MALTA
Legal Assessment on Innovation Procurement

	Country:	Malta	Expert:	Clement Mifsud Bonnici & Calvin Calleja		

Theme	Scope of assessment	Expert-based assessment
National legal and policy framework related to innovation procurement	*1. Current situation:* *1.1- Does the government in your country stimulate innovation procurement through specific policy legislation or political decisions?* *1.2- What are the primary legal frameworks / legal guidance governing innovation procurement in your country?* *1.3 - Are there gaps in the current legal framework, legal guidance or standard government contracting clauses that hinder wider uptake of the procurement of R&D or the purchase of innovative solutions?*	**1.1 – Policy legislation / political decisions that stimulate innovation procurement** The country profile of Malta in the EU wide benchmarking of national policy framework for innovation procurement outlines the policy measures adopted by Malta to stimulate innovation procurement up to December 2023 (the **"Benchmarking"**). It must be noted that there have only been minor policy advancements or legislative amendments in this respect since the Benchmarking and the situation in Malta has remained largely the same. There remains a lack of dedicated action plans, spending targets, monitoring systems or legal and non-legal incentives to mobilize procurers to implement innovation procurement. **1.2 – Applicable legal framework / guidance for innovation procurement** Public procurement in Malta is regulated through a number of subsidiary legislations enacted under the Public Finance Management Act (Chapter 601 of the Laws of Malta) (the **"PFMA"**). The main regulations which regulate ways to stimulate innovation in the public procurement rules and procedures for public buyers in different sectors are: a) the Public Procurement Regulations (Subsidiary Legislation 601.03 for "Classical sector" procurers) (the **"PPR"**) which transposes Directive 2014/24/EU into Maltese law. b) Public Procurement of Entities Operating in Water, Energy, Transport and Postal Services Sector Regulations (Subsidiary Legislation 601.05) (the **"Utilities Regulations"**) which transposes Directive 2014/25/EU for utilities sector procurers into Maltese law; c) Public Procurement of Contracting Authorities or Entities in the fields of Defence and Security Regulations (Subsidiary Legislation 601.07) (the **"Defence Regulations"**) which transposes Directive 2009/81/EC for defence sector procurers into Maltese law; d) Concession Contracts Regulations (Subsidiary Legislation 601.09) (the **"Concessions Regulations")** which transposes Directive 2014/23/EU into Maltese law; and e) Procurement of Property Regulations (Subsidiary Legislation 601.12) (the **"Property Regulations"**) which provides a framework for the procurement of certain types of immovable property by contracting authorities. Out of these five pieces of legislation, the PPR regulation for classical sector procurers is the one with the most references to innovation. The other Maltese procuremernt regulations for procurers in other sectors are encouraging innovation to a much more limited extent. There are also a number of other Regulations in place which regulate public procurement in Malta, such as the Emergency Procurement Regulations (Subsidiary Legislation 601.08), the Electronic Invoicing in Public Procurement Regulations (Subsidiary Legislation 601.10) and the Cleaner and More Energy-Efficient Road Transport Vehicles Regulations (Subsidiary Legislation 601.06). However, these make no reference to innovation. There are no other Maltese legislative instruments with provisions on innovation procurement outside of Maltese public procurement law. However, the Department of Contracts (**"DoC"**) also issues rules and conditions governing the tendering process and the granting of public contracts, which rules and conditions are updated regularly. Primarily, reference is made to the following documents: *a)* General Rules Governing Tenders (Version 4.10) (August 2024); *b)* General Conditions for Service Contracts (Version 4.8) (August 2024); *c)* General Conditions for Supplies Contracts (Version 4.8) (August 2024); and *d)* General Conditions for Works Contracts (Version 4.8) (August 2024). As regards the interpretation of laws, Regulation 80 of the PPR establishes the Public Contracts Review Board (the **"PCRB"**) which is a quasi-judicial body tasked with addressing concerns, complaints and other requests raised by candidates, tenderers or other persons having an interest in a particular public contract. The decisions of the PCRB are binding unless overturned by the Court of Appeal. The legal interpretation of case law is primarily done by the PCRB or the Court of Appeal. The Commercial Sanctions Tribunal determines matters relating to the blacklisting of persons. The DoC also occasionally publishes 'soft law' interpretations and guidance to ensure compliance with procurement rules. **1.3 – Gaps in the legal framework/guidance/standard contract clauses that hinder innovation procurement** **1.3.1 – Gaps in the legal Framework** Maltese procurement law transposes all the procurement procedures from the EU public procurement directives. There are however various other gaps in the legal framework which hinder the application of innovation procurement, as further explained below: ***a) Encourage/require the use of market research and preliminary market consultations*** - The Maltese procurement framework does not explicitly refer to the concept of procurers conducting a **market research** before a procurement (e.g. **online market search of existing solutions and prices and of different supplier's development roadmaps, IPR search etc**). This lack of legal requirement or even encouragement for conducting market research hampers innovation procurement, because there are several cases where procurers are not allowed by the law to start innovation procurements without having evidence that there are no solutions yet on the market that fit their procurement need. For example, procurers are

only allowed to use the exemption from the PPR for buying R&D services (like pre-commercial procurements) if they really need to buy R&D and this is only the case when there is no existing solution that fits their need. Also, in the case of innovation partnerships (Article 128 (2)) the contracting authority contracting must support the use of the procedure by documents demonstrating the needs that cannot be met by purchasing products, services or works already available on the market. In addition, the contracting authority shall ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market (Article 130, 139 of the PPR).

- The Maltese procurement framework explicitly includes the possibility of conducting **preliminary market consultations** (Article 47 of the PPR), but it is not encouraged or required, also not for innovation procurements that are specifically looking for innovative solutions.

As market research and preliminary market consultations are not mandatory and the law does not explain exhaustively how they can be implemented in a correct way, they are often overlooked, leading to insufficient verification of what type of innovation the market can offer and insufficient engagement with innovative suppliers before call for tenders are issued. This still results in public buyers issuing ill-conceived tender specifications that do not get the best out of what the market could deliver.

b) Encourage/require transparency/publication of notices linked to innovation procurements

The PPR mentions that transparency is important in public procurements procedures in general, however there are no specific provisions for ensuring that preliminary market consultations are announced in a transparent way and that the fact whether a procurement is related to innovation or not is communicated in a transparent and easy way to potentially interested bidders.

Regulation 41 of the PPR stipulates that the authority responsible for the tendering process may make known its intentions of planned procurements through the publication of a prior information notice (PIN). The prior information notice is mandatory for procurement procedures where the competitive dialogue, competitive procedure with negotiation, dynamic purchase systems, electronic auctions and negotiated procedure are used. The same is true for concessions for social and other services listed in Schedule 6 of the Concession Regulations, whereby a prior information notice is also required. In practice, contracting authorities tend to publish prior information notices for all planned procurements expect when the tender procedure of choice is a direct order. However, in these PIN notices, Maltese contracting authorities are not obliged to stipulate whether a preliminary market consultation is taking place for preparing the procurement. The PPR does not require public procurers to **transparently announce upcoming preliminary market consultations** on the Maltese or TED portal. It also does not require or encourage public buyers to use the new dedicated PIN notice that was specifically made available by the EC for announcing upcoming preliminary market consultations. This practice reduces the visibility of these crucial early-stage opportunities for businesses looking to engage with public buyers. EU wide benchmarking shows that Malta has transparently announced Preliminary Market Consultations via PINs for only 0.42% of the procurement procedures published on TED. There is also no obligation to systematically publish the results of Preliminary Market Consultations.

- Neither is there a requirement for the contracting authority to indicate whether the procurement cycle in question concerns innovation. Maltese public procurement legislation does not include specific requirements designed to enhance the **visibility of innovation-related procurement opportunities** for interested suppliers. Authorities are not required to use the term "innovation" or any other specific “innovation” flag in their calls for tenders, contract notices, or award notices. The absence of such identifiers prevents suppliers from easily searching for and filtering procurement procedures that seek innovative solutions.

Consequently, the low visibility of preliminary market consultations and innovation-related procurement business opportunities makes it challenging for companies, particularly small and medium-sized enterprises [SMEs], to systematically identify and pursue specific contracts in the field of innovation procurement.

c) Encourage / require buyers to evaluate the technical offer before the admin and financial part of offers

- The law does not require buyers to evaluate the technical offer before the admin and financial part of offers. Historically, before the Classic Directive came into force, tenders were physically submitted to the DOC or the relevant contracting authority in 3 separate envelopes: one for the administrative offer, one for the technical and one for the financial. Evaluators were obliged to open the envelopes in sequential order. This system ensured that the Tender Evaluation Committee remained impartial and unbiased during the evaluation process and were not persuaded to, for instance, qualify a technically non-compliant bid because of a cheaper priced financial component. Nowadays, procurement procedures are generally conducted on the government’s e-procurement platform, e-PPS (https://www.etenders.gov.mt/epps/home.do). With this new electronic system, it is no longer the case that procurers must the admin, technical and financial parts of the offers in a specific order. As there is no legal obligation to evaluate technical offers before financial offers, current practice depends on the e-PPS system design which is different for different procedures (e.g. for some procedures everyone, including the procurers, will already have access to the price of the offer from the start of the evaluation, while for other procedures not): The system is designed to publish specific data when the call for tender closes: the tenderers' names, the tender ID, and where applicable the tendered price will be published (Rule 13.2 of the General Rules Governing Tenders v4.10). However, in the case of restricted procedures, such as the innovation partnership procedure, this data is generally not publicly available and access to it would be limited to participants.

- Contracting authorities typically require full documentation from all bidders at submission stage.

- Maltese law also does not require or encourage procurers to allow tenderers to supplement or correct minor admin errors in their offer. This may lead to exclusion of offers that have the best innovative/technical solution as it could lead to a focus of the evaluation on non-technical criteria that may not adequately reflect the innovative potential of a proposal. This can be particularly problematic in the context of innovation procurements, where the focus of contracting authorities is on what it should be achieved by the solution.

As a result, even companies that are not going to win the contract are commonly asked to submit all detailed evidence (which is time consuming) and there are still public buyers that are disqualifying tenderers purely

on minor admin omissions that could have been corrected, without even reading the technical offer, which blocks better/innovative offers from competing.

d) Encourage / require the use of exemptions/specific procedures for buying R&D/prototypes /testing

- As for the purchase of R&D services, Regulation 153(d) of the PPR for classical sector procurers and Regulation 18(l) of the Maltese public procurement law for utilities sector procurers and Regulation 14(j) of the Maltese public procurement law for defence procurers allows the procurement of R&D services (such as pre-commercial procurements) outside the scope of the PPR because Regulation 7(1)(v) of the PPR applies only to public service contracts for research and development:

(i) which fall under the CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5;

(ii) whose benefits accrue exclusively to the contracting authority; and

(iii) where the service provided is wholly remunerated by the contracting authority.

- Regulation 153(d) of the PPR and Regulation 127(b) of the Maltese public procurement law for utilities sector procurers, and Regulation 29 (b)(ii) of the Maltese public procurement law for defence procurers allow procurers to use the negotiated procedure without prior publication for public supply contracts where the products involved are manufactured purely for the purpose of research, experimentation, study or development. However, contracts awarded pursuant to such a negotiated procedure shall not include quantity production to establish commercial viability or to recover research and development costs. This enables public buyers in all sectors to buy R&D supplies (e.g. prototypes or final end products resulting from an R&D contract like a PCP).

However, both of these provisions for R&D services and R&D supplies in Maltese law do not clarify clearly how or when to invoke R&D/prototype/testing exemptions, beyond the minimal text transposed from EU law. In addition, the law does not encourage the planning of procurement needs on the long run, so as to boost the search of innovative solutions on R&D services. In addition, the R&D services exemption and the negotiated procedure without prior publication is permitted only under specific conditions which need to be proven to be applicable before the procedure can be used. As a result, both of these possibilities to buy R&D services and R&D supplies are underused in Malta.

e) Encourage / require the use value for money award criteria versus lowest price only criteria

The general rule is that authorities are bound to award public contracts on the basis of the most economically advantageous tender. This means that they remain free to choose between the BPQR criterion or the cheapest price because. Regulation 164 (7) only states that contracting authorities "may" (but not "must") provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services. There is no requirement for contracting authorities to justify why they use lowest price only award criteria.

Only when a competitive dialogue or innovation partnership is used, Regulation 132 and Regulation 143 of the PPR respectively, stipulate that the contract shall be awarded on the sole basis of the award criterion of the best price-quality ratio. The best price-quality ratio is assessed on the basis of criteria which may include innovative characteristics (Regulation 239(2) of the PPR).

As a result, in practice, contracting authorities make very limited use of non-price award criteria and continue to rely predominantly on the lowest price. As confirmed by the EU single market scoreboard, in 87% of Maltese public procurements, contracts are still awarded based on lowest price only. There is also no requirement to give a substantial weighting to non-price criteria when using best-price-quality ratio, so in practice it still happens often that even then price is given such a high weighting that other criteria play no decisive or substantial role in the award decision.

f) Encourage / require the use of innovation-related award criteria and innovation-related contractual terms and conditions

- In relation to innovation-related award criteria, Regulation 239 of the PPR stipulates that where a best price-quality ratio award criteria is being used, the tender shall be assessed on the basis of criteria linked to the subject-matter of the public contract in question. Such criteria may comprise quality, including the innovative characteristics of the project.

- In relation to innovation-related contractual terms, Regulation 245 of the PPR stipulates that the contracting authority may lay down conditions relating to the performance of a contract, provided that such conditions are linked to the subject-matter of the contract and are indicated in the call for competition or in the procurement documents. These conditions may include, amongst others, innovation-related considerations. However, this is at the sole discretion of the contracting authority.

In conclusion, the law enables but does not require the systematic use of innovation-related award criteria or contractual terms: they remain discretionary. This gap hinders the ability to tailor procurement processes to foster innovation.

g) Encourage / require to evaluate offers based on their total cost of ownership

The contracting authority has the possibility of applying life cycle costing when determining the most economically advantageous tender. Regulation 240 of the PPR sets out all the costs which are to be taken into account when determining the life-cycle costing, which include but are not limited to, costs relating to acquisition, use, maintenance, end of life costs, costs imputed to environmental externalities, etc.

Life-cycle costing is enabled under Regulation 240 PPR but not mandatory. As a result, many procurers still award contracts based on short term cost considerations only (taking into account only the initial purchase price of the solution). This hampers the access of innovative solutions to the procurement market because innovations typically have a long term effect that would be better assessed with a TCO approach.

		h) Minimize overspecification of tender specs (e.g. through encouraging/requiring the use of functional requirements, variants) - The Maltese legal framework allows but does not require or explicitly encourage the use of technical specifications as performance or functional requirements. While Regulation 53(7) of the PPR allows the contracting authority to formulate the technical specifications in terms of performance or functional requirements, this is at the discretion of the contracting authority. However, Regulation 53(9) of the PPR stipulates that where a contracting authority uses the option of referring to technical specifications in the tender document, it shall not reject a tender on the ground that the works, supplies or services tendered do not comply with the technical specifications, as long as the tenderer proves that the solution proposed satisfies in an equivalent manner the requirements defined in the technical specifications. Generally, technical specifications are accompanied by the use of the term 'or equivalent' to indicate that bidders are free to submit functionally - equivalent products for consideration. Recent jurisprudence shows that the Maltese Court of Appeal is receptive of this approach.[1] - As a general rule for public contracts with an estimated value which equals or exceeds 143,000 Euros, the procurer may authorize or require tenderers to submit variants which are linked to the subject-matter of the contract, as long as this is indicated in the contract notice. This flexibility is underutilised in Malta due to a preference for traditional approaches (Regulation 244(1) of the PPR). In conclusion, functional and performance-based specifications are permitted (Reg. 53 PPR) and variants are allowed (Reg. 244 PPR), but both remain optional and underused in practice. As both functional specifications and variants are underused and not encouraged, suppliers with innovative solutions that differ from the widely available solutions are still often hampered or do not make offers because tender specifications are too solution prescriptive and often favoring well-known solutions. ***i) Encourage / require the use of value engineering*** Value engineering is not regulated in Maltese law. There is no direct requirement or formal encouragement for contracting authorities to apply value engineering. The PPR does not explicitly mention "value engineering" or provide dedicated rules for incentivizing suppliers to propose cost-saving design changes or process improvements during contract implementation. However, it does offer general avenues (Regulation 245 on performance of contracts allows to introduce contractual clauses with financial rewards for performance) that could support these methods, but without explicit legal provisions to promote them. Furthermore, the PPR does not include explicit sections about giving bonuses, financial rewards, or profit-sharing to suppliers who exceed performance requirements. As the law does not give procurers legal certainty about how to do this in a legally compliant way, most public procurers are reluctant to implement financial incentives for contractors to come with value engineering proposals.
1.4 – Is there specific legislation that facilitates (innovation) procurement for startups/SMEs?		***j) Allow / regulate contract modifications*** While the PPR allows and regulates contract modifications under certain conditions and with the permission of the Director of Contracts (Regulation 246 of the PPR), it does not cater specifically for innovation projects which often require ongoing modifications. The PPR does not describe the possibility of replacing during an ongoing contract the goods or services that were awarded with others that incorporate technological advances or innovations that improve the performance or characteristics of those awarded. Although it is possible to do this within the scope of the PPR without modifying substantially the scope of the contract (if tender specs were from the beginning functional based specifications), the law does not give procurers legal certainty about this. As a result, many procurers are unsure/afraid to use value engineering. The Maltese rules for contract modifications are strict: The general rule is that contracting authorities may grant contractual modifications where firstly, the value of the modification does not exceed 10% of the initial contract value (for service or supply contracts) or 15% for works contracts and secondly, where the modification does not exceed €143,000 (for service or supply contracts) or €5,382,000 for works contracts. Otherwise, with regards contracts with an estimate value of €143,000 or more, modifications may be granted if they satisfy one of certain alternative conditions set out in Regulation 246 of the PPR. Accordingly, modifications are allowed: a) where, irrespective of the monetary value of the modifications, these have been clearly stipulated in the initial procurement documents, and as long as they do not alter the overall nature of the contract; b) when additional works, services or supplies by the original contractor become necessary, and where: (i) a change in contractor cannot be made for economic or technical reasons; and (ii) a change in contractor would cause significant inconvenience or substantial duplication of costs for the contracting authority; and (iii) provided that any increase in price does not exceed 50% of the value of the original contract. c) where the need for the modification has been brought about by circumstances which a diligent contracting authority could not foresee, and as long as such modifications do not alter the overall nature of the contract, nor do they increase the price by more than 50% of the value of the original contract. d) Where, in specific scenarios set out in the PPR, a new contractor replaces the one which the contracting authority had initially awarded the contract to; and

[1] Krypton Chemists Limited vs CPSU (Ref. 538/2023/1) delivered by the Court of Appeal on 15 February 2024.

		e) where modifications, irrespective of their value, are not substantial. In terms of Regulation 246(5) of the PPR, a modification is deemed to be substantial where it renders the contract materially different in character from the one initially concluded. The provisions set out in the PPR with respect modification of contracts are further supplemented by Section 20 of the General Conditions for Service Contracts V 4.8, Section 22 of the General Conditions for Supply Contracts v 4.8 and Section 35 of the General Conditions for Works Contracts v 4.8. The General Conditions offer detailed guidance on the procedure for validly adopting modifications for each type of contract (services, works, or supply), which while similar, varies in certain aspects depending on the type of contract in question. Regardless of the type of contract, all modifications must be executed in strict compliance with the PPR. Similar grounds for modifications as those found in the PPR are also found in the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations (S.L. 601.5) and the Concession Contracts Regulations (S.L. 601.9) for contracts or concessions awarded under such Regulations. Notably, Regulation 11 of the Emergency Procurement Regulations (S.L. 601.8) prohibits modifications to contracts which have been awarded under these regulations. However, it must be pointed out that the scope of these Regulations is limited to situations where there is an unforeseen surge in the use of supplies resulting in a month stock level, or which are otherwise necessary due to issues of national health, security or strategic importance. Moreover, it is only the Central Procurement Supplies Unit and the Civil Protection Department which may procure under these Regulations, and in all cases contract awards must have an estimated procurement value of less than €135,000. Accordingly, such regulations are not generally resorted to for innovation procurement. In conclusion, Maltese law regulates contract modifications under strict conditions (Reg. 246 PPR, General Conditions), but no specific flexibility exists for innovation projects requiring iterative adjustments. ***k) Encourage / require innovation-friendly allocation of IPR rights and obligations*** There is a serious gap regarding IPR handling in Maltese public procurement law. - In general, the Maltese public procurement law does not require public procurers to define the distribution of IPR rights and obligations in the tender documents to specify which IPR rights it wants to buy (full transfer of all IPR rights or only usage rights). This is an omission because the IPR rights that the procurer wants to buy are part of the object of the tender (they are the intangible part of it) and shall therefore be clearly spelled out in the tender documents. Procurers are only required to defining the allocation of IPR rights and obligation in the tender documents for one procedure, the innovation partnership (see Regulation 138 of the classical sector regulation and Regulation 122 of the utilizes regulation). However, this procedure is hardly used and it is an omission that the same requirement is not introduced for all procedures because innovation can happen in any procurement. - Maltese public procurement law also does not require or encourage public procurers to allocate IPR rights in a way that stimulates innovation and commercialisation. Regulation 53 (3) of the PPR only stipulates that the technical specifications set out in the procurement documents "may" specify whether the transfer of intellectual property rights will be required (See also Regulation 76(3) of the Utilities Regulations). But it does not explain the other option for the contracting authority to leave IPR ownership with suppliers and request only IPR usage rights which is typically more beneficial for both public procurers and suppliers. In addition, Maltese public procurement law does not define a default regime that ensures that buyers only buy the IPR rights they really need and include a justification when they want require contractors to do a full transfer of all their IPR rights which blocks innovation and commercialization and involves much higher costs for procurers. - In addition, Maltese public procurement law does not require procurers to allocate IPR rights in compliance with applicable copyright and IPR laws. The General Terms for Contracts of Services stipulate that by default IPR created 'in the performance of the contract' shall lie with the Contracting Authority, which may be in violation with copyright law. As a result, companies still suffer from calls for tenders that may not be fully compliant with applicable IPR laws and that request full transfer of all their IPR rights even when the procurer does not really have a justification that he really needs this. This really hampers the submission of offers from companies with innovative solutions and it also hampers companies that do sign procurement contracts to commercialise any innovation that they may create during an ongoing contract. ***l) Minimize competition distortion in the preparation and implementation of procurements*** Regulation 39(3) of the PPR stipulates that the design of the procurement shall not be made with the intention of artificially narrowing competition. Competition is deemed to be artificially narrowed when the design of the procurement is made with the intention of unduly favoring or disadvantaging certain economic operators. Regulation 59 of the PPR states that where a candidate, tenderer or related undertaking has advised the contracting authority, whether in the context of a preliminary market consultation or otherwise or has otherwise been involved in the preparation of the procurement procedure, appropriate measures must be taken to ensure that competition is not distorted. With this aim, the law stipulates that relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders must be communicated to other tenderers or candidates. The candidate or tenderer concerned is excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment. This exclusion can only take place after the concerned candidate or tenderer has been given the opportunity to prove that their involvement in preparing the procurement document is not capable of distorting competition. Regulation 47(2) of the PPR further stipulates that with respect to preliminary market consultations, the contracting authorities may seek or accept advice from independent experts or authorities or from market participants. However, the Contracting Authority must ensure that the advice provided does not have the
	1.5- Are there any recent or upcoming legal reforms affecting innovation procurement?	

effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.

However, the law does not provide an exhaustive list of measures that contracting authorities should apply to mitigate the risk of competition distortion in such situations. There is also no clarity on what type of information must be shared with other bidders (e.g. functional requirements, draft specifications) and what type of information must not be disclosed (e.g. trade secrets, confidential business data, IPR-protected content). Moreover, the law does not specify how economic operators can prove that their prior involvement does not distort competition, leaving both authorities and bidders in legal uncertainty and thus risks remain when preliminary market consultations are used. In practice, therefore, while the provisions are sufficient to guarantee competition integrity, they are not always clear or flexible enough to actively promote innovation procurement. This has the effect of hampering innovation uptake, as suppliers of cutting-edge solutions may find it difficult to compete on equal footing with more conventional providers under rigid compliance-driven procedures.

m) Provide official definitions for R&D procurement and for innovation procurement

While the definition of "innovation" found in Regulation 2 of the PPR, the Utilities Regulations and the Concessions Regulations is identical to that found in Article 2(22) of the Classic Directive, the Maltese procurement legislation does not contain a definition of what constitutes "*innovation procurement"*.

Only the Defence Regulations (S.L. 601.07) contain a narrative definition of "research and development": *all activities comprising fundamental research, applied research and experimental development, where the latter may include the realisation of technological demonstrators, that is, devices that demonstrate the performance of a new concept or a new technology in a relevant or representative environment*". The classical and utilities sector regulations only define R&D by reference to CPV codes.

For future revisions of the (legislation) it would be advisable to include definitions of R&D and innovation procurement.

n) Regulate how to foster strategic autonomy through innovation procurement

The PPR does not regulate fostering strategic autonomy through innovation procurement.

o) Facilitate joint cross-border public procurement (e.g. flexibility in the use of non-national languages, publishing tender docs in machine processable/translatable format)

Three scenarios for joint cross-border procurement are allowed (Regulation 25 of the PPR): purchasing via a central purchasing body in another EU Member State, via a joint procurement entity set up together with procurers from other EU Member States, or by signing an ad-hoc joint procurement agreement with individual public procurers from other EU Member States (unless there is an international agreement between the Member States concerned that already regulates their joint cross-border procurements).

However, some obstacles remain to cross-border joint procurement:

- **Restrictions**: Regulation 25 of the PPR states that the Director may impose conditions on joint cross-border procurements. Such conditions may restrict the freedom for joint cross-border procurements.

- **Jurisdiction:** In the case of joint procurement involving contracting authorities from various EU Member States, the applicable law for procurement and its review is determined either by an international agreement or by an agreement between the parties participating in the joint procurement (Reg. 25. PPR). The PPR does not stipulate that Maltese courts must have exclusive jurisdiction over such contracts and allows for flexible determination of jurisdiction. However, it only clearly defines that another country's law can be applicable for the scenario of joint cross-border procurements via a central purchasing body or when establishing a joint entity. This leaves it completely to procurers to figure out on their own how to overcome differences between national laws when going for an ad hoc joint cross-border procurement.

- **Language**: Maltese law does not stipulate that procurement documentation must be prepared in one of the official national languages (Maltese or English). In practice call for tenders are published in English. Adding additional versions in other languages are allowed but that requires translation efforts. For what regards offers, the public procurer can define (Part B of the PPR) in which language or languages offers must be submitted.

- **Access to the procurement portal**: Registration in the portal is free of charge, but requires to include a company registration number, a VAT number and a business identification number. For more information see: Electronic Tendering - Information Area. The Department of Contracts uses the e-PPS platform to publish tenders and other procurement related documents. Such documents and communications between the contracting authority and the contractor are done in English which is an official language in Malta (as also stipulated in the General Rules and Conditions.

- **Use of machine-readable formats**: The law does not require contracting authorities to publish the tender documentation in a machine processable format, which may pose difficulties for foreign bidders to use automatic translation engines translate the tender documents into their own language.

- **Use of e-signature**: Tenderers are not required to use a specific e-signature system to submit offers.

p) Provides an easy way to implement multiple sourcing

There is a lack of an easy way of implement multiple sourcing which may hamper innovation procurement.

1.3.2 – Gaps in official standard contract conditions

In Malta there are four (4) types of standard conditions, namely:

- General Rules Governing Tenders (Version 4.10) (August 2024);
  (hereinafter referred to as the **"General Rules"**)

- General Conditions for Service Contracts (Version 4.8) (August 2024);

- General Conditions for Supplies Contracts (Version 4.8) (August 2024); and
- General Conditions for Works Contracts (Version 4.8) (August 2024).
  (hereinafter collectively referred to as the **"General Conditions"**)

The General Rules, which apply to the tender procedure, and the General Conditions, which regulate contractual performance (and which can be accessed here), supplement the PPR. These are generic in nature and are used for a wide range of procurement projects. In fact, no reference to innovation or innovation procurement is made in these General Rules and the General Conditions. These rules are generally, but not always, implemented by means of an express provision to this effect in the tender document.

The General Conditions for Service Contracts contain provisions relating to intellectual property rights and their allocation, whereby it is stated that as a default IPR shall lie exclusively with the contracting authority which may use, publish, assign or transfer the creations covered by such IPRs as it deems fit. The General Conditions also set out the procedure to be followed for contract modifications to be implemented validly in different scenarios. Other provisions in the General Conditions which may have an impact on innovation procurement relate to the requirement for a % of pre-financing for certain EU-funded tenders (as set out in Section 1.4 (a) of this study) and other rules relating to when performance guarantees and bid bonds are required (as set out in Section 1.4(g) of this study). Otherwise, there are no other standard contract clauses on innovation procurement related topics.

1.3.3 – Gaps in national guidance on innovation procurement

Guidance on procurement in Malta is published by the Department of Contracts. However, there is no national guidance on innovation procurement specifically. According to the 'circular index' published annually[2], no circular has been published over the past 10 years addressing innovation procurement. The website of the DOC provides brief explanations to those participating in public tenders regarding the competitive procedures which may be used, including the innovation partnership. It must be stated that the DOC website provides links to the guidance provided by the European Commission as regards innovation procurement and to other guidance provided by the various EU bodies.

There is no national guidance on innovation procurement; procurers must rely on EU-level guidance provided via DOC links.

1.4 – Specific legislation that makes (innovation) procurement easier for startups/SMEs

a) Encourage / require the use of advance payments to startups/SMEs

The PPR and the General Rules and Conditions only require pre-financing or advance payments for EU Funded tenders the value of which equals or exceeds 100,000 EUR, the law does not specifically envisage advance payments to startups/SMEs.

Other measures implemented by the DOC to relax financial obligations on SMEs and therefore encourage their participation in procurement include:

- the 'performance guarantee' is not required if the contract value is €10,000 or less. A 4% guarantee is required if the value is between €10,000 and €500,000 which is increased to 10% if the value exceeds €500,000; and
- abolition of the 'bid bond' requirement. Previously, bidders were often required to include a 'bid bond' with the submission of their offer, that is, a pledge that the bidder will not withdraw its offer prior to the expiry date of the bond.[3]

In conclusion, pre-financing is only required for EU-funded tenders over €100,000; there is no special SME/startup provision.

b) Encourage / require accelerated payments to startups/SMEs

There are no provisions in Maltese law on accelerated payments to startups/SMEs.

c) Encourage / require early publication of the preliminary ranking immediately after opening of offers

With the general exception of direct orders, tender procedures are published on the e-PPS website. The system is designed to publish specific data instantaneously on the tender closing date and time: the tenderers' names, the tender ID, and where applicable the tendered price will be published (Rule 13.2 of the General Rules Governing Tenders v4.10). Tenderers appear ranked on the e-PPS website according to their financial offers, even if the financial component accounts for only a part of the BPQR criterion.

However, in the case of restricted procedures, also in the innovation partnership procedure, this data is generally not publicly available and access to it would be limited to participants.

Tenderers have access to the 'Opened Tender Details' where they can view the schedule of submitted offers alongside the respective prices.[4]

In conclusion, the e-PPS platform publishes tenderers' names and prices (Rule 13.2 General Rules), but full transparency is limited for restricted procedures. The ranking is done by the e-PPS according to the specific procedure.

[2] 2023 index (PDF): https://contracts.gov.mt/wp-content/uploads/2024/06/Circ-Index-2023.pdf

2022 index (PDF): https://contracts.gov.mt/wp-content/uploads/2024/03/Circ-Index-2022.pdf

2021 index (PDF): https://contracts.gov.mt/wp-content/uploads/2024/03/Circ-Index-2021.pdf

[3] OECD (2023), Public Procurement in Malta: Building Capacity and Managing Risks, OECD Public Governance Reviews, OECD Publishing, Paris, https://doi.org/10.1787/d64e5e05-en.

[4] A video clip with guidance on how economic operators can access and view submitted tender details can be found here: https://www.etenders.gov.mt/epps/viewInfo.do?section=faq.

		d) Set a maximum time deadline for procurers to finalize the evaluation of offers and inform successful/non-successful tenderers Historically, evaluation committees were bound to publish the recommendation of award notice within the validity period of tenders. Put simply, bids were generally required to have a 90-day validity period which meant that evaluations had to be concluded and results published within 3 months. Rule 19.1 in the previously applicable Version 4.8 of the General Rules read as follows: "*19.1* ***Prior to the expiration of the period of validity of the offers****, the Central Government Authority / Sectoral Procurement Directorate / Contracting Authority will notify the successful tenderer in writing, that his/her submission has been recommended for award, pending any appeal being lodged in terms of the Public Procurement Regulations*". This qualification was removed in July 2023. Rule 19.1 of Version 4.9 and Version 4.10 of the General Rules now state: *"The Central Government Authority/Sectoral Procurement Directorate/Contracting Authority will notify the successful tenderer in writing, that his/her submission has been recommended for award, pending any appeal being lodged in terms of the Public Procurement Regulations (being reproduced as follows)"* with no reference being made as to the period within which such notification of the award must be made. Regulation 15(1) of the PPR gives the Director-General of Contracts discretion to cancel any procurement procedure if an evaluation process has not been concluded by the end of the validity period of the submitted bids. However, this discretion is rarely used in the absence of a specific request by a bidder. In conclusion, there is no strict maximum deadline set for evaluation; delays are common since Regulation 15 PPR gives discretion to the Director-General without mandatory enforcement. ***e) Encourage / require to give financial compensation to startups/SMEs to make offers for procurements and/or to participate in preliminary market consultations or negotiations, dialogue parts of procurements*** There are no specific financial tools or schemes to encourage SME participation in PMCs or negotiations. Exploring the development of supporting tools has been recommended by the OECD in its 2023 report on Maltese public procurement.[5] Generally speaking, prizes or payments to participants are envisaged as an option at the discretion of the contracting authority where the Competitive Dialogue Procedure (Regulation 149 PPR) or where the Design Contest Procedure (Regulation 157 PPR) is adopted. In conclusion, Maltese law leaves compensation for SME participation to the discretion of contracting authorities; no systematic mechanism exists. ***f) Encourage / require the use of contract clauses that require contractors to ensure that they protect basic rights of subcontractors (which are often startups/SMEs)*** There are no provisions on the use of contract clauses that require contractors to ensure that they protect basic rights of subcontractors. However, Regulation 199 of the PPR stipulates that the Director is empowered to blacklist an economic operator from participating in a procurement procedure *inter alia* where it can be demonstrated by appropriate means (i.e. any certificate, declaration or documentation issued by a competent entity) that in the execution of public contracts, the economic operator is in violation of applicable obligations in the fields of environmental, social and labour law established by EU and national laws, collective agreements or international laws. In conclusion, there is no explicit protection of subcontractors' rights in contract clauses; only blacklisting under Reg. 199 PPR indirectly addresses violations. ***g) Minimize the use of financial requirements that are unreasonable for startups/SMEs. Is it allowed / encouraged for procurers not to require any financial capacity requirements? Does national legislation encourage / require procurers to accept alternative proof of financial capacity that is not provided as proof of turnover (e.g. investments from VCs, bank guarantees)? Does national legislation have measures that limit requirements for disproportionate indemnity guarantees / insurances?*** In terms of the General Conditions, where the value of the contract does not exceed EUR 10,000, no performance guarantee is required. Moreover, in terms of the General Rules Governing Tenders and Procurement Policy Note Number 22 issued by the DoC on the 17th of January 2023, a contractor who signs two or more contract agreements that qualify for a performance guarantee, with the same contracting authority, can use a single bond in lieu of multiple performance guarantees. However, the single bond or 'performance guarantee' can only incorporate public contracts which have an individual contract value equal or below 5,000,000 EUR excluding VAT. Historically, bid bonds were also requested on the submission of a bid by an economic operator to ensure that the bidder did not suddenly and unilaterally revoke its bid. Bid bonds are no longer requested by contracting authorities. In fact, the 'bid bond' requirement has been abolished from the more recent versions of the General Rules Governing Tenders. Furthermore, according to the 2023 OECD Report,[6] the DoC insists on the relaxation of the tender's selection criteria, specifically those concerning a tenderer's economic and financial standing, where the contract's estimated value is lower than €2 million. Other measures implemented by the DoC to facilitate SME participation include restricting the use of experience as a criterion to contracts with a value of at least €500,000 and allowing the gratis rectification of submissions on selection criteria. The PPR are silent on alternative proof of financial capacity. However, contracting authorities are generally prohibited from requiring a minimum yearly turnover in excess of two times the estimated contract value

[5] ibid 2, page 85.
[6] ibid 2, page 84.

		(Regulation 219(1)). Where however, for instance, special risks arise from the nature of the works or services to be provided, the contracting authority may justify its non-adherence to the Regulation 219 rule. Regulation 218 expressly limits professional risk indemnity assurance requirements to "appropriate level(s)". The required level of professional risk indemnity insurances varies depending on the value of the contract. However, no specific definition is given in the PPR. In conclusion, Malta has taken some measures to ease SME participation (abolition of bid bonds, limits on turnover requirements, single performance bond option), but the law does not allow alternative proofs of capacity such as VC investments. **ARE THERE EXISTING PROVISIONS IN YOUR COUNTRY'S PUBLIC PROCUREMENT LAW THAT MAKE (INNOVATION) PROCUREMENT EASIER FOR SMEs/STARTUPS?** Malta's procurement regulatory framework allows for the division of contracts into lots and subcontracting. It also prohibits abnormally low tenders. Existing provisions such as lots, subcontracting, and the prohibition of abnormally low tenders indirectly support SMEs but are not tailored to innovation procurement. **1.5 – Recent or upcoming legal reforms that affect innovation procurement** As set out in the European Benchmarking, several relevant entities across Malta, including the Malta Information Technology Agency (MITA) and the Malta Council for Science and Technology[7] have made statements in their national plans and strategies for the coming years indicating a growing focus on innovation procurement within government agencies. However, the government has not published any indication that there are upcoming legal reforms in innovation procurement in the works. While strategies indicate growing attention to innovation procurement, there are currently no announced legal reforms in this area.
	2. Main challenges: *2.1- Which legal techniques are underutilized in your country that can foster innovation procurement?* *2.2- What challenges do contracting authorities face when attempting to procure R&D or innovative solutions?*	**2.1 - Underutilized legal techniques that can foster innovation procurement** The use of procurement procedures which enable innovation procurement remains limited in Malta. A search on the e-PPs portal (https://www.etenders.gov.mt/epps/viewCFTSFromFTSAction.do) shows that, to date: • **Innovation Partnerships:** The innovation partnership procedure has only been used twice; and • **Competitive Dialogue:** The competitive dialogue procedure has only been used approximately four times. **Preliminary Market Consultations ("PMC")** also constitute another underutilized tool. As per the 2024 European Benchmarking, Malta has used Preliminary Market Consultations in only 0.42% of the procurement procedures published on TED. According to the 2023 OECD Report, also indicates that the use of public information notices to inform the market of upcoming public procurement opportunities is also underutilized in Malta.[8] Moreover, as set out in the European Benchmarking, the Best-Quality-Price-Ratio award criteria is also underutilized in Malta. According to the Single Market Scoreboard, only 13% of public contracts in 2023 were awarded on a basis other than the cheapest price. **2.2 - The main challenges faced by public buyers for the implementation of innovation procurement are:** • **Lengthy Administrative Process:** Firstly, reference is made to Regulation 128 of the PPR which highlights the administrative burden which public procurers face when adopting the innovation partnership procedure. Namely, the use of the innovation partnership procedure needs to be approved in writing by the Director-General of Contracts and this only if the request of the contracting authority is supported by documents demonstrating that the need of the contracting authority cannot be met by purchasing products, services or works already available on the market. A similar procedure applies to the use of the competitive dialogue procedure, where once again the Director-General of Contracts must be satisfied that the conditions set out in Regulation 140 of the PPR have been satisfied prior to approving the use of such procedure. • **Bureaucratic Vetting Process when using the Best- Price-Quality-Ratio criteria:** Integrating the Best-Price-Quality- Ratio as an evaluation criterion adds additional administrative burdens on contracting authorities, particularly since the scoring criteria is subject to heavy scrutiny and approval by the DOC prior to publication for Schedule 2 and 16 Contracting Authorities as well as any Contracting Entities pursuing activities in line with S.L. 601.05 (vide Procurement Policy Note # 25). The DOC is Malta's central government authority. It is responsible for administering most procurement processes which are of a considerable financial value except for a limited number of contracting authorities who are authorized by law to administer their own procurement. Therefore, the DOC is responsible for vetting the use of the BPQR criteria when specialized industry-specific knowledge may lie elsewhere. • **Lack of Guidance on Innovation Procurement:** There is a lack of tailored guidelines and manuals on the implementation of innovation procurement including guidance in relation to the regulatory framework, the specific procedures in place, contract management, which as a result hinders contracting authorities from confidently adopting such procedures. (OECD, 2023) • **Lack of Competence Centres on Innovation Procurement:** In Malta, there are no competence centres on innovation procurement which have been mandated by the government or by law to encourage the use of innovation procurement or who can assist procurers in implementing innovation procurement. (OECD, 2023)

[7] Malta's National Research and Innovation Strategic Plan 2023-2027.
[8] ibid 2, page 27.

	2.3- What challenges do (small) companies face to participate in innovation procurements? *Are procurers (Q2) or companies (Q3) facing issues related to intellectual property rights or other specific techniques that could stimulate innovation procurement?*	• **Lack of Widespread procurement planning:** Strategic procurement planning at entity level is not widespread in Malta and this leads to a lack of visibility for both the contracting authority and the Sectoral Procurement Directorate responsible for vetting the requisite procurement and supporting documentation (where applicable), leading to further administrative delays. **2.3 – The main challenges faced by (small) companies to participate in innovation procurement:** **Administrative and Financial Burdens** It is noted that pre-financing is only envisaged with respect EU-funded projects exceeding a certain value. Moreover, even when a contractor is eligible for such pre-financing, the pre-financing payment is only issued after a pre-financing guarantee of an amount of equal to the value of the pre-financing is provided. (vide Policy Note 34 issued by the Department of Contracts). The Maltese procurement framework also does not envisage accelerated payments. **Distribution of IPRs** The fact that the PPR does not set out a default scenario for the distribution of IPR between the contractor and the procurers in Malta may represent a challenge for potential contractors. The General Conditions for Service Contracts then stipulate that as a default IPR shall lie exclusively with the contracting authority which may use, publish, assign or transfer the creations covered by such IPRs as it deems fit. **Damages** In terms of Condition 32 of the General Conditions for Service Contracts, where there is a breach of contract the contracting authority may (i) request the performance of an obligation, and in the case of non-performance, may cause the performance itself at the expense of the contractor; (ii) may terminate all or part of the contract; (iii) may conclude a contract with a third party replacing the contractor after terminating the original contract; or (iv) institute proceeding for damages. These wide-ranging remedies in the contracting authority's favour may act as a deterrent to market entrants, particularly since bidders are often obliged to accept the tender's terms and conditions in their entirety while simultaneously waiving their own conditions. In other words, with the possible exception of the right to apply for a pre-contractual remedy in terms of Regulation 262 of the PPR, the general rule is that a public contract's terms are unilaterally dictated by the contracting authority.
	3. Relevant case law: *3.1- Are there key cases in your country that set precedents for legal aspects related to the implementation of innovation procurement?* *3.2- How have courts addressed issues related to specific techniques that foster innovation procurement (e.g. use of preliminary market consultations, use of exemptions/specific procedures for buying R&D/prototypes/testing, value for money award criteria, overspecification of tender specs / use of functional requirements, value engineering, IPR, competition distortion, or contract modifications in procurement)?* *3.3- What lessons can be drawn from case law to improve the legal framework around innovation procurement in your country?*	There are no cases in Malta which set precedents for legal aspects related to the implementation of innovation procurement. However, on several occasions the courts have pronounced themselves on issues related to specific techniques which might foster innovation procurement. In this respect, we have limited our assessment to examples of relevant case law dealing with each stipulated factor. **A. Distortion of competition due to the prior involvement of an economic operator in preparatory activities** While we have not come across case law which specifically deals with distortion of competition due to the prior involvement of an economic operator in preparatory activities, we note that the courts have pronounced themselves on the matter of competition distortion multiple times. By way of example, please note the following: **Relevant Case Law:** ***Vivian Corporation Limited vs. Central Procurement and Supplies Unit et (Case Reference Number 12/2021/1), Court of Appeal (Superior Jurisdiction) delivered on the 17th of March, 2021:*** The question which the Court of Appeal was asked to consider was whether the PPR provisions prohibiting behaviour which "*artificially narrows competition*", should be interpreted restrictively to mean that the design of the procurement cannot narrow competition for the public contract in question, or whether it should also be interpreted to mean that it prohibits behaviour which could lead to the creation of a monopoly, with one sole supplier distorting competition **in the secondary market** and creating barriers to entry of other suppliers. **Court Decision:** The Court of Appeal held the second, wider interpretation was merited. However, the selection of one economic operator for a public contract and its subsequently dominant position on the market is not per se against the law, and therefore not prohibited. If the selected economic operator, then uses its dominant position to inflate prices, then it would be up to the relevant competition authority to intervene. Accordingly, the Court of Appeal held that in such a scenario—where the contracting authority's decision, though unfavorable, is not unlawful—it had no grounds to interfere with the authority's discretion. **Lesson learned from case law:** The Court has emphasized that the prohibition against distortion of competition must be interpreted widely to also prohibit the distortion of competition in the secondary market. Nevertheless, the Court can only intervene where the contracting authority's decision is unlawful, not just unfavorable for competition. **Relevant Case Law:** ***Krypton Chemists Limited vs. Central Procurement and Supplies Unit (Case Reference Number 538/2023/1), Court of Appeal (Superior Jurisdiction) delivered on the 15th of February 2024:*** Krypton Chemists Limited ("**Krypton**") claimed that the tender document had been drafted in such a way that it artificially limited competition, since the contracting authority had not allowed a 20% margin of difference from the size of the tulle dressing being procured as specified in the tender document without an objective reason for such refusal. The product that the appellant wished to offer satisfied all technical specifications bar the dimensions which meant that the contracting authority would have received an excess of the product. This, the appellant argued, would not have shortchanged the contracting authority. Rather,

the latter would have obtained 'more product' for 'less money'.

Court Decision: The Court of Appeal commented that while the contracting authority is not expected to adopt technical requirements so that all economic operators can participate in the tender, it also has a duty to establish technical requirements which can be met by a number of economic operators so that in this way competition is not unjustly restricted, and the main consideration to reach this balance should be that of proportionality.

The Court of Appeal also held that economic operators do not need to prove that a finding of artificial narrowing of competition does not depend upon proof of dishonesty or malicious intent by the contracting authority. It is sufficient to prove that the tender's technical criteria unjustly limit competition so that there are fewer participants.

Lesson learned from case law: The Court has emphasized that one does not need to prove that competition was unjustly restricted because the contracting authority acted maliciously or dishonestly. One just has to prove that the technical criteria unjustly limited competition.

B. Substantial contract modifications

Relevant Case Law: *356 Holdings Limited v. the Local Councils' Association et al (Case Reference Number 1018/2019), Civil Court First Hall, partial decision delivered on the 5th of July 2022:* The claimant, 356 Holdings Limited, argued that the addendum to the original agreement entered into between the defendant local councils and Faces Consultants Limited was illegal as the changes to the original contract were substantial to the extent that it created a new concession without a new procurement procedure being published first, and thus the defendant were in breach of the Concession Regulations.

The plaintiffs filed a claim before the First Hall Civil Court, on the basis of Article 469A of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) which provides for judicial review of administrative action wherein it requested the court to declare that the defendants had acted ultra vires and in breach of the law, and that thus the addendum was null and void.

The lawsuit was eventually withdrawn with the mutual consent of the parties.

C. Negotiated procedure without prior publication due to technical reasons

Relevant Case Law: *Managing Consulting Service Industry (MCSI) Limited vs. Ministeru tal-Edukazzjoni u tal-Impjieg et (Case Reference Number: 23/2022/1), Court of Appeal (Superior Jurisdiction) decided on the 4th of May 2022:* The claimant complained that a contract was awarded to one of the respondents following a negotiated procedure without prior publication without a legal basis for doing so. The respondents claimed that this procedure was used due to extreme urgency in terms of Regulation 154(1)(c) of the PPR, as it had not been possible to predict its needs with certainty due to the COVID 19 pandemic and given that the related policies were constantly in flux.

Court Decision: Quoting CJEU case law, the Court of Appeal considered that such procedure can only be used in very exceptional circumstances and that the onus of proof lies on the contracting authority to show that such circumstances exist. The court found that in this case, there had been sufficient time to publish and adjudicate a tender, so the use of this procedure was not justified.

Lesson learned from case law: In reaching its conclusions as to whether or not the use of such procedure was justified, the Court undertook a detailed examination of the 'exceptional circumstances' cited by the contracting authority as justification for its use. From this case it appears that, where urgency is cited, the Court will *inter alia* take into account the length of time between when the cited exceptional circumstance took place and when the negotiated procedure without prior publication commenced, and the time taken for an award to be given, in order to determine whether there had been sufficient time to adopt an open tender procedure instead.

D. Allocation of IPRs between public buyer and contractor

We did not come across any case law which deals specifically with the allocation of IPRs between the public buyer and the contractor.

E. Overutilisation or wrong use of lowest price only criteria versus value for money award criteria

In this respect we did not come across case law dealing specifically with the overutilisation or wrong use of the lowest price criteria. However, the courts have previously pronounced themselves on various aspects of how the most economically advantageous tender process is to be applied. By way of example, reference is made to the following case:

Relevant Case Law: *Cateressence Limited et vs Direttur tal-Kuntratti noe et, (Case Reference Number : 380/2016), Court of Appeal (Superior Jurisdiction), delivered on the 14th of February 2017:* The case in question related to a call for bids for public private partnership for the provision of comprehensive services to St. Vincent de Paul long term care facility. The selection of the winning bid had to be based on the *Most Economically Advantageous Tender (MEAT)* so that the evaluation had to be divided in two, namely 60% of the final points being based on the technical aspects of the offer, and 40% on the financial aspects of the offer.

Court Decision: The Court noted that assessing the technical aspects of an offer necessarily entails an element of subjectivity. Thus, while it is important that bidders know which elements are to be given the most importance during the evaluation of the bid, this does not mean that for the MEAT process to be just, each element of how points will be allocated has to be strictly set out, as in certain instances the evaluator must necessarily use their discretion.

The Court held that it did not have competence to examine how each individual point was allocated to the various bidders, as this was the discretion of the evaluation committee, who had been assisted by two experts. The Court held that, overall, the evaluation committee had been reasonable in assigning points.

Lesson learned from case law: The Court has emphasized once again that when the most economically

advantageous tender evaluation procedure is adopted, this necessarily entails a certain level of subjectivity, and that as long as the decision of the evaluation committee is reasonable it will not interfere with the discretion of the evaluation committee to decide such matters.

F. Overprescription of tender specifications, the use of variants and functional/performance based specifications to overcome this

Relevant Case Law: *Associated Equipment Limited vs. Direttur Generali tad-Dipartiment tal- Kuntratti et (Case Reference Number 378/2016), Court of Appeal (Superior Jurisdiction) delivered on the 14th of February 2017*: the appeal concerned a tender for the supply of thirty-two (32) brand-new operational haemodialysis machines on a pay-per-use basis to Mater Dei Hospital. The appellant argued that the successful bidder's offer was not technically compliant and should have been rejected.

Court Decision: In its judgment, the Court of Appeal referred to the Public Procurement Regulations (PPR), which explicitly allow an offeror to demonstrate that a proposed product meets the technical specifications in an equivalent manner. The Court also considered the clarification notes issued during the tender process, which confirmed that systems fulfilling the required functionality—albeit operating differently—could be deemed acceptable.

The Court emphasized that clarification notes form an integral part of the tender document. Since the machines offered by the successful bidder functioned differently from those specified in the tender but achieved the same intended results, the Court found that the offer complied with the contracting authority's requirements and was therefore valid.

Lesson learned from case law: When considering whether a proposed product meets the technical specifications of the tender in an equivalent manner, the Court will look closely at the functionality of such product and how well it aligns with its intended use.

Reference is also made to the abovementioned ***Krypton Chemists Limited vs. Central Procurement and Supplies Unit*** judgement, wherein the Court of Appeal cited Professor Sue Arrowsmith:

> *Compliance with the principle that specifications must not be drawn up in such a way as to exclude products/works/services that meet an entity's functional requirements can often be achieved by formulating specifications in terms of performance or functional specifications rather than detailed requirements.*[9]

3.2 DESCRIBE BRIEFLY ANY OTHER CASE LAW TOPIC YOU DEEM RELEVANT AND THE LESSONS LEARNED FROM THIS

In several instances, the Maltese courts have pronounced themselves on issues relating to the use of preliminary market consultations.

Relevant Case Law: Reference is made to *Virtù Holdings Limited v. Gozo Channel (Operations) Limited et (Case Reference Number 290/2018) decided by the Court of Appeal (Superior Jurisdiction) on the 11th of March 2019:* The case concerned a call for tenders issued by the Ministry for Transport and Infrastructure entitled '*Request for Proposals for a Public Service Concession Contract for the provision of passenger and vehicle ferry services between Malta and Gozo'*.

The defendant company (**Gozo Channel**), which is also listed in the PPR as a contracting authority, conducted a preliminary market consultation to identify a partner for a joint bid, initially selecting the plaintiff (**Virtu**). The tender was revoked by the Ministry in April 2017 and a new tender was issued in January 2018. Gozo Channel conducted another preliminary market consultation, this time, selected a third party, Island Ferry Network Limited (**Island Ferry**), as its partner.

Gozo Channel and Island Ferry entered into a charterparty agreement contingent on the bid's acceptance. Virtu filed an objection letter in the records of the PCRB raising various objections including that Island Ferries did not have the technical capabilities to meet the requirements set, nor the necessary experience or economic standing required by Gozo Channel. The PCRB deemed that the call made by Gozo Channel was not a call for a public tender and thus was not covered by the PPR or the jurisdiction of the PCRB.

Court Decision:

The PCRB had found that *inter alia* (i) the remedies provided in the PPR do not apply to preliminary market consultations; (ii) the objective of the preliminary market consultation does not in any way involve a form of public procurement; and (iii) in the specific case, Gozo Channel was not an authority for a public procurement but rather was a prospective bidder.

The Court of Appeal rejected the findings of the PCRB and held that the preliminary consultation was actually a call for bids which resulted in an agreement entered into between Gozo Channel and Island Ferry. Therefore, while Gozo Channel was not the contracting authority in the call for tenders made by the Ministry for Transport and Infrastructure, it was the contracting authority for the call for bids it published itself under the guise of preliminary market consultation.

The Court considered that the agreement between Gozo Channel and Island Ferry was not a joint venture agreement but rather a sub-contracting agreement so that Gozo Channel could provide the services required by the Ministry for Transport and Infrastructure.

Lesson learned from case law: This case shows that the Court will look at the substance of the procedures at hand, irrespective of the nomenclature used.

With regards preliminary market consultations, reference is also made to Case 1741 – CT3015/2022, wherein the PCRB goes into the nature of the preliminary market consultation procedure and makes it clear that preliminary market consultations are not binding on the contracting authority and thus it does not constitute a commitment to issue a request for bids, award a contract or pay any costs incurred in preparation of a response to it.

[9] Professor Arrowsmith S, 'The Law of Public and Utilities Procurement', (Volume 2, 2018) page 579.

Measures to overcome legal challenges / barriers at national level	**4. Possible solutions at national level:** *How could the above challenges be overcome in your country?* *What measures or reforms in the legal framework of your country could improve the uptake of innovation procurement?*	**PRELIMINARY MARKET CONSULTATIONS** According to the European Benchmarking exercise, preliminary market consultations were used in only 0.42% of the procurement procedures advertised on TED. This is 0.97% lower than the EU average. The mandatory use of preliminary market consultations, particularly for innovation procurement, can serve a dual purpose: it can help to yield more interest from SMEs and start-ups[10] and to reduce instances of informal approaches between contracting authorities and economic operators.[11] **BPQR CRITERIA** The Single Market Scoreboard reveals that in 2023, contracting authorities awarded 87% of public contracts based on the cheapest price. This over-reliance on price is significantly higher than the EU average and may be to the detriment of quality and innovation. The 2023 OECD Report recommends increasing the use of BPQR as the applicable award criteria. The EU Commission uses a weighted average of 70% for quality and 30% for cost.[12] This can serve to shift reliance to other more long-term benefits such as quality and life-cycle costing. Achieving this shift in mindset can be achieved through the publication of DOC circulars or policy notes. **POLICY CHANGES** The Ministry for Education, Sport, Youth, Research and Innovation (“**MEYR**”) has acknowledged the 2023 OECD Report and recognized the importance of innovation procurement.[13] Its 2023-2027 Strategy Plan identifies the mainstreaming of research and innovation in public policy as a primary goal and recommends pilot action on public procurement for innovation, including technical guidance and specialized training. However, while the strategy recommends a holistic approach across all government ministries to the implementation of innovation procurement, it stops short of establishing concrete targets. The 2023-2027 Strategy Plan was co-authored by MEYR and Xjenza Malta, the government agency responsible for national research and development. The latter entity could build on the strategy plan by engaging with private stakeholders to identify tangible action points for the uptake of innovation procurement. The Ministry for the Economy and Finance, as the authority responsible for public procurement, could establish a target percentage for innovation procurement within the total tenders issued in a given year. Maltese innovation procurement could also benefit from the establishment of an ad hoc innovation procurement centre with a tailored mandate. This centre could be used to promote innovation procurement through networking events, outreach programmes and advisory services. Part of the centre’s mandate could be to maintain a digital platform where contracting authorities can publish their procurement needs and SMEs or start-ups can provide innovative solutions. The financing of innovation procurement represents another area for improvement. Contracting authorities should implement the recommendations put forward in ‘Scale Up Europe: A Manifesto for Change and Empowerment in the Digital Age’, that is, 3% of spending to preliminary market consultations and 20% to innovation procurement.[14] **BLACKLISTING BY THE DIRECTOR-GENERAL OF CONTRACTS** Currently, the PPR authorize the Director-General of Contracts to blacklist an economic operator from participating in a procurement procedure where it can be demonstrated that the latter acted in breach of obligations in the fields of environmental, social and labour law or collective agreements. A res judicata blacklisting judgement bars the subject economic operator from participating in any tender or even direct order for the period of its blacklisting (Regulation 203(2) PPR). However, blacklisting is rarely—if ever, used. Any legal reform should address this underutilized sanction. The grounds of exclusion which lead to blacklisting should be available to tender evaluation committees. Such committees should be entitled to blacklist an economic operator where they have ‘appropriate means’ of proving their default on environmental, social and labour law obligations. It should also be possible for other economic operators to request blacklisting. The decision by the Director-General of Contracts to blacklist should be subject to review by the Public Contracts Review Board as opposed to the current legal setup where appeals are heard by the ad hoc Commercial Sanctions Tribunal. The PCRB has the necessary know-how and expertise, as well as the legal remit, to hear procurement disputes. Lastly, the decision by the Director-General of Contracts not to blacklist should be subject to appeal.
Measures to overcome legal barriers at EU level	***5. Possible measures to stimulate innovation procurement better at EU level*** *5.1- Is the legal framework for innovation procurement at EU level clear enough?* *5.2- Are there techniques or mechanisms that can foster innovation procurement that*	

[10] The Malta Chamber of Commerce,‘2024 Pre-Budget Document Proposals’.
[11] The Malta Chamber of Commerce and Ganado Advocates, Report on Public Procurement Reform 2021, page 12.
[12] Letta E, ‘Much More Than A Market: Speed, Security, Solidarity’ (April 2024), page 45.
[13] ibid 6, page 44.
[14] Scale Up Europe: A Manifesto for Change and Empowerment in the Digital Age (accessible at http://www.scaleupeuropemanifesto.eu/), page 26.

	are not tackled sufficiently at EU level? *5.3- How can the use of certain EU procurement procedures or mechanisms be improved from the legal perspective?* ***5.4 - Could you flag things that are done to foster innovation procurement in other jurisdictions outside of the EU that the EU could learn from?***	

- Add relevant annexes -

Annex - Public Sector IPR strategies relating to allocation of IPR related rights to the contractor and/or contracting authority/entity

	IPR ownership remains vested with the provider/supplier. The CA is granted usage rights.	**IPR ownership should be transferred to the CA; the provider/supplier is granted commercialisation rights.**	**IPR ownership should be transferred to the CA. No commercialisation rights are granted to the provider/supplier.**	**IPR ownership should be transferred to the CA. The CA is willing to enter into a commercialisation agreement with the provider/supplier.**	**Remarks**
Public Procurement Regulations (Subsidiary Legislation 601.3)					Regulation 138 stipulates that the contracting authority shall define the arrangements applicable to intellectual property rights.
General Conditions for Service Contracts V 4.8 (August 2024)			Condition 14.1 and Condition 14.2 stipulate that all intellectual and industrial property rights for anything acquired, compiled or prepared in the performance of the contract are the absolute property of the CA. Condition 14.3 stipulates that commercialization rights remain with the CA.		In terms of Condition 14.1 the provider/supplier is obliged to deliver all documents and data to the Contracting Authority upon completion of the contract and may not retain copies of such documents and data and shall not use them for purposes unrelated to the contract **without the prior consent of the CA.**
General Conditions for Works Contracts V 4.8 (August 2024)					No reference is made to the treatment of IPR
General Conditions for Supplies Contracts V 4.8 (August 2024)					No reference is made to the treatment of IPR

Annex - Substantial modifications strategies during the execution of a contract of the CA (contracting authority/contracting entity)

	Referral to modifications but no explicit referral to substantial modifications during the execution of a contract	**Substantial modifications are allowed under conditions**	**Substantial modifications lead to the right of termination for the CA**	**Remarks**
Public Procurement Regulations (Subsidiary Legislation 601.3)	Regulation 246 refers to those instances where modifications to the contract or framework agreement is allowed		Regulation 261(1)(a) stipulates that contracting authorities can terminate any agreement during its term where the contract has been subject to a substantial modification which would have required a new procurement procedure.	Modifications are in principle allowed with the prior approval of the Director of Contracts. Regulation 246(1)(e) stipulates that modifications are allowed, irrespective of their value, if they are not deemed to be 'substantial'. An explanation of what constitutes a 'substantial modification' is set out in Regulation 246(5).
General Conditions for Service Contracts V 4.8 (August 2024)	Section 20 deals with modification to services contracts Condition 20.4 refers to the Project Manager's power to order modifications necessary for the proper execution of the contract, without changing the object or scope of the contract, in line with the Public Procurement Regulations. Condition 20.5 refers to modifications for the repetition of services. Condition 20.6 refers to modifications for additional services.		Condition 34.3 (n) refers to the fact that where a contract has been subject to a substantial modification, which would have required a new procurement procedure pursuant to the Public Procurement Regulations, as a potential ground for termination by the CA.	
General Conditions for Works Contracts V 4.8 (August 2024)	Section 35 deals with modifications to work contracts. Condition 35.3 refers to the Supervisor's power to order any modifications to any part of the works necessary for the completion and/or functioning of the works, subject to certain conditions in line with the Public Procurement Regulations. Condition 35.8 refers to modifications for the repetition of works. Condition 35.9 refers to modifications for additional works.		Condition 61.1. (n) stipulates that where a contract has been subject to a substantial modification, which would have required a new procurement procedure pursuant to the Public Procurement Regulation, this could lead to termination by the CA.	
General Conditions Supplies Contracts V 4.8 (August 2024)	Section 22 deals with modifications to supply contracts. Condition 22.1 refers to the right of the CA to vary quantities subject to certain conditions. Condition 22.2 refers to the power of the Project Manager to order any modification to the contract, with the prior approval of the Central Government Authority, to any part of the supplies necessary for the proper completion and/or functioning of the supplies.		Condition 36.1 (n) refers to the fact that where a contract has been subject to a substantial modification, which would have required a new procurement procedure pursuant to the Public Procurement Regulations, as a potential ground for termination by the CA.	

	Condition 22.11 refers to modifications for the repetition of works. Condition 22.12 refers to modifications for additional supplies. Condition 22.13 refers to modifications for the decrease in the total volume of supplies.			