EUROPEAN COMMISSION
Directorate General Internal Market and Services

PUBLIC PROCUREMENT POLICY

EXPLANATORY NOTE – COMPETITIVE DIALOGUE – CLASSIC DIRECTIVE[1]

1. Introduction

In response to the finding that the "old" Directives, Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, do not offer sufficient flexibility with certain particularly complex projects due to the fact that the use of negotiated procedures with publication of a contract note is limited solely to the cases exhaustively listed in those Directives, a new award procedure, the competitive dialogue, was introduced in the new Directive 2004/18/EC[2] (hereinafter referred to as the "Directive" or the "Classic Directive").

As set out in recital 31, the legislation has therefore set itself the objective of providing for "a flexible procedure ... which preserves not only competition between economic operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate." However, it should be noted that the competitive dialogue is a procedure which can only be used in the specific circumstances expressly provided for in Article 29.[3]

2. Field of application - Under what circumstances can the competitive dialogue be used?

2.1. Complexity and objective impossibility

The first condition is that the market in question should be "**particularly complex**". The second paragraph of Article 1(11)(c) envisages two types of markets that are regarded as being particularly complex, specifically "where the contracting authorities:

– are not objectively able to define the technical means .... capable of satisfying their needs or objectives and/or

– are not objectively able to specify the legal and/or financial make-up of a project."

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1 This document corresponds to document CC/2005/04_rev 1 of 5.10.2005

2 Use of the negotiated procedures with opening to competition is not limited, either in the new Utilities Directive, Directive 2004/17/EC, or in the "old" Utilities Directive, Directive 93/38/EEC. Consequently, the competitive dialogue has not been introduced in the new Utilities Directive. However, there is nothing to prevent a contracting authority which has opted for a negotiated procedure with prior opening to competition from stipulating in the specifications that the procedure will be as laid down by the Standard Directive regarding the competitive dialogue.

3 Cf. the second sentence of the second subparagraph of Article 28.

These provisions should be read in the light of the first part of recital 31: "Contracting authorities which carry out particularly complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions. This situation may arise in particular with the implementation of important integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing the financial and legal make-up of which cannot be defined in advance."

In view of the fact that this is a special procedure whose use is regulated, it is necessary to examine on a case by case basis the nature of the market in question, taking account of the capacity **of the contracting authority** concerned to verify whether use of the competitive dialogue would be justified. This is because the concept of objective impossibility is not an abstract concept; it is mitigated by the preciseness of the recital under which the contracting authorities concerned find themselves in this situation "***without this being due to any fault on their part***". In other words, the contracting authority has an obligation of diligence – if it is in a position to define the technical resources necessary or establish the legal and financial framework, the use of the competitive dialogue is not possible.

It should be noted that amendments had been proposed during the legislative procedure aimed at limiting the use of competitive dialogue solely to cases where the prior organisation of a contest or the prior conclusion of a contract for the procurement of services (the completion of a study) would not have permitted the contracting authority to conclude the main contract (relating to the construction of a particularly complex project) through the use of an open or restricted procedure. This obligation has not been adopted by the legislation. The reason for this is that imposing it could present problems in certain cases, either as a result of the time required to conduct two award procedures and for the execution of the first contract or because of the risk that the first procedure could prove unproductive or the competition for the main contract would be insufficient if the service provider, the subject of the first contract, were to be excluded from participation in the second one in order to observe the principal of equality of treatment and/or the rule concerning the technical dialogue (recital 8).

2.2. Technical complexity

According to the wording of recital 31, technical complexity exists where the contracting authority is not able to define the means of satisfying its needs and/or able to achieve its objectives. Two cases may arise: either that the contracting authority would not be able to define the technical means to be used in order to achieve the prescribed solution; this should be fairly rare given the possibilities of establishing technical specifications – totally or partially - in terms of functionality or performance;[4] or – which would occur more often – that the contracting authority would not be able to determine which of several possible solutions would be best suited to satisfying its needs. In both cases, the contract in question would have to be considered as being particularly complex.

Let us take the example of a contracting authority wanting to create a connection between the shores of a river – it might well be that the contracting authority cannot determine whether the best solution would be a bridge or a tunnel, even though it would

4 I.e. through the use of one of the methods laid down in Article 23(3)(b), (c) and (d).

be able to establish the specifications for the bridge (suspended, metal, in pre-stressed concrete, etc.) or the tunnel (with one or more tubes, to be constructed under or on the riverbed, etc.). In this case, use of a competitive dialogue would also be justified.

As recalled by recital 31 – and to the extent they are not configured as concessions contracts – technical complexity could be present in the case of certain projects relating to the construction of major integrated transport infrastructure projects or the construction of major computer networks (although such cases are also likely to present legal or financial complexities).

2.3. Legal or financial complexity

Recital 31 states that a financial or legal complexity "may arise in particular … with the implementation of … projects involving complex and structured financing the financial and legal make-up of which cannot be defined in advance." Obviously, such issues arise very, very often in connection with projects of Public Private Partnerships.[5]

One possible example of legal or financial complexity might be a situation in which the contracting authorities cannot foresee whether the economic operators will be prepared to accept such an economic risk that the contract will be a concession contract or whether ultimately it will end up being a "traditional" public contract.[6] In this situation a contracting authority considering it most likely that the contract will be a concession and consequently applying a procedure other than as laid down for public contracts[7] would find itself faced with difficult choices if it were to turn out at the end of the procedure that the contract would after all be a public contract and not a concessions contract. This is because the contracting authority could either conclude the contract and commit an infringement of Community law, with all the resultant risks of appeals or infringement proceedings, or cancel the procedure and restart it using one of the procedures laid down for concluding public contracts. In such cases, the competitive dialogue allows these problems to be avoided: this is because the procedural requirements would be satisfied whether the contract results in a public contract or a concessions contract.

Another example of legal or financial complexity which could justify the use of the competitive dialogue (yet again concerning a form of private financing, or even a public-private partnership) can be found in the Commission's administrative practice: the contracting authority planned to rebuild a school and wanted to limit the costs of this as much as possible by allowing the economic operators to propose different ways of remuneration by using land belonging to the contracting authority for various purposes

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5 There is, however, no automaticity - calling something a "PPP-project" does not in itself entail legal or financial complexity; it must always be examined whether the concrete case meets the conditions or not even though that will most often be the case.

6 Of course, if the contracting authority is able to anticipate that the contract will definitively take the form of a concession of services – and this proves to be the case – it is not obliged to apply the provisions of the Directive (including those relating to the competitive dialogue) and can use a procedure which satisfies the requirements arising out of the Treaty (cf. footnote 6).

7 Depending on the case, either the procedure laid down by concessions of works or a procedure complying with the requirements arising out of the Treaty, as interpreted by the Telaustria case-law.

(housing construction, sports facilities, etc.), together with payment or not.[8] In the case in question this was a works contract and not a concession. Other examples of projects that most often justify recourse to the competitive dialogue could be projects in which the contracting authorities wish to have at their disposal a facility (school, hospital, prison, etc.) to be financed, built and operated by an economic operator (i.e. the latter would take care of maintenance works, maintenance services, guard services, catering services, etc.), often for a fairly long period. The legal and financial set-up is very often particularly complex and it may furthermore be uncertain from the outset whether the end result will be a concession or a public contract.

3. Conduct of the procedure

3.1. Contract notice, descriptive document and selection of economic operators

The contracting authority makes known its "needs and requirements" in the contract notice and it defines them in the notice itself and/or in a descriptive document.[9] The substantial or fundamental elements of the notice and of the descriptive document may not be modified during the award procedure.[10]

As the selection is carried out "in accordance with the relevant provisions of Articles 44 to 52",[11] the notice will have to state the minimum capacity levels. Where the competitive dialogue is justified by technical complexity, the contracting authorities can establish their requirements concerning the technical capacity of the economic operators on the basis of the definition of needs and requirements. If, for example, the contract relates to the establishment of an integrated transport infrastructure intended to serve a geographic area of size x with a transport capacity of y persons/hour without specifying a precise combination of the various means of transport, the candidates will have to prove their capacity to build such transport systems whatever the combination of means of transport they use for this purpose.

If the contracting authorities intend to limit the number of participants to be invited to the dialogue (at least three), the notice will also have to contain "the objective and non-

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8 In the case in question, the contracting authority used a negotiated procedure with the publication of a contract notice, invoking an exemption from Directive 93/37/EEC corresponding to that laid down in Article 30(1)(b) of the Standard Directive ("*in exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing*"). However, this derogation is to cover solely the exceptional situations in which there is uncertainty *a priori* regarding the nature or scope of the work to be carried out; it does not cover situations in which the uncertainties result from other causes, such as the difficulty of prior pricing owing to the complexity of the legal and financial package put in place.

9 The "descriptive document" is the counterpart of the traditional "specifications". The term "descriptive document" was chosen to indicate that it was a document that may be less detailed and/or more prescriptive than "normal" specifications. It should be emphasised that the descriptive document may, for example, envisage legal/administrative/contractual conditions which will form part of the common basis for the conduct of the procedure and the preparation of tenders.

10 See the end of the second subparagraph of Article 29(6) and the end of the second sentence of Article 29(7).

11 Article 29(3).

discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appropriate, the maximum number."[12]

Where the contracting authorities intend to make use of the opportunity laid down in Article 29(4)[13] to gradually reduce the number of solutions to be discussed during the dialogue phase, they have to indicate this in the contract notice or the descriptive document.

Under Annex VII A, "contract notices"[14], point 23, first sentence, the notice should state which of the "criteria referred to in Article 53 [are] to be used for award of the contract: 'lowest price' or 'most economically advantageous tender'". In the case of the competitive dialogue, the award criterion must be the most economically advantageous tender.[15]

The criteria to be used for the identification of the most economically advantageous tender[16] should appear in the contract notice if they do not appear in the descriptive

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12 Article 44(2) and (3). Article 44(3) envisages the invitation of at least three candidates, "provided a sufficient number of suitable candidates is available." It is specified in the third subparagraph of this paragraph that "Where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum number, the contracting authority may continue the procedure by inviting the candidate(s) with the required capabilities. In the context of this same procedure, the contracting authority may not include other economic operators who did not request to participate, or candidates who do not have the required capabilities."

13 See section 3.2.1 below. This possibility may be used either instead of the limitation of the number of participants to invite at the beginning of the dialogue (see the paragraph below) or on top of the initial limitation.

14 The contract notice contains information that may give rise to questions in the context of a competitive dialogue. Thus, point 6(b), first indent, requires contracting authorities to indicate whether tenders are "requested with a view to purchase, lease rental, hire or hire purchase or a combination of these". In the case of a competitive dialogue, contracting authorities may often not know which of these forms of contracts will be appropriate - they will therefore have to indicate that tenders may take any of these forms, at the tenderer's choice. Under point 9 of the notice, contracting authorities must indicate whether variants are admitted or not. Variants are useful only as "alternatives" to a "standard" solution / "standard" requirements – given that "standard" solutions will rarely be prescribed in the context of a competitive dialogue, the need to have recourse to variants will doubtlessly be very limited. If, however, contracting authorities find that they need to provide for the possibility of deviating from certain requirements which would otherwise be applicable, then they must not only indicate in the notice that variants are allowed, but also – and above all – indicate (in the descriptive document) what "the minimum requirements to be met by the variants and any specific requirements for their presentation" (Art. 24(3)) are. Deviations from substantial or even fundamental prescriptions during the award procedure are not possible unless explicit provision is made for such a possibility right from the beginning of the procedure. Similarly, any division into lots and the possibility of tendering for one, more or all of the lots must be mentioned in the notice as the introduction of such possibilities during the procedure would constitute a fundamental change to the award procedure. The contracting authority might also wish to have the right to draw on options – for instance, in the case of a contract to create a transport system in a given zone, the possibility of extending the system to a greater area. In this case, too, contracting authorities must indicate this possibility in the contract notice – otherwise, such options will not be possible.

15 See the second subparagraph of Article 29(1).

16 For example, "price, technical value, environmental characteristics …"

document.[17] The relative weighting of the criteria or, under the conditions laid down in the third subparagraph of Article 53(2), the decreasing order of importance of the criteria should appear in the contract notice, the descriptive document or the invitation to participate in the dialogue.[18] In respect of weighting, the Directive provides that "where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance." This provision should be applied in the light of the explanations provided in the second subparagraph at the end of recital 46: "Contracting authorities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. …" Given that recourse to competitive dialogue presupposes that the contract is "particularly complex", it seems almost tautological that the conditions for not weighting the award criteria should therefore be met when the contract is awarded by this award procedure – contracting authorities may instead limit themselves to mentioning the criteria in decreasing order of importance.

It should be stressed that the award criteria (and the order of their importance) may not be changed during the award procedure (that is, at the latest after the transmission of the invitations to participate in the dialogue) for obvious reasons of equal treatment; in fact, any changes to the award criteria after this stage in the procedure would be introduced at a time when the contracting authority could have obtained knowledge of the solutions that are proposed by the different participants. The possibilities of "steering" the procedure in favour of one or the other participants would be all too obvious, and even more so in those cases where these same award criteria were used to gradually reduce the number of solutions to be examined (see point 3.2.1 below and, in respect of the criteria themselves, footnote 16 above).

After the expiry of the time for submission of applications to participate[19] and after having made their selection, the contracting authorities send an invitation to participate in the dialogue to the candidates selected. This invitation must be in accordance with the provisions of Article 40.

3.2. The dialogue stage

Under Article 29(3), "contracting authorities shall open, with the candidates selected in accordance with the relevant provisions of Articles 44 to 52, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may

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17 See Annex VII A, "contract notices", section 23, second sentence. As with selection criteria, the award criteria may be established in terms of the needs and requirements of the contracting authority. Thus, in the example referred to above of an integrated transport infrastructure, the award criteria could be the cost of establishment and management for the contracting authority, the environmental impact of the system, the level of comfort offered, the frequency of service, the transport capacity of the system, accessibility to the system for handicapped persons, the safety of the system, etc., i.e., criteria that may be applied whatever the technical solution proposed. Of course, these criteria and the manner in which they are applied will have to be specified in the contract documents.

18 See Article 53(2) and Article 40(5)(e).

19 To be established in accordance with the provisions of Article 38.

discuss all aspects of the contract with the chosen candidates during this dialogue." This latter provision should be underlined: 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.).

The Directive does not regulate the conduct of the dialogue in detail; it limits itself to placing it within the framework of the provisions of the second and third subparagraphs of Article 29(3).[20] Under this latter provision, 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. Except with the consent of the parties concerned,[21] there is therefore no danger of "cherry-picking" – i.e. the use of the ideas and solutions of one of the participants by another one – and confidentiality is further protected by a general provision on the subject, Article 6.[22] Moreover, participants may also, as appropriate, benefit from the protection laid down by – Community or national – legislation on intangible property. It should therefore be noted that the competitive dialogue is the only award procedure laid down by the Directive providing protection for ideas not subject to intangible property rights – in particular, no provision comparable to that in the third subparagraph of Article 29(3) exists for the negotiated procedure.[23]

During the course of the dialogue, contracting authorities may ask the participants to specify their proposals in writing, possibly in the form of progressively completed/refined tenders, as implicitly assumed in Article 29(5).[24] Aware of the fact that this may require considerable investment for the economic operators concerned, the Community legislation wished to indicate that it may be particularly appropriate in the

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20 "During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

Contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement."

21 It would be possible for contracting authorities to stipulate in the tender notice or in the descriptive document that acceptance of the invitation to participate implies consent.

22 "Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 35(4) and 41, and in accordance with the national law to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders."

23 The Commission has had to deal with cases concerning negotiated procedures – with or without publication – used in situations where a competitive dialogue could have been justified. Despite the absence of any provision aimed at prohibiting it, it should be noted that none of them related to "cherry-picking" situations, etc.

24 "The contracting authority shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs."

case of the competitive dialogue to specify "prices[25] or payments to the participants in the dialogue".[26]

3.2.1. Gradual limitation of the number of solutions to be examined

Under Article 29(4), contracting authorities may "provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria[27] …". The very complexity of the contract, coupled with the necessity for the contracting authorities of comparing several solutions and being able to take decisions which can subsequently be justified, requires that the application of the award criterion be based on written documents. Whether these documents are qualified as “outline solutions”, “project proposals”, “tenders” or other is not specified in the Directive – it is in any case clear that even if considered to be “tenders”, they cannot be required to contain “all the elements required and necessary for the performance of the project” given that this requirement only applies to tenders that are submitted in the final stage of the competitive dialogue (cf. Article 29(6)).[28] It should be noted that it is the number of solutions to be discussed which is directly referred to by gradual reduction.[29] However, the reduction in the number of solutions must remain within the limits laid down in the last sentence of Article 44(4): "In the final stage[30], the number arrived at shall make for genuine competition …”. The Directive specifies that this rule only applies “insofar as there are enough solutions or suitable candidates." Reduction by application of the award criteria might therefore show that there is only one

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25 In this context the term "price" should be understood in the meaning of "prize" or "award", i.e. as being directly based on the provision in Article 67(2)(b) on design contests.

26 See Article 29(8). Strictly speaking, this provision would be unnecessary, since such prices or payments could be provided for even in the absence of such a provision, as there is nothing in the Directive to prevent them. If the provision nevertheless appears in the finally adopted Directive, it is only as a "signal " and it should be emphasised that conclusions to the contrary should not be drawn concerning the possibility of such prices or payments in relation to award procedures other than the competitive dialogue. See in this sense the second subparagraph of Article 9(1), which is not limited solely to the competitive dialogue ("Where the contracting authority provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the contract.").

27 See the fourth subparagraph of point 3.1 above.

28 As is the case with the final tender, the Directive does not establish precise time limits for the submission of tenders within the framework of a competitive dialogue. Such time limits must however be established in compliance with Article 38(1) ("When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account in particular of the complexity of the contract and the time required for drawing up tenders") and the principle of equality of treatment.

29 In the majority of cases, participants will only have developed one solution each and the elimination of the solution therefore also entails the elimination of the economic operator concerned. However, there is nothing in the Directive to prevent the contracting authorities from allowing the participants to develop several solutions.

30 In the context of the competitive dialogue, this relates to the final tenders laid down in Article 29(6).

appropriate candidate or solution, which does not prevent the contracting authorities from continuing with the procedure.[31]

3.3. End of the dialogue, final tenders and award of the contract

At the appropriate time, the awarding authority declares the dialogue concluded and informs the participants of this.[32] It asks them to submit their "final tenders on the basis of the solution or solutions presented and specified during the dialogue." Generally speaking, these final tenders are based on the solution (or possibly solutions) of each of their participants – it is only in the scenario of an agreement referred to in the third subparagraph of Article 29(3) on the part of the economic operator or operators concerned that the contracting authority could ask the participants to base their final tender on a solution common to all. Normally, there is not therefore a new set of specifications or descriptive document at the end of the dialogue. The Directive provides that "these tenders shall contain all the elements required and necessary for the performance of the project" – they are therefore complete tenders.

Once these final tenders have been received, the contracting authority may, under the second subparagraph of Article 29(6), ask for them to be to be "clarified, specified and fine-tuned ... However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect." The wording of this provision – like that of the second subparagraph of paragraph 7 – was based largely on a statement by the Council:[33] "*The Council and the Commission state that in open and restricted procedures all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders of the requirements of the contracting authorities and provided this does not involve discrimination.*" In the light of the precise wording of the last sentence of recital 31,[34] it may therefore be considered that the room for manoeuvre that contracting authorities have after the submission of the final tenders is fairly limited.

Under the first subparagraph of Article 29(7), the final tenders are then assessed on the basis of the award criteria and the most economically advantageous tender is identified. Where necessary and at the request of the contracting authority, the tenderer identified as

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31 Obviously, the provisions of Article 41 concerning justification of the various decisions taken during an award procedure are also applicable in this context.

32 See the first subparagraph of Article 29(6).

33 Published in OJ L 210 of 21.7.1989, p. 22. This statement accompanied Council Directive 89/440/EEC of 18 July 1989, amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts. The statement relates to Article 5(4) of Directive 71/305/EEC.

34 "However, this procedure must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful tenderer, or by involving any tenderer other than the one selected as the most economically advantageous."

having submitted the most economically advantageous tender "may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination." It must be emphasised that this does not entail any negotiations solely with this economic operator – amendments aimed at authorising such negotiations were proposed and rejected by the Community legislative process. It relates to something much more limited, specifically "clarification" or "confirmation"[35] of undertakings already appearing in the final tender itself. This provision should also be interpreted in the light of the last sentence of recital 31, as cited in footnote 33.

In conclusion, the competitive dialogue may be summarised, by way of simplification, as a particular procedure which has features in common with both the restricted procedure and the negotiated procedure with the publication of a contract notice. The dialogue mainly distinguishes itself from the restricted procedure by the fact that negotiations concerning every aspect of the contract are authorised and from the negotiated procedure by the fact that, essentially, negotiations are concentrated within a particular phase in the procedure.

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35 This possibility of confirming undertakings at the very last stage before the conclusion of the contract but after the identification of the most economically advantageous tender has been provided in particular in order to take account of the reluctance of financial institutions to subscribe to firm undertakings before this stage of a procedure.