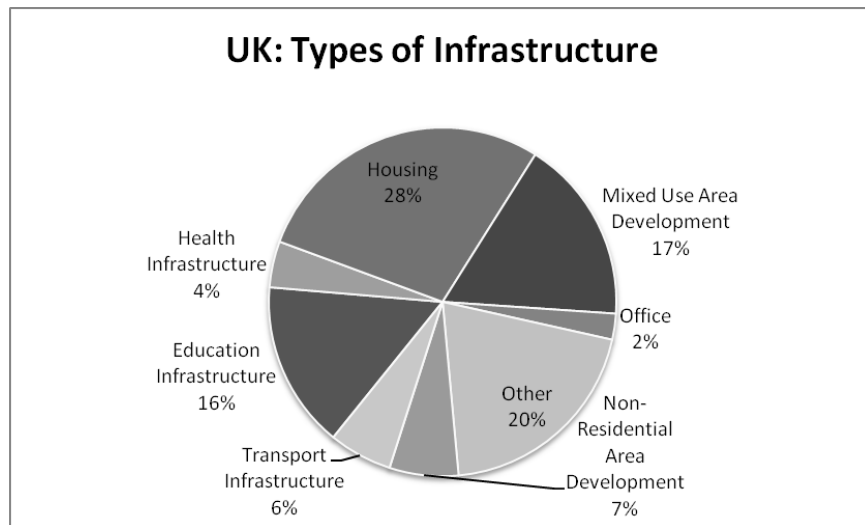
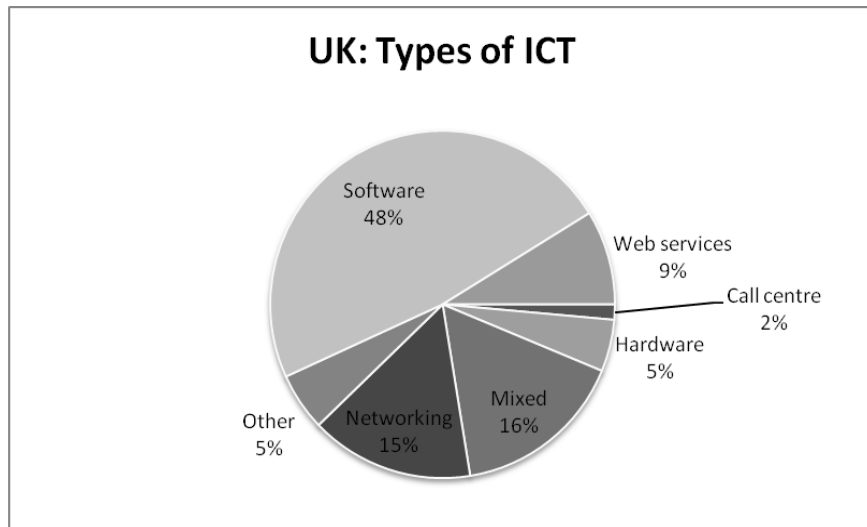


Figure 5.3.1.2: Infrastructure Contracts to be awarded using Competitive Dialogue in the UK (2006-2009)





**Figure 5.3.1.3: ICT Contracts to be awarded using Competitive Dialogue in the UK (2006-2009)**

The breakdown of the infrastructure category can be seen in Figure 5.3.1.2. Here, housing, which includes residential accommodation such as student halls of residence, is the largest sub-category (28%). The education sector is also well represented. In part, this may be down to the UK Government’s major schools investment programme, “Building Schools for the Future”, in which the Government has committed itself to replace, rebuild or renovate every secondary school in England (around 3,500 in total).<sup>10</sup> Construction work on university buildings, however, also fell within this sub-category.

There were a significant amount of ICT competitive dialogue contract notices. Again, a breakdown of this category can be seen in Figure 5.3.1.3. Here, it can be seen that software purchases account for very nearly half of all ICT notices. The authors are aware of anecdotal evidence pointing to dissatisfaction amongst practitioners with the procurement of complex ICT projects under restricted procedure prior to the introduction of competitive dialogue. It is submitted that many of the more complex ICT projects that would have been carried out under the restricted procedure are now being procured under competitive dialogue. In that sense, it would seem that competitive dialogue has achieved its objective of bringing greater flexibility.

The substantial “other” category covers an array of different projects, e.g. nursery services, provision of fairground attractions, bar and catering services, printing and mailing services, double glazing, design and production of UK passports, the supply of low carbon and eclectic powered vans, and the supply of bullet proof vests. It should be noted that there were several facilities management contracts and other maintenance type projects advertised; however, not sufficient to warrant a category to themselves.

<sup>10</sup> See <http://www.partnershipsforschools.org.uk/about/aboutbsf.jsp>.

### 5.3.2 France

In Figure 5.3.2.1 we observe that unlike in the UK, the majority of French uses of competitive dialogue were for ICT purchases rather than Infrastructure. In fact, infrastructure only ranks third in terms of regularity of use; the 'other' category represents nearly a quarter of all notices.

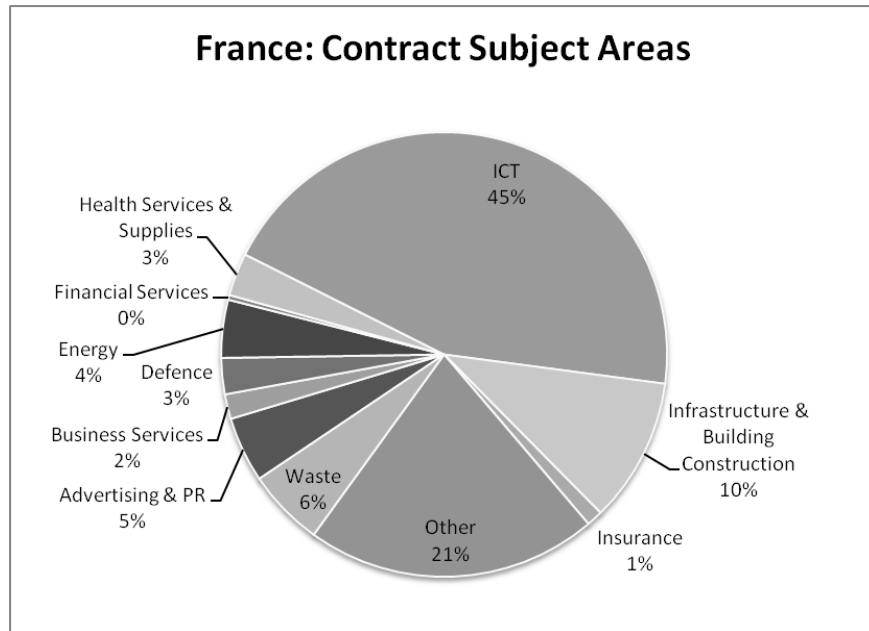


Figure 5.3.2.1: The Main Subject Areas of Contract Notices in France (2006-2009)

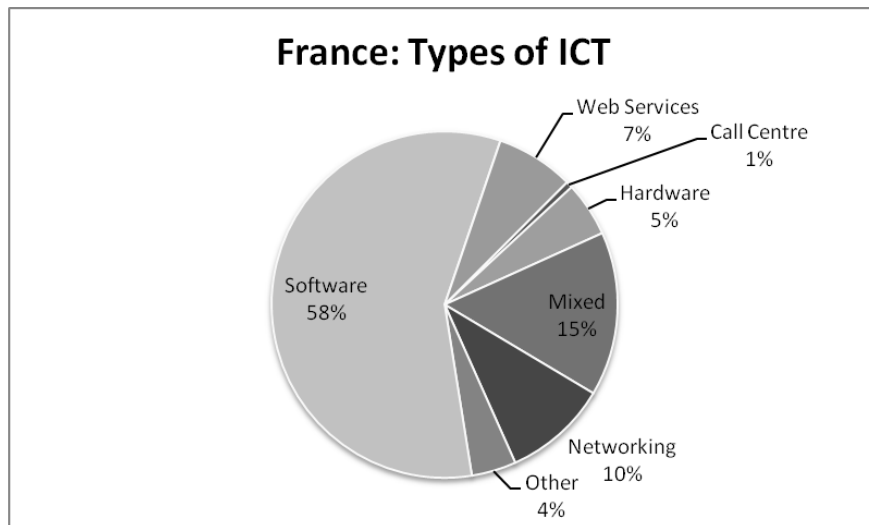
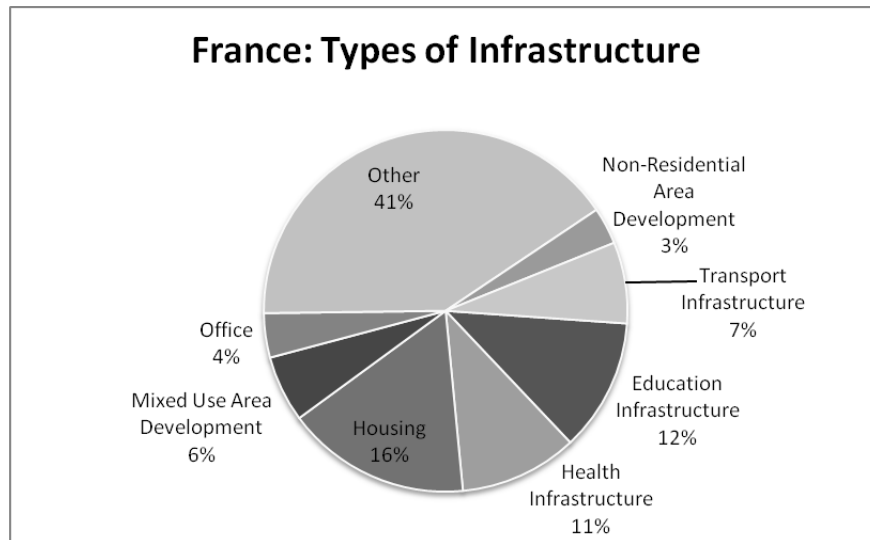


Figure 5.3.2.2: ICT Contracts to be awarded using Competitive Dialogue in France (2006-2009)



**Figure 5.3.2.3: Infrastructure Contracts to be awarded using Competitive Dialogue in France (2006-2009)**

Figure 5.3.2.2 shows clearly that nearly half of all ICT contracts purchased had software as their main component; this is unsurprising given findings in other Member States. What is interesting, however, is that with this much use, repeat purchases in the ‘software’ category can be found. It was already mentioned in Section 4 that the health sector is a heavy-duty competitive dialogue user; what accounts for this is the fact that the vast majority of all ICT software purchased was for hospital ICT requirements to enable digital patient files. In general, (complex) software was the most common thing purchased with competitive dialogue in the past four years; the French statistics demonstrate this quite clearly.

It is nearly impossible to chart the ‘other’ contracts category in a country such as France, where there were far too many varied contract notices (306 over the entire period, versus 152 for infrastructure, to illustrate); much like in the less frequent usage countries, however, competitive dialogue was used for a wide variety of purchases, only a few of which occur more than once in the same year.

What can be highlighted here is that there were two types of repeat ‘other’ purchases typical to France. Firstly, public lighting contracts is a category that covers all sorts of urban activity dealing with the installation, operation and maintenance of outdoor lighting on a municipal level, but also unrelated requirements, such as the installation and maintenance of road signage. The other category—urban furniture—is broader, and relates to any sort of ‘structure’ that a municipality can build outdoors, but that isn’t quite a building; there are thus contracts for bus shelters, public benches, multimedia kiosks, and even public bicycles. Both of these types of contracts recurred regularly over the examined period, but only in France.

Figure 5.3.2.3 reveals that in terms of infrastructure contracts, the prevalent category being purchased using competitive dialogue is the ‘other’ category. Like in Germany, this is caused by country-specific purchases that did not surface often enough in other countries to warrant their own category. Specific to France is the purchase of “gendarmerie” (a police force that is part of the military) bases/barracks, which recurred several times over the period examined; also recurring were contracts relating to redevelopment or renovation of zoos, football stadiums, and velodromes (cycling arenas) and various conference/exhibition centres, for either general or specific purposes.

The other types of infrastructure that were frequently advertised as competitive dialogue projects in France were housing, health and education; it can be highlighted here that housing and school renovation projects were far more common in the UK, whereas hospital construction was more common in France. However, health infrastructure in France usually related to the building of specific wards within an existing hospital, but not the entire redevelopment or construction of a hospital as it frequently would in the UK; similarly, education infrastructure in France was more commonly concerned with the redevelopment of university buildings than with the building of entire schools, such as under BSF projects.

Lastly, it is notable that area development, whether mixed use or non-residential, did not figure heavily among the notices published in 2006-2009 in France; this can be contrasted with the UK, where competitive dialogue was in fact quite frequently used for area development contracts.

## 6. Competitive Dialogue and Private Finance: A Murky Picture

The phrase Public Private Partnership (PPP) is not defined in EU law. The phrase means different things to different people, often depending upon context; however, in the UK, the Government defines PPP broadly, covering “a range of business structures and partnership arrangements, from the Private Finance Initiative (PFI) to joint ventures and concessions, to outsourcing, and to the sale of equity stakes in state-owned businesses”.<sup>11</sup> The term is not therefore limited to cases of private sector finance.

In the European Commission’s explanatory note on competitive dialogue it is stated that PPPs will “very, very often” be of sufficient financial/legal complexity to satisfy the grounds for using competitive dialogue.<sup>12</sup> This is not to say, however, that a PPP project will automatically qualify, nor is the use of competitive dialogue necessarily limited to PPP projects. The Commission goes on to give examples of PPP projects where the financial/legal complexity condition would in its opinion be satisfied; all of the examples involve private sector financing. It was therefore felt that an assessment of the proportion of competitive dialogue procured contracts involving private financing would be of particular interest; not least, because the UK’s perceived overuse of the competitive negotiated procedure for the award of PFI contracts is seen to be a key reason behind the introduction of competitive dialogue.

### 6.1 Light Users

Even in the countries that used competitive dialogue very rarely over the course of the past four years, contract notices could be found that required PPP-style financing. In Belgium, for instance, both contracts purchased by the Commission in order to build new delegation buildings in foreign countries required private financing; but no specific type of financing structure was identified. Similarly, in Portugal, one of the two contracts advertised contained an option for private finance—but not under any specific name.

Spain is a slightly different case; the notices that required private finance there generally referred to a “Contrato de colaboración entre el sector público y privado” (CPP), which is a specific *type* of PPP contract, defined in Article 11 of the Spanish Public Procurement Code.<sup>13</sup> Beyond this, there was one notice for a concession contract as well; these findings on the whole indicate that private finance is a

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<sup>11</sup> HM Treasury, PUBLIC PRIVATE PARTNERHIPS: The Government’s Approach,

<sup>12</sup> Ibid, p.3.

<sup>13</sup> Ley 30/2007, de 30 de octubre 2007, de Contratos del Sector Público (BOE 261/2007).

common element to contracts purchased using competitive dialogue, even where the procedure is used very infrequently.

## 6.2 'Regular' Users

### 6.2.1 Ireland

In Ireland, out of the 80 notices it was felt that only **17 could be said to definitely involve private sector financing**. The vast majority of the 17 notices described a DBFO structure (or something similar). There was one contract notice where the decision to use private financing for the project was to be left open to be discussed during dialogue. Thirteen of the adverts considered to be definitely notifying of a private finance arrangement were concerned with infrastructure and building construction. It should also be mentioned that there were **14 contract notices** where the researcher could not decipher whether private finance was intended to form part of the project.

### 6.2.2 The Netherlands

In the Netherlands, a distinction can be drawn between “Publiek Private Samenwerking” or PPS contracts, which are a generic type of PPP contracts that the central government uses primarily to fund infrastructure projects, and other ‘private finance’ projects, which do not use this name. Examination of the contract notices revealed **13 privately financed** contracts total, of which **7 were PPS contracts** and **6 were other private finance contracts**.

The general assumption about contracts classified as PPS is that they operate on a DBFM(O) basis, which is to say, the private partner usually designs, builds, finances, maintains (and sometimes operates) the infrastructure being purchased. Despite being difficult to define a PPS contract beyond indicating that it is a *type* of public-private partnership, these contracts are mentioned specifically here because the central government has issued specific guidance on using competitive dialogue for these PPS contracts<sup>14</sup>—meaning there was, at the start of the research, an assumption to find a substantial number of PPS contracts.

As stated, other types of private finance arrangements can, however, also be used in the Netherlands; for instance, concession agreements with a financing element, or a contract notice that just very generally mentioned a ‘transfer of risk’ to the private sector without indications of a specific framework for said risk transfer were thus also found. Lastly, there were also instances of DBFM(O) contracts being advertised *without* the PPS label—indicating once again that PPP terminology is applied irregularly, even within the context of just one Member State.

### 6.2.3 Germany

In total, in Germany **28 privately financed** contracts of a variety of types were found.

In Germany, it is not possible to properly identify any specific type of public-private partnership setup as being dominantly used or encouraged by government. Unlike in the Netherlands or the UK, there aren’t

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<sup>14</sup> Rijksoverheid, “De Concurrentiegerichtte Dialoog” (2009), available at <http://www.ppsbijhetrijk.nl/dsresource?objectid=709&type=org>

any pieces of legislation or policy that identify one particular type of new-style PPP arrangement<sup>15</sup>; while the term *öffentlich-privaten Partnerschaft* (OPP) is occasionally used by contracting authorities, this is merely the German term for “PPP”—but not any specific type of PPP-setup.<sup>16</sup> **10 contract notices** explicitly use the phrase “PPP” or “OPP”, either as a requirement or an option for financing.

Aside from notices advertising an interest in OPP, there were also various contract notices that required private finance in the form of concession agreements, long-term leaseholds, and, interestingly, privatization contracts; one of these involved a sale of a 49% stake in the airport as well as its daily operation. Like in the Netherlands, there were also a few contracts that just generally required ‘finance’ or ‘funding’, but without any specific mention of private partnerships; and, like Ireland, Germany also showed several contracts that required ‘private partners’ but did not specifically mention finance.

### 6.3 Heavy Users

#### 6.3.1 The UK

The UK showed the most frequent use of private finance out of every country examined, with **470 notices** potentially involving some element of private finance—though it must be stressed that this is still, at best, only 35% of all purchases made with competitive dialogue over the relevant period.

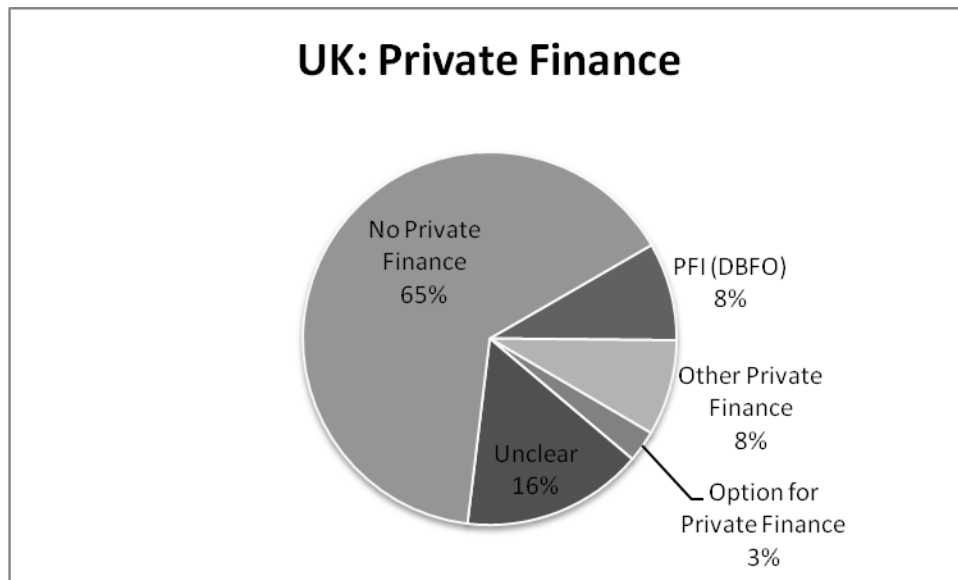


Figure 6.3.1: Private Finance Arrangements for Competitive Dialogue Contracts in the UK (2006-2009)

In the UK, the Private Finance Initiative was formally commenced in 1992 to encourage the use of private finance for major capital investment projects. Essentially, a PFI arrangement is a long-term contract (typically 15-30 years duration) whereby a private sector partner will finance the design and construction of a capital asset and recoup its costs and make a profit by charging for services provided over the duration of the contract. A typical model for such contracts is the Design-Build-Finance-Operate (DBFO) model. A range of projects have been procured by way of PFI, including roads

<sup>15</sup> To be contrasted with traditional PPP arrangements like concessions and long-term leaseholds.

<sup>16</sup> See the EC Internal Market: Public Procurement website in German (available at [http://ec.europa.eu/internal\\_market/publicprocurement/ppp\\_de.htm](http://ec.europa.eu/internal_market/publicprocurement/ppp_de.htm)).

(motorways) and bridges, schools, hospitals, prisons, waste treatment plants, and major ICT projects. Because of the importance of PFI in the UK, it was decided that PFI projects clearly stating they are being procured under the PFI would be recorded in a separate category to other private finance arrangements. Although UK authorities are advised to specify in the contract notice where a contract is being procured under the PFI, the authors could not be sure that this was always the case and so projects clearly describing a DBFO structure, even though not using the wording PFI, were grouped into this category as well.

Only 8% of the projects could clearly be said to be PFI; however, this is to be expected considering it is an arrangement for infrequent major capital investments. As may have been expected, it was mainly infrastructure and building construction projects and also waste projects (e.g. for the construction of a waste treatment plant) which employed the PFI method. In particular, there were several Building Schools (and colleges) for the Future projects and also many housing and town regeneration projects adopted this finance arrangement.

In 8% of the notices it was clear that private finance was involved, but this was not necessarily under a DBFO structure; for example, joint ventures involving private finance found their way in to this category.

HM Treasury guidance for PPP projects in the market conditions of 2009 advises authorities to “draft the OJEU notice and other tender documents as widely as possible to ensure that alternative financing solutions can be accommodated”.<sup>17</sup> This was issued quite late on in our research (28 August 2009); however, it was clearly a necessary step, as, in the authors’ opinion, only 3% of notices were drafted in such a manner to leave financing options open.

It can be seen that in 16% of cases the authors did not feel sufficiently confident to classify a contract as one or the other. This commonly occurred where, for example, an authority made no mention of private finance but used a phrase such as “partnering arrangement”. Such phrases may mean more to those involved with procurement in practice.

The data supports UK Office of Government Commerce claims that authorities in the UK are now favouring the competitive dialogue to the competitive negotiated procedure for PFI and other private finance procurement. This is likely down to the clear guidance from central government stating that the negotiated procedure should only be used in “very exceptional circumstances”.<sup>18</sup>

### 6.3.2 France

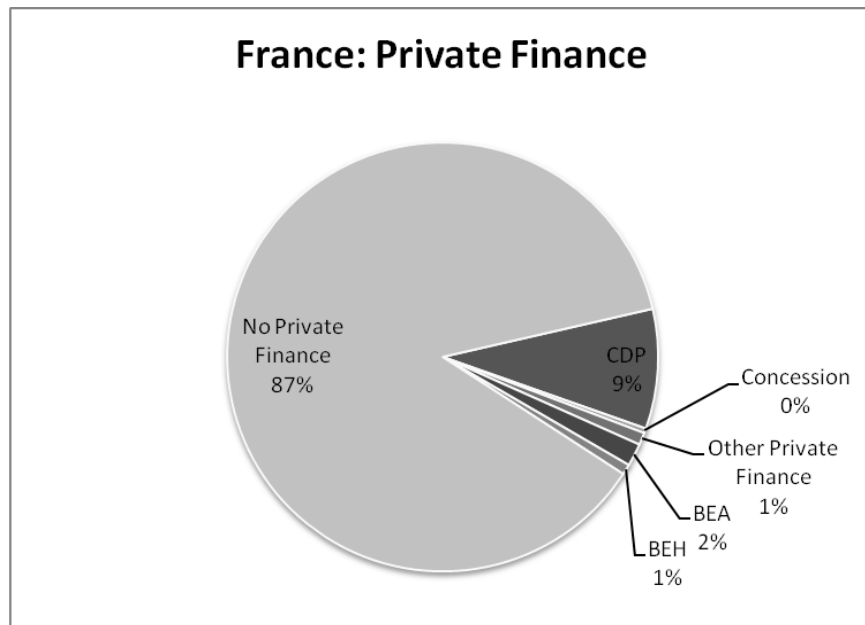
In France, only **180 contract notices** indicated a need for private finance; however, it is possible to account for the significant drop from the UK statistics in part because there were significantly fewer ‘unclear’ contracts in France than there were in the UK. This is presumably the case because the legal framework for PPP-type contracts in France is quite different from that in most other member states, as the types of PPPs commonly concluded by contracting authorities are all subject to specific legislation,

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<sup>17</sup> HM Treasury, “Application Note – PPP Projects in the Current Market Conditions”, (28 August 2009), P.2.

<sup>18</sup> OGC, “Competitive Dialogue Procedure: OGC guidance on the competitive dialogue procedure in the new procurement regulations” (January 2006), P.3; a quick search of negotiated procedure use in TED reveals that between 2006 and 2009, the vast majority of these notices relate to insurance or financial services—and the overall use of the negotiated procedure by public sector authorities is dropping with each year. It therefore appears that the guidance is having an effect.

rather than just the general procurement rules.<sup>19</sup> As such, they are also readily identified in contract notices, and easy to separate for the purposes of this study.



**Figure 6.3.2: Private Finance Arrangements for Competitive Dialogue Contracts in France (2006-2009)**

As can be seen in Figure 6.3.2, one particular type of PPP contract was dominant in France. This is the so-called *Contrat de Partenariat (CDP)*: a type of PPP that follows DBFM(O) structure. Their award is regulated in a specific ordinance that entered into force in 2004.<sup>20</sup> CDPs can be used in all sectors and have been applied particularly often with regard to the urban furniture/public lighting type contracts discussed in Section 6.3.2 above—however, they are also used for general infrastructure contracts, waste contracts, and transport infrastructure.

Beyond this, several specific sectors in France have been given the right to conclude PPP-type contracts separately. The public health sector can use a specific type of long-term leasehold agreement called a *bail emphytéotique hospitalier* to build new public health-related infrastructure.<sup>21</sup> Until 2008, local contracting authorities dealing with public order and security could use long-term leasehold structures to build their necessary infrastructure; as such, police stations, military barracks, courts, prisons could all be constructed using a type of PPP leasehold entitled a *bail emphytéotique administratif (BEA)*.<sup>22</sup> Until 2010, the BEA setup could also be used to build infrastructure related to the fire services<sup>23</sup>; and more generally, BEA is still available for public authorities when they are purchasing in order to carry out their

<sup>19</sup> For a very complete outline of the types of PPP contracts regulated by law in France, see: [http://www.ppp.minefi.gouv.fr/tableau\\_comparatif.pdf](http://www.ppp.minefi.gouv.fr/tableau_comparatif.pdf)

<sup>20</sup> Ordinance No. 2004-559 of 17 June 2004.

<sup>21</sup> Article L. 6148-1 and onwards of the *Code de la santé publique* (Public Health Code).

<sup>22</sup> More specifically, public order & safety construction is usually purchased using a so-called AOT-LOA setup; this refers to a situation whereby a temporary right to occupy and operate is granted to the leaseholder, who concludes the lease with an option to buy. [For more detail, in English, see T. Laloum and A. Jahangiri, “Chapter 5: France” in the *International Comparative Legal Guide to PFI/PPP Projects 2007* (available at <http://www.iclg.co.uk>, last accessed February 2010).

<sup>23</sup> See Article L1311-2 of the *Code général des collectivités territoriales* (General Code for Local Authorities).



public services, or (more specifically) in building sports infrastructure.<sup>24</sup> Aside from in the indicated sectors, BEAs were also commonly used to purchase swimming pools and local authority offices.

Beyond these leaseholds and new-type PPP contracts, concession agreements were also found in France—though these appear to not be concluded with competitive dialogue as much, as they only sparingly surfaced in the search (see Figure 6.3.2 above). As with other jurisdictions, there were also contract notices that only mentioned ‘finance’ or ‘partnering’ as a necessity, but without reference to any of the specific contract types highlighted above.

## 7. Conclusions

The research undertaken in this paper produced findings on two different levels. Though not the purpose of the research, it must be mentioned that it was discovered that there are significant problems with the supply of information in OJEU notices. Some of the information is not helpful, where it was expected to be informative; other information is highly contingent on contracting authorities filling it in correctly, which—as was discovered—is done with highly variable degrees of accuracy.

More generally, it is a big problem that the specific requirements—technical or financial—for any given contract can only be obtained in the original language that the OJEU notice was posted in. Only very basic information about contracts is available in languages other than the originally submitted language, and the title of the contract, for instance, only rarely accurately describes that which is actually being purchased. If the ‘real’ information is only available in local languages, be it through TED or—quite commonly—on the authority’s website, there are obviously real limits to the usefulness of OJEU notices.

Beyond finding that there are various inadequacies to the OJEU system of contract advertising, the project also revealed some general trends in competitive dialogue use prior to 2010. In terms of usage, local government was the most regular competitive dialogue user, with the health sector following closely behind. Furthermore, the infrastructure and ICT categories together represented the majority of regular purchases being made using competitive dialogue; this is unsurprising as complex infrastructure and IT systems were used as examples of ‘particularly complex contracts’ that would warrant use of competitive dialogue.<sup>25</sup> It is quite difficult to generalize findings beyond this, however, as the ‘other’ categories proved to be substantial in many of the subject Member States; this demonstrates that many interesting one-off purchases are also made using competitive dialogue—some of which are country specific, and some of which only occurred once in the entire EU during the time investigated.

Finally, research on private finance highlighted primarily that there are significant drawbacks to the inexistence of an agreed definition of “PPP”, as the statistics collected on private financing arrangements were not comparable between Member States. Furthermore, many of the contract notices were deliberately drafted in vague terms in countries where there are no set legal frameworks for private finance purchases—thus adding to the general impression that OJEU notices successfully provide basic information about contracts procured using competitive dialogue, but do not always result in comprehensive understanding of what is being purchased, or how it is being paid for.

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<sup>24</sup> The latter inserted by loi n° 2009-179 du 17 février 2009 pour l'accélération des programmes de construction et d'investissement publics et privés.

<sup>25</sup> See recital 31 to Directive 2004/18/EC, as well as the Commission’s “Explanatory Note on Competitive Dialogue” (available at [http://ec.europa.eu/internal\\_market/publicprocurement/explan-notes\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/explan-notes_en.htm))